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

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## FEDERAL TRADE COMMISSION

### 16 CFR Part 305

[RIN 3084-AB03]

### Energy Labeling Rule

**AGENCY:** Federal Trade Commission.

**ACTION:** Final rule; correction.

**SUMMARY:** The Federal Trade Commission is correcting a final rule published in the **Federal Register** of September 15, 2016 (81 FR 63634). This document corrects provisions in the final rule related to ceiling fan labeling requirements.

**DATES:** Effective September 17, 2018.

**FOR FURTHER INFORMATION CONTACT:** Hampton Newsome, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580; (202) 326-2889.

**SUPPLEMENTARY INFORMATION:** This document makes corrections to the September 15, 2016 final rule document (81 FR 63634) amending the Energy Labeling Rule (“Rule”), 16 CFR part 305. Specifically, it corrects instruction 7 on page 63649 to indicate that the labeling requirements in section 305.13 of the Rule (Labeling for ceiling fans) apply to ceiling fans less than or equal to 84 inches in diameter, consistent with Department of Energy testing requirements (see 81 FR 48620 (July 25, 2016)). It also replaces “Sample Label 17—Ceiling Fan” in Appendix L on page 63661 to correct range and performance numbers in that sample label.

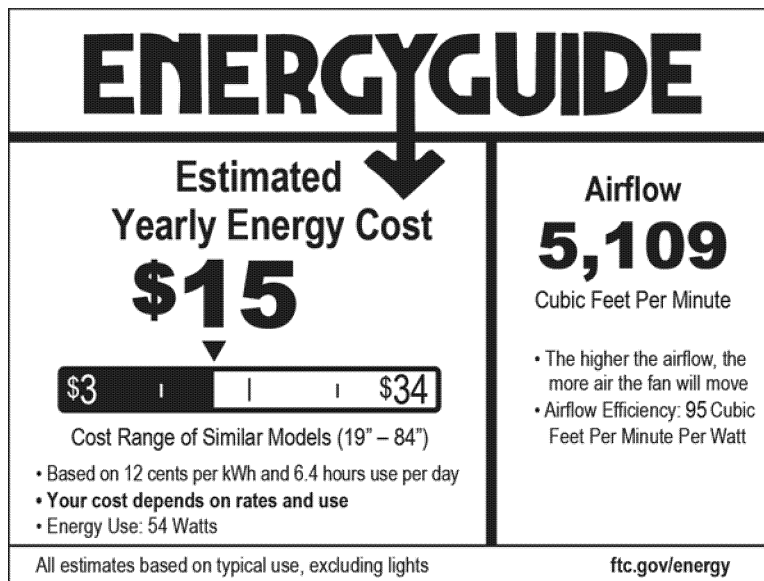
In FR Doc. 2016-21854, appearing on page 63634 in the **Federal Register** of Thursday, September 15, 2016, the following corrections are made:

### § 305.13 [Corrected]

- 1. On page 63649, in the second column, in § 305.13 Labeling for ceiling fans, in paragraph (a)(1), “models 84 inches or greater in diameter” is corrected to read “large diameter.”
- 2. On page 63649, in the third column, in § 305.13 Labeling for ceiling fans, in paragraph (a)(1)(xii), “and less than 84 inches” is corrected to read “and less than or equal to 84 inches.”
- 3. On page 63649, in the third column, in § 305.13 Labeling for ceiling fans, in paragraph (a)(5), “(cubic feet per watt)” is corrected to read “(cubic feet per minute per watt).”

### Appendix L to Part 305—Sample Labels [Corrected]

- 4. On page 63661, in Appendix L to Part 305, remove the graphic “Sample Label 17—Ceiling Fan” and add the following graphic in its place:



Sample Label 17- Ceiling Fan

By direction of the Commission.

**Donald S. Clark,**  
Secretary.

[FR Doc. 2016-25725 Filed 10-27-16; 8:45 am]

BILLING CODE 6750-01-P

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

#### 19 CFR Part 177

[CBP Dec. 16-19]

RIN 1515-AE17

#### New Mailing Address for the National Commodity Specialist Division, Regulations and Rulings, Office of Trade; Technical Correction

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Final rule.

**SUMMARY:** This document amends the U.S. Customs and Border Protection (CBP) regulations to reflect that the mail room servicing the Director, National Commodity Specialist Division, Regulations and Rulings, in the Office of Trade, has relocated within New York, and a new location has been established to receive non-electronic correspondence. E-rulings procedures will remain the same and are not affected by the change in office location. **DATES:** Final rule effective October 28, 2016.

**FOR FURTHER INFORMATION CONTACT:** Steven Mack, Director, National Commodity Specialist Division, Regulations and Rulings, Office of Trade, (646) 733-3001.

#### SUPPLEMENTARY INFORMATION:

##### Background

On January 14, 2016, Customs and Border Protection (CBP) published a notice in the **Federal Register** (81 FR 1960), announcing a temporary change of office location effective January 28, 2016, due to the relocation of the National Commodity Specialist Division (NCSD). In that notice, CBP stated that it would update its regulation once the relocation of the NCSD is complete. The relocation is now completed and a permanent address is established. As such, CBP is revising section 177.2(a) of title 19 of the Code of Federal Regulations (19 CFR 177.2(a)) to reflect the new mailing address. Starting October 28, 2016, all non-electronic correspondence to the NCSD should be sent to the following address: Director,

National Commodity Specialist Division, Regulations and Rulings, Office of Trade, 201 Varick Street, Suite 501, New York, New York 10014. E-rulings procedures will remain the same and are not affected by the change in office location.

#### Inapplicability of Notice and Delayed Effective Date Requirements

Because the technical correction set forth in this document merely updates a mailing address, CBP finds that good cause exists for dispensing with notice and public procedure as unnecessary under 5 U.S.C. 553(b)(A). For this same reason, pursuant to 5 U.S.C. 553(d)(3), CBP finds that good cause exists for dispensing with the requirement for a delayed effective date.

#### Executive Order 12866

The amendment does not meet the criteria for a “significant regulatory action” as specified in Executive Order 12866.

#### Regulatory Flexibility Act

Because this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

#### Signing Authority

This document is limited to a technical correction of the CBP regulations. Accordingly, it is being signed under the authority of 19 CFR 0.1(b)(1).

#### List of Subjects in 19 CFR Part 177

Administrative practice and procedure, Customs duties and inspection, Government procurement, Reporting and recordkeeping requirements.

#### Amendments to the Regulations

For the reasons set forth above, part 177 of the CBP Regulations (19 CFR part 177) is amended as set forth below.

#### PART 177—ADMINISTRATIVE RULINGS

■ 1. The general authority citation for part 177 continues to read as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1502, 1624, 1625.

##### § 177.2 [Amended]

■ 2. In § 177.2, paragraph (a), the third sentence is amended by removing the words “New York, New York 10119, Attn: Classification Ruling Requests, New York, New York 10048, or to any

service port office of the Customs and Border Protection” and adding in its place the words “201 Varick Street, Suite 501, New York, New York 10014”.

Dated: October 25, 2016.

**R. Gil Kerlikowske,**  
Commissioner, U.S. Customs and Border Protection.

[FR Doc. 2016-26075 Filed 10-27-16; 8:45 am]

BILLING CODE 9111-14-P

## DEPARTMENT OF LABOR

### Office of the Secretary

#### 29 CFR Part 20

RIN 1290-AA27

#### Administrative Wage Garnishment Procedures

**AGENCY:** Office of the Secretary, Labor.

**ACTION:** Final rule.

**SUMMARY:** This rule will allow the U.S. Department of Labor (Department) to garnish the disposable wages of non-federal workers who are indebted to the Department without first obtaining a court order. It implements the administrative wage garnishment provisions contained in the Debt Collection Improvement Act of 1996 (DCIA) in accordance with the regulations issued by the Secretary of the Treasury.

**DATES:** This final rule is effective on October 28, 2016.

**FOR FURTHER INFORMATION CONTACT:** Shelia Alexander, Office of the Chief Financial Officer, (202) 693-4472; or Rachel Rikleen, Office of the Solicitor, (202) 693-5702.

#### SUPPLEMENTARY INFORMATION:

##### I. Debt Collection Improvement Act Requirements and Background

Section 31001(o) of the Debt Collection Improvement Act of 1996 (DCIA), which is codified at 31 U.S.C. 3720D, authorizes federal agencies to use administrative procedure to garnish the disposable pay of an individual to collect delinquent non-tax debt owed to the United States in accordance with regulations promulgated by the Secretary of the Treasury. Wage garnishment is a process whereby an employer withholds amounts from an employee's wages and pays those amounts to the employee's creditor pursuant to a withholding order. Under the DCIA, agencies may garnish up to 15% of a delinquent non-tax debtor's disposable wages. Prior to the enactment of the DCIA, agencies were generally required to obtain a court

judgment before garnishing the wages of non-Federal employees.

The DCIA requires the Secretary of the Treasury to issue regulations implementing the administrative wage garnishment requirements. These implementing regulations, which are at 31 CFR 285.11, provide for due process for nontax debtors and require agencies to publish regulations for administrative wage garnishment hearings. Pursuant to 31 CFR 285.11(f), federal agencies must either prescribe regulations for the conduct of an administrative wage garnishment hearing consistent with the procedures set forth in section 285.11 or adopt section 285.11 without change by reference. Through this rule, the Department has decided to issue its own regulations consistent with the procedural requirements of section 285.11.

This final rule governs only administrative wage garnishment. Nothing in this regulation precludes the use of collection remedies not contained in the regulation. The Department and other federal agencies may simultaneously use multiple collection remedies to collect a debt, except as prohibited by law.

The Department may, but is not required to, promulgate additional policies, procedures, and understandings consistent with this regulation and other applicable Federal laws, policies, and procedures, subject to the approval of the Department's Chief Financial Officer or their delegate. The Department does not intend for its components, agencies, and entities to be able to adopt different policies, procedures, or understandings.

## II. Discussion of Comments

In response to its Interim Final Rule (IFR) concerning Administrative Wage Garnishment (80 FR 60797 October 8, 2015), the Department received five comments from private citizens and an industry association. The comments focused primarily on three subject areas: The justification for the regulation, due process concerns, and the burden of proof requirements.

Two commenters asked why the regulation is necessary, arguing that the Department must explain why the current debt collection tool are insufficient. The Department has determined that it is legally obligated to prescribe regulations for the conduct of administrative wage garnishment. On May 6, 1998 (63 FR 25136), the Department of the Treasury published a final rule implementing the statutory administrative wage garnishment requirements at 31 CFR 285.11. Paragraph (f) of 31 CFR 285.11 provides

that “[a]gencies shall prescribe regulations for the conduct of administrative wage garnishment hearings consistent with this section or shall adopt this section without change by reference.” This regulatory obligation is what necessitates this final rule. No changes were made to the final rule in response to the comments received regarding the regulation's justification.

The Department received four comments raising concerns related to due process. In general, these comments argued that garnishing wages through an administrative process, instead of through the courts, would remove protections for debtors and may cause unnecessary hardships to impoverished individuals. The Department has determined the regulation protects due process rights that must be afforded to a debtor when an agency seeks to collect a debt, including the ability to verify, challenge, and compromise claims, and provide access to administrative appeals procedures. Under section 20.205, debtors must be notified of the potential of a wage garnishment. Under section 20.206, a hearing must be held prior to the issuance of a withholding order if the debtor submits a timely request. The Department will provide the debtor with an opportunity to inspect and copy records related to the debt, and to establish a repayment agreement under section 20.205. All of these requirements protect the due process rights of the debtors, and, as a result, no changes have been made to the final rule in response to comments received.

As for concerns about imposing untenable burdens on debtors, the proposed rule included multiple provisions to protect against this outcome. For example, under section 20.210, the Department may not garnish the wages of a debtor who has been involuntarily separated from employment until that individual has been re-employed continuously for at least 12 months. Additionally, section 20.209 sets out clear limits on the amounts the Department may seek to garnish, and section 20.211 allows the debtor to request adjustments to the garnishment based on new financial hardships. The Department has determined that these protections are sufficient to ensure that no undue burden is put on impoverished debtors.

One commenter indicated the rule should be modified to require “an oral, in-person, face-to-face meeting.” Currently, under section 20.206, a hearing may be conducted in writing, by telephone or other communications technology, or in person. The commenter was concerned that anything other than a face to face meeting would

fail to demonstrate the individuals' situation and would harm the process. Under 31 CFR 285.11(f)(3)(ii), “[a]ll travel expenses incurred by the debtor in connection with an in-person hearing will be borne by the debtor.” The Department has determined requiring debtors to appear in-person would constitute an unconscionable financial burden on debtors and serve as an unreasonable obstacle to appropriate disputes. The Department notes that in-person hearings are not required to ensure that due process is served. As a result, no changes have been made to the final rule in response to comments received.

Finally, one commenter raised a concern about the burden of proof requirements found in section 20.206(f). The commenter contends that the section does not describe requirements for what documentation the Department must produce to “establish the existence of the debt and the amount of the debt” and that more information would be necessary for a court-ordered garnishment. Under section 20.206(f), the Department will have the initial burden of proving, by a preponderance of the evidence, the existence or amount of the debt by submitting a certified copy of the adjudication or other document. By requiring this documentation, the Department has set a standard for the kind of document that will be acceptable to meet its burden of proof. This documentation requirement is equivalent to the proof that would be needed in some courts for a garnishment order. Additionally, this rule parallels existing regulations of other agencies, including the Department of the Treasury, those promulgated by other Federal agencies, and the Federal Claims Collection Standards (FCCS), as required by the Debt Collection Improvement Act of 1996.

## III. Summary of Key Aspects of the Rule

This rule allows the Department to initiate proceedings administratively to garnish the wages of a delinquent debtor. It applies to debts owed to the Department or in connection with any program administered by the Department. The administrative wage garnishment process will be applied consistently throughout the Department.

The Department can enter into agreements, such as memoranda of understanding, with other Federal agencies permitting that agency to administer part or all of the Department's administrative wage garnishment process. Nothing in this regulation requires the Department to duplicate notices or administrative

proceedings required by contract, this regulation, or other laws or regulations. Thus, for example, the Department is not required to provide a debtor with two hearings on the same issue merely because two different collection tools are used, each of which requires that the debtor be provided with a hearing.

Section 20.205 lists the notice requirements, which includes an explanation of the debtor's rights. The debtor is allowed to inspect Department records related to the debt, enter into a written repayment agreement, and have a hearing.

Under section 20.206, a debtor can request one of two types of available hearings—a paper hearing or an oral hearing. The format of oral hearings is not limited to in-person and telephone hearings, it may include new forms of technology. The hearing official has the authority to determine the kind of hearing and the amount of time allotted each hearing.

If a hearing is held, the Department can meet its initial burden by offering documentation, including a copy of the debt adjudication, which demonstrates the existence of the debt and its amount as is required under section 20.206(f). Once the Department has established its prima facie case, the debtor can dispute the existence or amount of the debt. For example, debtors can meet their burden by demonstrating that they are not the person who owes a debt to the Department, that they have not received payments from the Department or have not been fined by the Department, or that they have already paid the debt.

Additionally, the Federal Employees Compensation Act (FECA), 5 U.S.C. 8101–8193, contains a provision that precludes administrative and judicial review of agency determinations, which normally includes a repayment schedule. As a result, for hearings related to FECA debts, once the Department has made its prima facie case, the debtor has only two limited grounds on which he or she can demonstrate that an administrative wage garnishment is not appropriate. The debtor may not challenge the underlying merits of the determination that created the debt.

Section 20.207 outlines the timing and elements of the withholding order to the debtor's employer. Pursuant to section 20.208, employers must complete and return a certification noting, in addition to other information, that they have received the withholding order and verifying the debtor's employment.

Section 20.209 describes how much the Department can withhold through administrative wage garnishment,

which is up to 15% of the debtor's disposable pay, and the employer's administrative wage garnishment duties. A withholding order for family support would always have priority over an administrative wage garnishment order. If there are multiple federal garnishment orders, priority depends on which garnishment order was first obtained. When a debtor's disposable pay is already subject to one or more withholding orders with higher or equal priority with the Department's administrative wage garnishment order, the amount that the employer must withhold and remit to the Department would not be more than an amount calculated by subtracting the amount(s) withheld under the other withholding order(s) from 25% of the debtor's disposable pay. For example, if the employer is withholding 20% of a debtor's disposable pay for a family support or prior withholding order, the amount withheld for the subsequent withholding order issued under this section is limited to 5% of the debtor's disposable pay. When the family support or prior withholding order terminates, the amount withheld for the subsequent withholding order issued under this section may be increased to 15%.

Finally, sections 20.210 and 20.211 provide protections to employees that are facing financial hardships. Section 20.210 prohibits the Department from garnishing the wages of a debtor who was involuntarily separated from employment. The debtor has the obligation under this section to inform the Department of the involuntary separation. Section 20.211 outlines how a debtor can request a review of their garnishment due to materially changed circumstances that have created a financial hardship.

#### **IV. Compliance With Statutory and Regulatory Requirements for Rulemakings**

*The Administrative Procedure Act.* The Department has determined this rule involves an agency procedure or practice, and therefore no notice of proposed rulemaking is required under the Administrative Procedure Act (APA) at 5 U.S.C. 553(b)(A) and (B).

This rule parallels the existing operational regulations of other agencies to effectuate the collection of non-tariff and nontax debts to implement 31 U.S.C. 3711. Because this rule parallels existing, long-standing rules that have already been subject to APA notice and comment procedures, we believe that publishing this rule with the usual notice and comment procedures is unnecessary. Accordingly, the

Department has determined that prior notice and public comment procedures would be unnecessary pursuant to 5 U.S.C. 553(b)(B).

*The Paperwork Reduction Act.* The Department has determined that the provisions of the Paperwork Reduction Act of 1995, as amended, 44 U.S.C. 3501, *et seq.*, do not apply to any collections of information contained in this rule because any such collections of information are made during the conduct of administrative action taken by an agency against specific individuals or entities. 5 CFR 1320.4(a)(2). In the IFR, the Department specifically invited comments about this determination, but none were received.

*The Regulatory Flexibility Act.* The Regulatory Flexibility Act (RFA), Public Law 96–354, as amended (5 U.S.C. 601 *et seq.*), requires administrative agencies to consider the effect of their actions on small entities, including small businesses. As a procedural rule, the requirements of the RFA pertaining to regulatory flexibility analysis do not apply. However, even if the RFA were to apply, the Department certifies that this rule will not have a significant impact on a substantial number of small entities as defined in RFA. Although small entities will be subject to this regulation and to the certification requirement in this rule, the requirements will not have a significant economic impact on these entities. Employers of delinquent debtors must certify certain information about the debtor such as the debtor's employment status and earnings. This information is contained in the employer's payroll records. Therefore, it will not take a significant amount of time or result in a significant cost for an employer to complete the certification form. Even if an employer is served with withholding orders on several employees over the course of a year, the cost imposed on the employer to complete the certifications would not have a significant economic impact on that entity. Employers are not required to vary their normal pay cycles in order to comply with a withholding order issued pursuant to this rule.

*Unfunded Mandates Reform Act.* Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, requires Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments or the private sector. This rule contains no Federal mandates, as defined by Title II of the UMRA, for State, local, and tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

*Executive Orders 12866, 12988, and 13132.* This rule is not a significant regulatory action as defined in Executive Order 12866. The rule has been reviewed in accordance with Executive Order 12988. This rule preempts state laws that are inconsistent with its provisions. Before a judicial action may be brought concerning this rule or action taken under this rule, all administrative remedies must be exhausted. This regulation will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on distribution of power and responsibilities among the various levels of Government. Therefore, in accordance with E.O. 13132, it is determined this regulation does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

#### List of Subjects in 29 CFR Part 20

Administrative wage garnishment, Debt collection, Labor.

Signed at Washington, DC, on this 17th day of October, 2016.

**Thomas E. Perez,**  
U.S. Secretary of Labor.

#### PART 20—FEDERAL CLAIMS COLLECTION

■ Accordingly, the interim rule amending 29 CFR part 20 which was published at 80 FR 60797 on October 8, 2015, is adopted as a final rule without change.

[FR Doc. 2016–26093 Filed 10–27–16; 8:45 am]

BILLING CODE 4510–7C–P

#### ENVIRONMENTAL PROTECTION AGENCY

##### 40 CFR Part 52

[EPA–R06–OAR–2012–0263; FRL–9953–46–Region 6]

#### Approval and Promulgation of Implementation Plans; Oklahoma; Disapproval of Prevention of Significant Deterioration for Particulate Matter Less Than 2.5 Micrometers—Significant Impact Levels and Significant Monitoring Concentration

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is disapproving the severable portions of the February 6, 2012, Oklahoma State Implementation Plan (SIP) submittal which establish certain *de minimis* thresholds for

particulate matter less than 2.5 micrometers in diameter (PM<sub>2.5</sub>) in the Prevention of Significant Deterioration (PSD) permitting requirements. Specifically, we are disapproving provisions that adopt and implement the PM<sub>2.5</sub> significant impact levels (SILs) and significant monitoring concentration (SMC); both of which were vacated by a federal court and subsequently removed from federal PSD regulations. We are disapproving the submitted provisions as inconsistent with federal laws and regulations for the permitting of PM<sub>2.5</sub>. The EPA is finalizing this disapproval under section 110 and part C of the Clean Air Act (CAA).

**DATES:** This rule is effective on November 28, 2016.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2012–0263. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733.

**FOR FURTHER INFORMATION CONTACT:** Adina Wiley, (214) 665–2115, [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

#### I. Background

The background for this action is discussed in detail in our August 11, 2016, proposed disapproval at 81 FR 53098. In that document, we proposed to disapprove the severable portions of the February 6, 2012, Oklahoma SIP submittal which establish the voluntary PM<sub>2.5</sub> SILs provision and SMC. We presented our preliminary determination that these submitted revisions to the Oklahoma SIP must be disapproved because they establish permitting SIP requirements that are inconsistent with the federal statutory and regulatory permitting requirements for PM<sub>2.5</sub>. We did not receive any comments regarding our proposed disapproval

#### II. Final Action

We are disapproving the following severable portions of the February 6, 2012, Oklahoma SIP submittal establishing the voluntary PM<sub>2.5</sub> SILs provision and SMC. We are taking this final action under section 110 and part C of the CAA.

- Substantive revisions to the Oklahoma SIP at OAC 252:100–8–33(c)(1)(C) establishing the PM<sub>2.5</sub> SMC as submitted on February 6, 2012; and
- Substantive revisions to the Oklahoma PSD program in OAC 252:100–8–35(a)(2) establishing the PM<sub>2.5</sub> PSD SILs provision as submitted on February 6, 2012.

The EPA is disapproving the revisions listed because the submitted provisions are inconsistent with the federal statutory and regulatory permitting requirements for PM<sub>2.5</sub>. Upon the effective date of this final disapproval, owners or operators of a proposed source or modification will continue to satisfy the source impact analysis provisions for PM<sub>2.5</sub> as required under the Oklahoma SIP at OAC 252:100–8–35(a)(1). Additionally, the State of Oklahoma will continue to have the necessary authority to require monitoring of PM<sub>2.5</sub> under the Oklahoma SIP at OAC 252:100–8–35.1(b)(3), consistent with the provisions of 40 CFR 52.21(m). This final disapproval does not require the EPA to promulgate a Federal Implementation Plan, because the Oklahoma PSD SIP program continues to satisfy the Federal PSD SIP requirements for PM<sub>2.5</sub> monitoring and source impact analysis. We are finalizing this disapproval under section 110 and part C of the Act; as such, the EPA will not impose sanctions as a result of this final disapproval.

#### III. Statutory and Executive Order Reviews

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

*B. Paperwork Reduction Act (PRA)*

This action does not impose an information collection burden under the PRA. There is no burden imposed under the PRA because this action disapproves submitted revisions that are no longer consistent with federal laws and regulations for the regulation and permitting of PM<sub>2.5</sub>.



### C. *Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This action disapproves submitted revisions that are no longer consistent with federal laws and regulations for the regulation and permitting of PM<sub>2.5</sub>, and therefore will have no impact on small entities.

### D. *Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. This action disapproves submitted revisions that are no longer consistent with federal laws and regulations for the regulation and permitting of PM<sub>2.5</sub>, and therefore will have no impact on small governments.

### 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. This action disapproves provisions of state law that are no longer consistent with federal law for the regulation and permitting of PM<sub>2.5</sub>; there are no requirements or responsibilities added or removed from Indian 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*

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it disapproves state permitting provisions that are inconsistent with

federal laws and regulations for the regulation and permitting of PM<sub>2.5</sub>.

### 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 the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. This action is not subject to Executive Order 12898 because it disapproves state permitting provisions that are inconsistent with federal laws and regulations for the regulation and permitting of PM<sub>2.5</sub>.

### 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).

### L. *Judicial Review*

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 27, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b)(2).)

### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

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

Dated: October 21, 2016.

Ron Curry,

Regional Administrator, Region 6.

40 CFR part 52 is amended as follows:

## PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

### Subpart LL—Oklahoma

■ 2. Section 52.1922 is revised to read as follows:

#### § 52.1922 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Oklahoma’s State Implementation Plan under section 110 of the Clean Air Act for the attainment and maintenance of the national standards.

(b) The EPA is disapproving the following severable portions of the February 6, 2012, Oklahoma SIP submittal:

(1) Revisions establishing Minor New Source Review Greenhouse Gas (GHG) permitting requirements at OAC 252:100–7–2.1 as submitted on February 6, 2012.

(2) Revisions to the Oklahoma Prevention of Significant Deterioration (PSD) program in OAC 252:100–8–31 establishing PSD permitting requirements for sources that are classified as major and thus required to obtain a PSD permit based solely on their potential GHG emissions (“Step 2 sources”) at paragraph (E) of the definition of “subject to regulation” as submitted on February 6, 2012.

(3) Revisions to the Oklahoma PSD Program at OAC 252:100–8–33(c)(1)(C) establishing the PM<sub>2.5</sub> Significant Monitoring Concentration as submitted on February 6, 2012.

(4) Revisions to the Oklahoma PSD Program in OAC 252:100–8–35(a)(2) establishing the PM<sub>2.5</sub> PSD Significant Impact Levels as submitted on February 6, 2012.

(c) The EPA is disapproving the revisions to the Oklahoma State Implementation Plan definitions of “carbon dioxide equivalent emissions” at OAC 252:100–1–3 and “subject to regulation” at OAC 252:100–8–31 to implement the Greenhouse Gas Biomass Deferral as submitted on January 18, 2013.

[FR Doc. 2016–25982 Filed 10–27–16; 8:45 am]

BILLING CODE 6560–50–P

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52**

[EPA-R06-OAR-2016-0450; FRL-9953-94-Region 6]

**Approval and Promulgation of Implementation Plans; Louisiana; Prevention of Significant Deterioration Significant Monitoring Concentration for Fine Particulates****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving two revisions to the Louisiana State Implementation Plan (SIP) that revise the Louisiana Prevention of Significant Deterioration (PSD) permitting program to establish the significant monitoring concentration (SMC) for fine particles (PM<sub>2.5</sub>) at a zero microgram per cubic meter (0 µg/m<sup>3</sup>) threshold level consistent with federal permitting requirements. The EPA is approving this action under section 110 and part C of the Clean Air Act (CAA or Act).

**DATES:** This rule is effective on December 27, 2016 without further notice, unless the EPA receives relevant adverse comment by November 28, 2016. If the EPA receives such comment, the EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket No. EPA-R06-OAR-2016-0450, at <http://www.regulations.gov> or via email to [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov). Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact Adina Wiley, (214) 665-2115, [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov). For the full EPA public comment policy, information

about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**Docket:** The index to the docket for this action is available electronically at [www.regulations.gov](http://www.regulations.gov) and in hard copy at EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.*, copyrighted material), and some may not be publicly available at either location (*e.g.*, CBI).

**FOR FURTHER INFORMATION CONTACT:**

Adina Wiley, 214-665-2115, [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov). To inspect the hard copy materials, please schedule an appointment with Ms. Adina Wiley or Mr. Bill Deese at 214-665-7253.

**SUPPLEMENTARY INFORMATION:**

Throughout this document “we,” “us,” and “our” means the EPA.

**I. Background****A. CAA and SIPs**

Section 110 of the CAA requires states to develop and submit to the EPA a SIP to ensure that state air quality meets National Ambient Air Quality Standards. These ambient standards currently address six criteria pollutants: Carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter, and sulfur dioxide. Each federally-approved SIP protects air quality primarily by addressing air pollution at its point of origin through air pollution regulations and control strategies. The EPA approved SIP regulations and control strategies are federally enforceable.

**B. Prior Federal Action**

Under Section 165(a) of the CAA, a major source may not commence construction unless the source has been issued a permit and has satisfied certain requirements. Among those requirements, the permit applicant must demonstrate that emissions from construction or operation of the facility will not cause, or contribute to, air pollution in excess of any increment, NAAQS, or any other applicable emission standard of standard of performance. This statutory requirement has been incorporated into federal regulations at 40 CFR 51.166(k)(1). Moreover, to support this analysis, PSD permit applications must be supported by air quality monitoring data representing air quality in the area affected by the proposed source for the 1-year period preceding receipt of the application. This statutory requirement

has been incorporated into federal regulations at 40 CFR 51.166(m)(ii)-(iv).

In 2010, the EPA promulgated regulations for SIPs concerning PSD permitting for PM<sub>2.5</sub> which included two voluntary screening tools: Significant impact levels (SILs) and SMC. 75 FR 64864 (October 20, 2010). The SILs are screening tools that states and local permitting authorities with PSD SIPs apply in the issuance of a PSD permit to demonstrate that the proposed source’s allowable emissions will not cause or contribute to a violation of the NAAQS or increment. The SMC is a screening technique that has been used to exempt sources from the requirement in the CAA to collect preconstruction monitoring data for up to 1 year before submitting a permit application in order to help determine existing ambient air quality. 78 FR 73699 (December 9, 2013).

Sierra Club filed a petition for review of the PSD regulations containing the PM<sub>2.5</sub> SILs and SMC with the United States Court of Appeals for the District of Columbia Circuit (the Court). On January 22, 2013, the Court issued an opinion granting a request from the EPA to vacate and remand to the EPA portions of the October 20, 2010, PSD regulations establishing the PM<sub>2.5</sub> SIL and further vacating the portions of the PSD regulations establishing a PM<sub>2.5</sub> SMC. *See, Sierra Club v. EPA*, 706 F.3d 428 (D.C. Cir. 2013).

In response to the Court’s decision, the EPA amended its regulations to remove the affected PM<sub>2.5</sub> SIL regulations from the federal regulations and to replace the existing PM<sub>2.5</sub> SMC value with a “zero” threshold. 78 FR 73698 (December 9, 2013). In that rulemaking, the EPA removed the regulatory text related to the affected PM<sub>2.5</sub> SILs at sections 51.166(k)(2) and 52.21(k)(2). Although the Court vacated the PM<sub>2.5</sub> SMC provisions in 40 CFR 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c), the EPA did not remove the affected regulatory text, but instead revised the concentration for the PM<sub>2.5</sub> SMC listed in sections 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c) to zero micrograms per cubic meter (0 µg/m<sup>3</sup>). Because 40 CFR 51.166(i)(5)(iii) and 40 CFR 52.21(i)(5)(iii) establish an exemption from air monitoring requirements for any pollutant “not listed in paragraph (i)(5)(i),” the EPA explained that it would not be appropriate to remove the reference to PM<sub>2.5</sub> in paragraph (i)(5)(i). Were the EPA to completely remove PM<sub>2.5</sub> from the list of pollutants in sections 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c) of the PSD regulations, PM<sub>2.5</sub> would no longer be a listed pollutant and the paragraph (iii)

provision could be interpreted as giving reviewing authorities the discretion to exempt permit applicants from the requirement to conduct monitoring for PM<sub>2.5</sub>, in contravention of the Court's decision and the CAA. Instead, the EPA revised the concentration listed in sections 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c) to zero micrograms per cubic meter (0 µg/m<sup>3</sup>). This means that there is no air quality impact level below which a reviewing authority has the discretion to exempt a source from the PM<sub>2.5</sub> monitoring requirements at 40 CFR 52.21(m).

### C. Louisiana's Submittals

On February 27, 2013, Louisiana submitted revisions to its PSD SIP at LAC 33:III.509 that adopted provisions substantively identical to the EPA PSD SIP's requirement for PM<sub>2.5</sub> PSD SMC. 40 CFR 51.166(i)(5)(i). The February 27, 2013, submittal included other revisions to the Louisiana SIP that have been separately approved by the EPA on November 5, 2015. See 80 FR 68451. On July 22, 2016, Louisiana submitted revisions to its PSD SIP at LAC 33:III.509 to revise the previously adopted and submitted PM<sub>2.5</sub> SMC at LAC 33:III.509(I)(5)(a). Louisiana has not adopted or submitted provisions addressing the PM<sub>2.5</sub> SIL.

## II. The EPA's Evaluation

Our analysis, available in our Technical Support Document (TSD) in the rulemaking docket, finds that the State of Louisiana adopted and submitted on February 27, 2013, revisions to the Louisiana SIP that were substantively consistent with the voluntary exemptions from PSD monitoring at 40 CFR 51.166(i)(5)(i) promulgated on October 20, 2010. Subsequent to the submittal of these provisions, the Court vacated and remanded these provisions to the EPA. On December 9, 2013, we promulgated revisions to the PSD SIP rules that replaced the existing PM<sub>2.5</sub> SMC value with a zero micrograms per cubic meter (0 µg/m<sup>3</sup>) threshold level at 40 CFR 51.166.

To address the EPA's December 9, 2013, rulemaking, the State of Louisiana submitted further revisions to the Louisiana PSD program on July 22, 2016, setting the PM<sub>2.5</sub> SMC to zero; effectively removing any exemption from pre- and post-construction monitoring under the Louisiana PSD SIP.

Our evaluation of the Louisiana PSD program finds that the adoption and revision of the PSD PM<sub>2.5</sub> SMC at a zero threshold value is consistent with federal PSD permitting provisions for

PSD SMCs. We further find that the Louisiana PSD program does not provide an exemption from the PSD pre- and post-construction monitoring requirements for emissions of PM<sub>2.5</sub> that are SIP-approved at LAC 33:III.509(M) as consistent with federal PSD permitting provisions.

## III. Final Action

We are approving revisions to the Louisiana PSD program into the Louisiana SIP that establish the PSD PM<sub>2.5</sub> SMC and set the SMC to zero micrograms per cubic meter (0 µg/m<sup>3</sup>) consistent with federal PSD permitting requirements and the CAA. Specifically, the EPA is approving the following revisions to the Louisiana PSD SIP:

- New provisions at LAC 33:III.509(I)(5)(a) adopted on December 20, 2012 and submitted on February 27, 2013, establishing the PM<sub>2.5</sub> SMC;
- Revisions to LAC 33:III.509(I)(5)(a), adopted on March 20, 2016 and submitted on July 22, 2016 setting the PM<sub>2.5</sub> SMC to 0 µg/m<sup>3</sup>.

The EPA is publishing this rule without prior proposal because we view this as a non-controversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the SIP revision if relevant adverse comments are received. This rule will be effective on December 27, 2016 without further notice unless we receive relevant adverse comment by November 28, 2016. If we receive relevant adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so now. Please note that if we receive relevant adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

## IV. Incorporation by Reference

In this rule, we are finalizing regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, we are finalizing the incorporation by reference of the revisions to the Louisiana regulations as described in the Final Action section above. We have made, and will continue

to make, these documents generally available electronically through [www.regulations.gov](http://www.regulations.gov) and/or in hard copy at the EPA Region 6 office.

## V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the 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 action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a

tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the

**Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 27, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: October 21, 2016.

**Ron Curry**,  
Regional Administrator, Region 6.

40 CFR part 52 is amended as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

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

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

**Subpart T—Louisiana**

■ 2. In § 52.970(c), the table titled “EPA Approved Louisiana Regulations in the Louisiana SIP” is amended by revising the entry for Section 509 to read as follows:

**§ 52.970 Identification of plan.**

\* \* \* \* \*  
(c) \* \* \*

**EPA-APPROVED LOUISIANA REGULATIONS IN THE LOUISIANA SIP**

State citation	Title/subject	State approval date	EPA approval date	Comments
*	*	*	*	*
<b>Chapter 5—Permit Procedures</b>				
Section 509 .....	Prevention of Significant Deterioration.	03/20/2016	10/28/2016, [Insert <b>Federal Register</b> citation].	SIP does not include provisions for permitting of GHGs as effective on 04/20/2011 at LAC 33:III.509(B) definition of “carbon dioxide equivalent emissions”, “greenhouse gases”, “major stationary source”, and “significant”.
*	*	*	*	*

\* \* \* \* \*  
[FR Doc. 2016–25992 Filed 10–27–16; 8:45 am]  
**BILLING CODE 6560–50–P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 70**

[EPA–R02–OAR–2015–0837; FRL–9954–61–Region 2]

**Clean Air Act Title V Operating Permit Program Revision; New Jersey**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency is approving a revision to the

New Jersey Operating Permit Program related to the permitting of stationary sources subject to title V of the Clean Air Act (CAA) in the state of New Jersey. The revision consists of amendments to Subchapter 22 of Chapter 27 of Title 7 of the New Jersey Administrative Code, “Operating Permits.” The revision was submitted to change the fee schedule for certain permitting activities for major facilities. The changes provide additional needed fee revenues for New Jersey’s Operating Permit Program. This approval action will help ensure New Jersey properly implements the requirements of title V of the CAA.

**DATES:** This rule will be effective November 28, 2016.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–R02–OAR–2015–0837. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) Web site. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through [www.regulations.gov](http://www.regulations.gov), or contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

**FOR FURTHER INFORMATION CONTACT:**

Suilin Chan, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007-1866, (212) 637-4019.

**SUPPLEMENTARY INFORMATION:**

**I. What was included in New Jersey’s submittal?**

On May 15, 2015, the New Jersey Department of Environmental Protection (NJDEP) requested that the EPA approve revisions to the New Jersey title V Operating Permit Program; the EPA proposed to approve those revisions on June 24, 2016 (81 FR 41283). The revisions consisted of amendments to sections 22.1 and 22.31 of New Jersey’s Operating Permits Rule, codified at Title 7 of the New Jersey Administrative Code, Chapter 27, Subchapter 22, that updated the fees paid for certain permitting activities for major facilities, including application fees for significant modifications and fees to authorize general operating permit registration and operation of used oil space heaters. As discussed further in the June 24, 2016 proposed rule, the revisions help NJ raise additional fees to cover its permit program costs, as required by CAA title V. These revisions were adopted by the State on December 29, 2014, and became effective on February 27, 2015. For a detailed discussion on the content of the relevant revisions to New Jersey’s Operating Permits Rule, the reader is referred to the EPA’s June 24, 2016 proposed rule and the public docket.

**II. What comments did the EPA receive in response to its proposal?**

In response to the EPA’s June 24, 2016, proposed rulemaking action, the EPA received no comments.

**III. What is the EPA’s conclusion?**

The EPA has evaluated New Jersey’s submittal for consistency with the Act, EPA regulations, and EPA policy. The EPA has determined that the revisions to Subchapter 22, New Jersey’s Operating Permits Rule meet the requirements of title V of the CAA and its implementing regulations codified at title 40 of the Code of Federal Regulations, part 70. Therefore, the EPA is approving the subject revisions.

**IV. Statutory and Executive Order Reviews**

This action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office

of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 *note*) because application of those requirements would be inconsistent with the CAA; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the program 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.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a

“major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 27, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action which approves the May 15, 2015 program revision submittal by the State of New Jersey as a revision to the New Jersey Operating Permits Program may not be challenged later in proceedings to enforce its requirements. *See* CAA section 307(b)(2).

**List of Subjects in 40 CFR Part 70**

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

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

Dated: October 18, 2016.

**Judith A. Enck,**

*Regional Administrator, Region 2.*

Part 70, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

**PART 70—STATE OPERATING PERMIT PROGRAMS**

- 1. The authority citation for part 70 continues to read as follows:

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

- 2. Appendix A to part 70 is amended by adding paragraph (e) in the entry for New Jersey to read as follows:

**Appendix A to Part 70—Approval Status of State and Local Operating Permit Programs**

\* \* \* \* \*

*New Jersey*

\* \* \* \* \*

(e) The New Jersey Department of Environmental Protection submitted program revisions on May 15, 2015; the revisions related to fees imposed in connection with the permitting of major sources are approved effective November 28, 2016.

\* \* \* \* \*

[FR Doc. 2016-26017 Filed 10-27-16; 8:45 am]

**BILLING CODE 6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 147**

[EPA-HQ-OW-2015-0372; FRL 9953-37-OW]

**State of Kentucky Underground Injection Control (UIC) Class II Program; Primacy Approval**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is taking direct final action to approve the Commonwealth of Kentucky’s Underground Injection Control Class II (UIC) Program for primacy. The EPA determined that the state’s program is consistent with the provisions of the Safe Drinking Water Act (SDWA) at Section 1425 to prevent underground injection activities that endanger underground sources of drinking water. The agency’s approval allows the state to implement and enforce state regulations for UIC Class II injection wells located within the state. The Commonwealth’s authority excludes the regulation of injection well Classes I, III, IV, V and VI and all wells on Indian lands, as required by rule under the SDWA.

**DATES:** This rule is effective on January 26, 2017 without further notice, unless EPA receives adverse comment by November 28, 2016. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the

rule will not take effect. For judicial purposes, this final rule is promulgated as of January 26, 2017. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of January 26, 2017.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OW-2015-0372, to the *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Holly S. Green, Drinking Water Protection Division, Office of Ground Water and Drinking Water (4606M), U.S.

Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 566-0651; fax number: (202) 564-3754; email address: [green.holly@epa.gov](mailto:green.holly@epa.gov); or Nancy H. Marsh, Safe Drinking Water Branch, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303; telephone number (404) 562-9450; fax number: (404) 562-9439; email address: [marsh.nancy@epa.gov](mailto:marsh.nancy@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Why is EPA issuing a direct final rule?**

EPA published this rule without a prior proposed rule because the agency views this action as noncontroversial and anticipates no adverse comment. However, in the “Proposed Rules” section of today’s **Federal Register**, EPA published a separate document that serves as the proposed rule if the agency receives adverse comment on this direct final rule. The agency will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

If EPA receives adverse comment, the agency will publish a timely withdrawal in the **Federal Register**, informing the public that this direct final rule will not take effect. The agency will then address all public comments in any subsequent final rule based on the proposed rule.

**II. Does this action apply to me?**

*Regulated Entities*

Category	Examples of potentially regulated entities	North American industry classification system
Industry .....	Private owners and operators of Class II injection wells located within the state (Enhance Recovery, Produce Fluid Disposal and Hydrocarbon Storage).	211111 & 213111

This table is intended to be a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. 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.

**III. Legal Authorities**

EPA approves the Commonwealth of Kentucky’s UIC Program primacy application for Class II injection wells located within the state, as required by

rule under the SDWA, to prevent underground injection activities that endanger underground sources of drinking water. Accordingly, the agency codifies the state’s program in the *Code of Federal Regulations* (CFR) at 40 CFR part 147, under the authority of the SDWA, sections 1425, 42 U.S.C. 300h-4. The state applied to EPA under sections 1425 of the SDWA, 42 U.S.C. Sections 300h-4, for primacy (primary enforcement responsibility) for all Class II injection wells within the state except those on Indian lands.

The agency’s approval is based on a legal and technical review of the state’s

primacy application as directed at 40 CFR part 145 and the requirements for state permitting and compliance evaluation programs, enforcement authority and information sharing to determine that the state’s program is effective. EPA oversees the state’s administration of the UIC program; part of the agency’s oversight responsibility requires quarterly reports of non-compliance and annual UIC performance reports pursuant to 40 CFR 144.8. The Memorandum of Agreement between EPA and the Commonwealth of Kentucky, signed by the Regional Administrator on October 20, 2015,

provides the agency with the opportunity to review and comment on all permits. The agency continues to administer the UIC program for Class I, III, VI, V and VI injection wells in the state and all wells on Indian lands (if any such lands exist in the state in the future).

#### IV. Kentucky's Application

##### A. Public Participation Activities Conducted by the Commonwealth of Kentucky

As part of the primacy application requirements, the state held a public hearing on the state's intent to apply for primacy. The hearing was held on September 23, 2014, in the city of Frankfort, Kentucky. Both oral and written comments received for the hearing were generally supportive of the state pursuing primacy for the UIC Class II injection well program.

##### B. Public Participation Activities Conducted by EPA

On November 10, 2015, the agency published a notice of the state's application in the **Federal Register** (80 FR 69629). This notice provided a comment period and that a public hearing would be held if requested. The EPA received one comment during the comment period, and no requests for a public hearing. An anonymous commenter suggested the state agency give permission to construct these Class II wells so that energy dependency and job creation remain domestic and that extraction of oil and gas resources be done in an environmentally sound manner. The agency determined that the issue was outside the scope of the UIC program and not relevant as to whether the state's regulations are effective to manage the UIC Class II injection well program in accordance with section 1425 of the Safe Drinking Water Act.

##### C. Incorporation by Reference

This direct final rule amends 40 CFR part 147 and incorporates by reference EPA-approved state statutes and regulations. The provisions of the Commonwealth of Kentucky Code that contain standards, requirements and procedures applicable to owners or operators of UIC Class II wells are incorporated by reference into 40 CFR part 147. Any provisions incorporated by reference, as well as all permit conditions or permit denials issued pursuant to such provisions, will be enforceable by EPA pursuant to the SDWA, section 1423 and 40 CFR 147.1(e).

In order to better serve the public, the agency is reformatting the codification

of the EPA-approved state statutes and regulations. Instead of codifying the Commonwealth of Kentucky's Statutes and Regulations as separate paragraphs, the agency is now codifying a binder that contains the "EPA-Approved Commonwealth of Kentucky Safe Drinking Water Act § 1425 Underground Injection Control (UIC) Program Statutes and Regulations for Class II wells." This binder will be incorporated by reference into 40 CFR part 147 and available at [www.regulations.gov](http://www.regulations.gov) in the docket for this rule. The agency is also codifying a table listing the "EPA-Approved Commonwealth of Kentucky Safe Drinking Water Act § 1425 Underground Injection Control (UIC) Program Statutes and Regulations for Class II wells" in 40 CFR part 147.

#### V. Statutory and Executive Order Reviews

##### A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is exempt from review by the Office of Management and Budget (OMB) because OMB has determined that the approval of state UIC primacy for Class II rules are not significant regulatory actions.

##### B. Paperwork Reduction Act

This action does not impose any new information collection burden. EPA determined that there is no need for an Information Collection Request under the Paperwork Reduction Act because this direct final rule does not impose any new federal reporting or recordkeeping requirements. Reporting or recordkeeping requirements are based on the Commonwealth of Kentucky's UIC Regulations, and the state is not subject to the Paperwork Reduction Act. However, OMB has previously approved the information collection requirements contained in the existing UIC regulations at 40 CFR parts 144–148 for SDWA section 1422 states and also for section 1425 states under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and assigned OMB control number 2040–0042. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

##### 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 impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a

significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This action does not impose any new requirements on any regulated entities. It simply codifies the Commonwealth of Kentucky's UIC Program regulations, which meets the effectiveness standard under SDWA section 1425 for regulating a Class II well program. I have therefore concluded that this action will have no net regulatory burden for any directly regulated small entities.

##### D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate as described in UMRA, 2 U.S.C. 1521–1538. 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 as explained in section V.C. Thus, Executive Order 13175 does not apply to this action.

##### G. Executive Order 13045: Protection of Children From Environmental Health & 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. This action is not subject to Executive Order 13045 because it approves a state action as explained in section V.C.

##### 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*

EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations because the rule does not change the level of protection provided to human health or the environment.

*K. Congressional Review Act (CRA)*

This action is subject to the CRA, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 147**

Environmental protection, Appeals, Incorporation by reference, Penalties, Requirements for plugging and abandonment, Underground Injection Control, Protection for USDWs.

Dated: October 19, 2016.

**Gina McCarthy,**  
*Administrator.*

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

**PART 147—STATE, TRIBAL, AND EPA-ADMINISTERED UNDERGROUND INJECTION CONTROL PROGRAMS**

■ 1. The authority citation for part 147 is revised to read as follows:

**Authority:** 42 U.S.C. 300h–4.

■ 2. Section 147.900 is added to read as follows:

**Subpart S—Kentucky**

**§ 147.900 State-administered program—Class II wells.**

The UIC program for Class II injection wells in the Commonwealth of Kentucky, except for those on Indian lands, is the program administered by the Kentucky Department of Natural Resources, Division of Oil and Gas approved by the EPA pursuant to section 1425 of the SDWA. Notification of this approval was published in the **Federal Register** on October 28, 2016]; the effective date of this program is January 26, 2017. Table 1 to paragraph (a) of this section is the table of contents of the Kentucky state statutes and

regulations incorporated as follows by reference. This program consists of the following elements, as submitted to the EPA in the state’s program application.

(a) *Incorporation by reference.* The requirements set forth in the Kentucky State statutes and regulations cited in the binder entitled “EPA-Approved Commonwealth of Kentucky Safe Drinking Water Act § 1425 Underground Injection Control (UIC) Program Statutes and Regulations for Class II wells,” dated August 2016 is hereby incorporated by reference and made a part of the applicable UIC program under the SDWA for the Commonwealth of Kentucky. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the Kentucky regulations may be obtained or inspected at the Kentucky Department of Natural Resources, Division of Oil and Gas, 3th Floor, 300 Sower Blvd., Frankfort, Kentucky 40601, (315) 532–0191; at the U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960, (404) 562–8190; or at the National Archives and Records Administration (NARA). For information on availability of this material at NARA, call (202) 741–6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

**TABLE 1 TO PARAGRAPH (a)—EPA-APPROVED KENTUCKY SDWA § 1425 UNDERGROUND INJECTION CONTROL PROGRAM STATUTES AND REGULATIONS FOR CLASS II WELLS**

State citation	Title/subject	State effective date	EPA approval date <sup>1</sup>
Kentucky Revised Statutes Chapter 13B.	Kentucky Administrative Procedures Act KRS 13B.005 to 13B.170.	June 15, 1994 .....	[Insert <b>Federal Register</b> citation].
Kentucky Revised Statutes 353.180.	Requirements for plugging abandoned well—Bids—Remedy for possessor of adjacent land or for department.	June 24, 2015 .....	[Insert <b>Federal Register</b> citation].
Kentucky Revised Statutes 353.510.	Definition of KRS 353.500 to 353.720 .....	July 15, 2010 .....	[Insert <b>Federal Register</b> citation].
Kentucky Revised Statutes 353.520.	Territorial application of KRS 353.500 to 353.720—Waste of oil and gas prohibited.	June 24, 2003 .....	[Insert <b>Federal Register</b> citation].
Kentucky Revised Statutes 353.550.	Specific authority over oil and gas operators .....	July 15, 1996 .....	[Insert <b>Federal Register</b> citation].
Kentucky Revised Statutes 353.570.	Permit Required—May authorize operation prior to issuance of permit.	July 15, 1998 .....	[Insert <b>Federal Register</b> citation].
Kentucky Revised Statutes 353.590.	Application for permit-Fees-Plat-Bond to insure plugging—Schedule—Blanket bonds-Corporate guarantee—Use of forfeited funds-Oil and gas well. plugging fund-Wells not included in “water supply well”.	July 15, 2010 .....	[Insert <b>Federal Register</b> citation].
Kentucky Revised Statutes 353.591.	Purpose and application of KRS 353.592 and 353.593.	July 15, 1986 .....	[Insert <b>Federal Register</b> citation].
Kentucky Revised Statutes 353.592.	Powers of the department .....	June 24, 2015 .....	[Insert <b>Federal Register</b> citation].
Kentucky Revised Statutes 353.593.	Appeals .....	July 15, 1996 .....	[Insert <b>Federal Register</b> citation].
Kentucky Revised Statutes 353.992.	Penalties .....	July 15, 1986 .....	[Insert <b>Federal Register</b> citation].
805 Kentucky Administrative Regulations 1:020.	Providing Protection for USDWs .....	August 9, 2007 .....	[Insert <b>Federal Register</b> citation].



TABLE 1 TO PARAGRAPH (a)—EPA-APPROVED KENTUCKY SDWA § 1425 UNDERGROUND INJECTION CONTROL PROGRAM STATUTES AND REGULATIONS FOR CLASS II WELLS—Continued

State citation	Title/subject	State effective date	EPA approval date <sup>1</sup>
805 Kentucky Administrative Regulations 1:030.	Well location and as-drilled location plat, preparation, form and contents.	October 23, 2009 .....	[Insert <b>Federal Register</b> citation].
805 Kentucky Administrative Regulations 1:060.	Plugging wells; non-coal-bearing strata .....	June 11, 1975 .....	[Insert <b>Federal Register</b> citation].
805 Administrative Regulations 1:070.	Plugging wells; coal bearing strata .....	October 23, 1975 .....	[Insert <b>Federal Register</b> citation].
805 Kentucky Administrative Regulations 1:110.	Underground Injection Control .....	April 4, 2008 .....	[Insert <b>Federal Register</b> citation].

<sup>1</sup> In order to determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** document cited in this column for the particular provision.

(b) *Memorandum of Agreement (MOA)*. The MOA between EPA Region 4 and the Commonwealth of Kentucky Department of Natural Resources signed by EPA Regional Administrator on October 20, 2015.

(c) *Statements of Legal Authority*. “Underground Injection Control Program, Attorney General’s Statement,” signed by General Counsel of Kentucky Energy and Environmental Cabinet on June 7, 2010.

(d) *Program Description*. The Program Description submitted as part of Kentucky’s application, and any other materials submitted as part of this application or as a supplement thereto.

■ 3. Section 147.901 is amended by revising the section heading and the first sentence of paragraph (a) to read as follows:

**§ 147.901 EPA-administered program—Class I, III, IV, V, and VI wells and Indian lands.**

(a) *Contents*. The UIC program for Class I, III, IV, V and VI wells and all wells on Indian lands in the Commonwealth of Kentucky is administered by the EPA. \* \* \*

\* \* \* \* \*

■ 4. Add § 147.902 to read as follows:

**§ 147.902 Aquifer Exemptions.**

(a) This section identifies any aquifers or their portions exempted in accordance with §§ 144.7(b) and 146.4 of this chapter. These aquifers are not being proposed for exemption under the Commonwealth of Kentucky’s primacy approval. Rather, the exempted aquifers listed below were previously approved while EPA had primary enforcement authority for the Class II UIC program in the Commonwealth of Kentucky and are included here for reference. Additional information pertinent to these exempted aquifers or their portions resides in EPA Region 4.

(1) The following eight aquifers (underground sources of drinking water) in the Commonwealth of Kentucky have been exempted in accordance with the provisions of §§ 144.7(b) and 146.4 of this chapter for Class II injection activities only: A portion of the Tar Springs sandstone formation that has a quarter mile radius areal extent (125.6 acres) that is located at latitude 37.7261 and longitude –86.6914. The formation has a true vertical depth from surface of 280 feet.

(2) A portion of the Tar Springs sandstone formation that has a quarter mile radius areal extent (125.6 acres) that is located at latitude 37.7294 and longitude –867212. The formation has a true vertical depth from surface of 249 feet.

(3) A portion of the Tar Springs sandstone formation that has a quarter mile radius areal extent (125.6 acres) that is located at latitude 37.7055 and longitude –86.7177. The formation has a true vertical depth from surface of 210 feet.

(4) A portion of the Pennsylvanian Age sandstone formation that has a quarter mile radius areal extent (125.6 acres) that is located at latitude 37.5402 and longitude –87.2551. The formation has a true vertical depth from surface of 1,050 feet.

(5) A portion of the Tar Springs sandstone formation that has a quarter mile radius areal extent (125.6 acres) that is located at latitude 37.7301 and longitude –87.6922. The formation has a true vertical depth from surface of 240 feet.

(6) A portion of the Caseyville sandstone formation that has a quarter mile radius areal extent (125.6 acres) that is located at latitude 37.5776 and longitude –87.1321. The formation had a true vertical depth from surface of 350 feet.

(7) A portion of the Caseyville sandstone formation that has a quarter

mile radius areal extent (125.6 acres) that is located at latitude 37.5778 and longitude –87.1379. The formation has a true vertical depth from surface of 1,080 feet.

(8) A portion of the Caseyville sandstone formation that has a quarter mile radius areal extent (125.6 acres) that is located at latitude 37.5652 and longitude –87.1222. The formation has a true vertical depth from surface of 1,060 feet.

(b) [Reserved]

■ 5. Section 147.903 is amended by revising the section heading to read as follows:

**§ 147.903. Existing Class I and III wells authorized by rule.**

**§ 147.904 [Removed and reserved]**

■ 6. Section 147.904 is removed and reserved.

[FR Doc. 2016–25931 Filed 10–27–16; 8:45 am]

BILLING CODE 6560–50–P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Office of the Secretary**

**45 CFR Part 5**

**RIN 0991–AC04**

**Freedom of Information Regulations**

**AGENCY:** Office of the Secretary, Department of Health and Human Services (HHS).

**ACTION:** Final rule.

**SUMMARY:** This rule amends the Department of Health and Human Services (HHS’s) Freedom of Information Act (FOIA) regulations. The regulations have been revised in order to incorporate changes made to the FOIA by the Electronic FOIA Act of 1996 (E–FOIA Act), the Openness

Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act), and the FOIA Improvement Act of 2016 (FOIA Improvement Act). Additionally, the regulations have been updated to reflect changes to the organization, to make the FOIA process easier for the public to navigate, to update HHS's fee schedule, and to make provisions clearer.

**DATES:** This rule is effective on November 28, 2016.

**FOR FURTHER INFORMATION CONTACT:**

Michael Marquis, Michael Bell, Deborah Peters, and/or Brandon Lancey by email to: [HHS.ACFO@hhs.gov](mailto:HHS.ACFO@hhs.gov). These individuals also can be reached by telephone at 202-690-7453.

**SUPPLEMENTARY INFORMATION:** HHS published a proposed rule to amend its FOIA regulations for public comment in the *Federal Register* at 81 FR 39003 on June 15, 2016. The comment period ended on August 15, 2016. In total, we received 10 public comments in response to the proposed rule. We have given due consideration to each of the comments we received, and, in response, we have made several modifications to the proposed rule. These modifications include clarifying, revising, expanding, or adding various provisions, withdrawing provisions, and making minor technical edits. We have addressed the substantive comments that we received in narrative form below; grouped by the section the comment corresponds to, as located in the proposed rule.

**Purpose (§ 5.1)**

One commenter recommended removing a provision that we originally proposed in § 5.1(b)(1) concerning records that are subject to a statutorily-based fee schedule program. The commenter interpreted this provision to suggest that we would withhold records in response to a FOIA request simply because a separate statute provided for charging fees for those records. In order to help clarify the meaning of that provision, the commenter's recommendation has been accepted and the proposed provision has been removed. An additional provision relating to records that are subject to other statutes specifically providing for fees has been added at § 5.52(f). In addition to the language in § 5.1(b)(1) concerning records that are subject to a statutorily-based fee schedule program, we have also removed the language concerning §§ 5.1(b)(2), (3) and (5), as we consider the provisions of § 5.2 to adequately address proactive disclosures and the provisions of § 5.5 and § 5.22 to adequately address the

interrelationship between the FOIA and the Privacy Act and how to make a first-party request.

**Presumption of Openness and Proactive Disclosures (§ 5.2)**

Three commenters suggested revising the language of this section to more closely conform to the provisions of the FOIA Improvement Act, which codified the presumption of openness into the statute. This recommended change has been made and the rule reflects the statutory language at 5 U.S.C. 552(a)(8).

Two commenters suggested that we add language concerning proactive disclosures to this section. One of these commenters provided suggested language, which included a reference to two types of records that government agencies are required to make available to the public in an electronic format pursuant to the FOIA Improvement Act and 5 U.S.C. 552(a)(2)(D). Another commenter suggested that we consider the Department of Justice's FOIA regulation and government-wide guidance when drafting language on the subject. After considering these comments, we have added additional language to this section describing the responsibility of HHS Operating and Staff Divisions to proactively make certain records available to the public under the FOIA. This includes describing the responsibility for HHS Operating and Staff Divisions to identify additional records of interest to the public that are appropriate for public disclosure and referencing frequently requested records, which the rule defines in § 5.3 to include records, regardless of form or format, that have been released to any person and have been requested three or more times. This conforms with the proactive disclosure provisions of the FOIA, as amended by the FOIA Improvement Act.

One commenter suggested that requesters who make requests for records that ultimately become frequently requested records should have the option to receive credit for their FOIA requests, or, in the event that that seems like too much work, the Department should simply always give credit. We decline to accept the commenter's suggestion. There is no provision in the FOIA requiring agencies to give "credit" to requests for records that ultimately become frequently requested records. There also does not appear to be any policy rationale behind this suggestion. The purpose of the FOIA is not to provide "credit" to individuals or entities that make requests. Rather, it is to ensure an informed citizenry and inform the

public about the operations and activities of the government.

One commenter, in connection with the requirements that we make certain records available proactively for public inspection in an electronic format and make available in an electronic format frequently requested records, suggested that we properly track and make available Public Use Files (PUFs) and ensure that they are adequately maintained. In addition, the commenter suggested we proactively track and publish score cards for PUF release reliability alongside data about FOIA performance. This comment is outside the scope of the rule. The purpose of this rule is to provide guidelines for the processing of agency records under the FOIA. The rule does not specify how we will treat specific category of records unless those categories are specifically delineated in the FOIA statute.

One commenter suggested that the Department should use the systems it has to proactively release information pursuant to 5 U.S.C. 552(a)(2) to highlight types of records that HHS is obligated to have but could not locate in response to a FOIA request. After reviewing this comment, we have decided not to accept the suggestion. The purpose of 5 U.S.C. 552(a)(2) is to make certain categories of records available to the public automatically and without waiting for a FOIA request. Our main goal in implementing this provision of the FOIA is to determine which records we must make publicly available (including frequently requested records), to identify additional records of interest to the public that are appropriate for public disclosure, and to post and index such records.

One commenter stated that HHS should track Structured Query Languages (SQLs) used to respond to data FOIA requests. The commenter believes these should be tracked to make sure that PUF files released as a frequently requested record are consistent over time even after contractors or personnel change. The commenter also wanted the SQL and schema definitions to be provided with the response to the FOIA request/data result and if software was used, that should be provided with the data too. This comment is outside the scope of the rule. The rule does not specify how we will treat specific category of records unless those categories are specifically delineated in the FOIA statute.

**Definitions (§ 5.3)**

One commenter suggested revising the definition of "educational institution" to include a student who

makes a request in furtherance of their coursework or other school-sponsored activities, which reflects a recent development in the case law. The suggested change has been accepted.

In order to comport with a recent development in the case law, two commenters suggested removing the following line from the definition of “representative of the news media”: “We decide whether to grant a requester media status on a case-by-case basis, based on the requester’s intended use of the requested records.” We have accepted this suggestion. Another commenter also had a concern with this language, but that comment is now moot since the language has been removed.

One commenter recommended including a comprehensive list of entities that would qualify as a “representative of the news media” instead of citing examples such as television, radio stations, and periodicals. The commenter noted that modern journalism has moved online. We have decided to reject the commenter’s suggestion to include a comprehensive list of entities that would qualify as “representatives of the news media.” Such a list would be difficult to devise and could become quickly outdated, given the ever-changing media landscape. We do note, however, that the rule acknowledges the presence of online media and makes reference to “online publications that disseminate news”.

One commenter thought that the following wording used to describe the term “representative of the news media” was unclear: “We do not consider requests for records that support the news-dissemination function of the requester to be a commercial use.” In response to this comment, we do not believe that this wording requires additional clarification. This wording was derived from the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (OMB). The OMB has policy-making responsibility for issuing fee guidance, and we defer to the OMB for any further interpretation of this wording.

One commenter suggested that the rule include performance metrics to evaluate the Chief FOIA Officer and the Deputy Chief FOIA Officer and that these metrics be based on objective measures of external collaboration (*e.g.*, number of emails answered, average response time to answer FOIA requester questions, etc.). While we believe strongly in providing good customer service and being held accountable for providing timely responses to FOIA requests, we believe the mechanisms to

achieve these goals are already in place. Requesters can seek assistance with the processing of their requests by contacting the appropriate FOIA Public Liaison at the FOIA Requester Service Center processing their request. Requesters can also seek assistance with their FOIA request through the services provided by the Office of Government Information Services (OGIS). Moreover, each year we submit to the Department of Justice and make available to the public two reports evaluating the Department’s performance on FOIA: the Annual FOIA Report and the Chief FOIA Officer Report. The Annual FOIA Report contains detailed statistics on the numbers of requests received and processed by the Department, the time taken to respond, and the outcome of each request, as well as many other vital statistics regarding the administration of the FOIA at the Department. The Chief FOIA Officer Report includes detailed descriptions of the steps taken by the Department to improve FOIA compliance and transparency. Together, these reports provide the public with an accurate representation of the Department’s performance on FOIA.

One commenter suggested making a grammatical change to the first sentence of the definition of the term “FOIA request” and suggested removing the second sentence of the definition because it does not enhance the reader’s understanding of the meaning of the term. The commenter also thought that the second sentence of the definition might restrict the Department’s ability to communicate with requesters. After considering this comment, we have made the suggested grammatical change to the first sentence of the definition and removed the second sentence.

Two commenters noted that we included a link in the definition of “Freedom of Information (FOIA)” that is no longer active and suggested that we either remove the link or update it. In response to these comments, we have updated the link. The updated link includes the current text of the FOIA.

One commenter suggested that the term “Freedom of Information Officer” be replaced with the term “Freedom of Information Act Officer” for the sake of consistency. The commenter noted that the word “act” is used in the titles of the Chief Freedom of Information Act Officer and the Deputy Chief Freedom of Information Act Officer and that the term “Freedom of Information Officer” has been shortened to “FOIA Officer” in §§ 5.27(b) and 5.28(a). After considering this comment, we have decided to accept the suggestion and have replaced the term “Freedom of Information

Officer” with the term “Freedom of Information Act Officer”.

One commenter suggested that the term “frequently requested records” be modified to include records that have been released to any person under the FOIA and that have been requested 3 or more times. The FOIA Improvement Act requires federal agencies to make this category of records available to the public in an electronic format. In accordance with the FOIA Improvement Act, we have amended the term “frequently requested records” as suggested.

One commenter recommended changes to the definition of the term “submitter”. The commenter suggested clarifying that a person or entity that provides financial information qualifies as a submitter under the definition. The commenter also recommended adding language to the definition stating that a federal agency cannot be considered a submitter for the purposes of this rule. After considering this comment, the definition of the term submitter has been amended to include persons or entities that provide financial information to the agency. We have also included language in the definition stating that Federal government entities do not qualify as submitters.

#### **Who can file a FOIA request? (§ 5.21)**

One commenter noted that two of the three sentences in the section state that federal agencies may not submit FOIA requests; the commenter thought that one statement to that effect would suffice. At the recommendation of the commenter, the second sentence in this section has been removed. The revised section only has one sentence stating a federal agency may not submit FOIA requests.

#### **How does HHS process my FOIA request? (formerly § 5.25)**

One commenter noted that in § 5.25(b)(1)(iii) we referred to a “requestor” but throughout the rest of the rule, we referred to a “requester”. In order to be consistent, we will use “requester” for all references to the term.

Two commenters expressed concern with the criteria set forth in § 5.25(b)(1) for considering a request perfected and the amount of time provided in § 5.25(b)(2) for a requester to respond to a request to perfect their request. With regard to § 5.25(b)(1), both commenters noted that the FOIA statute states that the twenty-working-day statutory response period begins to run when the request is received by the responsible FOIA office, but not later than ten days after it is received by an HHS

component designated to receive requests. Section 5.25(b)(1) has been amended at the recommendation of the commenters and in order to comply with the requirements of 5 U.S.C. 552(a)(6)(A). In addition, one of the commenters considered the contents of § 5.25(b)(1) to be contrary to the FOIA statute itself and recommended that the provision be removed from the rule in its entirety. In the view of the commenter, the provision added additional requirements to the FOIA that were not authorized by law. We disagree with this comment. The FOIA requires requesters to satisfy two conditions when submitting a FOIA request: that the request reasonably describes the records sought and that it is made in accordance with agency's published rule setting forth the procedures for filing a FOIA request. If a requester fails to satisfy these conditions, § 5.25(b) requires an Operating Division or Staff Division to attempt to contact the requester and inform him or her of what additional information is needed to meet the requirements of the FOIA and this rule. This includes attempts to contact the requester in order to reformulate or modify a request in cases where we do not consider the records sought to be reasonably described. In addition, in instances where we close a request because of a failure to reasonably describe the records sought, the requester will be given administrative appeal rights to challenge the decision since this is an adverse determination. Finally, although such a requirement was legally permissible, we have decided to make it easier for requesters to perfect their requests by eliminating the requirement that, in order to perfect, a requester agree to pay all or an established amount of applicable fees or request a fee waiver. We do, however, encourage requesters to include such information in their requests and make reference to that suggestion in § 5.22.

As it relates to § 5.25(b)(2), the two commenters expressed concern with the amount of time requesters were provided with to respond to a request to perfect their requests. One commenter claimed that there was no authorization in the FOIA for an agency to unilaterally "administratively close" a FOIA request; that an agency can only grant a request in full or in part or deny it; and that § 5.25(b)(2) should be removed in its entirety. In the alternative, the commenter suggested affording the requester no less than 30 days to respond to a request to perfect their request in order to ensure that they have sufficient time to respond. The second

commenter thought that requesters should be given at least 20 working days to respond to communications from the agency, and if the agency takes more than twenty working days from the date of the request to initiate communication with the requester, the requester should receive the same amount of time to respond to the agency. The second commenter also thought the agency should be required to make at least three good-faith efforts to contact a requester by various forms of communication (mail, email, telephone), if a communication goes unanswered because it is returned as undeliverable. In response to these comments, we have increased the amount of time requesters are provided with to respond to a request to perfect their request from "at least 10 working days" to "at least 20 working days". We believe that this provides requesters with a reasonable amount of time to review the request to perfect, conduct any necessary research, and respond to the agency. In instances where a communication goes unanswered because it is returned as undeliverable, we will attempt to reach the requester using any alternative contact information provided before administratively closing the request. However, we do not think it is necessary to state the number of times we will attempt to contact a requester before administratively closing the request. Finally, we disagree with the comment suggesting that agencies do not have a right to administratively close a request. The FOIA specified two requirements for an access request: It must reasonably describe the records being sought and it must be made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed. If a requester fails to satisfy these conditions, the rule requires HHS to attempt to contact the requester to seek clarification and provides the requester with a reasonable amount of time to respond. If a requester does not respond to communication within the specified timeframe, it is reasonable to deny the request and administratively close it because of a failure to reasonably describe the records sought or make the request in accordance with the published rules. Such a provision is found in a number of agency FOIA regulations throughout the government including the regulations of four other cabinet-level departments. Therefore, we decline to accept the comment.

The same two commenters expressed concern with the amount of time requesters were provided with in § 5.25(c) to respond to a request to respond to requests for additional

information or clarification regarding the specifics of a request or fee assessment. In response to these comments and in order to provide requesters with a reasonable amount of time to respond, we have increased the amount of time to respond to a request for additional information or clarification regarding the specifics of a request or fee assessment from "at least 10 working days" to "at least 20 working days". The commenters also expressed concern with the language in § 5.25(c) stating "[s]hould you not answer any correspondence, or should the correspondence be returned undeliverable, we reserve the right to administratively close the FOIA request." The concerns expressed about this provision were the same as those stated for § 5.25(b)(2), namely that the agency should be required to make at least three good-faith efforts to contact a requester by various forms of communication (mail, email, telephone), if a communication goes unanswered because it is returned as undeliverable, and that there is no authorization in the FOIA for an agency to unilaterally administratively close a FOIA request. For the same reasons stated with regard to § 5.25(b)(2), we decline to accept the comment concerning undeliverable communications. With respect to whether the agency has the authority to administratively close requests when a communication goes unanswered, we again disagree with the comment. If a requester does not respond to communication within a reasonable amount of time, we have legitimate reason to believe that the requester is no longer interested in pursuing their request. Moreover, a provision allowing for the administrative closure of requests where a request for additional information or clarification goes unanswered is commonly included in a number of agency FOIA regulations throughout the government including the regulations of four other cabinet-level departments.

Multiple commenters provided input on §§ 5.25(e), (f), and (h), which describe the Department's procedures for multitrack processing and handling requests that involve unusual circumstances. One commenter expressed a concern that § 5.25(h) could be read to provide the agency with the authority to provide itself with unlimited time to respond to complex FOIA requests. Another commenter requested that §§ 5.25(e) and (f) be modified to include a commitment to provide requesters with an estimated completion date if their request is

placed in the complex processing queue or if unusual circumstances exist. Additionally, the commenter recommended that § 5.25(h) be modified to require an agency to notify a requester of an expected delay because of unusual circumstances and that such a notice should provide requesters with an explanation of the unusual circumstances and an estimated completion date. The commenter recommended providing such a notice prior to having any conversations regarding the scope of the request. After considering these comments, the contents of §§ 5.25(e), (f), and (h) have been modified to distinguish requests that are placed in the complex processing queue from requests involving unusual circumstances and to align these sections with the FOIA statute. In cases where unusual circumstances require us to extend the processing time by more than 10 working days, we have clarified that requesters will have an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. Finally, with regard to estimated completion dates, we have clarified the language of the rule indicating that we will provide requesters with an estimated completion date when we notify them of the unusual circumstances involved with their request. However, we decline to accept the commenter's recommendation to provide an estimated completion date for all requests placed in the complex processing queue. Such a policy is not required by the FOIA and, while we estimate the completion date based on our reasonable judgment as to how long it will likely take to complete the request, given the uncertainty inherent in establishing any estimate, the estimated completion date would be subject to change at any time.

One commenter recommended giving priority to records and data requests that give detailed and accurate information about where to find the records in question. The commenter believes that requesters who make such requests should be rewarded with cheaper fees and faster processing time. Requesters who give detailed and accurate information receive a number of benefits under the FOIA and this regulation already. First, if a request provides detailed and accurate information about where to find the records, there is a strong likelihood that the request will be considered perfected and quickly routed for search. Second, there is a strong likelihood that it will be unnecessary to toll the processing time to clarify the

scope of the request if the requested records are well-described and we are given accurate information about where to find the records in question. Third, if the request provides accurate information about where to find the records in question, the search can be conducted more quickly which could reduce search fees, if those are associated with the request, and it could speed up the processing time. Finally, we have adopted multitrack processing and place requests on the simple or complex track based on the estimated amount of work or time needed to process the request. Providing information that helps us locate documents responsive to a request makes it more likely that the request will be placed on the simple track and processed more quickly. Given these advantages, we do not believe it is necessary to provide any additional benefits to requesters who provide detailed and accurate information about where to find the records in question.

One commenter suggested that the rule be modified to inform requesters that they are entitled to judicial review if the agency does not meet statutorily imposed deadlines. The commenter further stated that HHS should reference 5 U.S.C. 552(a)(6)(C) in the rule and clarify how a requester may exhaust his or her administrative remedies. After carefully considering this comment, we decline to adopt the commenter's suggested change. The FOIA statute itself already makes clear that a failure to comply with the time limits for either an initial request or an administrative appeal may be treated as a "constructive exhaustion" of administrative remedies. Once there has been a "constructive exhaustion", a requester may immediately thereafter seek judicial review if he or she wishes to do so. It is unnecessary for this rule to simply restate information that is already in the FOIA statute concerning the exhaustion of administrative remedies.

One commenter suggested defining the term "voluminous" in § 5.25(f). In revising the rule, we have removed the term "voluminous" from the referenced section. The term "voluminous" was contained in a recitation of the statutory definition of unusual circumstances. Since the FOIA statute already contains this information, it was unnecessary to include in the rule. However, even if the term "voluminous" remained in the rule, we do not believe it is appropriate to define it here. The term "voluminous" can be understood by the plain meaning in the statute, legislative intent, and any case law interpreting that term.

One commenter suggested we consider adding subsections that fully explain referrals, consultations, and coordination with other federal agencies or entities. We have accepted the commenter's suggestion. Section 5.25 provides a full explanation of the Department's procedures for rerouting of misdirected requests, referrals, consultations, and coordination.

#### **How does HHS determine estimated completion dates for FOIA requests? (§ 5.26)**

One commenter expressed a concern about § 5.26(a). In the view of the commenter, the language of this provision suggested that estimated completion dates are only provided when a requester asks for them. The commenter recommended that we provide estimated completion dates whenever a request is first placed in the complex processing queue, whenever we determine that an estimated completion date must change for a request, or when a requester asks for an update on expected completion date, and that the language in this section be updated to reflect that. In response to this comment, we have amended the language in this section to clarify that we will provide estimated completion dates when we notify requesters of any unusual circumstances involved with their request and when a requester has asked for an estimated completion date. However, we decline to accept the commenter's recommendation of providing an estimated completion date for any request placed in the complex processing queue or whenever an estimated completion date must change for a request. As previously stated, while we estimate the completion date based on our reasonable judgment as to how long it will likely take to complete the request, given the uncertainty inherent in establishing any estimate, the estimated completion date would be subject to change at any time.

#### **How do I request expedited processing? (§ 5.27)**

Multiple commenters submitted comments concerning the criteria for granting expedited processing of FOIA request described in § 5.27(c). One commenter expressed concern that we did not include the need to meet a litigation deadline in an administrative appeal or in a court action as a case deemed appropriate for granting expedited processing. In the opinion of the commenter, a failure to include this policy into the rule would contradict the statute and constitute an invalid departure from established agency precedent. The commenter expressed

three specific concerns with the rule as it relates to the omission of any express provision to grant expedited processing in cases where the information is needed to meet a deadline in litigation. First, the commenter believes the proposed rule is in conflict with the FOIA statute. The FOIA statute provides for expedited processing “in other situations”. The commenter is of the opinion that this meant Congress intended for agencies to make expedited processing available for a broader range of FOIA requests than just those defined as serving a “compelling need.” Second, the commenter is under the impression that HHS has a longstanding policy of allowing expedited processing in cases where the information is needed to meet a deadline in litigation. In support of this, the commenter cited a stipulated court order in *Home Health Line, Inc. v. Health Care Financing Admin.*, 90–cv–1006–LFO (D.D.C.1990), and a notice published by the Centers for Medicare & Medicaid Services (CMS) (formerly the Health Care Financing Administration (HCFA)), as a stipulation of dismissal and settlement of the case, outlining its policy for expedited processing. The notice was published at 55 FR 51342 (Dec. 13, 1990). The cited notice includes language stating that “HCFA follows its first-in/first-out practice for processing requests except where the requester demonstrates exceptional need or urgency.” 55 FR 51342. The notice further states that there are three categories of requester needs which HCFA has determined frequently [demonstrate exceptional need of urgency].” *Id.* One of the three categories of requester needs described in the notice is “where the requester needs the specific records in question to meet a deadline in litigation, either in a court or before an administrative tribunal.” *Id.* The commenter asserted that the agency cannot change its policy on expedited processing without violating the court order and the conditions of settlement in the *Home Health Line, Inc.* case. Finally, the commenter cited the Administrative Procedure Act to state that agencies must both acknowledge and explain the reasons for a departure from established policies or precedent. In the opinion of the commenter, there is no good reason for the agency to depart from a policy of granting expedited processing to meet a litigation deadline in an administrative appeal or court. The commenter has particular concern because, according to the commenter, under HHS regulations governing appeals to the PRRB, FOIA is the only means available to hospitals and other

providers to obtain relevant and material evidence concerning the accuracy of Medicare payment determinations by HHS.

We reject this comment and will discuss each point in the order it was raised by the commenter. First, the commenter is incorrect when stating that the rule is in conflict with the FOIA statute because the rule does not provide for the expedited processing of requests “in other cases determined by the agency.” 5 U.S.C. Sec. 552(a)(6)(E)(i)(II). The plain language of the FOIA statute makes clear that the decision to provide for expedited processing “in other cases” is left to the discretion of the agency and the agency is free not to deem any other case appropriate. Second, we acknowledge that CMS had a policy of ordinarily granting expedited processing on a variety of circumstances, both administrative in nature and in response to specific needs stated by a requester, and that this policy was published in the **Federal Register** for the public’s benefit. However, at the time, HHS had not promulgated any rule with respect to expedited processing. This rule now promulgates rules for the entire Department providing for expedited processing of requests for records and supersedes the guidance CMS published at 55 FR 51342. Finally, while the adopted regulations do not represent a change in policy for the whole Department, we acknowledge that the only circumstance in CMS’s policy which we have chosen to retain in this rule is when a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. We believe that this change to CMS’s policy is necessary to establish fairness in the FOIA process. When granting expedited processing, we must consider the interest of all requesters in having their requests treated equally. We must also bear in mind that whenever we grant expedited processing to one requester, other requesters waiting patiently in line will have to wait longer for a response. As a result, the Department must only grant expedited processing in truly exceptional circumstances. The basic purpose of FOIA is to ensure that there is an informed citizenry, which is vital to the functioning of a democratic society, necessary to check against corruption, and needed to hold government officials accountable to the public. All members of the public are beneficiaries of the FOIA, and while this includes parties to a litigation, historically, a requester’s rights are not

affected by his or her litigation need for government records. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 n.23 (1978). We additionally note that the number of FOIA requests which the Department must process has increased exponentially since 1990, which is yet another reason why we have decided to only grant expedited processing in very limited circumstances. For these reasons, we disagree with the commenter’s contention that CMS does not have a good reason to depart from its current expedited processing policy.

A second commenter recommended that HHS provide for expedited processing of state survey documents such as investigator notes, witness statements, witness lists, and documents reviewed during the course of the investigation. The commenter believes that HHS should commit to responding to these types of requests so that nursing home residents can receive these documents before their claims are time barred by a statute of limitations. We must, unfortunately, decline to accept this recommendation. While specific requesters may have a strong personal need to receive responsive records as quickly as possible, the agency must consider the interests of all requesters waiting patiently in line and make sure that everyone is treated equally. As a result, we only grant expedited processing in truly exceptional circumstances. Moreover, the FOIA is fundamentally meant to inform the public about agency action and not to benefit private litigants. *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975). For those reasons, we decline to accept this recommendation.

One commenter recommended that a requester’s history of making requests for expedited processing should be considered when determining whether to grant expedited processing. In the opinion of the commenter, organizations that always request expedited processing for all requests should receive greater scrutiny in their requests for expedited processing than organizations that do not request expedited processing when their requests are obviously not urgent. In response to this comment, we decline to accept the commenter’s recommendation. Each request for expedited processing is evaluated on its own merits. We do not provide special treatment to some requesters over others based on their history of making requests.

When granting expedited processing, one commenter thought that we should consider the fact that a requester has a

history of making requests for records that eventually became frequently requested records. In response to this comment, we decline to accept the commenter's recommendation. Each request for expedited processing is evaluated on its own merits. We do not provide special treatment to some requesters over others based on a history of requesting records that become frequently requested records.

One commenter recommended granting expedited processing in situations where the requested records implicate an ongoing public health issue. We grant expedited processing in two cases: (1) Where a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual, and (2) where there is an urgent need to inform the public about an actual or alleged Federal Government activity. We only grant expedited processing in limited circumstances because we must consider the interests of all requesters waiting patiently in line and make sure that everyone is treated equally. For this reason, we must decline to adopt this comment.

Finally, one commenter suggested that records released in response to a request that receives expedited processing or a fee waiver should be made proactively available one year after it is released to the requester even if the information has not been requested three or more times. We have decided not to accept this comment. Even if a record has not been released and requested three or more times, we will make available additional records if we believe they are of interest to the public and are appropriate for public disclosure. However, not every record released in response to a request that receives expedited processing or a fee waiver may fall into that category.

#### **How does HHS respond to my request? (§ 5.28)**

Several commenters recommended modifying the rule to incorporate changes made to the FOIA as a result of the FOIA Improvement Act. As a result of the FOIA Improvement Act, we have modified the language of § 5.28(a) to indicate that we will provide requesters with a notification of their right to seek assistance from the appropriate FOIA Public Liaison in all disclosure determination letters, and we have modified § 5.28(b) to indicate that we will provide requesters with a notification of their right to seek dispute resolution services from the appropriate FOIA Public Liaison and the Office of Government Information Services in all

disclosure determination letters that include an adverse determination.

#### **How may I request assistance with the FOIA process? (§ 5.29)**

One commenter wanted to know who at the various offices is available for helping to ensure that the FOIA is processed properly. The commenter can seek assistance from the FOIA Requester Service Center that is processing the request. Each FOIA Requester Service Center also has a FOIA Public Liaison who can assist in reducing delays, clarifying the scope of a request, increasing transparency, providing status updates, and assisting in dispute resolution. The contact information for each FOIA Requester Service Center and the name of each FOIA Public Liaison is available through the web link included in this section. In addition, requesters can seek assistance from the Office of Government Information Services (OGIS) including mediation services.

Several commenters suggested modifying the rule to incorporate the requirements of the FOIA resulting from the FOIA Improvement Act. Section 3 of the FOIA Improvement Act requires each agency to include procedures for engaging in dispute resolution with the FOIA Public Liaison and the Office of Government Information Services (OGIS). These procedures are included in this section of the rule. In addition, throughout the rule, we have included provisions that provide for the assistance of the appropriate FOIA Public Liaison and the Office of Government Information Services (OGIS) or give notification of their services.

#### **What are the reasons records may be withheld? (§ 5.31)**

One commenter stated that a section describing the exemptions to the FOIA was unnecessary, and at most should simply restate the exemptions set forth in 5 U.S.C. 552(b). The commenter further stated that the scope of the exemptions is determined by the courts and not agency regulations. After considering this comment and other comments concerning this section, we have removed language describing the scope of each exemption and simply restated the exemptions as set forth in the FOIA statute.

One commenter suggested revising the opening paragraph of § 5.31 to reflect the presumption of openness codified in the FOIA Improvement Act. Another commenter suggested adding similar language to the end of the section. We have made the recommended change and have

included a reference to the foreseeable harm standard in this section. We have chosen to place this reference in the opening paragraph of the section.

One commenter noted that all FOIA exemptions are discretionary, not mandatory. Therefore, all language describing an Exemption should state that an Exemption "authorizes" the withholding of information instead of "requires". We have accepted this comment and made the recommended change. We note, however, that the ability to make a discretionary release will vary according to the exemption involved and whether the information is required to be protected by some other legal authority. Some of the FOIA's exemptions, such as Exemption 2 and Exemption 5, protect a type of information that is not generally subject to a disclosure prohibition. By contrast, the exemptions covering national security, commercial and financial information, personal privacy, and matters within the scope of nondisclosure statutes protect records that are also encompassed within other legal authorities that restrict their disclosure to the public. *See Attorney General Holder's FOIA Guidelines*, 74 FR 51879, (October 8, 2009) (describing exemptions where discretionary disclosure can most readily be made and those for which discretionary disclosure is not available). Thus, agencies are constrained in their ability to make discretionary disclosures of records covered by Exemptions 1, 3, 4, 6, and 7 & certain subparts of Exemption 7.

Several commenters expressed concern regarding the descriptions of the scope of Exemptions 4, 5, and 6. These comments have been rendered moot, however, since the language in this section now simply restates the Exemptions as they are set forth in the FOIA statute.

One commenter provided feedback on § 5.31(d)(4)(ii) concerning the amount of time we provide submitters to respond to a predisclosure notification. The provision states that submitters have ten working days to object to disclosure and that HHS FOIA Offices may extend this period as appropriate and necessary. The commenter thought that we should take into consideration the time limits within which agencies must respond to FOIA requests. Furthermore, the commenter recommended that the regulation state that the agency will expeditiously provide predisclosure notification and should make clear that the amount of time provided to a submitter to respond to a predisclosure notification should not exceed the remaining amount of time in which the



agency is required by law to process the request. After considering this comment, we have decided not to accept it. We attempt to process all FOIA requests as expeditiously as possible. However, it sometimes is not possible to know whether a predisclosure notification is necessary to process a request or where a predisclosure notification needs to be sent until a search for records has been conducted and a review of the records has begun. It is unclear how adding a requirement that we expeditiously provide predisclosure notification would speed up that process. We also do not think it is reasonable to restrict a submitter's opportunity to object to disclosure based on the amount of time in which we are required by law to process the request. All submitters should be given ten working days (or where appropriate and necessary, ten or more working days) to object to the disclosure of information they provided to the government regardless of how long it takes for HHS to conduct the search or determine that a predisclosure notification is required.

One commenter provided input regarding § 5.41(d)(4)(iii). More specifically, the commenter expressed concern with the rule's language regarding the requirements of a notice of intent to disclose. The language, as written, suggested that we would release information over the objection of a submitter within five days of the date of the notice of intent to disclose. The commenter suggested that this could potentially allow for a release of information less than five days after the notice of intent to release, which would be unreasonable. The commenter also noted that the timeframe for the release of records after a notice of intent to disclose was based on the date of the notice whereas with § 5.41(d)(4)(ii), the date to provide objections to a predisclosure notification was based on the date of receipt of the notification. Moreover, as written, FOIA Offices were given the authority to extend the timeframe for responding to a predisclosure notification letter but not for releasing records after providing a notice of intent to release. In accordance with Executive Order 12600 and in response to this comment, we have modified the requirements regarding the notice of intent to disclose to require that the notice include a specified disclosure date and that the date be at least five working days after the date of the notice. This will provide a reasonable number of days before a release and it gives flexibility to FOIA Offices to provide more than five

working days when necessary. In order to be consistent, we also have revised the predisclosure notification procedures to base the amount of time to object on the date of the notice rather than the date of receipt. This is administratively easier to track and, as communication has become more electronic, the date of the notice and the date of receipt are often the same. Finally, all provisions regarding confidential commercial information are now located in their own subpart, Subpart D.

Multiple commenters suggested modifying the description of Exemption 5 to include the restriction on applying the deliberative process privilege to records that were created 25 years or more before the date on which the records were requested. This limitation to the deliberative process privilege was added by the FOIA Improvement Act and it is now reflected in this rule.

#### **Records Not Subject to the Requirements of the FOIA—Law Enforcement Exclusions (§ 5.32)**

One commenter stated that they found it unusual and highly irregular for HHS to include a description of the law enforcement record exclusions. In response to this comment, we have removed the descriptions of the exclusions and have simply included a citation to the section of the FOIA statute that references exclusions.

#### **General Information on Fees for All FOIA Requests (Formerly § 5.41)**

One commenter recommended that requesters be given at least 20 working days to make an advance payment (§ 5.41(b)) or respond to an agency communication in the course of negotiating fees (§ 5.41(e)) and, if the agency takes more than twenty working days from the date of the request to initiate these actions with the requester, the requester should receive the same amount of time to respond to the agency. In response to this comment, we have increased the number of days to make an advance payment and respond to an agency communication from at least 10 working days to at least 20 working days. We believe that this provides requesters with a reasonable amount of time to respond to us before we assume that they are no longer interested in pursuing their request.

#### **What Fee Policies Apply to HHS Records? (Formerly § 5.42)**

One commenter suggested editing the provision on minimum fees to state that “[w]e do not send an invoice to requesters if *assessable* processing fees are less than \$25.” We have accepted

the commenter's suggestion and made the change.

#### **What is the FOIA Fee Schedule for Obtaining Records? (Formerly § 5.43)**

Two commenters recommended removing language related to the fees we charge for the use of a computer to conduct a search in § 5.43(a)(2). One commenter thought that the language was archaic and should be removed. The second commenter considered the cost of a computer to be a sunk cost to the Department and stated that the computer would have been running anyway if it hadn't been used to conduct the search. We decline to accept the commenters' recommendations. When establishing the fee schedule, we follow the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (OMB), which establishes uniform standards for fee matters. Conformity with the OMB Guidelines is required by the FOIA. See 5 U.S.C. 552(a)(4)(A)(i). The OMB Fee Guidelines state that with regard to computer searches for records “[a]gencies should charge at the actual direct cost of providing the service. This will include the cost of operating the [computer] for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary apportionable to the search.” In order to conform with the OMB Fee Guidelines, we have included the same provision in our rule.

#### **How does HHS Calculate FOIA Fees for Different Categories of Requesters? (Formerly § 5.44)**

The commenter thought that some of the language in § 5.44(c) was potentially redundant and ambiguous. The commenter did not consider it necessary to state both that if you do not fall into the categories in paragraphs (a) and (b) of this section (a commercial requester or an educational or noncommercial scientific institution requester, or a member of the news media), you are an “other requester”. The commenter believed that this language suggested a conjunctive relationship when none was intended to exist. The commenter suggested using “*i.e.*” instead of “and are” to clarify things. In response to this comment, we have edited § 5.44(c) to make the language identifying an “other requester” clearer.

Multiple commenters recommended amending this section in order to reference new provisions to the FOIA created by the FOIA Improvement Act that place further limitations on assessing search fees (or, for a requester



with preferred status, duplication fees) if response time is delayed. At the recommendation of the commenters and in accordance with the FOIA Improvement Act, the recommended change has been made to this section.

#### **How may I request a fee waiver? (formerly § 5.45)**

One commenter expressed concern with the description of the factors described in § 5.45(b) used to determine whether a requester is eligible for a fee waiver or a reduction in fees. The commenter specifically pointed out an issue with § 5.45(b)(5) which stated that, to be eligible for a fee waiver, a requester must explain how the requester “intend[s] to disseminate the requested information to a broad spectrum of the public.” The commenter noted that in *Cause of Action v. FTC*, the D.C. Circuit specifically held that “proof of the ability to disseminate the released information to a broad cross-section of the public is not required.” 799 F.3d 1108, 1116 (D.C. Cir. 2015). Rather, “the relevant inquiry . . . is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Id.* In addition to noticing an issue with § 5.45(b)(5), the commenter also thought § 5.45(b)(5) and § 5.45(b)(4) were duplicative. Likewise, the commenter thought that § 5.45(b)(3) should be deleted because it duplicated §§ 5.45(b)(1), (2), (4) & (6). The commenter expressed concern that if these duplicative provisions remained in the rule, requesters would have to repeat the same information numerous times in order to be eligible for a fee waiver. In response to this comment, we have modified this section to include a streamlined list of the fee waiver factors based on *Cause of Action v. FTC*. We believe that this streamlined list satisfies the commenter’s concerns of correctly stating the standard for being able to disseminate information and reducing redundancy.

#### **How do I file an appeal? (formerly § 5.52)**

As a result of an amendment to the FOIA by the FOIA Improvement Act, two commenters recommended increasing the number of days to appeal an adverse determination to no less than 90 days after the date of an adverse determination. We have accepted this comment and increased the number of days to appeal to 90 days after the date of an adverse determination. Note that the contents of this provision have moved to § 5.61 (When may I appeal HHS’s FOIA determination?).

One commenter suggested that we use the postmark date rather than the date the appeal is received by the agency when determining whether an appeal has been submitted in a timely manner. The same commenter suggested that the appeal timeframe commence once the disclosure determination is received by the requester instead of the date of the adverse determination letter. After considering this comment, we have decided to partially accept it. The rule has been modified to indicate that we will base the timeliness of an appeal on the postmark date or, in the case of an electronic submission, the transmittal date. The rule has been further modified, however, to stipulate that if a postmark date is illegible, we will revert to using the date of receipt to determine the timeliness of the appeal submission. We also specify that an electronic submission transmitted after normal business hours will be considered transmitted on the next day for the purposes of determining the timeliness of an appeal submission. Finally, we reject the commenter’s suggestion that the appeal timeframe commence once notice of the adverse determination is received by the requester. The FOIA statute itself bases the minimum timeframe that agencies must provide for a requester to appeal a request on a specific number of days “after the date of such adverse determination”, not on the date such determination is received by the requester. Moreover, we believe that a 90 day appeal timeframe, as currently structured, provides requesters with a reasonable amount of time to submit a timely request. Note that the provision discussed by this comment has moved to § 5.61 (When may I appeal HHS’s FOIA determination?).

One commenter observed that § 5.52(b) stated that an appeal could be submitted electronically; however, in the opinion of the commenter, the rule failed to identify a means of submitting administrative appeals electronically. In response to this comment, we have clarified that instructions on how to submit a FOIA appeal electronically can be found by using the web links provided in the section.

#### **What avenues are available to me if I disagree with HHS’s appeal decision? (formerly § 5.54)**

One commenter expressed concern with the language in paragraph (a) of § 5.54, which states that a requester must submit an administrative appeal in order to seek judicial review. In expressing this concern, the commenter suggested that this language was dubious and referenced examples cited

in the Department of Justice *Guide to the Freedom of Information Act* where multiple courts had held that “exhaustion of administrative remedies is not required prior to seeking court review of an agency’s denial of requested expedited access.” U.S. DEP’T OF JUSTICE, *Litigation Considerations* 44 & n. 144, GUIDE TO THE FREEDOM OF INFORMATION ACT (last updated Nov. 26, 2013), available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/litigation-considerations.pdf#p29>. In response to this comment, we have amended the language to state that “[b]efore seeking review by a court of an adverse determination, you generally must first submit a timely administrative appeal.” The modified language informs requesters of the need to generally submit an administrative appeal prior to seeking judicial review without suggesting that this is required in all cases.

#### **Miscellaneous**

One commenter suggested that we provide our understanding of what the term “due diligence” means. Based on the context of the comment, it appears that the commenter was referring to the use of the term in the FOIA statute at 5 U.S.C. 552(a)(6)(C)(i), which states that “[i]f the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.” We believe that the concept of exceptional circumstances is adequately explained in the FOIA statute and it is unnecessary to include a provision about that subject in this rule. With regard to the term “due diligence”, we believe that the term can best be understood by the plain meaning in the statute, legislative intent, and any case law interpreting that term. We, therefore, decline to provide any further interpretation of this term.

One commenter noted that in certain cases we spelled out numbers and in other cases we used figures. *Compare*, e.g., § 5.31(d)(4)(iii) (“5 working days”), and § 5.23(b) (“10 working days”), with § 5.31(d)(5)(iv) (“five working days”), and § 5.25(f) (“ten working days”). In response to this comment, we have replaced the referenced spelled out numbers with figures.

Finally, in response to public comments and feedback from within the Department, we have made the following changes: moved and clarified the provision on oral requests from § 5.2(a) to § 5.22(e); clarified the definition of non-commercial scientific

institution (§ 5.3); clarified the definition of fee waiver (§ 5.3); removed references to the Program Support Center (PSC) (§§ 5.3, 5.62(b)(2) (formerly § 5.52(b)(2))) (the PSC FOIA Office has been dissolved and its responsibilities have transferred to the Office of the Secretary (OS) FOIA Office); renamed “reading room” “FOIA Library” (§ 5.3, § 5.22(i)); clarified the definition of “record” (§ 5.3); clarified the definition of “submitter” (§ 5.3); clarified that an individual seeking records under the Privacy Act has access rights under the FOIA (§ 5.5); clarified the information needed to make a first-party request (§ 5.22(f)) and a third-party request (§ 5.22(g)); added additional information describing when a requester should provide a HIPAA Authorization Form (§ 5.22(h) (formerly § 5.22(c))); merged the contents of § 5.24 (Does HHS accept electronic FOIA requests?) with § 5.23 (Where do I send my FOIA request?); removed unnecessary language from § 5.25(a); revised language in §§ 5.24(b) and (c) (formerly §§ 5.25 (b) and (c)) to distinguish the procedures used to assist a requester in perfecting their request from those used to clarify a reasonably described request through tolling; removed unnecessary language from §§ 5.27(a) and 5.28(a); clarified the language in § 5.28(d); moved confidential commercial information procedures to its own subpart (§§ 5.41–5.42); removed former § 5.31(d)(4)(iv) because it was redundant to § 5.31(d)(4)(v) (now located at § 5.42(a)(4)); removed unnecessary language from former § 5.31(d)(4)(iii) (now located at § 5.42(a)(3)); merged former § 5.42 (What fee policies apply to HHS records?) with former § 5.41 (General information on fees for all FOIA requests.) (now located at § 5.51); clarified the notice provisions of § 5.51(a) (formerly § 5.41(a)) to conform with the OMB Fee Guidelines; removed § 5.51(i) (formerly § 5.42(c)) as a result of the clarification of § 5.51(a) (formerly § 5.41(a)); replaced a reference to a Web site where FOIA fee rates would be posted with a description of the calculation used to determine hourly rates for manual searching, computer operator/programmer time, and time spent reviewing records (§ 5.52 What is the FOIA fee schedule for obtaining records?) (formerly § 5.43); and clarified § 5.52(c)(2) (formerly § 5.43(c)(2)).

### Regulatory Analysis

#### *Executive Order 12866*

The rule has been drafted and reviewed in accordance with Executive Order 12866, 58 FR 51735 (Sept. 30, 1993), section 1(b), Principles of

Regulation, and Executive Order 13563, 76 FR 3821 (January 18, 2011), Improving Regulation and Regulatory Review. The rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, the rulemaking has not been reviewed by the Office of Management and Budget.

#### *Regulatory Flexibility Act*

The Department certifies under 5 U.S.C. 605(b) that the rule will not have a significant economic impact on a substantial number of small entities because the proposed revisions do not impose any burdens upon FOIA requesters, including those that might be small entities. Therefore, a regulatory flexibility analysis is not required by the Regulatory Flexibility Act.

#### *Unfunded Mandates Reform Act of 1995*

The rule will not result in the expenditure by State, local, or tribal governments in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### *Executive Order 12612*

This rule has been reviewed under Executive Order 12612, Federalism, and it has been determined that it does not have sufficient implications for federalism to warrant preparation of a Federalism Assessment.

#### *Paperwork Reduction Act*

The rule contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### List of Subjects in 45 CFR Part 5

Freedom of information.

■ In consideration of the foregoing, HHS revises part 5 of title 45, Code of Federal Regulations, to read as follows:

### PART 5—FREEDOM OF INFORMATION REGULATIONS

#### Subpart A—General Information About Freedom of Information Act Requests Sec.

- 5.1 Purpose.
- 5.2 Presumption of openness and proactive disclosures.
- 5.3 Definitions.
- 5.4 Regulatory scope.
- 5.5 Interrelationship between the FOIA and the Privacy Act of 1974.

#### Subpart B—How to Request Records under FOIA

- 5.21 Who can file a FOIA request?

- 5.22 What do I include in my FOIA request?
- 5.23 Where do I send my FOIA request?
- 5.24 How does HHS process my FOIA request?
- 5.25 How does HHS handle requests that involve more than one OpDiv, StaffDiv, or Federal agency?
- 5.26 How does HHS determine estimated completion dates for FOIA requests?
- 5.27 How do I request expedited processing?
- 5.28 How does HHS respond to my request?
- 5.29 How may I request assistance with the FOIA process?

#### Subpart C—Exemptions to Disclosure

- 5.31 What are the reasons records may be withheld?
- 5.32 Records not subject to the requirements of the FOIA—law enforcement exclusions.

#### Subpart D—Confidential Commercial Information

- 5.41 How does a submitter identify records containing confidential commercial information?
- 5.42 How does HHS process FOIA requests for confidential commercial information?

#### Subpart E—Fees

- 5.51 General information on fees for all FOIA requests.
- 5.52 What is the FOIA fee schedule for obtaining records?
- 5.53 How does HHS calculate FOIA fees for different categories of requesters?
- 5.54 How may I request a fee waiver?

#### Subpart F—Appeals

- 5.61 When may I appeal HHS's FOIA determination?
- 5.62 How do I file an appeal?
- 5.63 How does HHS process appeals?
- 5.64 What avenues are available to me if I disagree with HHS's appeal decision?

#### Subpart G—Records Retention

- 5.71 How does HHS retain FOIA records?

**Authority:** 5 U.S.C. 552, 18 U.S.C. 1905, 31 U.S.C. 9701, 42 U.S.C. 1306(c), E.O. 12600, E.O.13392

### Subpart A — General Information About Freedom of Information Act Requests

#### § 5.1 Purpose.

This part implements the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, for Department of Health and Human Services (HHS) records that are subject to the FOIA. This part should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget. This part contains the rules that we follow to process FOIA requests, such as the amount of time we have to make a determination regarding the release of records, who can decide to release

records and who can decide not to release them, the fees we may charge, if applicable, the reasons why some records are exempt from disclosure under the FOIA, and the administrative and legal remedies available should a requester disagree with our initial disclosure determination.

(a) The FOIA provides a right of access to agency records, except to the extent that any portions of the records are protected from public disclosure by an exemption or exclusion in the statute. The FOIA does not require us to perform research for you or to answer your questions. The FOIA does not require agencies to create new records or to perform analysis of existing records; for example, by extrapolating information from existing agency records, reformatting publicly available information, preparing new electronic programs or databases, or creating data through calculations of ratios, proportions, percentages, trends, frequency distributions, correlations, or comparisons. However, at our discretion and if it would conserve government resources, we may decide to supply requested information by consolidating information from various records.

(b) This part does not apply to data generated by an agency grant recipient under the provisions of 45 CFR part 75 to the extent the requirements of 45 CFR 75.322(e) do not apply to the data. We will not process your request under the FOIA or these regulations if that data is already available to the public through an archive or other source. In that situation, we will refer you to that other source. The procedures for requesting research data made available under the provisions of 45 CFR 75.322(e) are referenced in § 5.23(a).

### § 5.2 Presumption of openness and proactive disclosures.

(a) We will administer the FOIA with a presumption of openness. In accordance with 5 U.S.C. 552(a)(8) we will disclose records or information exempt from disclosure under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption and disclosure is not prohibited by law. We also will consider whether partial disclosure of information is possible whenever we determine that a full disclosure of a requested record is not possible. This includes taking reasonable steps to segregate and release nonexempt information.

(b) Records that the FOIA requires agencies to make available for public inspection in an electronic format may be accessed through each OpDiv's and Staff Div's Web site. Each OpDiv and

StaffDiv is responsible for determining which of its records must be made publicly available (including frequently requested records), for identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. Each OpDiv and StaffDiv must ensure that its Web site of posted records and indices is reviewed and updated on an ongoing basis. Each OpDiv and StaffDiv has a FOIA Requester Service Center or FOIA Public Liaison who can assist individuals in locating records. A list of agency FOIA Public Liaisons is available at <http://www.foia.gov/report-makerequest.html>.

### § 5.3 Definitions.

The following definitions apply to this part:

*Agency* is defined at 5 U.S.C. 551(1). HHS is an agency. Private entities performing work under a contractual agreement with the government are not agencies for the purpose of this definition. However, information maintained on behalf of an agency under Government contract, for the purposes of records management, is considered an agency record.

*Chief FOIA Officer* means a senior official of HHS, at the Assistant Secretary or equivalent level, who has agency-wide responsibility for ensuring efficient and appropriate compliance with the FOIA, monitoring implementation of the FOIA throughout the agency, and making recommendations to the head of the agency to improve the agency's implementation of the FOIA. The Secretary of HHS has designated the Assistant Secretary, Office of the Assistant Secretary for Public Affairs (ASPA), as the Agency Chief FOIA Officer (ACFO); that official may be contacted at [HHS.ACFO@hhs.gov](mailto:HHS.ACFO@hhs.gov).

*Commercial use* means a use or purpose that furthers a commercial, trade, or profit interest of the requester or the person or entity on whose behalf the request is made.

*Department or HHS* means the U.S. Department of Health and Human Services.

*Deputy Agency Chief FOIA Officer (DACFO)* means a designated official within the Office of the Assistant Secretary for Public Affairs, who has been authorized by the Chief FOIA Officer to act upon their behalf to implement compliance with the FOIA, as described above.

This official is also the approving review authority for FOIA administrative appeals.

*Direct costs* mean those expenses that an agency incurs in searching for and

duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (*i.e.*, the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

*Duplication* means the process of making a copy of a record and sending it to the requester, to the extent necessary to respond to the request. Such copies include both paper copies and electronic records. Fees for duplication are further explained within § 5.52.

*Educational institution* means any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with his or her role at the educational institution. Agencies may seek assurance from the requester that the request is in furtherance of scholarly research.

*Example 1.* A request from a professor of geology at a university for records relating to soil erosion, written on letterhead of the Department of Geology, would be presumed to be from an educational institution.

*Example 2.* A request from the same professor of geology seeking drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationery.

*Example 3.* A student who makes a request in furtherance of their coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of this fee category.

*Expedited processing* means the process set forth in the FOIA that allows requesters to request faster processing of their FOIA request, if they can demonstrate a specific compelling need.

*Fee category* means one of the four categories established by the FOIA to determine whether a requester will be charged fees for search, review, and duplication. The categories are: commercial use requests; non-commercial scientific or educational institutions requests; news media requests; and all other requests. Fee categories are further explained within § 5.53.

*Fee waiver* means the waiver or reduction of fees if a requester is able to demonstrate that certain standards set forth in the FOIA and this part are satisfied, including that disclosure of the records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

*First-party request* means a request by an individual for records pertaining to that individual, or an authorized representative acting on such an individual's behalf.

*FOIA Public Liaison* means an agency official who reports to the agency Chief FOIA Officer and serves as a supervisory official to whom a requester can raise concerns about the service the requester has received from the FOIA Requester Service Center. This individual is responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

*FOIA request* means a written request that reasonably describes the records sought.

*Freedom of Information Act (FOIA)* means the law codified at 5 U.S.C. 552 that provides the public with the right to request agency records from Federal executive branch agencies. A link to the text of the FOIA is at <https://www.justice.gov/oip/freedom-information-act-5-usc-552>.

*FOIA library records* are records that are required to be made available to the public without a specific request under 5 U.S.C. 552(a)(2). We make FOIA library records available to the public electronically through our Web pages (<http://www.hhs.gov/foia/reading/index.html>) and at certain physical locations. A list of the physical locations is available at <http://www.hhs.gov/foia/contacts/index.html>. Other records may also be made available at our discretion through our Web pages (<http://www.hhs.gov>).

*Freedom of Information Act (FOIA) Officer* means an HHS official who has been delegated the authority to release or withhold records; to assess, waive, or reduce fees in response to FOIA requests; and to determine whether to grant expedited processing. In that capacity, the Freedom of Information Act (FOIA) Officer has the authority to task agency organizational components to search for records in response to a FOIA request, and to provide records located in their offices. Apart from records subject to proactive disclosure pursuant to subsection (a)(2) of the FOIA, only FOIA Officers have the

authority to release or withhold records or to waive fees in response to a FOIA request. Our FOIA operations are decentralized, and each FOIA Requester Service Center has a designated official with this authority; the contact information for each FOIA Requester Service Center is available at <http://www.hhs.gov/foia/contacts/index.html>.

(1) The *HHS Freedom of Information Act (FOIA) Officer in the Office of the Secretary* means the HHS official who in addition to overseeing the daily operations of the FOIA program in that office and having the authority of a *Freedom of Information Act (FOIA) Officer*, is also responsible for the Department-wide administration and coordination of the FOIA and its implementing regulations and policies as they pertain to the programs and activities of the Department. This individual serves as the principal resource with respect to the articulation of procedures designed to implement and ensure compliance with the FOIA and its implementing regulations and policies as they pertain to the Department. This individual reports through the DACFO to the ACFO to support oversight and compliance with the OPEN Government Act.

(2) [Reserved]

*Frequently requested records* means records, regardless of form or format, that have been released to any person under the FOIA and that have been requested 3 or more times or because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.

*Immediate Office of the Secretary (IOS)* means offices within the Office of the Secretary, responsible for operations and work of the Secretary. It includes the Office of the Deputy Secretary, Office of the Chief of Staff, the Secretary's Counselors, the Executive Secretariat, the Office of Health Reform, and the Office of Intergovernmental and External Affairs.

*Non-commercial scientific institution* means an institution that is not operated to further a commercial, trade, or profit interest and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use.

*Office of the Inspector General (OIG)* means the Staff Division within the

Office of the Secretary (OS), which is responsible for protecting the integrity of HHS programs and the health and welfare of the beneficiaries of those programs. OIG is responsible for processing FOIA requests for the records it maintains.

*Office of the Secretary (OS)* means the HHS's chief policy officer and general manager, who administers and oversees the organization, its programs and activities. The Deputy Secretary and a number of Assistant Secretaries and Staff Divisions support OS. The HHS FOIA Office within ASPA processes FOIA requests for records maintained by OS Staff Divisions other than the OIG. In certain circumstances and at the HHS FOIA Office's discretion, the HHS FOIA office may also process FOIA requests involving other HHS OpDivs, as further described in § 5.28(a).

*Operating Division (OpDiv)* means any of the following divisions within HHS which are subject to this regulation:

- Office of the Secretary (OS)
- Administration for Children and Families (ACF)
- Administration for Community Living (ACL)
- Agency for Healthcare Research and Quality (AHRQ)
- Agency for Toxic Substances and Disease Registry (ATSDR)
- Centers for Disease Control and Prevention (CDC)
- Centers for Medicare & Medicaid Services (CMS)
- Food and Drug Administration (FDA)
- Health Resources and Services Administration (HRSA)
- Indian Health Service (IHS)
- National Institutes of Health (NIH)
- Substance Abuse and Mental Health Services Administration (SAMHSA).

*Operating Division and Staff Division Freedom of Information Act (FOIA) Officers* means the officials who are responsible for overseeing the daily operations of their FOIA programs in their respective Operating Divisions or Staff Divisions, with the full authority as described in the definition of *Freedom of Information Act (FOIA) Officer*. These individuals serve as the principal resource and authority for FOIA operations and implementation within their respective Operating Divisions or Staff Divisions.

*Other requester* means any individual or organization whose request does not qualify as a commercial-use request, representative of the news media request (including a request made by a freelance journalist), or an educational or non-commercial scientific institution request.

*Record* means any information that would be an agency record when

maintained by an agency in any format, including an electronic format; and any information that is maintained for an agency by an entity under Government contract, for the purposes of records management.

*Redact* means delete or mark over.

*Representative of the news media* means any person or entity that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast news to the public at large and publishers of periodicals, including print and online publications that disseminate news and make their products available through a variety of means to the general public. We do not consider requests for records that support the news-dissemination function of the requester to be a commercial use. We consider “freelance” journalists who demonstrate a solid basis for expecting publication through a news media entity as working for that entity. A publishing contract provides the clearest evidence that a journalist expects publication; however, we also consider a requester’s past publication record.

*Review* means examining records responsive to a request to determine whether any portions are exempt from disclosure. Review time includes processing a record for disclosure (*i.e.*, doing all that is necessary to prepare the record for disclosure), including redacting the record and marking the appropriate FOIA exemptions.

*Search* means the process of identifying, locating, and retrieving records to find records responsive to a request, whether in hard copy or in electronic form or format.

*Staff Division (StaffDiv)* means an organization component that provides leadership, direction, and policy and management guidance to the Office of the Secretary and the Department. The following StaffDivs are subject to the regulations in this part:

Immediate Office of the Secretary (IOS)  
Assistant Secretary for Administration (ASA)  
Assistant Secretary for Financial Resources (ASFR)  
Assistant Secretary for Health (OASH)  
Assistant Secretary for Legislation (ASL)  
Assistant Secretary for Planning and Evaluation (ASPE)  
Assistant Secretary for Public Affairs (ASPA)  
Assistant Secretary for Preparedness and Response (ASPR)

Departmental Appeals Board (DAB)  
Office for Civil Rights (OCR)  
Office of the General Counsel (OGC)  
Office of Global Affairs (OGA)  
Office of the Inspector General (OIG)  
Office of Medicare Hearings and Appeals (OMHA)  
Office of the National Coordinator for Health Information Technology (ONC)

*Submitter* means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides commercial or financial information, either directly or indirectly to the Federal Government.

*Tolling* means temporarily stopping the running of a time limit. We may toll a request to seek clarification or to address fee issues, as further described in § 5.24.

#### § 5.4 Regulatory scope.

The requirements in this part apply to all OpDivs and StaffDivs of HHS. Some OpDivs and StaffDivs may establish or continue to maintain additional rules because of unique program requirements, but such rules must be consistent with this part and the FOIA. If additional rules are issued, they must be published in the **Federal Register** and you may get copies online at <https://www.federalregister.gov/>, <http://www.regulations.gov/> or by contacting one of our FOIA Requester Service Centers.

#### § 5.5 Interrelationship between the FOIA and the Privacy Act of 1974.

The FOIA allows any person (whether an individual or entity) to request access to records. The Privacy Act, at 5 U.S.C. 552a(d), provides an additional right of access, allowing individuals to request records about themselves, if the records are maintained in a system of records (defined in 5 U.S.C. 552a(a)(5)).

(a) *Requesting records about you.* If any part of your request includes records about yourself that are maintained within a system of records as defined by the Privacy Act at 5 U.S.C. 552a(a)(5), you should make your request in accordance with the Privacy Act and the Department’s implementing regulations at 45 CFR part 5b. This includes requirements to verify your identity. We will process the request under the Privacy Act and, if it is not fully granted under the Privacy Act, we will process it under the FOIA. You may obtain, under the FOIA, information that is exempt from access under the Privacy Act, if the information is not excluded or exempt under the FOIA. If you request records about yourself that are not maintained within a system of

records, we will process your request under the FOIA only.

(b) *Requesting records about another individual.* If you request records about another individual, we will process your request under the FOIA. You may receive greater access by following the procedures described in § 5.22(g).

### Subpart B—How to Request Records under FOIA

#### § 5.21 Who can file a FOIA request?

Any individual, partnership, corporation, association, or public or private organization other than a Federal agency, regardless of nationality, may submit a FOIA request to us. This includes state and local governments.

#### § 5.22 What do I include in my FOIA request?

In your FOIA request:

(a) Provide a written description of the records you seek in sufficient detail to enable our staff to locate them with a reasonable amount of effort. The more information you provide, the better possibility we have of finding the records you are seeking. Information that will help us find the records would include:

- (1) The agencies, offices, or individuals involved;
- (2) The approximate date(s) when the records were created;
- (3) The subject, title, or description of the records sought; and
- (4) Author, recipient, case number, file designation, or other reference number, if available.

(b) Include your name, full mailing address, and phone number and if available, your email address. This information allows us to reach you faster if we have any questions about your request. It is your responsibility to keep your current mailing address up to date with the office where you have filed the FOIA request.

(c) State your willingness to pay all fees, or the maximum amount of fees you are willing to pay, and/or include a request for a fee waiver/reduction.

(d) Mark both your letter and envelope, or the subject line of your email, with the words “FOIA Request.”

(e) If you are unable to submit a written request to us due to circumstances such as disability or literacy, you may make a request orally to a FOIA Officer. FOIA Officers will put in writing an oral request made directly to them.

(f) If you are making a first-party request, you must comply with the verification of identity procedures set forth in 45 CFR part 5b.

(g) Where your request for records pertains to another individual, you may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (e.g., a copy of a death certificate or an obituary). At our discretion, we may require you to supply additional information if necessary to verify that a particular individual has consented to disclosure of records about them.

(h) If you are requesting the medical records of an individual other than yourself from a government program that pays or provides for health care (e.g. Medicare, Indian Health Service) and you are not that individual's legally authorized representative, you should submit a Health Insurance Portability and Accountability Act (HIPAA) compliant release authorization form signed by the subject of records or the individual's legally authorized representative. The HIPAA Privacy Rule requires that an authorization form contain certain core elements and statements which are described in the Privacy Rule's requirements at 45 CFR 164.508. If you are submitting a request for Medicare records to CMS, CMS has a release authorization form at the following link: <https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/Downloads/CMS10106.pdf>.

(i) Before filing your request, you may find it helpful to consult the HHS FOIA Requester Service Centers online at <http://www.hhs.gov/foia/contacts/index.html>, which provides additional guidance to assist in submitting a FOIA request to a specific OpDiv or StaffDiv or to regional offices or divisions within an OpDiv or StaffDiv. You may also wish to check in the agency's electronic FOIA libraries available online at <http://www.hhs.gov/foia/reading/index.html>, to see if the information you wish to obtain is already available.

#### **§ 5.23 Where do I send my FOIA request?**

We have several FOIA Requester Service Centers (FOIA offices) that process FOIA requests. You should send your FOIA request to the appropriate FOIA Requester Service Center that you believe would have the records you seek. An up-to-date listing is maintained online at <http://www.hhs.gov/foia/contacts/index.html>. You also may submit your request electronically by emailing it to the appropriate FOIA Requester Service Center or by submitting it to the Department's web

portal located at <https://requests.publiclink.hhs.gov/palMain.aspx>.

(a) If you are requesting research data made available under the provisions of 45 CFR 75.322(e), requests for such data should be addressed to the OpDiv that made the award under which the data were first produced. That OpDiv will process your request in accordance with established procedures consistent with the FOIA and 45 CFR 75.322(e).

(b) We officially receive your request when it reaches the FOIA Requester Service Center with responsibility for the OpDiv or StaffDiv where requested records are likely to be located, but no later than 10 working days after the request first arrives at any of our FOIA Requester Service Centers.

(c) If you have questions concerning the processing of your FOIA request, you may contact the FOIA Requester Service Center processing your request. If that initial contact does not resolve your concerns, you may wish to contact the designated FOIA Public Liaison for the OpDiv or StaffDiv processing your request. You can find a list of our FOIA Requester Service Centers and Public Liaisons at <http://www.hhs.gov/foia/contacts/index.html>.

#### **§ 5.24 How does HHS process my FOIA request?**

(a) *Acknowledgement.* We acknowledge all FOIA requests in writing within 10 working days after receipt by the appropriate office. The acknowledgement letter or email informs you of your request tracking number, provides contact information, and informs you of any complexity we are aware of in processing that may lengthen the time required to reach a final decision on the release of the records. In addition, the acknowledgement letter or email or a subsequent communication may also seek additional information to clarify your request.

(b) *Perfected requests.* (1) A request is considered to be perfected (i.e., the 20 working day statutory response time begins to run) when—

(i) The request either has been received by the responsible FOIA office, or, in any event, not later than 10 working days after the request has been received by any HHS FOIA office;

(ii) The requested records are reasonably described; and

(iii) The request contains sufficient information to enable the FOIA office to contact you and transmit records to you.

(2) We provide at least 20 working days for you to respond to a request to perfect your request, after notification. Requests must reasonably describe the

records sought and contain sufficient information to enable the FOIA office to contact you and transmit records to you. If we determine that a request does not meet these requirements, we will attempt to contact you if possible.

Should you not answer any correspondence, or should the correspondence be returned as undeliverable, we reserve the right to administratively close the FOIA request.

(c) *Stops in processing time (tolling).* We may stop the processing of your request one time if we require additional information regarding the specifics of the request. The processing time resumes upon our receipt of your response. We also may stop the processing of your request if we require clarification regarding fee assessments. If additional information or clarification is required, we will attempt to contact you using the contact information you have provided. The processing time will resume upon our receipt of your response. We will provide at least 20 working days after notification for you to respond to a request for additional information or clarification regarding the specifics of your request or fee assessment. Should you not answer any correspondence, or should the correspondence be returned as undeliverable, we may administratively close the FOIA request.

(d) *Search cut-off date.* As the end or cut-off date for a records search, we use the date on which we first begin our search for documents responsive to your request, unless you specify an earlier cut-off date, or a specific date range for the records search. We will use the date of the first search in those cases when you request records "through the present," "through today," or similar language. The FOIA allows you to request existing agency records. The FOIA cannot be used to request records which the agency may create in the future in the course of carrying out its mission.

(e) *Processing queues.* We place FOIA requests in simple or complex processing queues to be processed in the order received, on a first-in, first-out basis, absent approval for expedited processing based upon a compelling need, as further explained and defined in § 5.27. We will place your request in the simple or complex processing queue based on the estimated amount of work or time needed to process the request. Among the factors we may consider are the number of records requested, the number of pages involved in processing the request, and the need for consultations or referrals. We will advise requesters of potential complicating factors in our

acknowledgement letter or email, or in subsequent communications regarding your request and, when appropriate, we will offer requesters an opportunity to narrow or modify their request so that it can be placed in the simple processing track.

(f) *Unusual Circumstances.* Whenever we cannot meet the statutory time limit for processing a request because of "unusual circumstances," as defined in the FOIA, and we extend the time limit on that basis, we will notify you, before expiration of the 20-day period to respond and in writing of the unusual circumstances involved and of the date by which we estimate processing of the request will be completed. Where the extension exceeds 10 working days, we will provide you, as described by the FOIA, with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. We will make available a designated FOIA contact in the appropriate FOIA Requester Service Center or the appropriate FOIA Public Liaison for this purpose. In addition, we will inform you of the right to seek dispute resolution services from the Office of Government Information Services (OGIS).

(g) *Aggregating requests.* For the purposes of satisfying unusual circumstances, we may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request, involving clearly related matters, that would otherwise involve unusual circumstances. In the event that requests are aggregated, they will be treated as one request for the purposes of calculating both response time and fees.

#### **§ 5.25 How does HHS handle requests that involve more than one OpDiv, StaffDiv, or Federal agency?**

(a) *Re-routing of misdirected requests.* When a FOIA Requester Service Center determines that a request was misdirected within HHS, the receiving FOIA Requester Service Center must route the request to the FOIA Requester Service Center of the proper OpDiv or StaffDiv within HHS.

(b) *Consultation, referral, and coordination.* When reviewing records located by an OpDiv or StaffDiv in response to a request, the OpDiv or StaffDiv will determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, the OpDiv or StaffDiv must proceed in one of the following ways:

(1) *Consultation.* When records originated with an OpDiv or StaffDiv processing the request, but contain within them information of interest to another OpDiv, StaffDiv, agency or other Federal Government office, the OpDiv or StaffDiv processing the request should typically consult with that other entity prior to making a release determination.

(2) *Referral.* (i) When the OpDiv or StaffDiv processing the request believes that a different OpDiv, StaffDiv, or agency is best able to determine whether to disclose the record, the OpDiv or StaffDiv typically should refer the responsibility for responding to the request regarding that record to that other entity. Ordinarily, the entity that originated the record is presumed to be the best entity to make the disclosure determination. However, if the OpDiv or StaffDiv processing the request and the originating entity jointly agree that the OpDiv or StaffDiv processing the request is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever an OpDiv or StaffDiv refers any part of the responsibility for responding to a request to another OpDiv, StaffDiv, or federal agency, it must document the referral, maintain a copy of the record that it refers, and notify the requester of the referral; informing the requester of the name(s) of the entity to which the record was referred, including that entity's FOIA contact information.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the OpDiv, StaffDiv, or federal agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the OpDiv or StaffDiv that received the request should coordinate with the originating entity to seek its views on the disclosability of the record. The release determination for the record that is the subject of the coordination should then be conveyed to the requester by the OpDiv or StaffDiv that originally received the request.

(c) *Classified information.* On receipt of any request involving classified information, the OpDiv or StaffDiv must determine whether the information is currently and properly classified in accordance with applicable classification rules. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by

another agency under any applicable executive order concerning the classification of records, the OpDiv or StaffDiv must refer the responsibility for responding to the request regarding that information to the agency that classified the information, or which should consider the information for classification. Whenever an OpDiv's or StaffDiv's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), the OpDiv or StaffDiv must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(d) *Timing of responses to consultations and referrals.* All consultations and referrals received by the Department will be handled according to the date that the FOIA request initially was received by the first OpDiv, StaffDiv, or federal agency.

(e) *Agreements regarding consultations and referrals.* OpDivs or StaffDivs may establish agreements with other OpDivs, StaffDivs, or federal agencies to eliminate the need for consultations or referrals with respect to particular types of records.

#### **§ 5.26 How does HHS determine estimated completion dates for FOIA requests?**

(a) When we provide an estimated completion date, in accordance with § 5.24(f) and upon request, for the processing of records that do not require consultation with another agency, we estimate the completion date on the basis of our reasonable judgment as to how long it will take to complete the request. Given the uncertainty inherent in establishing any estimate, the estimated completion date is subject to change at any time.

(b) When we provide an estimated completion date, in accordance with § 5.24(f) and upon request, for records that must be reviewed by another agency, our estimate may also be based on information from the other agency.

#### **§ 5.27 How do I request expedited processing?**

(a) To request expedited processing, you must submit a statement, certified to be true and correct, explaining the basis for your need for expedited processing. You must send the request to the appropriate FOIA Officer at the address listed at <http://www.hhs.gov/foia/contacts/index.html>. You may request expedited processing when you first request records or at any time during our processing of your request or appeal.

(b) We process requests on an expedited basis whenever we determine



that one or more of the following criteria exist:

(1) That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) There is an urgent need to inform the public about an actual or alleged Federal Government activity (this criterion applies only to those requests made by a person primarily engaged in disseminating information to the public).

(c) We will respond to your request for expedited processing within 10 calendar days of our receipt of your request to expedite. If we grant your request, the OpDiv or StaffDiv responsible for the review of the requested records will process your request as a priority, and it will be processed as soon as practicable. We will inform you if we deny your request for expedited processing and provide you with appeal rights. If you decide to appeal that denial, we will expedite our review of your appeal.

(d) If we must refer records to another agency, we will inform you and suggest that you seek expedited review from that agency.

#### **§ 5.28 How does HHS respond to my request?**

(a) The appropriate FOIA Officer will send you a response informing you of our release determination, including whether any responsive records were located, how much responsive material was located, whether the records are being released in full or withheld in full or in part, any fees you must pay for processing of the request, and your right to seek assistance from the appropriate FOIA Public Liaison.

(b) If we deny any part of your request, our response will explain the reasons for the denial, which FOIA exemptions apply to the withheld records, your right to appeal that determination, and your right to seek dispute resolution services from the appropriate FOIA Public Liaison or the Office of Government Information Services (OGIS). We will advise you of the number of pages withheld or the estimated volume of withheld records, unless providing such information would harm an interest protected by an applicable FOIA exemption.

(c) Records may be withheld in full or in part if any of the nine FOIA exemptions apply. If we determine to withhold part of a record pursuant to an exemption, we will provide access to reasonably segregable non-exempt information contained in the record. On the released portion of the record, we

indicate where the information has been redacted and the exemption(s) we applied, unless including that indication would harm an interest the exemption protects. In Subpart C of this part, we list the exemptions to disclosure that may apply to agency records.

(d) We also may deny your request for other reasons, including that a request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested records do not exist, cannot be located, or have been destroyed; or that the requested records are not readily reproducible in the form or format requested.

(e) If a request involves a voluminous amount of material or searches in multiple locations, we may provide you with interim responses if feasible and reasonably possible, releasing the records on a rolling basis.

(f) Copies of records in the format you request will be provided if the records already exist in that format or if they are reasonably and readily reproducible in the format you request.

#### **§ 5.29 How may I request assistance with the FOIA process?**

(a) If you have questions concerning the processing of your FOIA request, you should first contact the FOIA Requester Service Center processing your request. Additionally, for assistance at any point in the FOIA process, you may contact the FOIA Public Liaison at the FOIA Requester Service Center processing your request. The FOIA Public Liaison is responsible for assisting you to reduce delays, increasing transparency and understanding of the status of requests, and assisting to resolve any FOIA disputes. Some FOIA Requester Service Centers allow you to check the status of your request online. You can find a list of our FOIA Requester Service Centers and Public Liaisons at <http://www.hhs.gov/foia/contacts/index.html>.

(b) The Office of Government Information Services (OGIS), which is part of the National Archives and Records Administration, serves as the Federal FOIA ombudsman and assists requesters and agencies to prevent and resolve FOIA disputes through mediation. Mediation is a voluntary process. If we participate in the dispute resolution services provided by OGIS, we will actively engage as a partner to the process in an attempt to resolve the dispute and will follow the principles of confidentiality in accordance with the Administrative Dispute Resolution Act, 5 U.S.C. 571–8. You may contact OGIS at the following address: National

Archives and Records Administration, Office of Government Information Services, 8601 Adelphi Road—OGIS, College Park, MD 20740–6001, or by email at [ogis@nara.gov](mailto:ogis@nara.gov), or by telephone at 202–741–5770 or 1–877–684–6448 (toll free).

### **Subpart C—Exemptions to Disclosure**

#### **§ 5.31 What are the reasons records may be withheld?**

While we are committed to providing public access to as many of our records as possible, there are instances in which information falls within one or more of the FOIA's nine exemptions and disclosure would either foreseeably harm an interest protected by a FOIA exemption or disclosure is prohibited by law. We review all records and weigh and assess all legal and policy requirements prior to making a final disclosure determination. A description of the nine FOIA exemptions is provided in paragraphs (a) through (i) of this section.

(a) *Exemption 1.* Exemption 1 protects from disclosure information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order.

(b) *Exemption 2.* Exemption 2 authorizes our agency to withhold records that are related solely to the internal personnel rules and practices of an agency.

(c) *Exemption 3.* Exemption 3 authorizes our agency to withhold records which are specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)) provided that such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types of matters to be withheld; and if enacted after the date of enactment of the OPEN FOIA Act of 2009, October 28, 2009, specifically cites to 5 U.S.C. 552(b)(3).

(d) *Exemption 4.* Exemption 4 authorizes our agency to withhold trade secrets and commercial or financial information obtained from a person and privileged or confidential.

(e) *Exemption 5.* Exemption 5 authorizes our agency to withhold inter-agency or intra agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.



(f) *Exemption 6.* Exemption 6 authorizes our agency to protect information in personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.

(g) *Exemption 7.* Exemption 7 authorizes our agency to withhold records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information would cause the following harm(s):

(1) Could reasonably be expected to interfere with enforcement proceedings;

(2) Would deprive a person of a right to a fair trial or an impartial adjudication;

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(4) Could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting lawful national security intelligence investigation, information furnished by a confidential source;

(5) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions, if such disclosure could reasonably be expected to risk circumvention of the law; or

(6) Could reasonably be expected to endanger the life or physical safety of any individual.

(h) *Exemption 8.* Exemption 8 authorizes our agency to withhold records that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

(i) *Exemption 9.* Exemption 9 authorizes our agency to withhold geological and geophysical information and data, including maps, concerning wells.

**§ 5.32 Records not subject to the requirements of the FOIA—law enforcement exclusions.**

Under the FOIA, there is special protection for narrow categories of law enforcement and national security records. The provisions protecting those records are known as “exclusions” and are described in 5 U.S.C. 552(c). These exclusions expressly authorize Federal

law enforcement agencies, under these exceptional circumstances, to treat the records as not subject to the requirements of the FOIA.

(a) Should an HHS OpDiv or StaffDiv maintain records which are subject to a FOIA exclusion, and consider employing an exclusion or have a question as to the implementation of an exclusion, the OpDiv or StaffDiv will consult with the Office of Information Policy, U.S. Department of Justice.

(b) Because records falling within an exclusion are not subject to the requirements of the FOIA, should any HHS OpDiv or StaffDiv maintain such excluded records, the OpDiv or StaffDiv will limit its response to those records that are subject to the FOIA.

**Subpart D—Confidential Commercial Information**

**§ 5.41 How does a submitter identify records containing confidential commercial information?**

A person who submits records to the government may designate part or all of the information in such records that they may consider to be exempt from disclosure under Exemption 4 of the FOIA. The person may make this designation either at the time the records are submitted to the government or within a reasonable time thereafter. The designation must be in writing. Any such designation will expire 10 years after the records were submitted to the government.

**§ 5.42 How does HHS process FOIA requests for confidential commercial information?**

(a) *Predisclosure notification.* The procedures in this section apply to records on which the submitter has designated information as provided in § 5.41. They also apply to records that were submitted to the government where we have substantial reason to believe that information in the records could reasonably be considered exempt under Exemption 4. Certain exceptions to these procedures are stated in paragraph (b) of this section.

(1) When we receive a request for such records, and we determine that we may be required to disclose them, we will make reasonable efforts to notify the submitter about these facts. The notice will include a copy of the request, and it will inform the submitter about the procedures and time limits for submission and consideration of objections to disclosure. If we must notify a large number of submitters, we may do this by posting or publishing a notice in a place where the submitters are reasonably likely to become aware of it.

(2) The submitter has 10 working days from the date of the notice to object to disclosure of any part of the records and to state all bases for its objections. FOIA Offices in HHS and its organizational components may extend this period as appropriate and necessary.

(3) We review and consider all objections to release that we receive within the time limit. If a submitter fails to respond within the time period specified in the notice, we will consider the submitter to have no objection to disclosure of the information. If we decide to release the records, we inform the submitter in writing, along with our reasons for the decision to release. We include with the notice a description of the information to be disclosed or copies of the records as we intend to release them. We also provide the submitter with a specific date that we intend to disclose the records, which must be at least 5 working days after the date of the notice. We do not consider any information we receive after the date of a disclosure decision.

(4) If the requester files a lawsuit under the FOIA for access to records submitted to HHS, we promptly notify the submitter.

(5) We will notify the requester in these circumstances:

(i) When we notify a submitter that we may be required to disclose information under the FOIA, we will also notify the requester that notice and opportunity to comment are being provided to the submitter;

(ii) When the agency notifies a submitter of a final disclosure decision under the FOIA,

and;

(iii) When a submitter files a lawsuit to prevent the disclosure of the information.

(b) *Exceptions to predisclosure notification.* The notice requirements in paragraph

(a) of this section do not apply in the following situations:

(1) We determine that we should withhold the information under a FOIA exemption;

(2) The information has been lawfully published or made available to the public

(3) We are required by a statute (other than the FOIA), or by a regulation issued in accordance with the requirements of Executive Order 12600, to disclose the information; or

(4) The designation made by the submitter appears obviously frivolous. However, in such a case, the agency must provide the submitter with written notice of any final disclosure determination and intent to release, at least 5 working days prior to the

specified disclosure date. We will notify the submitter as referenced in § 5.42(a)(3).

### Subpart E—Fees

#### § 5.51 General information on fees for all FOIA requests.

(a) We generally assume that when you request records you are willing to pay the fees we charge for services associated with your request. You may specify a limit on the amount you are willing to spend. We will notify you if it appears that the fees will exceed \$25.00 or your specified limit and ask whether you nevertheless want us to proceed with the search.

(b) If you have failed to pay FOIA fees in the past, we will require you to pay your past due bill and we may also require you to pay the anticipated fee before we begin processing your current request. If we estimate that your fees may be greater than \$250.00, we also may require advance payment or a deposit before we begin processing your request. If you fail to make an advance payment within 20 working days after the date of our fee letter, we will close the request.

(c) We may charge interest on unpaid bills beginning on the 31st calendar day following the day the FOIA fee invoice was sent. We may assess interest, administrative costs, and penalties for overdue FOIA fee costs.

(d) If we determine that you (either acting alone or with a group of requesters) are breaking down a single request into a series of requests in order to avoid or reduce fees, we may aggregate all of these requests when calculating the fees. In aggregating requests, we may consider the subject matter of the requests and whether the requests were filed close in time to one another.

(e) If, in the course of negotiating fees, you do not respond to the agency within 20 working days of our last communication, your request will be closed.

(f) We may stop the processing of your request, if necessary, to clarify fee issues with you, and to confirm your willingness to pay applicable fees. Fee related issues may arise sequentially over the course of processing a request, and the FOIA allows agencies to stop the processing time as many times as necessary in order to clarify issues regarding fee assessment and willingness to pay fees.

(g) We may charge search fees even if the records are exempt from disclosure, or if we do not find any responsive records during our search.

(h) We do not send an invoice to requesters if assessable processing fees are less than \$25.00.

#### § 5.52 What is the FOIA fee schedule for obtaining records?

In responding to FOIA requests for records, we charge the following fees, where applicable, unless we have given you a reduction or waiver of fees. The fees we charge for search and review are three-tiered, and the hourly charge is determined by the classification and grade level of the employee performing the search or review. When the search or review is performed by employees at grade GS-1 through GS-8 (or equivalent), an hourly rate will be charged based on the salary of a GS-5, step 7, employee; when done by a GS-9 through GS-14 (or equivalent), an hourly rate will be charged based on the salary of a GS-12, step 4, employee; and when done by a GS-15 or above (or equivalent), an hourly rate will be charged based on the salary of a GS-15, step 7, employee. In each case, the hourly rate will be computed by taking the current hourly rate listed for the specified grade and step in the General Schedule Locality Pay Table for the Locality of Washington-Baltimore-Northern Virginia, DC-MD-VA-WV-PA, adding 16% of that rate to cover benefits, and rounding to the nearest whole dollar.

(a) *Search fees*—(1) *Manual searches.* Fees will be assessed to search agency files and records in both hardcopy and electronic format. Such fees will be at the rate or rates for the classification of the employee(s) performing the search, as established in this section.

(2) *Computer searches.* We base the fees for computer searches on the actual cost to our agency of operating the computer and the salary of the operator.

(b) *Review fees.* (1) We charge review fees for time we spend examining documents that are responsive to a request to determine whether we must apply any FOIA exemptions to withhold information. Review time includes processing any record for disclosure (*i.e.*, doing all that is necessary to prepare the record for disclosure), including redacting the record and marking the appropriate FOIA exemptions. We charge review fees even if we ultimately are unable to disclose a record.

(2) We do not charge review fees for time we spend resolving general legal or policy issues regarding the application of exemptions. However, we do charge review fees for time we spend obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter.

(c) *Duplication fees*—(1) *Photocopying standard-sized pages.* The current charge for photocopying records is \$0.10 per page.

(2) *Reproduction of electronic records.* We will attempt to provide records in the format you sought, if the records are reasonably and readily reproducible in the requested format. We charge you for our direct costs for staff time and to organize, convert, and format data for release, per requester instructions, and for printouts or electronic media necessary to reproduce electronic records requested under the FOIA.

(3) *Copying other media.* We will charge you the direct cost of copying other media.

(d) *Mailing and special delivery fees.* We release records by United States Postal Service or, when appropriate, by electronic means, such as electronic mail or web portal. If a requester seeks special delivery, such as overnight shipping, we reserve the right to pass on the actual costs of special delivery to the requester. Requesters may provide their mailing account and billing information to the agency, so that they may pay directly for special delivery options.

(e) *Certification of records.* The FOIA does not require agencies to certify records as true copies. We may elect, as a matter of administrative discretion, to certify records upon request; however, such a request must be submitted in writing. Further, we will only certify as true copies records that have not left the agency's chain of custody. The charge for certification is \$25.00 per record certified.

(f) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an OpDiv or StaffDiv to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the OpDiv or StaffDiv must inform the requester of the contact information for that program.

#### § 5.53 How does HHS calculate FOIA fees for different categories of requesters?

(a) If you are a commercial use requester, we charge you fees for searching, reviewing, and duplicating responsive records.

(b) If you are an educational or noncommercial scientific institution requester, or a member of the news media, you are entitled to search time, review time, and up to 100 pages of duplication (or the cost equivalent for other media) without charge. We charge

duplication fees after the first 100 pages (or its cost equivalent).

(c) If you do not fall into either of the categories in paragraphs (a) and (b) of this section (*i.e.* you are an “other requester”), you are entitled to two hours of free search time, up to 100 pages of duplication (or the cost equivalent of other media) without charge, and you will not be charged for review time. We may charge for search time beyond the first two hours and for duplication beyond the first 100 pages (or its cost equivalent).

(d)(1) If we fail to comply with the FOIA’s time limits in which to respond to a request, we may not charge search fees, or, in the instances of the requester categories referenced in paragraph (b) of this section, may not charge duplication fees, except as described in (d)(2)-(4).

(2) If we have determined that unusual circumstances as defined by the FOIA apply and we provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 days.

(3) If we have determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, we may charge search fees, or, in the instances of requests from requesters described in paragraph (b) of this section, may charge duplication fees if the following steps are taken: we must have provided timely written notice to the requester in accordance with the FOIA and must have discussed with the requester via written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5. U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, we may charge all applicable fees incurred in the processing of the request.

(4) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

#### **§ 5.54 How may I request a fee waiver?**

(a) Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(b) We must furnish records responsive to a request without charge or at a reduced rate when we determine,

based on all available information, that the following three factors are satisfied:

(1) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(2) Disclosure of the requested information would be likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(i) Disclosure of the requested records must 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 must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester’s expertise in the subject area as well as the requester’s ability and intention to effectively convey information to the public must be considered. We will presume that a representative of the news media will satisfy this consideration.

(3) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, we will consider the following criteria:

(i) We will identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters will be given an opportunity to provide explanatory information regarding this consideration.

(ii) If there is an identified commercial interest, we will determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (b)(1) and (2) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. We ordinarily will presume that when a news media requester has satisfied factors (b)(1) and (2) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government

information for direct economic return will not be presumed to primarily serve the public interest.

(c) You should ask for waiver or reduction of fees when you first submit your request to HHS, and should address the criteria referenced in this section.

## **Subpart F—Appeals**

### **§ 5.61 When may I appeal HHS’s FOIA determination?**

In order to fully exhaust all of your administrative remedies, you must file an appeal of an adverse agency determination in writing, and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted within 90 calendar days from the date of such determination. Any electronic transmission made after normal business hours will be considered to have been transmitted on the next calendar day. If a postmark is not legible, the timeliness of a submission will be based on the date that we receive the appeal. Adverse determinations include:

(a) Refusal to release a record, either in whole or in part;

(b) Determination that a record does not exist or cannot be found;

(c) Determination that a request does not reasonably describe the records sought;

(d) Determination that the record you sought was not subject to the FOIA;

(e) Denial of a request for expedited processing;

(f) Denial of a fee waiver request; or

(g) Fee category determination.

### **§ 5.62 How do I file an appeal?**

(a) You have the right to appeal an adverse agency determination of your FOIA request.

(b) You may submit your appeal via mail or electronically.

(1) Please send your appeal to the review official at the address provided in your denial letter. If you are unsure who is the appropriate review official, please contact the FOIA Requester Service Center that processed your request to obtain that information.

(2) The addresses to mail FOIA appeals for CMS and OS are, respectively: Centers for Medicare & Medicaid Services, Attn: Principal Deputy Administrator, Room C5-16- 03, 7500 Security Boulevard, Baltimore, MD 21244; and U.S. Department of Health and Human Services, Deputy Agency Chief FOIA Officer, Office of the Assistant Secretary for Public Affairs, Room 729H, 200 Independence Avenue SW., Washington, DC 20201.

Additionally, information, including how to submit a FOIA appeal electronically, can be found at the following online locations for CMS and OS: <https://www.cms.gov/Regulations-and-Guidance/Legislation/FOIA/filehow.html> and <https://requests.publiclink.hhs.gov/palMain.aspx>.

(3) When submitting an appeal, you should mark both your letter and envelope with the words “FOIA Appeal” or include the words “FOIA Appeal” in the subject line of your email. You should also include your FOIA request tracking number, a copy of your initial request, and a copy of our final determination letter.

(c) Your appeal should clearly identify the agency determination that is being appealed. It would be helpful if you provide specific reasons explaining why you believe the agency’s adverse determination should be reconsidered.

#### **§ 5.63 How does HHS process appeals?**

(a) We respond to your appeal within 20 working days after the appeal official designated in your appeal letter receives it. If, however, your appeal is based on a denial of a request for expedited processing, we will act on your appeal

of that decision expeditiously. Before making a decision on an appeal of an adverse determination, the designated review official will consult with the Office of the General Counsel. Also, the concurrence of the Office of the Assistant Secretary for Public Affairs is required in all appeal decisions, including those on fees. When the review official responds to an appeal, that constitutes the Department’s final action on the request.

(b) If we reverse or modify the initial decision, we will inform you in writing and, if applicable, reprocess your request. If we do not change our initial decision, we will respond in writing to you, explain the reasons for the decision, set out any FOIA exemptions that apply, and inform you of the provisions for judicial review. If a requester files a FOIA lawsuit in reference to an appeal, we will cease processing the appeal.

#### **§ 5.64 What avenues are available to me if I disagree with HHS’s appeal decision?**

(a) In our response letter, we notify you of your right to seek judicial review of an adverse determination as set forth in the FOIA at 5 U.S.C. 552(a)(4)(B). Before seeking review by a court of an adverse determination, you generally

must first submit a timely administrative appeal.

(b) We also inform you that the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. As referenced in § 5.29(b) you may contact OGIS via mail, email, or telephone for assistance.

### **Subpart G—Records Retention**

#### **§ 5.71 How does HHS retain FOIA records?**

We will preserve records created in administering the Department’s Freedom of Information program until disposition is authorized under an applicable General Records Schedule or other records schedule duly approved by the Archivist of the United States.

Dated: June 7, 2016.

**Sylvia M. Burwell,**

*Secretary, Department of Health and Human Services.*

**Note:** This document was received for publication by the Office of the Federal Register on October 19, 2016.

[FR Doc. 2016–25684 Filed 10–27–16; 8:45 am]

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# Proposed Rules

Federal Register

Vol. 81, No. 209

Friday, October 28, 2016

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

## DEPARTMENT OF ENERGY

### 10 CFR Part 430

[Docket Number EERE-2011-BT-STD-0043]

RIN 1904-AC51

#### Energy Conservation Program: Energy Conservation Standards for Miscellaneous Refrigeration Products

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Energy Policy and Conservation Act of 1975 (“EPCA”), as amended, established the Energy Conservation Program for Consumer Products Other Than Automobiles. Based on provisions in EPCA that enable the Secretary of Energy to classify additional types of consumer products as covered products, the U.S. Department of Energy (“DOE”) classified miscellaneous refrigeration products (“MREFs”) as covered consumer products under EPCA. In determining whether to set standards for products, DOE must evaluate whether new standards would be technologically feasible and economically justified, and would save a significant amount of energy. In this proposed rule, DOE proposes new energy conservation standards for MREFs identical to those set forth in a direct final rule published elsewhere in this **Federal Register**. If DOE receives adverse comment and determines that such comment may provide a reasonable basis for withdrawal, DOE will publish a notice withdrawing the final rule and will proceed with this proposed rule.

**DATES:** DOE will accept comments, data, and information regarding the proposed standards no later than February 15, 2017.

Comments regarding the likely competitive impact of the proposed standard should be sent to the Department of Justice contact listed in

the **ADDRESSES** section before November 28, 2016.

**ADDRESSES:** See section III, “Public Participation,” for details. If DOE withdraws the direct final rule published elsewhere in this **Federal Register**, DOE will hold a public meeting to allow for additional comment on this proposed rule. DOE will publish notice of any meeting in the **Federal Register**.

Any comments submitted must identify the proposed rule for Energy Conservation Standards for Miscellaneous Refrigeration Products, and provide docket number EERE-2011-BT-STD-0043 and/or regulatory information number (RIN) number 1904-AC51. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal:* [www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments.
2. *Email:* [WineChillers-2011-STD-0043@ee.doe.gov](mailto:WineChillers-2011-STD-0043@ee.doe.gov). Include the docket number and/or RIN in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.
3. *Postal Mail:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE-5B, 1000 Independence Avenue SW., Washington, DC, 20585-0121. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.
4. *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L’Enfant Plaza SW., 6th Floor, Washington, DC 20024. Telephone: (202) 586-6636. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimilies (faxes) will be accepted. For detailed instructions on submitting comments and additional information on the rulemaking process, see section III of this document (“Public Participation”).

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to Office of Energy Efficiency and Renewable

Energy through the methods listed above and by email to [Chad\\_S\\_Whiteman@omb.eop.gov](mailto:Chad_S_Whiteman@omb.eop.gov).

EPCA requires the Attorney General to provide DOE a written determination of whether the proposed standard is likely to lessen competition. The U.S. Department of Justice Antitrust Division invites input from market participants and other interested persons with views on the likely competitive impact of the proposed standard. Interested persons may contact the Division at [energy\\_standards@usdoj.gov](mailto:energy_standards@usdoj.gov) before November 28, 2016. Please indicate in the “Subject” line of your email the title and Docket Number of this rulemaking notice.

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

A link to the docket Web page can be found at: <http://www.regulations.gov/#/docketDetail;D=EERE-2011-BT-STD-0043>. This Web page contains a link to the docket for this notice on the [www.regulations.gov](http://www.regulations.gov) site. The [www.regulations.gov](http://www.regulations.gov) Web page contains simple instructions on how to access all documents, including public comments, in the docket. See section III, “Public Participation,” for further information on how to submit comments through [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** Joseph Hagerman, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE-5B, 1000 Independence Avenue SW., Washington, DC, 20585-0121. Telephone: (202) 586-6590. Email: [refrigerators\\_and\\_freezers@ee.doe.gov](mailto:refrigerators_and_freezers@ee.doe.gov).

For further information on how to submit a comment, review other public comments and the docket, or participate in the public meeting, contact the Appliance and Equipment Standards Program staff at (202) 586-6636 or by email: [Appliance\\_Standards\\_Public\\_Meetings@ee.doe.gov](mailto:Appliance_Standards_Public_Meetings@ee.doe.gov).

**SUPPLEMENTARY INFORMATION:**

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## I. Introduction and Legal Authority

### A. Legal Authority

The Energy Policy and Conservation Act of 1975, as amended (“EPCA”) (Public Law 94–163 (December 22, 1975)) includes provisions covering the products addressed by this notice. EPCA addresses, among other things, the energy efficiency of certain types of consumer products. Relevant provisions of the Act specifically include definitions (42 U.S.C. 6291), energy conservation standards (42 U.S.C. 6295), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

Under 42 U.S.C. 6292(a)(20), DOE may extend coverage over a particular type of consumer product provided that DOE determines that classifying products of such type as covered products is necessary or appropriate to carry out the purposes of EPCA and that the average annual per-household energy use by products of such type is likely to exceed 100 kilowatt-hours (“kWh”) or its British thermal unit (“Btu”) equivalent per year. See 42 U.S.C. 6292(b)(1). EPCA sets out the following additional requirements to establish energy conservation standards for a newly covered product: (1) The average per household domestic energy use by such products exceeded 150 kWh or its Btu equivalent for any 12-month period ending before such determination; (2) the aggregate domestic household energy use by such products exceeded 4.2 million kWh or its Btu equivalent for any such 12-month period; (3) substantial energy efficiency of the products is technologically feasible; and (4) applying a labeling rule is unlikely to be sufficient to induce manufacturers to produce, and consumers and other persons to purchase, products of such type that achieve the maximum level of energy efficiency. See 42 U.S.C. 6295(l)(1).

Pursuant to EPCA, DOE’s energy conservation program for covered products consists essentially of four parts: (1) Testing; (2) labeling; (3) the establishment of Federal energy conservation standards; and (4) certification and enforcement procedures. The Federal Trade Commission (“FTC”) is primarily responsible for labeling, and DOE implements the remainder of the program. Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product. (42 U.S.C. 6295(o)(3)(A) and (r)) Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c) and 6295(s)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted pursuant to EPCA. (42 U.S.C. 6295(s)) The DOE test procedure for MREFs currently appears at title 10 of the Code of Federal Regulations (“CFR”) part 430, subpart B, appendix A (appendix A).

DOE follows specific criteria when prescribing new or amended standards for covered products. As indicated above, any new or amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and (3)(B)) Furthermore, DOE may not adopt any standard that would not result in the significant conservation of energy. (42 U.S.C. 6295(o)(3)) Moreover, DOE may not prescribe a standard: (1) for certain products, including MREFs, if no test procedure has been established for the product, or (2) if DOE determines by rule that the new or amended standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)(A)–(B)) In deciding whether a new or amended standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination after receiving comments on the proposed standard and considering, to the greatest extent practicable, the following seven factors:

1. The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

2. The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the imposition of the standard;

3. The total projected amount of energy, or as applicable, water, savings likely to result directly from the imposition of the standard;

4. Any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;

5. The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

6. The need for national energy and water conservation; and

7. Other factors the Secretary of Energy (Secretary) considers relevant. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

Further, EPCA, as codified, establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii))

EPCA also contains what is known as an “anti-backsliding” provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4))

Additionally, DOE may set energy conservation standards for a covered product that has two or more subcategories. In those instances, DOE must specify a different standard level for a type or class of products that has the same function or intended use if DOE determines that products within such group: (A) Consume a different

kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6295(q)(1)) In determining whether a performance-related feature justifies a different standard for a group of products, DOE must consider such factors as the utility to the consumer of such a feature and other factors DOE deems appropriate. *Id.* Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2))

Federal energy conservation requirements generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a) through (c)) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions set forth under 42 U.S.C. 6297(d).

DOE is also required to address standby mode and off mode energy use. (42 U.S.C. 6295(gg)(3)) Specifically, when DOE adopts a standard for a covered product after that date, it must, if justified by the criteria for the adoption of standards under EPCA (42 U.S.C. 6295(o)), incorporate standby mode and off mode energy use into a single standard, or, if that is not feasible, adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A) and (B)) DOE's test procedures for MREFs address standby mode and off mode energy use, as do the new standards adopted in this notice of proposed rulemaking.

With particular regard to direct final rules, the Energy Independence and Security Act of 2007 ("EISA 2007"), Public Law 110-140 (December 19, 2007), amended EPCA, in relevant part, to grant DOE authority to issue a type of final rule (*i.e.*, a "direct final rule") establishing an energy conservation standard for a product on receipt of a statement that is submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates), as determined by the Secretary, and that contains recommendations with respect to an energy or water conservation standard. In the context of consumer products, if the Secretary determines that the recommended standard contained in the statement is in accordance with 42 U.S.C. 6295(o), the Secretary may issue a final rule

establishing the recommended standard. A notice of proposed rulemaking ("NOPR") that proposes an identical energy efficiency standard is published simultaneously with the direct final rule. A public comment period of at least 110 days is provided. See 42 U.S.C. 6295(p)(4). Not later than 120 days after the date on which a direct final rule issued under this authority is published in the **Federal Register**, the Secretary shall withdraw the direct final rule if the Secretary receives one or more adverse public comments relating to the direct final rule or any alternative joint recommendation and based on the rulemaking record relating to the direct final rule, the Secretary determines that such adverse public comments or alternative joint recommendation may provide a reasonable basis for withdrawing the direct final rule under subsection 42 U.S.C. 6295(o) or any other applicable law. On withdrawal of a direct final rule, the Secretary shall proceed with the NOPR published simultaneously with the direct final rule and publish in the **Federal Register** the reasons why the direct final rule was withdrawn. This direct final rule provision applies to the products at issue in the direct final rule published simultaneously with this NOPR. See 42 U.S.C. 6295(p)(4).

DOE also notes that it typically finalizes its test procedures for a given regulated product or equipment prior to proposing new or amended energy conservation standards for that product or equipment, see 10 CFR part 430, subpart C, Appendix A, sec. 7(c) ("Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products" or "Process Rule"). In this instance, although DOE has finalized its test procedure for MREFs, rather than issue a notice of proposed rulemaking to set standards for these products, DOE is moving forward with a direct final rule. As part of the negotiated rulemaking that led to the Term Sheet setting out the standards that DOE is proposing, Working Group members recommended (with ASRAC's approval) that DOE implement the test procedure that DOE recently finalized. See 81 FR 46768 (July 18, 2016). The approach laid out in that final rule is consistent with the approach agreed upon by the various Working Group members who participated in the negotiated rulemaking. Accordingly, in accordance with section 14 of the Process Rule, DOE tentatively concludes that deviation from the Process Rule is appropriate here.

### B. Rulemaking History

DOE has not previously established energy conservation standards for MREFs. Consistent with its statutory obligations, DOE sought to establish regulatory coverage over these products prior to establishing energy conservation standards to regulate MREF efficiency. On November 8, 2011, DOE published a notice of proposed determination of coverage ("NOPD") to address the potential coverage of those refrigeration products that do not use a compressor-based refrigeration system. 76 FR 69147. Rather than employing a compressor/condenser-based system typically installed in the refrigerators, refrigerator-freezers, and freezers found in most U.S. homes, these "non-compressor-based" refrigeration products use a variety of other means to introduce chilled air into the interior of the storage cabinet of the product. Two systems that DOE specifically examined were thermoelectric- and absorption-based systems.<sup>1</sup> The former of these systems is used in some wine chiller applications. With respect to the latter group of products, DOE indicated its belief that these types of products were used primarily in mobile applications and would likely fall outside of DOE's scope of coverage. See 42 U.S.C. 6292(a) (excluding from coverage "those consumer products designed solely for use in recreational vehicles and other mobile equipment").

On February 13, 2012, DOE published a notice announcing the availability of the framework document, "Energy Conservation Standards Rulemaking Framework Document for Wine Chillers and Miscellaneous Refrigeration Products," and a public meeting to discuss the proposed analytical framework for the energy conservation standards rulemaking. 77 FR 7547. In the framework document, DOE described the procedural and analytical approaches it anticipated using to evaluate potential energy conservation standards for four types of consumer refrigeration products: Wine chillers, non-compressor refrigerators, hybrid refrigerators (*i.e.*, a wine chiller combined with a refrigerator), and ice makers.

DOE held a public meeting on February 22, 2012, to present the framework document, describe the analyses DOE planned to conduct during the rulemaking, seek comments from interested parties on these subjects, and inform the public about, and facilitate public participation in, the

<sup>1</sup> Chapter 3 of the direct final rule technical support document provides a detailed description of each of these refrigeration technologies.



rulemaking. At the public meeting and during the comment period, DOE received multiple comments that addressed issues raised in the framework document and identified additional issues relevant to the rulemaking.

On October 31, 2013, DOE published in the **Federal Register** a supplemental notice of proposed determination of coverage (the “October 2013 SNOPT”), in which it tentatively determined that the four categories of consumer products addressed in the framework document (wine chillers, non-compressor refrigeration products, hybrid refrigerators, and ice makers) satisfy the provisions of 42 U.S.C. 6292(b)(1). 78 FR 65223.

DOE published a notice announcing a public meeting and the availability of the preliminary technical support document (“TSD”) for the MREF energy conservation standards rulemaking on December 3, 2014. 79 FR 71705. The preliminary analysis considered potential standards for the products proposed for coverage in the October 2013 SNOPT. The preliminary TSD included the results of the following DOE preliminary analyses: (1) Market and technology assessment; (2) screening analysis; (3) engineering analysis; (4) markups analysis; (5) energy use analysis; (6) LCC and PBP analyses; (7) shipments analysis; (8) national impact analysis (“NIA”); and (9) preliminary manufacturer impact analysis (“MIA”).

DOE held a public meeting on January 9, 2015, during which it presented preliminary results for the engineering and downstream economic analyses and sought comments from interested parties on these subjects. At the public meeting and during the comment period, DOE received comments that addressed issues raised in the preliminary analysis and identified additional issues relevant to this rulemaking. After reviewing the comments received in response to both the preliminary analysis and a test procedure NOPR published on December 16, 2014 (the “December 2014 Test Procedure NOPR,” 79 FR 74894), DOE ultimately determined that the development of test procedures and potential energy conservation standards for MREFs would benefit from a negotiated rulemaking process.

On April 1, 2015, DOE published a notice of intent to establish an Appliance Standards and Rulemaking Federal Advisory Committee (“ASRAC”) negotiated rulemaking working group for MREFs (the “MREF Working Group” or in context, the “Working Group”) to discuss and, if

possible, reach consensus on a recommended scope of coverage, definitions, test procedures, and energy conservation standards. 80 FR 17355. The MREF Working Group consisted of 15 members, including two members from ASRAC and one DOE representative. The MREF Working Group met in person during six sets of meetings in 2015: May 4–5, June 11–12, July 15–16, August 11–12, September 16–17, and October 20.

On August 11, 2015, the MREF Working Group reached consensus on a term sheet to recommend a scope of coverage, set of definitions, and test procedures for MREFs (“Term Sheet #1”).<sup>2</sup> That document laid out the scope of products that the Working Group recommended that DOE adopt with respect to MREFs, the definitions that would apply to MREFs and certain other refrigeration products, and the test procedure that manufacturers of MREFs would need to use when evaluating the energy usage of these products. On October 20, 2015, the MREF Working Group reached consensus on a second term sheet embodying its recommended energy conservation standards for coolers and combination cooler refrigeration products (“Term Sheet #2”). ASRAC approved Term Sheet #1 during an open meeting on December 18, 2015, and Term Sheet #2 during an open meeting on January 20, 2016. ASRAC subsequently sent both term sheets to the Secretary for consideration.

In addition to these steps, DOE sought to ensure that it had obtained complete information and input regarding certain aspects related to manufacturers of thermoelectric refrigeration products. To this end, on December 15, 2015, DOE published a notice of data availability (the “December 2015 NODA”) in which it requested additional public feedback on the methods and information used in the development of the MREF Working Group Term Sheets. 80 FR 77589. DOE noted in particular its interest in information related to manufacturers of thermoelectric refrigeration products. *Id.* at 77590.

After considering the MREF Working Group recommendations and comments received in response to the December 2015 NODA, DOE published an SNOPT and notice of proposed rulemaking (the “March 2016 SNOPT”) on March 4, 2016. 81 FR 11454. The March 2016 SNOPT proposed establishing coverage, definitions, and terminology consistent with Term Sheet #1. It also proposed to determine that coolers and combination

cooler refrigeration products—as defined under the proposal—would meet the requirements under EPCA to be considered covered products. *Id.* at 11456–11459.

On July 18, 2016, DOE published a final coverage determination and final rule (the “July 2016 Final Coverage Determination”) to establish coolers and combination cooler refrigeration products as covered products under EPCA. Because DOE did not receive any comments in response to the March 2016 SNOPT that would substantively alter its proposals, the findings of the final determination were unchanged from those presented in the March 2016 SNOPT. Moreover, DOE determined in the July 2016 Final Coverage Determination that MREFs, on average, consume more than 150 kWh/yr, and that the aggregate annual national energy use of these products exceeds 4.2 TWh. Accordingly, these data indicate that MREFs satisfy at least two of the four criteria required under EPCA in order for the Secretary to set standards for a product whose coverage is added pursuant to 42 U.S.C. 6292(b). See 42 U.S.C. 6295(l)(1)(A)–(D). 81 FR 46768. With respect to the remaining two criteria, as indicated in substantial detail in its accompanying direct final rule, DOE’s analysis indicates that these two criteria are satisfied as well.

In addition to establishing coverage, the July 2016 Final Coverage Determination established definitions for “miscellaneous refrigeration products,” “coolers,” and “combination cooler refrigeration products” in title 10 of the Code of Federal Regulations (“CFR”) § 430.2. The July 2016 Final Coverage Determination also amended the existing definitions for “refrigerator,” “refrigerator-freezer,” and “freezer” for consistency with the newly established MREF definitions. These definitions were generally consistent with the March 2016 SNOPT. *Id.*

DOE has considered the recommended energy conservation standards from the MREF Working Group and believes that they meet the EPCA requirements for issuance of a direct final rule. As a result, DOE has published a direct final rule establishing energy conservation standards for MREFs elsewhere in this **Federal Register**. If DOE receives adverse comments that may provide a reasonable basis for withdrawal and withdraws the direct final rule, DOE will consider those comments and any other comments received in determining how to proceed with this proposed rule.

For further background information on these proposed standards and the

<sup>2</sup> The MREF Working Group term sheets are available in docket ID EERE–2011–BT–STD–0043 at <http://regulations.gov>.



supporting analyses, please see the direct final rule published elsewhere in this **Federal Register**. That document includes additional discussion on the EPCA requirements for promulgation of energy conservation standards, the history of the standards rulemakings establishing such standards, as well as information on the test procedures used to measure the energy efficiency of MREFs. The document also contains an in-depth discussion of the analyses conducted in support of this rulemaking, the methodologies DOE used in conducting those analyses, and the analytical results.

**II. Proposed Standards**

When considering proposed standards, the new or amended energy conservation standard that DOE adopts for any type (or class) of covered product shall be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In determining whether a standard is economically justified, DOE must determine whether the benefits of

the standard exceed its burdens, considering to the greatest extent practicable the seven statutory factors set forth in EPCA. (42 U.S.C. 6295(o)(2)(B)(i)) The new or amended standard must also result in a significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

DOE considered the impacts of standards at each trial standard level (“TSL”) considered, beginning with maximum technologically feasible (max-tech) level, to determine whether that level was economically justified. Where the max-tech level was not economically justified, DOE then considered the next most efficient level and undertook the same evaluation until it reached the highest efficiency level that is both technologically feasible and economically justified and saves a significant amount of energy.

To aid the reader as DOE discusses the benefits and burdens of each TSL, DOE has included tables that present a summary of the results of DOE’s quantitative analysis for each TSL. In addition to the quantitative results presented in the tables, DOE also considers other burdens and benefits

that affect economic justification. These include the impacts on identifiable subgroups of consumers, such as low-income households and seniors, who may be disproportionately affected by a national standard. Section V.B.1.b of the direct final rule published elsewhere in this **Federal Register** presents the estimated impacts of each TSL for these subgroups.

*A. TSLs Considered for Coolers*

Table II.1 and Table II.2 summarize the quantitative impacts estimated for each TSL for coolers. The national impacts are measured over the lifetime of coolers purchased in the 30-year period that begins in the anticipated year of compliance with new standards (2019–2048 for TSL 2, and 2021–2050 for the other TSLs). The energy savings, emissions reductions, and value of emissions reductions refer to full-fuel-cycle (“FFC”) results. The efficiency levels contained in each TSL are described in section V.A of the direct final rule published elsewhere in this **Federal Register**.

TABLE II.1—SUMMARY OF ANALYTICAL RESULTS FOR COOLERS: NATIONAL IMPACTS

Category	TSL 1*	TSL 2*	TSL 3*	TSL 4*
<b>Cumulative FFC National Energy Savings (quads)</b>				
Quads .....	1.13	1.51	1.84	2.02.
<b>NPV of Consumer Costs and Benefits (2015\$ billion)</b>				
3% discount rate .....	8.34	11.02	12.19	6.83.
7% discount rate .....	3.41	4.78	4.81	1.81.
<b>Cumulative FFC Emissions Reduction (Total FFC Emissions)</b>				
CO <sub>2</sub> (million metric tons) .....	67.91	91.76	110.61	121.30.
SO <sub>2</sub> (thousand tons) .....	39.38	54.04	64.13	70.26.
NO <sub>x</sub> (thousand tons) .....	122.38	163.86	199.36	218.79.
Hg (tons) .....	0.15	0.20	0.24	0.26.
CH <sub>4</sub> (thousand tons) .....	291.14	387.12	474.33	520.85.
CH <sub>4</sub> (thousand tons CO <sub>2</sub> eq)** .....	8151.79	10839.31	13281.37	14583.83.
N <sub>2</sub> O (thousand tons) .....	0.82	1.12	1.33	1.46.
N <sub>2</sub> O (thousand tons CO <sub>2</sub> eq)** .....	217.02	296.92	353.41	387.24.
<b>Value of Emissions Reduction (Total FFC Emissions)</b>				
CO <sub>2</sub> (2015\$ billion)† .....	0.478 to 6.673	0.679 to 9.266	0.777 to 10.856	0.849 to 11.882.
NO <sub>x</sub> – 3% discount rate (2015\$ million) .....	229.6 to 523.5	326.1 to 743.4	373.3 to 851.2	407.9 to 929.9.
NO <sub>x</sub> – 7% discount rate (2015\$ million) .....	92.5 to 208.7	141.9 to 319.9	150.2 to 338.7	163.1 to 367.8.

Parentheses indicate negative (–) values.

\* For TSL 2, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

\*\* CO<sub>2</sub>eq is the quantity of CO<sub>2</sub> that would have the same global warming potential (“GWP”).

† Range of the economic value of CO<sub>2</sub> reductions is based on estimates of the global benefit of reduced CO<sub>2</sub> emissions.

TABLE II.2—SUMMARY OF ANALYTICAL RESULTS FOR COOLERS: MANUFACTURER AND CONSUMER IMPACTS

Category	TSL 1*	TSL 2*	TSL 3*	TSL 4*
<b>Manufacturer Impacts</b>				
Industry NPV (2015\$ million) (No-new-standards case INPV = 263.3) .....	244.3 to 264.0	208.5 to 253.3	168.4 to 226.5	110.5 to 283.8.
Industry NPV (% change) .....	−7.2 to 0.3	−20.8 to −3.8	−36.0 to −14.0	−58.0 to 7.8.
<b>Consumer Average LCC Savings (2015\$)</b>				
Freestanding Compact Coolers .....	279	265	288	123.
Built-in Compact Coolers .....	** n.a.	28	60	(230).
Freestanding Coolers .....	648	153	240	(121).
Built-in Coolers .....	n.a.	77	187	(254).
<b>Consumer Simple PBP (years)</b>				
Freestanding Compact Coolers .....	1.1	1.4	1.6	3.5.
Built-in Compact Coolers .....	n.a.	4.6	4.4	14.8.
Freestanding Coolers .....	1.0	1.8	1.8	4.8.
Built-in Coolers .....	n.a.	6.1	4.7	17.7.
<b>% of Consumers that Experience Net Cost</b>				
Freestanding Compact Coolers .....	6	9	12	51.
Built-in Compact Coolers .....	0	29	27	93.
Freestanding Coolers .....	0	22	9	78.
Built-in Coolers .....	0	22	7	86.

Parentheses indicate negative (−) values.

\* For TSL 2, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

\*\* Calculation of savings and PBP is not applicable (n.a.) for an efficiency level that is already met or exceeded in the MREF market.

DOE first considered TSL 4, which represents the max-tech efficiency levels. TSL 4 would save 2.02 quads of energy, an amount DOE considers significant. Under TSL 4, the net present value (“NPV”) of consumer benefit would be \$1.81 billion using a discount rate of 7 percent, and \$6.83 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 4 are 121.3 million metric tons (“Mt”) of CO<sub>2</sub>, 70.3 thousand tons of SO<sub>2</sub>, 218.8 thousand tons of NO<sub>x</sub>, 0.26 ton of Hg, 520.9 thousand tons of CH<sub>4</sub>, and 1.5 thousand tons of N<sub>2</sub>O. The estimated monetary value of the CO<sub>2</sub> emissions reduction at TSL 4 ranges from \$849 million to \$11,882 million.

At TSL 4, the average LCC savings range from −\$254 to \$123. The simple payback period ranges from 3.5 years to 17.7 years. The fraction of consumers experiencing a net LCC cost ranges from 51 percent to 93 percent.

At TSL 4, the projected change in industry net present value (“INPV”) ranges from a decrease of \$152.8 million to an increase of \$20.5 million, which correspond to a decrease of 58.0 percent to an increase of 7.8 percent, respectively. Manufacturer feedback during confidential interviews indicated that all cooler segments are highly price-sensitive, and therefore the lower bound of INPV impacts is more likely to occur. Additionally, at TSL 4, disproportionate

impacts on low-volume manufacturers (“LVMs”) of MREFs may be severe. This could have a direct impact on domestic manufacturing capacity and production employment in the cooler industry.

The Secretary concludes that at TSL 4 for coolers, the benefits of energy savings, positive NPV of consumer benefits, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the economic burden on some consumers, and the impacts on manufacturers, including the conversion costs and profit margin impacts that could result in a large reduction in INPV. Consequently, the Secretary has concluded that TSL 4 is not economically justified.

DOE then considered TSL 3, which would save an estimated 1.84 quads of energy, an amount DOE considers significant. Under TSL 3, the NPV of consumer benefit would be \$4.81 billion using a discount rate of 7 percent, and \$12.19 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 3 are 110.6 Mt of CO<sub>2</sub>, 64.1 thousand tons of SO<sub>2</sub>, 199.4 thousand tons of NO<sub>x</sub>, 0.24 tons of Hg, 474.3 thousand tons of CH<sub>4</sub>, and 1.33 thousand tons of N<sub>2</sub>O. The estimated monetary value of the CO<sub>2</sub> emissions reduction at TSL 3 ranges from \$777 million to \$10,856 million.

At TSL 3, the average LCC savings range from \$60 to \$288. The simple payback period ranges from 1.6 years to 4.7 years. The fraction of consumers experiencing a net LCC cost ranges from 7 percent to 27 percent.

At TSL 3, the projected change in INPV ranges from a decrease of \$94.8 million to a decrease of \$36.8 million, which correspond to decreases of 36.0 percent and 14.0 percent, respectively. Manufacturer feedback from confidential interviews indicated that all cooler segments are highly price sensitive, and therefore the lower bound of INPV impacts is more likely to occur. Again, at TSL 3, disproportionate impacts on the LVMs may be severe. This could have a direct impact on domestic manufacturing capacity and production employment in the cooler industry.

The Secretary concludes that at TSL 3 for coolers, the benefits of energy savings, positive NPV of consumer benefits, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the impacts on manufacturers, including the conversion costs and profit margin impacts that could result in a large reduction in INPV. Consequently, the Secretary has concluded that TSL 3 is not economically justified.

DOE then considered TSL 2, which reflects the standard levels recommended by the MREF Working Group. TSL 2 would save an estimated 1.51 quads of energy, an amount DOE considers significant. Under TSL 2, the NPV of consumer benefit would be \$4.78 billion using a discount rate of 7 percent, and \$11.02 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 2 are 91.8 Mt of CO<sub>2</sub>, 54.0 thousand tons of SO<sub>2</sub>, 163.9 thousand tons of NO<sub>x</sub>, 0.20 tons of Hg, 387.1 thousand tons of CH<sub>4</sub>, and 1.12 thousand tons of N<sub>2</sub>O. The estimated monetary value of the CO<sub>2</sub> emissions reduction at TSL 2 ranges from \$679 million to \$9,266 million.

At TSL 2, the average LCC savings range from \$28 to \$265. The simple payback period ranges from 1.4 years to

6.1 years. The fraction of consumers experiencing a net LCC cost ranges from 9 percent to 29 percent.

At TSL 2, the projected change in INPV ranges from a decrease of \$54.8 million to a decrease of \$10.0 million, which represent decreases of 20.8 percent and 3.8 percent, respectively. Feedback from the LVMs indicated that TSL 2 would not impede their ability to maintain their current MREF product offerings.

After considering the analysis and weighing the benefits and burdens, DOE has determined that the recommended standards for coolers are in accordance with 42 U.S.C. 6295(o). Specifically, the Secretary has determined the benefits of energy savings, positive NPV of consumer benefits, emission reductions, the estimated monetary value of the emissions reductions, and positive

average LCC savings would outweigh the negative impacts on some consumers and on manufacturers, including the conversion costs that could result in a reduction in INPV for manufacturers. Accordingly, the Secretary has concluded that TSL 2 would offer the maximum improvement in efficiency that is technologically feasible and economically justified, and would result in the significant conservation of energy.

Therefore, DOE proposes to adopt TSL 2 as the energy conservation standard for coolers. The proposed new energy conservation standards which are expressed as maximum annual energy use, in kWh/yr, as a function of adjusted volume ("AV"), in cubic feet ("ft<sup>3</sup>"), are shown in Table II.3.

TABLE II.3—PROPOSED NEW ENERGY CONSERVATION STANDARDS FOR COOLERS

Product class	Maximum allowable AEU* (kWh/yr)
Built-in Compact Built-in. Freestanding Compact. Freestanding.	7.88AV † + 155.8

† AV = Adjusted volume, in ft<sup>3</sup>, as calculated according to title 10 CFR part 430, subpart B, appendix A.

*B. TSLs Considered for Combination Cooler Refrigeration Products.*

Table II.4 and Table II.5 summarize the quantitative impacts estimated for each TSL for combination cooler refrigeration products. The national

impacts are measured over the lifetime of products purchased in the 30-year period that begins in the anticipated year of compliance with new standards (2019–2048 for TSL 1, and 2021–2050 for the other TSLs). The energy savings,

emissions reductions, and value of emissions reductions refer to FFC results. The efficiency levels contained in each TSL are described in section V.A of the direct final rule published elsewhere in this **Federal Register**.

TABLE II.4—SUMMARY OF ANALYTICAL RESULTS FOR COMBINATION COOLER REFRIGERATION PRODUCTS TSLs: NATIONAL IMPACTS

Category	TSL 1*	TSL 2*	TSL 3*	TSL 4*
<b>Cumulative FFC National Energy Savings (quads)</b>				
Quads	0.00084	0.007	0.012	0.016.
<b>NPV of Consumer Costs and Benefits (2015\$ billion)</b>				
3% discount rate	0.0045	0.035	(0.06)	(0.14).
7% discount rate	0.0017	0.011	(0.04)	(0.09).
<b>Cumulative FFC Emissions Reduction (Total FFC Emissions)</b>				
CO <sub>2</sub> (million metric tons)	0.05	0.44	0.73	0.96.
SO <sub>2</sub> (thousand tons)	0.03	0.25	0.42	0.55.
NO <sub>x</sub> (thousand tons)	0.09	0.80	1.32	1.73.
Hg (tons)	0.00	0.00	0.00	0.00.
CH <sub>4</sub> (thousand tons)	0.21	1.90	3.16	4.13.
CH <sub>4</sub> (thousand tons CO <sub>2</sub> eq)**	6.02	53.24	88.46	115.75.
N <sub>2</sub> O (thousand tons)	0.00	0.01	0.01	0.01.
N <sub>2</sub> O (thousand tons CO <sub>2</sub> eq)**	0.16	1.40	2.34	3.05.
<b>Value of Emissions Reduction (Total FFC Emissions)</b>				
CO <sub>2</sub> (2015\$ billion) †	0.000 to 0.005	0.003 to 0.042	0.005 to 0.071	0.007 to 0.092.
NO <sub>x</sub> – 3% discount rate (2015\$ million)	0.2 to 0.4	1.4 to 3.3	2.4 to 5.5	3.1 to 7.1.

TABLE II.4—SUMMARY OF ANALYTICAL RESULTS FOR COMBINATION COOLER REFRIGERATION PRODUCTS TSLs: NATIONAL IMPACTS—Continued

Category	TSL 1*	TSL 2*	TSL 3*	TSL 4*
NO <sub>x</sub> – 7% discount rate (2015\$ million) .....	0.1 to 0.2	0.6 to 1.3	0.9 to 2.1	1.2 to 2.7.

Parentheses indicate negative (–) values.  
 \* For TSL 1, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.  
 \*\* CO<sub>2</sub>eq is the quantity of CO<sub>2</sub> that would have the same global warming potential (GWP).  
 † Range of the economic value of CO<sub>2</sub> reductions is based on estimates of the global benefit of reduced CO<sub>2</sub> emissions.

TABLE II.5—SUMMARY OF ANALYTICAL RESULTS FOR COMBINATION COOLER REFRIGERATION PRODUCTS TSLs: MANUFACTURER AND CONSUMER IMPACTS

Category	TSL 1*	TSL 2*	TSL 3*	TSL 4*
<b>Manufacturer Impacts</b>				
Industry NPV (2015\$ million) (No-new-standards case INPV = 108.2) .....	107.4 to 107.6	103.7 to 107.5	101.6 to 117.7	100.1 to 128.5.
Industry NPV (% change) .....	–0.7 to –0.5	–4.1 to –0.6	–6.0 to 8.9	–7.5 to 18.8.
<b>Consumer Average LCC Savings (2015\$)</b>				
C–3A .....	n.a.**	58	53	(209).
C–3A–BI .....	n.a	66	59	(237).
C–9 .....	n.a.	89	3	(182).
C–9–BI .....	n.a.	102	4	(205).
C–13A .....	32	17	(123)	(194).
C–13A–BI .....	n.a.	8	(151)	(232).
<b>Consumer Simple PBP (years)</b>				
C–3A .....	n.a.	4.1	6.8	25.3.
C–3A–BI .....	n.a.	4.1	6.8	25.4.
C–9 .....	n.a.	2.6	12.1	23.3.
C–9–BI .....	n.a.	2.6	12.0	23.2.
C–13A .....	4.3	5.0	13.3	16.0.
C–13A–BI .....	n.a.	6.5	21.6	24.6.
<b>% of Consumers that Experience Net Cost</b>				
C–3A .....	0	4	26	92.
C–3A–BI .....	0	4	26	92.
C–9 .....	0	0	62	90.
C–9–BI .....	0	0	63	90.
C–13A .....	6	44	94	96.
C–13A–BI .....	0	49	97	98.

Parentheses indicate negative (–) values.  
 \* For TSL 1, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.  
 \*\* Calculation of savings and PBP is not applicable (n.a.) for an efficiency level that is already met or exceeded in the MREF market.

DOE first considered TSL 4, which represents the max-tech efficiency levels. TSL 4 would save 0.016 quads of energy, an amount DOE considers significant. Under TSL 4, the NPV of consumer benefit would be –\$0.09 billion using a discount rate of 7 percent, and –\$0.14 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 4 are 0.96 Mt of CO<sub>2</sub>, 0.55 thousand tons of SO<sub>2</sub>, 1.73 thousand tons of NO<sub>x</sub>, 0.0 ton of Hg, 4.13 thousand tons of CH<sub>4</sub>, and 0.01 thousand tons of N<sub>2</sub>O. The estimated monetary value of the CO<sub>2</sub> emissions reduction at TSL 4 ranges from \$7 million to \$92 million.

At TSL 4, the average LCC savings range from –\$237 to –\$182. The simple payback period ranges from 16.0 years to 25.4 years. The fraction of consumers experiencing a net LCC cost ranges from 90 percent to 98 percent.

Also at TSL 4, the projected change in INPV ranges from a decrease of \$8.1 million to an increase of \$20.3 million, which correspond to a decrease of 7.5 percent to an increase of 18.8 percent, respectively. Similar to coolers, detailed feedback from manufacturer interviews indicated that combination cooler refrigeration products are highly price sensitive, and therefore the lower bound of INPV impacts is more likely to occur. Additionally, in the context of new

standards for coolers and other cumulative regulatory burdens, at TSL 4, disproportionate impacts on domestic LVMs of combination cooler refrigeration products may be severe. This could have a direct impact on the availability of certain niche combination cooler refrigeration products, as well as on competition, domestic manufacturing capacity, and production employment related to the combination cooler refrigeration product industry.

The Secretary concludes that at TSL 4 for combination cooler refrigeration products, the benefits of energy savings, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the

negative NPV of consumer benefits, the economic burden on some consumers, and the disproportionate impacts on the LVMs, which could directly impact the availability of certain niche combination cooler products. Consequently, the Secretary has concluded that TSL 4 is not economically justified.

DOE then considered TSL 3, which would save an estimated 0.012 quads of energy, an amount DOE considers significant. Under TSL 3, the NPV of consumer benefit would be  $-\$0.04$  billion using a discount rate of 7 percent, and  $-\$0.06$  billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 3 are 0.73 Mt of CO<sub>2</sub>, 0.42 thousand tons of SO<sub>2</sub>, 1.32 thousand tons of NO<sub>x</sub>, 0.00 tons of Hg, 3.16 thousand tons of CH<sub>4</sub>, and 0.01 thousand tons of N<sub>2</sub>O. The estimated monetary value of the CO<sub>2</sub> emissions reduction at TSL 3 ranges from \$5 million to \$71 million.

At TSL 3, the average LCC savings range from  $-\$151$  to \$59. The simple payback period ranges from 6.8 years to 21.6 years. The fraction of consumers experiencing a net LCC cost ranges from 26 percent to 97 percent.

At TSL 3, the projected change in INPV ranges from a decrease of \$6.5 million to an increase of \$9.6 million, which represent a decrease of 6.0 percent and an increase of 8.9 percent, respectively. Again, manufacturers indicated that combination cooler refrigeration products are highly price sensitive, and therefore the lower bound of INPV impacts is more likely to occur. In the context of new standards for coolers and other cumulative regulatory burdens, at TSL 3, disproportionate impacts on domestic LVMs of combination cooler refrigeration products may be severe. This could have a direct impact on the availability of certain niche combination cooler refrigeration products, as well as on competition, domestic manufacturing capacity and production employment related to the combination cooler refrigeration product industry.

The Secretary concludes that at TSL 3 for combination cooler refrigeration products, the benefits of energy savings, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the negative NPV of consumer benefits and disproportionate impacts on the LVMs, which could directly impact the availability of certain niche combination cooler products. Consequently, the Secretary has concluded that TSL 3 is not economically justified.

DOE then considered TSL 2, which reflects the efficiency levels with maximum consumer NPV at seven percent discount rate. TSL 2 would save an estimated 0.007 quads of energy, an amount DOE considers significant. Under TSL 2, the NPV of consumer benefit would be \$0.011 billion using a discount rate of 7 percent, and \$0.035 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 2 are 0.44 Mt of CO<sub>2</sub>, 0.25 thousand tons of SO<sub>2</sub>, 0.8 thousand tons of NO<sub>x</sub>, 0.00 tons of Hg, 1.90 thousand tons of CH<sub>4</sub>, and 0.013 thousand tons of N<sub>2</sub>O. The estimated monetary value of the CO<sub>2</sub> emissions reduction at TSL 2 ranges from \$3 million to \$42 million.

At TSL 2, the average LCC savings range from \$8 to \$102. The simple payback period ranges from 2.6 years to 6.5 years. The fraction of consumers experiencing a net LCC cost ranges from zero percent to 49 percent.

At TSL 2, the projected change in INPV ranges from a decrease of \$4.4 million to a decrease of \$0.6 million, which represent decreases of 4.1 percent and 0.6 percent, respectively. Again, in the context of new standards for coolers and other cumulative regulatory burdens, at TSL 2, disproportionate impacts on domestic LVMs may be severe. This could have a direct impact on the availability of certain niche combination cooler refrigeration products, as well as on competition, domestic manufacturing capacity and production employment related to the combination cooler refrigeration product industry.

The Secretary concludes that at TSL 2 for combination cooler refrigeration products, the benefits of energy savings, positive NPV of consumer benefits, emission reductions, and the estimated monetary value of the emissions reductions would again be outweighed by the disproportionate impacts on the domestic LVMs, which could directly impact the availability of certain niche combination cooler products. Consequently, the Secretary has concluded that TSL 2 is not economically justified.

DOE then considered TSL 1, which reflects the standard levels recommended by the MREF Working Group. TSL 1 would save an estimated 0.00084 quads of energy, an amount DOE considers significant. Under TSL 1, the NPV of consumer benefit would be \$0.0017 billion using a discount rate of 7 percent, and \$0.0045 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 1 are 0.05 Mt of CO<sub>2</sub>, 0.03

thousand tons of SO<sub>2</sub>, 0.09 thousand tons of NO<sub>x</sub>, 0.00 tons of Hg, 0.21 thousand tons of CH<sub>4</sub>, and 0.00 thousand tons of N<sub>2</sub>O. The estimated monetary value of the CO<sub>2</sub> emissions reduction at TSL 1 ranges from \$0 million to \$5 million.

At TSL 1, the combination cooler refrigeration products currently available on the market already meet or exceed the corresponding efficiency levels in all product classes except for C-13A. As a result, for five of the product classes, no consumers experience a net cost, and the LCC savings and simple payback period are not applicable. For product class C-13A, the average LCC savings is \$32, the simple payback period is 4.3 years, and the fraction of consumers experiencing a net LCC cost is 6 percent.

At TSL 1, the projected change in INPV ranges from a decrease of \$0.8 million to a decrease of \$0.5 million, which represent decreases of 0.7 percent and 0.5 percent, respectively. DOE estimated that all combination cooler refrigeration products manufactured domestically by LVMs currently meet the standard levels corresponding to TSL 1. Therefore, at TSL 1, DOE believes that domestic manufacturers will continue to offer the same combination cooler refrigeration products as those they currently offer.

After considering the analysis and weighing the benefits and burdens, DOE has determined that the recommended standards for combination cooler refrigeration products are in accordance with 42 U.S.C. 6295(o). Specifically, the Secretary has determined the benefits of energy savings, positive NPV of consumer benefits, emission reductions, the estimated monetary value of the emissions reductions, and positive average LCC savings would outweigh the negative impacts on some consumers and on manufacturers, including the conversion costs that could result in a reduction in INPV for manufacturers. Accordingly, the Secretary has concluded that TSL 1 would offer the maximum improvement in efficiency that is technologically feasible and economically justified, and would result in the significant conservation of energy.

Therefore, DOE proposes to adopt TSL 1 as the energy conservation standard for combination cooler refrigeration products. The proposed new energy conservation standards, which are expressed as maximum annual energy use, in kWh/yr, as a function of AV, in ft<sup>3</sup>, are shown in Table II.6.

TABLE II.6—PROPOSED ENERGY CONSERVATION STANDARDS FOR COMBINATION COOLER REFRIGERATION PRODUCTS

Product class description	Product class designation	Maximum allowable AEU (kWh/yr)
Cooler with all-refrigerator—automatic defrost .....	C-3A	4.57AV † + 130.4
Built-in cooler with all-refrigerator—automatic defrost .....	C-3A-BI	5.19AV + 147.8
Cooler with upright freezers with automatic defrost without an automatic icemaker .....	C-9	5.58AV + 147.7
Built-in cooler with upright freezer with automatic defrost without an automatic icemaker .....	C-9-BI	6.38AV + 168.8
Cooler with upright freezer with automatic defrost with an automatic icemaker .....	C-9I	5.58AV + 231.7
Built-in cooler with upright freezer with automatic defrost with an automatic icemaker .....	C-9I-BI	6.38AV + 252.8
Compact cooler with all-refrigerator—automatic defrost .....	C-13A	5.93AV + 193.7
Built-in compact cooler with all-refrigerator—automatic defrost .....	C-13A-BI	6.52AV + 213.1

† AV = Adjusted volume, in ft<sup>3</sup>, as calculated according to title 10 CFR part 430, subpart B, appendix A.

C. Summary of Benefits and Costs of the Proposed Standards

The benefits and costs of the adopted standards can also be expressed in terms of annualized values. The annualized net benefit is the sum of: (1) the annualized national economic value (expressed in 2015\$) of the benefits from operating products that meet the adopted standards (consisting primarily of operating cost savings from using less energy, minus increases in product purchase costs, and (2) the annualized monetary value of the benefits of CO<sub>2</sub> and NO<sub>x</sub> emission reductions.<sup>3</sup>

Table II.7 shows the annualized values for MREFs under TSL 2 for coolers and TSL 1 for combination cooler refrigeration products, expressed in 2015\$. The results under the primary estimate are as follows. Using a 7-percent discount rate for benefits and costs other than CO<sub>2</sub> reduction, (for which DOE used a 3-percent discount rate along with the SCC series that has a value of \$40.6/t in 2015),<sup>4</sup> the estimated cost of the standards in this rule is \$153 million per year in increased equipment costs, while the estimated annual benefits are \$593 million in reduced equipment operating

costs, \$165 million in CO<sub>2</sub> reductions, and \$13.1 million in reduced NO<sub>x</sub> emissions. In this case, the net benefit amounts to \$619 million per year.

Using a 3-percent discount rate for all benefits and costs and the SCC series has a value of \$40.6/t in 2015, the estimated cost of the standards is \$157 million per year in increased equipment costs, while the estimated annual benefits are \$754 million in reduced operating costs, \$165 million in CO<sub>2</sub> reductions, and \$17.7 million in reduced NO<sub>x</sub> emissions. In this case, the net benefit amounts to \$779 million per year.

TABLE II.7—ANNUALIZED BENEFITS AND COSTS OF ADOPTED STANDARDS FOR MREFS \*

	Discount rate	Primary estimate*	Low net benefits estimate*	High net benefits estimate*
(Million 2015\$/year)				
<b>Benefits</b>				
Consumer Operating Cost Savings .....	7% .....	593 .....	545 .....	649.
.....	3% .....	754 .....	686 .....	839.
CO <sub>2</sub> Reduction Value (\$12.2/t)** .....	5% .....	49 .....	46 .....	53.
CO <sub>2</sub> Reduction Value (\$40.0/t)** .....	3% .....	165 .....	155 .....	179.
CO <sub>2</sub> Reduction Value (\$62.3/t)** .....	2.5% .....	242 .....	227 .....	263.
CO <sub>2</sub> Reduction Value (\$117/t)** .....	3% .....	502 .....	471 .....	546.
NO <sub>x</sub> Reduction Value † .....	7% .....	13.1 .....	12.4 .....	31.6.
.....	3% .....	17.7 .....	16.6 .....	43.6.
Total Benefits †† .....	7% plus CO <sub>2</sub> range ...	655 to 1,108 .....	603 to 1,028 .....	733 to 1,226.
.....	7% .....	771 .....	712 .....	860.
.....	3% plus CO <sub>2</sub> range ...	820 to 1,273 .....	748 to 1,173 .....	935 to 1,428.
.....	3% .....	937 .....	857 .....	1,062.
<b>Costs</b>				
Consumer Incremental Product Costs .....	7% .....	153 .....	145 .....	118.
.....	3% .....	157 .....	148 .....	116.
<b>Net Benefits</b>				
Total †† .....	7% plus CO <sub>2</sub> range ...	503 to 956 .....	459 to 884 .....	615 to 1,108.
.....	7% .....	619 .....	568 .....	742.
.....	3% plus CO <sub>2</sub> range ...	663 to 1,116 .....	601 to 1,026 .....	819 to 1,312.

<sup>3</sup> To convert the time-series of costs and benefits into annualized values, DOE calculated a present value in 2016, the year used for discounting the NPV of total consumer costs and savings. For the benefits, DOE calculated a present value associated with each year's shipments in the year in which the shipments occur (2020, 2030, etc.), and then

discounted the present value from each year to 2016. The calculation uses discount rates of 3 and 7 percent for all costs and benefits except for the value of CO<sub>2</sub> reductions, for which DOE used case-specific discount rates. Using the present value, DOE then calculated the fixed annual payment over

a 30-year period, starting in the compliance year that yields the same present value.

<sup>4</sup> DOE used a 3-percent discount rate because the SCC values for the series used in the calculation were derived using a 3-percent discount rate (see section IV.L of the direct final rule published elsewhere in this **Federal Register**).

TABLE II.7—ANNUALIZED BENEFITS AND COSTS OF ADOPTED STANDARDS FOR MREFS \*—Continued

	Discount rate	Primary estimate*	Low net benefits estimate *	High net benefits estimate *
(Million 2015\$/year)				
	3% .....	779 .....	709 .....	946.

\* This table presents the annualized costs and benefits associated with MREFs shipped in 2019–2048. These results include benefits to consumers which accrue after 2048 from the MREFs purchased from 2019–2048. The results account for the incremental variable and fixed costs incurred by manufacturers due to the standard, some of which may be incurred in preparation for the rule. The Primary, Low Benefits, and High Benefits Estimates utilize projections of energy prices and housing starts from the *AEO 2015* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental product costs reflect constant price trend the Primary Estimate and the Low Benefits Estimate, and a high decline rate in the High Benefits Estimate. The methods used to derive projected price trends are explained in section IV.F of the direct final rule published elsewhere in this **Federal Register**. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

\*\* The CO<sub>2</sub> values represent global monetized values of the SCC, in 2015\$ per metric ton (t), in 2015 under several scenarios of the updated SCC values. The first three cases use the averages of SCC distributions calculated using 5%, 3%, and 2.5% discount rates, respectively. The fourth case represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. The SCC time series incorporate an escalation factor.

† DOE estimated the monetized value of NO<sub>x</sub> emissions reductions associated with electricity savings using benefit per ton estimates from the “Regulatory Impact Analysis for the Clean Power Plan Final Rule,” published in August 2015 by EPA’s Office of Air Quality Planning and Standards. (Available at [www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis](http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis).) See section IV.L of the direct final rule published elsewhere in this **Federal Register** for further discussion. For the Primary Estimate and Low Net Benefits Estimate, DOE used a national benefit-per-ton estimate for NO<sub>x</sub> emitted from the Electric Generating Unit sector based on an estimate of premature mortality derived from the ACS study (Krewski *et al.* 2009). For DOE’s High Net Benefits Estimate, the benefit-per-ton estimates were based on the Six Cities study (Lepuele *et al.* 2011), which are nearly two-and-a-half times larger than those from the ACS study.

†† Total Benefits for both the 3% and 7% cases are derived using the series corresponding to the average SCC with 3-percent discount rate (\$40.6/t case). In the rows labeled “7% plus CO<sub>2</sub> range” and “3% plus CO<sub>2</sub> range,” the operating cost and NO<sub>x</sub> benefits are calculated using the labeled discount rate, and those values are added to the full range of CO<sub>2</sub> values. The value of consumer incremental product costs is lower in the high net benefits scenario than it is in the primary case because the high net benefits scenario uses a highly declining price trend that more than offsets the increase in shipments due to higher economic growth.

### III. Public Participation

#### A. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule until the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this proposed rule.

Although DOE welcomes comments on any aspect of the proposal in this notice and the analysis as described in the direct final rule published elsewhere in this **Federal Register**, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

1. Whether the standards proposed in this notice would result in any lessening of utility for MREFs, including whether certain features would be eliminated from these products. See sections III.H.1.d and IV.2 of the direct final rule published elsewhere in this **Federal Register**.

2. The incremental manufacturer production costs DOE estimated at each efficiency level. See section IV.C of the direct final rule published elsewhere in this **Federal Register**.

3. DOE’s method to estimate MREF shipments under the no-new-standards case and under potential energy conservation standards levels. See section IV.G of the direct final rule

published elsewhere in this **Federal Register**.

4. The assumption that installation, maintenance, and repair costs do not vary for MREFs at higher efficiency levels. See section IV.F of the direct final rule published elsewhere in this **Federal Register**.

5. The manufacturer conversion costs (both product and capital) used in DOE’s analysis. See section V.B.2.d of the direct final rule published elsewhere in this **Federal Register**.

6. The cumulative regulatory burden to MREF manufacturers associated with the proposed standards and on the approach DOE used in evaluating cumulative regulatory burden, including the timeframes and regulatory dates evaluated. See section V.B.2.e of the direct final rule published elsewhere in this **Federal Register**.

*Submitting comments via [www.regulations.gov](http://www.regulations.gov).* The [www.regulations.gov](http://www.regulations.gov) Web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact

you for clarification, DOE may not be able to consider your comment.

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

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (faxes) will be accepted.

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

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

*Confidential Business Information.* Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery/courier two well-marked copies: One copy of the document

marked "confidential" including all the information believed to be confidential, and one copy of the document marked "non-confidential" with the information believed to be confidential deleted.

Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person that would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

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

**B. Public Meeting**

As stated previously, if DOE withdraws the direct final rule published elsewhere in this **Federal Register** pursuant to 42 U.S.C. 6295(p)(4)(C), DOE will hold a public meeting to allow for additional comment on this proposed rule. DOE will publish notice of any meeting in the **Federal Register**.

**IV. Procedural Issues and Regulatory Review**

The regulatory reviews conducted for this proposed rule are identical to those conducted for the direct final rule published elsewhere in this **Federal Register**. Please see the direct final rule for further details.

**V. Approval of the Office of the Secretary**

The Secretary of Energy has approved publication of this proposed rule.

**List of Subjects in 10 CFR Part 430**

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Reporting and recordkeeping requirements, and Small businesses.

Issued in Washington, DC, on October 4, 2016.

**David J. Friedman,**

*Acting Assistant Secretary, Energy Efficiency and Renewable Energy.*

For the reasons set forth in the preamble, DOE proposes to amend part 430 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

**PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS**

■ 1. The authority citation for part 430 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Amend § 430.32 by adding paragraph (aa) to read as follows:

**§ 430.32 Energy and water conservation standards and their compliance dates.**

\* \* \* \* \*

(aa) *Miscellaneous refrigeration products.* The energy standards as determined by the equations of the following table(s) shall be rounded off to the nearest kWh per year. If the equation calculation is halfway between the nearest two kWh per year values, the standard shall be rounded up to the higher of these values.

(1) Coolers manufactured starting on [date three years after date of publication of the direct final rule in the federal register] shall have Annual Energy Use (AEU) no more than:

Product class	AEU (kWh/yr)
1. Built-in compact .....	7.88AV + 155.8
2. Built-in.	
3. Freestanding compact.	
4. Freestanding.	

AV = Total adjusted volume, expressed in ft<sup>3</sup>, as calculated according to appendix A of subpart B of this part.

(2) Combination cooler refrigeration products manufactured starting on [date three years after date of publication of the direct final rule in the federal register] shall have Annual Energy Use (AEU) no more than:



Product class	AEU (kWh/yr)
C-3A. Cooler with all-refrigerator—automatic defrost .....	4.57AV + 130.4
C-3A-BI. Built-in cooler with all-refrigerator—automatic defrost .....	5.19AV + 147.8
C-9. Cooler with upright freezers with automatic defrost without an automatic icemaker .....	5.58AV + 147.7
C-9-BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker .....	6.38AV + 168.8
C-9I. Cooler with upright freezer with automatic defrost with an automatic icemaker .....	5.58AV + 231.7
C-9I-BI. Built-in cooler with upright freezer with automatic defrost with an automatic icemaker .....	6.38AV + 252.8
C-13A. Compact cooler with all-refrigerator—automatic defrost .....	5.93AV + 193.7
C-13A-BI. Built-in compact cooler with all-refrigerator—automatic defrost .....	6.52AV + 213.1

AV = Total adjusted volume, expressed in ft<sup>3</sup>, as calculated according to appendix A of subpart B of this part.

[FR Doc. 2016-24758 Filed 10-27-16; 8:45 am]

BILLING CODE 6450-01-P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

**21 CFR Parts 514 and 556**

[Docket No. FDA-2012-N-1067]

RIN 0910-AG17

**New Animal Drugs; Updating Tolerances for Residues of New Animal Drugs in Food**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Proposed rule; supplemental notice of proposed rulemaking.

**SUMMARY:** The Food and Drug Administration (FDA or we) is proposing to amend our 2012 document entitled “New Animal Drugs; Updating Tolerances for Residues of New Animal Drugs in Food.” The document proposed to revise the animal drug regulations regarding tolerances for residues of approved and conditionally approved new animal drugs in food by standardizing, simplifying, and clarifying the determination standards and codification style. We also proposed to add definitions for key terms. We are taking this action to more clearly explain our current thinking about certain provisions of the 2012 document based on comments from stakeholders, and to more accurately reflect the rationale FDA relied on in the past to approve certain new animal drugs without a tolerance. We are reopening the comment period only with respect to the specific issues identified in this supplemental proposed rule.

**DATES:** Submit either electronic or written comments on this proposed rule by December 27, 2016.

**ADDRESSES:** You may submit comments as follows:

*Electronic Submissions*

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <http://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <http://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

*Written/Paper Submission*

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

*Instructions:* All submissions received must include the Docket No. FDA-2012-N-1067 for this proposed rulemaking. Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <http://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <http://www.regulations.gov>. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to <http://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Dong Yan, Center for Veterinary Medicine (HFV-151), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240-402-0825, [dong.yan@fda.hhs.gov](mailto:dong.yan@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:**

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**Executive Summary**

*Purpose and Coverage of the Supplemental Notice of Proposed Rulemaking*

We previously proposed to revise the animal drug regulations regarding tolerances for residues of approved and

conditionally approved new animal drugs in food. In addition to proposing to standardize, simplify, and clarify the standards of determination and codification style for tolerances, we proposed a new definition section. In this document, we are proposing to revise or remove some of the previously proposed definitions, taking into account comments we received that have led us to clarify our current thinking, and to more accurately reflect the rationale FDA relied on in the past to approve certain new animal drugs without a tolerance.

*Summary of the Major Provisions of the Supplemental Notice of Proposed Rulemaking*

The previously proposed rule (2012 proposed rule) did not adequately explain our current view that methods other than the “regulatory method” derived from the method submitted by a sponsor as part of the new animal drug application can be used to determine the quantity of residue in edible tissues for surveillance and enforcement purposes. Therefore, we are removing the proposed definition for “regulatory method” and are reserving the term for use with carcinogenic compounds. We are also removing the use of this term

from proposed § 556.5(d) (21 CFR 556.5(d)). We are proposing to revise portions of the 2012 proposed rule to better align the proposed rule with our current thinking and practice that an analytical method other than the practicable method(s) submitted by the sponsor as part of the new animal drug application can be used for surveillance and enforcement purposes for non-carcinogenic compounds, as long as the performance criteria of that method are comparable to those of the practicable method. However, as described in section II.C, we are not proposing similar changes to the regulations concerning carcinogenic compounds because our current interpretation of the relevant provisions in the Federal Food, Drug, and Cosmetic Act (the FD&C Act) is that, unlike for non-carcinogenic compounds, the regulatory method prescribed in the approval of the new animal drug must be used for surveillance and enforcement purposes for carcinogenic compounds.

We are also revising the proposed definitions for “marker residue”, “tolerance”, “not required”, and “zero”. We are removing the definition for “acceptable single-dose intake” and adding a definition for “acute reference dose”.

**TABLE OF ABBREVIATIONS AND ACRONYMS**

Abbreviation/acronym	What it means
ARfD .....	Acute reference dose.
ASDI .....	Acceptable single-dose intake.
CFR .....	Code of Federal Regulations.
CVM .....	Center for Veterinary Medicine.
FDA .....	U.S. Food and Drug Administration.
FD&C Act .....	Federal Food, Drug, and Cosmetic Act.
JECFA .....	World Health Organization/Food and Agriculture Organization of the United Nations Joint Expert Committee on Food Additives.
VICH .....	International Cooperation on Harmonisation of Technical Requirements for Registration of Veterinary Medicinal Products.

**I. Background**

*A. Introduction*

In the **Federal Register** of December 5, 2012 (77 FR 72254), we issued a document to revise part 556 (21 CFR part 556) by standardizing and simplifying the codification style, revising the general considerations section, adding a scope section, and adding a definition section to define key terms used in the part. The definition section was proposed to include the terms used by FDA in the determination of tolerances. Some of the terms had been used previously in part 556, but never defined, and some terminology that had been used was outdated or resulted in confusion to users of the

part. We proposed a general considerations section (proposed § 556.5) to provide additional information and clarification for the tolerances listed in proposed subpart B. We are issuing this supplemental notice of proposed rulemaking to revise the proposed changes to part 556 to align with our current thinking.

*B. Comments to the 2012 Proposed Rule for Updating Tolerances for Residues of New Animal Drugs in Food*

We received several stakeholder comments to the proposed rule including a comment that requests clarification on the proposed definition for “regulatory method” and on the use of the term in proposed § 556.5(d),

which stated that FDA requires that a drug sponsor develop a regulatory method to measure drug residues in edible tissues of approved target species. This comment notes that a regulatory method has historically been used to refer to the “required determinative and confirmatory procedures for regulatory surveillance of residue concentrations in meat products entering the food supply for comparison to the tolerance post-commercialization of the product.” The comment also states the context of the proposal appears to be the method(s) used to collect data to support the setting of the tolerances preapproval. The comment also asks if the proposal implies that tolerances may be established using

analytical procedures other than the determinative procedure. In addition, the comment states it should be clarified if regulatory method is referring to method(s) used preapproval for setting the tolerance versus a finite method(s) used for determining post-commercialization residue to compare to the tolerance.

We realize that the term “regulatory method” proposed in § 556.3 and used in proposed § 556.5(d) has caused some confusion. As a result of the comments, we are taking this opportunity to better explain our current thinking about analytical methods used to determine residue levels in tissues for new animal drugs intended for use in food-producing animals.

## II. Proposed Revisions to Subpart A—General Provisions

### A. Analytical Method

An analytical method other than the practicable method can be used for surveillance and enforcement purposes for non-carcinogenic compounds, as long as the performance criteria (*e.g.*, sensitivity, specificity, accuracy, and precision) of that method are comparable to those of the practicable method submitted by the sponsor as part of the new animal drug application. Such an analytical method would need to have the same capability as the practicable method to determine the quantity of the drug residues so that the tolerance, withdrawal period, or other use restrictions continue to ensure that the use of the drug will be safe. However, as described in section II.C, for carcinogenic compounds, the regulatory method prescribed in the approval of the new animal drug must be used for surveillance and enforcement purposes for carcinogenic compounds (see 21 CFR part 500, subpart E).

FDA establishes tolerances using the practicable method submitted by a sponsor as part of the new animal drug application as required by section 512(b)(1)(G) of the FD&C Act (21 U.S.C. 360b(b)(1)(G)). The practicable method has to meet certain performance criteria, including evaluation of accuracy, precision, and sensitivity. We use the practicable method submitted by the sponsor as part of the new animal drug application to determine the quantity of the drug residues that can safely remain in edible tissues (*i.e.*, the tolerance), the withdrawal period, and any other use restrictions necessary to ensure that the proposed use of the drug will be safe, and make these use restrictions part of the conditions of approval. These conditions of use are designed to ensure

that the proposed use of the drug will be safe § 514.1(b)(7) (21 CFR 514.1(b)(7)). In the past, the practicable method was often used for determining the quantity of residue in edible tissue when monitoring the food supply. However, as technologies have evolved, many of the older methods have become obsolete. In addition, there is an increased reliance on multiresidue methods in the monitoring of the food supply (*i.e.*, methods that analyze for a number of different drug residues at the same time). As a result, we are clarifying that an analytical method other than the practicable method can be used for surveillance and enforcement purposes for non-carcinogenic compounds, provided it meets the same performance criteria as the practicable method to determine the quantity of the relevant drug residues. Therefore, we are proposing to revise some of the definitions in proposed § 556.3 of the 2012 proposed rule as well as revise some of the language under “General Considerations” in proposed § 556.5, to more accurately reflect our current thinking.

### B. Proposed Revisions to Definitions (Proposed § 556.3)

In the 2012 proposed rule, we included a section of definitions (proposed § 556.3). We propose to revise four of the definitions, remove two definitions, and add a new definition in proposed § 556.3.

In the definition of “marker residue”, we propose to delete “selected for assay by the regulatory method” because we are reserving the term “regulatory method” for use with carcinogenic compounds (see part 500, subpart E). Also, we propose to delete the explanatory text that follows the first sentence of the definition because an explanation of how the tolerance is used is not needed in this definition. In addition, we are removing the term “target tissue” in the definition and replacing it with “an edible tissue”.

In the definition of “not required”, we propose to more accurately reflect the rationale FDA relied on in the past to approve certain new animal drugs without a tolerance. Currently, our general practice is to establish a tolerance for all new animal drugs we approve.

In the definition of “tolerance”, we propose to delete the explanatory text that follows the first sentence of the definition because an explanation of how the tolerance is used is not needed in this definition.

In the definition of “zero”, we propose to delete “when using a method of detection prescribed or approved by

FDA” because, as discussed previously, an analytical method other than the practicable method can be used for surveillance and enforcement purposes for non-carcinogenic compounds. The additional proposed revisions to this definition are intended to clarify the meaning of the term “zero” as used in part 556 so that “zero” means any residues detected in the tissue renders it unsafe.

We propose to remove the definition of “acceptable single-dose intake (ASDI)”. See discussion for “acute reference dose (ARfD)” further in this section for the explanation.

We propose to remove the definition of “regulatory method” because we are reserving the term “regulatory method” for use with carcinogenic compounds, consistent with our current interpretation of the FD&C Act (see part 500, subpart E).

We propose to add the definition of “acute reference dose (ARfD)” to mean “an estimate of the amount of residues expressed on a body weight basis that can be ingested in a period of 24 hours or less without adverse effects or harm to the health of the human consumer.” ARfD would be used in place of ASDI wherever this term is currently used in the tolerances listed in subpart B of part 556.

In the 2012 proposed rule, we explained that sometimes the concept of an ASDI was used to calculate tolerances. We proposed to define the ASDI as “the amount of total residue that may safely be consumed in a single meal. The ASDI may be used to derive the tolerance for residue of a drug at the injection site where the drug is administered according to the label.” The definition of the ASDI was based on the U.S. Environmental Protection Agency definition of ARfD and chosen, in part, to provide additional clarity for the veterinary drug health based guidance value. Since that time, the use of the term ARfD has been more broadly applied by scientific and regulatory authorities, as further discussed in this section.

The United States is an active member of the Codex Alimentarius and the Codex Committee for Residues of Veterinary Drugs in Food, which rely on the World Health Organization/Food and Agriculture Organization of the United Nations Joint Expert Committee on Food Additives (JECFA) for scientific advice. The JECFA uses the guidance Environmental Health Criteria (EHC) 240, Principles and Methods for the Risk Assessment of Chemicals in Food in its evaluations (Ref. 1). This guidance defines and discusses the term ARfD. More importantly for FDA, the

International Cooperation on Harmonisation of Technical Requirements for Registration of Veterinary Medicinal Products (VICH) has also developed guidelines that discuss the ARfD. The United States is a member of VICH and adopts finalized VICH guidelines for technical requirements for new animal drug approvals in the United States. On June 1, 2015 (80 FR 31041), we announced a draft guidance (Guidance for Industry #232 (VICH GL54)) entitled “Studies to Evaluate the Safety of Residues of Veterinary Drugs in Human Food: General Approach to Establish an Acute Reference Dose (ARfD)”, in which the term “acute reference dose (ARfD)” is used to describe the same concept as the 2012 proposed definition of ASDI (Ref. 2). There are no fundamental differences between the meaning of ASDI and ARfD.

We consider it appropriate to propose using the VICH definition of ARfD to replace the 2012 proposed definition of ASDI. The ARfD may be used in the same manner as the ASDI, which is to derive the tolerance for residues of a drug at an injection site where the drug is administered according to the label, or to derive the tolerance for residues of a drug in other edible tissues as a result of concern for the acute toxicity of the residues of the veterinary drug.

#### C. Proposed Revisions to General Considerations (Proposed § 556.5)

We propose to revise proposed § 556.5(d) to align with our current thinking. In addition, we propose to remove the term “regulatory method” from this provision because we are reserving this term for use with carcinogenic compounds (part 500, subpart E).

Although the proposed revisions would clarify that an analytical method other than the practicable method may be used for surveillance and enforcement purposes for residue levels of non-carcinogenic animal drugs, with regard to approved carcinogenic compounds, our current interpretation of the relevant provisions of the FD&C Act is that it requires that a regulatory method be prescribed for such a compound and used for surveillance and enforcement purposes. Under the Delaney Clause, section 512(d)(1)(I) of the FD&C Act, FDA cannot approve an application for a new animal drug if it is found to induce cancer when ingested by humans or animals. An exception to this provision, referred to as the DES (diethylstilbestrol) Proviso, allows for the approval of a carcinogenic compound if FDA finds that, under the approved conditions of use, the drug

will not adversely affect treated animals and no residue of the drug will be found (*by methods of examination prescribed or approved by the Secretary by regulations*) (emphasis added) in any food for human consumption derived from the treated animals (see section 512(d)(1)(I)(i) and (ii) of the FD&C Act). FDA has issued regulations defining the operational definition of no residue and regulatory method for purposes of measuring carcinogenic compounds (21 CFR 500.82 and 500.88).

#### III. Proposed Conforming Change to 21 CFR Part 514

We are proposing a conforming change to the language in the introductory text of § 514.1(b)(7) by removing the term “regulatory” in the last sentence to reflect the fact that we are reserving this term for use with carcinogenic compounds. (See discussion in section II.C.)

#### IV. Legal Authority

Our authority for issuing this proposed rule is provided by sections 512(b)(1)(G) and (H), 512(d)(1)(F), 512(d)(2), 512(i), 571(a)(2)(A), and 571(b)(1) of the FD&C Act (21 U.S.C. 360b(b)(1)(G) and (H), 360b(d)(1)(F), 360(d)(2), 360b(i), 360ccc(a)(2)(A), and 360ccc(b)(1)). These provisions relate to the information new animal drug and conditional approval applicants provide with respect to proposed tolerances, withdrawal periods, and practicable methods, and the process by which FDA establishes and publishes regulations setting tolerances for residues of approved and conditionally approved new animal drugs. In addition, section 701(a) of the FD&C Act (21 U.S.C. 371(a)) gives FDA general rulemaking authority to issue regulations for the efficient enforcement of the FD&C Act.

#### V. Economic Analysis of Impacts

We have examined the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). We believe that this proposed rule is not a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options

that would minimize any significant impact of a rule on small entities. Because this proposed rule would not impose compliance costs on the current or future sponsors of any approved and conditionally approved new animal drugs, we proposed to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing “any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold after adjustment for inflation is \$146 million, using the most current (2015) Implicit Price Deflator for the Gross Domestic Product. This proposed rule would not result in an expenditure in any year that meets or exceeds this amount.

#### VI. Paperwork Reduction Act of 1995

We tentatively conclude that this proposed rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

#### VII. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.30(i) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

#### VIII. Federalism

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. We have determined that the proposed rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, we conclude that the proposed rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

#### IX. References

The following references are on display in the Division of Dockets

Management (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at <http://www.regulations.gov>. FDA has verified the Web site addresses, as of the date this document publishes in the **Federal Register**, but Web sites are subject to change over time.

1. International Programme on Chemical Safety, "Environmental Health Criteria 240, Principals and Methods for the Risk Assessment of Chemicals in Food," 2009. (<http://www.who.int/foodsafety/publications/chemical-food/en/>). Accessed on February 11, 2016.
2. FDA, "Draft Guidance for Industry #232: Studies to Evaluate the Safety of Residues of Veterinary Drugs in Human Food: General Approach to Establish an Acute Reference Dose (ARfD), VICH GL54," (<http://www.fda.gov/downloads/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/UCM448430.pdf>), June 2015. Accessed on February 11, 2016.

#### List of Subjects

##### 21 CFR Part 514

Administrative practice and procedure, Animal drugs, Confidential business information, Reporting and recordkeeping requirements.

##### 21 CFR Part 556

Animal drugs, Foods.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR chapter I, subchapter E, be amended as follows:

#### PART 514—NEW ANIMAL DRUG APPLICATIONS

- 1. The authority citation for part 514 continues to read as follows:

**Authority:** 21 U.S.C. 321, 331, 351, 352, 354, 356a, 360b, 360ccc, 371, 379e, 381.

##### § 514.1 [Amended]

- 2. In § 514.1(b)(7) introductory text, remove the word "regulatory" from the last sentence.

#### PART 556—TOLERANCES FOR RESIDUES OF NEW ANIMAL DRUGS IN FOOD

- 3. The authority citation for part 556, as proposed to be revised on December 5, 2012 (77 FR 72254), continues to read as follows:

**Authority:** 21 U.S.C. 342, 360b, 360ccc, 371.

- 4. Amend § 556.3, as proposed to be added on December 5, 2012 (77 FR 72254), as follows:

- a. Remove the definition of "Acceptable single-dose intake";
- b. Add, in alphabetical order, a definition for "Acute reference dose";
- c. Revise the definitions for "Marker residue" and "Not required";
- d. Remove the definition of "Regulatory method"; and
- e. Revise the definitions for "Tolerance" and "Zero".

The revisions and additions read as follows:

##### § 556.3 Definitions.

\* \* \* \* \*

*Acute reference dose (ARfD)* means an estimate of the amount of residues expressed on a body weight basis that can be ingested in a period of 24 hours or less without adverse effects or harm to the health of the human consumer.

\* \* \* \* \*

*Marker residue* means the residue whose concentration is in a known relationship to the concentration of total residue in an edible tissue.

\* \* \* \* \*

*Not required*, in reference to tolerances in this part, means that at the time of approval:

(1) No withdrawal period was necessary for residues of the drug to deplete to or below the concentrations considered to be safe, or an adequate withdrawal period was inherent in the proposed drug use, and there was no concern about residues resulting from misuse or overdosing; or

(2) No withdrawal period was necessary because the drug was poorly absorbed or metabolized rapidly so as to make selection of an analyte impractical or impossible.

\* \* \* \* \*

*Tolerance* means the maximum concentration of a marker residue, or other residue indicated for monitoring, that can legally remain in a specific edible tissue of a treated animal.

\* \* \* \* \*

*Zero*, in reference to tolerances in this part, means any residues detected in the tissue renders it unsafe.

- 5. Amend § 556.5, as proposed to be added on December 5, 2012 (77 FR 72254), by revising paragraph (d) to read as follows:

##### § 556.5 General considerations.

\* \* \* \* \*

(d) FDA requires that a drug sponsor submit a practicable method as part of their new animal drug application. FDA uses the practicable method to determine the quantity of the drug residues that can safely remain in edible tissues (*i.e.*, the tolerance), the

withdrawal period, and any other use restrictions necessary to ensure that the proposed use of the drug will be safe.

Dated: October 21, 2016.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2016-26043 Filed 10-27-16; 8:45 am]

**BILLING CODE 4164-01-P**

#### DEPARTMENT OF STATE

##### 22 CFR Part 96

[Public Notice: 9772]

RIN 1400-AD91

#### Intercountry Adoptions

**AGENCY:** Department of State.

**ACTION:** Proposed rule; extension of comment period.

**SUMMARY:** The Department of State (the Department) is extending the period of time by 15 days for the public to submit comments on the Proposed Intercountry Adoption rule, in order to give the public more time to respond.

**DATES:** The new comment closing date for the September 8, 2016, NPRM (FR Doc No. 2016-20968, 81 FR 62322), is November 22, 2016.

#### ADDRESSES:

- *Internet:* You may view this Proposed rule and submit your comments by visiting the [Regulations.gov](http://www.regulations.gov) Web site at [www.regulations.gov](http://www.regulations.gov), and searching for docket number DOS-2016-0056.

- *Mail or Delivery:* You may send your paper, disk, or CD-ROM submissions to the following address: Comments on Proposed rule 22 CFR part 96, Office of Legal Affairs, Overseas Citizens Services, U.S. Department of State, CA/OCS/L, SA-17, Floor 10, Washington, DC 20522-1710.

- All comments should include the commenter's name and the organization the commenter represents (if applicable). If the Department is unable to read your comment for any reason, the Department might not be able to consider your comment. Please be advised that all comments will be considered public comments and might be viewed by other commenters; therefore, do not include any information you would not wish to be made public. After the conclusion of the comment period, the Secretary will publish a Final rule as expeditiously as possible in which it will address relevant public comments.

#### FOR FURTHER INFORMATION CONTACT:

*Technical Information:* Trish Maskew, (202) 485-6024.

*Legal Information:* Carine L. Rosalia, (202) 485-6092.

**SUPPLEMENTARY INFORMATION:** On September 8, 2016, the Department published a notice of Proposed rulemaking (NPRM), to amend requirements for accreditation of agencies and approval of persons to provide adoption services in intercountry adoption cases. (See 81 FR 62322.) The NPRM provided a comment period of 60 days, which expires on November 7, 2016.

In response to a request for extension, the Department extends the comment period until November 22, 2016. This will provide 75 days for the public to submit comments on this rule. Further information, including the text of the Proposed rule, can be found in the NPRM.

Dated: October 19, 2016.

**Theodore R. Coley,**

*Acting Deputy Assistant Secretary, Overseas Citizen Services, Bureau of Consular Affairs, U.S. Department of State.*

[FR Doc. 2016-26094 Filed 10-27-16; 8:45 am]

**BILLING CODE 4710-06-P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### 24 CFR Parts 50, 55, 58, and 200

[Docket No. FR-5717-P-01]

RIN 2501-AD62

#### Floodplain Management and Protection of Wetlands; Minimum Property Standards for Flood Hazard Exposure; Building to the Federal Flood Risk Management Standard

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would revise HUD's regulations governing floodplain management to require, as part of the decision making process established to ensure compliance with Executive orders on Floodplain Management and Federal Flood Risk Management, that a HUD assisted or financed (including mortgage insurance) project involving new construction or substantial improvement that is situated in an area subject to floods be elevated or floodproofed between 2 and 3 feet above the base flood elevation as determined by best available information.

The proposed rule would also revise HUD's Minimum Property Standards for one-to-four unit housing under HUD

mortgage insurance and low-rent public housing programs. Building to the proposed standards will, consistent with the Executive orders, increase resiliency to flooding, reduce the risk of flood loss, minimize the impact of floods on human safety, health, and welfare, and promote sound, sustainable, long-term planning informed by a more accurate evaluation of flood risk that takes into account possible sea level rise and increased development associated with population growth.

This document also proposes to revise a categorical exclusion available when HUD performs the environmental review under the National Environmental Policy Act (NEPA) and related Federal laws by making it consistent with changes to a similar categorical exclusion that is available to HUD grantees or other responsible entities when they perform these environmental reviews. This change will make the review standard identical regardless of whether HUD or a grantee is performing the review.

**DATES:** *Comment Due Date:* December 27, 2016.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410-0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted 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.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the [www.regulations.gov](http://www.regulations.gov) Web site can be viewed by other commenters and interested members of the public. Commenters should follow the

instructions provided on that site to submit comments electronically.

**Note:** To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

*No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

*Public Inspection of Public Comments.* All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an appointment to review the public comments must be scheduled in advance by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339. Copies of all comments submitted are available for inspection and downloading at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** Danielle Schopp, Director, Office of Environment and Energy, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW., Room 7250, Washington, DC 20410-8000, telephone number 202-402-4442. For inquiry by phone or email, contact Elizabeth Zepeda, Environmental Review Division, Office of Environment and Energy, Office of Community Planning and Development, at 202-402-3988 (this is not a toll-free number), or email to: [Elizabeth.G.Zepeda@hud.gov](mailto:Elizabeth.G.Zepeda@hud.gov). For questions regarding the Minimum Property Standards, Robert L Frazier, Housing Program Policy Specialist, Office of Housing, Home Valuation Division, 202-708-2121. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800-877-8339.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

In the United States, floods caused 4,586 deaths from 1959 to 2005.<sup>1</sup> With climate change and associated sea-level rise, flooding risks have increased over time, and are anticipated to continue increasing. The National Climate Assessment (May 2014), for example,

<sup>1</sup> "Flood Fatalities in the United States," Sharon T. Ashley and Walker S. Ashley, *Journal of Applied Meteorology and Climatology*. Available at: <http://journals.ametsoc.org/doi/pdf/10.1175/2007JAMC1611.1>.

projects that extreme weather events, such as severe flooding, will persist throughout the 21st century. Severe flooding can cause significant damage to infrastructure, including buildings, roads, ports, industrial facilities, and even coastal military installations. With more than \$260 billion in flood damages across the Nation since 1980, it is necessary to take action to responsibly use Federal funds, and HUD must ensure it does not wastefully make Federal investments in the same structures after repeated flooding events. In addition, the FFRMS will align with the thousands of communities across the country that have strengthened their local floodplain management codes and standards to ensure that buildings and infrastructure are resilient to flood risk. HUD recognizes that the need to make structures resilient also requires a flexible approach to adapt to the needs of the Federal agency, local community, and the circumstances surrounding each project or action.

In response to the threats that increasing flood risks pose to life and taxpayer funded property, on January 30, 2015, the President signed Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input. Significantly, Executive Order 13690 amended Executive Order 11988, Floodplain Management, issued in 1977<sup>2</sup> by, among other things, revising Section 6(c) of Executive Order 11988 to provide new approaches to establish the floodplain. Executive Order 13690 provided, however, that prior to any actions implementing Executive Order 13690, additional input from stakeholders be solicited and considered. Consistent with this direction, the Federal Emergency Management Agency (FEMA), as Chair of the Mitigation Framework Leadership Group (MitFLG<sup>3</sup>), published a notice in

<sup>2</sup> E.O. 13690 was published in the **Federal Register** on February 4, 2015 (80 FR 6425). Throughout this document, references to E.O. 11988 as amended by E.O. 13690 will be referred to as "Executive Order 11988, as amended." References to E.O. 11988 as published in 1977 will simply be referred to as "Executive Order 11988."

<sup>3</sup> The Mitigation Framework Leadership Group (MitFLG) is a senior level group formed in 2013 to coordinate mitigation efforts across the Federal Government and to assess the effectiveness of mitigation capabilities as they are developed and deployed across the Nation. The MitFLG includes relevant local, state, tribal, and Federal

the **Federal Register** seeking comment on the proposed "Revised Guidelines for Implementing Executive Order 11988, Floodplain Management" to provide guidance to agencies on the implementation of Executive Orders 13690 and 11988 (80 FR 6530, February 5, 2015). On March 26, 2015 (80 FR 16018), FEMA on behalf of MitFLG published a document in the **Federal Register** extending the public comment period for 30 days until May 6, 2015. MitFLG held 9 public listening sessions across the country that were attended by over 700 participants from State and local governments and other stakeholder organizations to discuss the Guidelines.<sup>4</sup> MitFLG considered stakeholder input and provided recommendations to the Water Resources Council.<sup>5</sup>

On October 8, 2015, the Water Resources Council issued updated "Guidelines for Implementing Executive Order 11988, Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input" (Guidelines). The Guidelines state that although the Guidelines describe various approaches for determining the higher vertical flood elevation and corresponding horizontal floodplain for federally funded projects, they are not meant to be an elevation standard, but are a resilience standard. Accordingly, roads, parking lots, and other horizontal infrastructure do not require elevation nor do acquisitions of structures that do not require substantial improvements. However, the new

organizations. The balance of non-Federal members ensures appropriate integration of Federal efforts across the whole community." The MitFLG Charter is available at: [http://www.aswm.org/pdf/lib/nffa/mitigation\\_framework\\_leadership\\_group\\_charter.pdf](http://www.aswm.org/pdf/lib/nffa/mitigation_framework_leadership_group_charter.pdf).

<sup>4</sup> A list of stakeholder listening sessions can be found at: [www.fema.gov/federal-flood-risk-management-standard-ffrms](http://www.fema.gov/federal-flood-risk-management-standard-ffrms).

<sup>5</sup> The Water Resources Council (WRC) is tasked to maintain a continuing study and prepare an assessment of the adequacy of supplies of water necessary to meet the water requirements in each water resource region in the United States and the national interest therein. The WRC is a means for the coordination of the water and related land resources policies and programs of the several Federal agencies. The WRC is composed of the Secretary of the Interior, the Secretary of Agriculture, the Secretary of the Army, the Secretary of Commerce, the Secretary of Housing and Urban Development, the Secretary of Transportation, the Administrator of the Environmental Protection Agency, and the Secretary of Energy.

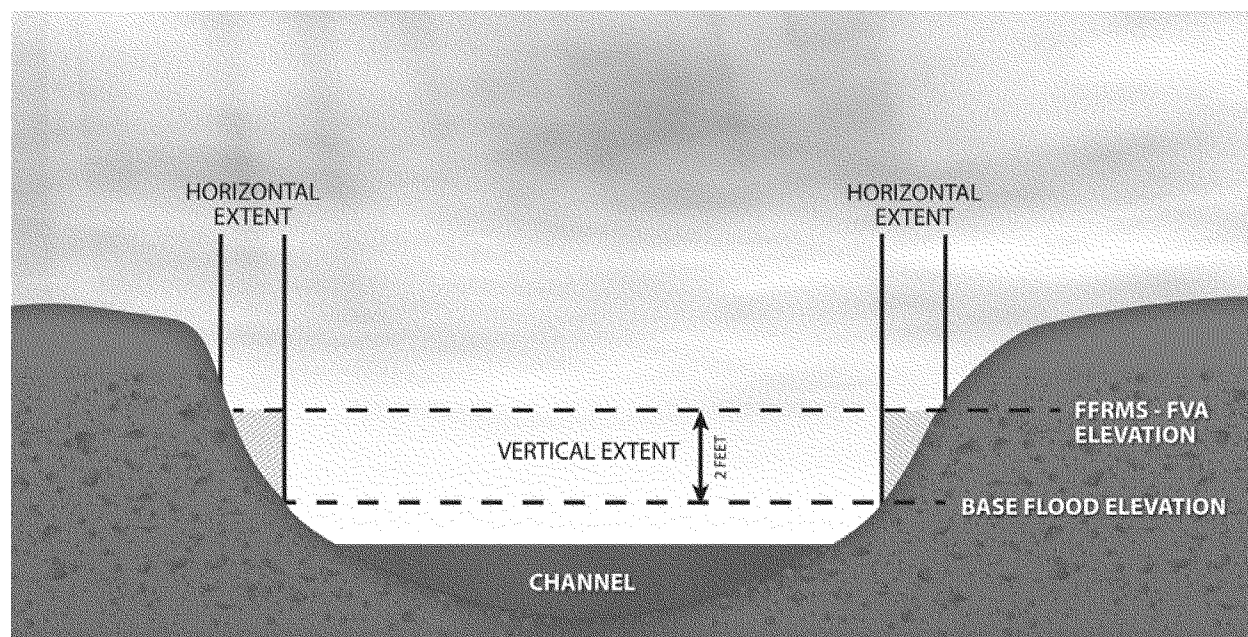
Guidelines require that all future actions where federal funds are used for new construction, substantial improvement or to address substantial damage meet the level of resilience established by the Guidelines. In implementing the Guidelines and establishing the Federal Flood Risk Management Standard (FFRMS), Federal agencies were to select among the following three approaches for establishing the flood elevation and hazard area in siting, design, and construction:

- Climate-Informed Science Approach (CISA): Utilizing best-available, actionable data and methods that integrate current and future changes in flooding based on science,
- Freeboard<sup>6</sup> Value Approach (FVA): Two or three feet of elevation, depending on the criticality of the building, above the 100-year, or 1 percent-annual-chance, flood elevation, or
- 500 Year Flood (0.2 Percent Flood) Approach: 500-year, or 0.2 percent-annual-chance, flood elevation.

The FVA and 0.2 Percent Flood approaches result in higher elevations with correspondingly larger horizontal floodplain areas. CISA will generally have a similar result, except that agencies using CISA may find the resulting elevation to be equal to or lower than the current elevation in some areas due to the nature of the specific climate change processes and physical factors affecting flood risk at the project site. However, as a matter of policy established in the Executive Order 11988 and 13690 Implementing Guidelines, CISA can only be used if the resulting flood elevation is equal to or higher than current base flood elevation. The higher elevations result in a larger horizontal floodplain as illustrated below:

<sup>6</sup> Freeboard is defined by FEMA as "a factor of safety usually expressed in feet above a flood level for purposes of floodplain management. "Freeboard" tends to compensate for the many unknown factors that could contribute to flood heights greater than the height calculated for a selected size flood and floodway conditions, such as wave action, bridge openings, and the hydrological effect of urbanization of the watershed." See 44 CFR 59.1. Freeboard is not required by NFIP standards, but communities are encouraged to adopt at least a one-foot freeboard to account for the one-foot rise built into the concept of designating a floodway and the encroachment requirements where floodways have not been designated. Freeboard may result in lower flood insurance rates due to lower flood risk. Available at: <http://www.fema.gov/freeboard>.





Executive Order 11988, issued May 24, 1977 (published in the **Federal Register** on May 25, 1977 at 42 FR 26951), requires Federal agencies to avoid, to the extent possible, the long and short term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct and indirect support of floodplain development wherever there is a practicable alternative. Floodplains are found both in coastal flood areas, where rising tides and storm surge are often responsible for flooding, and in riverine flood areas where moving water bodies may overrun their banks due to heavy rains or snow melt. Because flood risk can change over time, FEMA continually revises floodplain maps to incorporate new information and reflect current understanding of flood risk.

Prior to Executive Order 13690, a floodplain for Executive Order 11988 purposes referred to the lowland and relatively flat areas adjoining inland and coastal waters including flood-prone areas of offshore islands, including at a minimum, that area subject to a one percent or greater chance of flooding in any given year (often referred to as the "100-year" flood or "base flood"). Executive Order 13690 amended Executive Order 11988, to require agencies to update the FFRMS and the original Executive Order 11988 floodplain using one (or a combination) of the three approaches listed above, which are incorporated in the FFRMS.

Consistent with Executive Order 11988, when no practicable alternative exists to development in flood-prone areas, HUD requires the design or modification of the proposed action to

minimize potential adverse impact to and from flooding. HUD has implemented Executive Order 11988 and its 8-step review process through regulations at 24 CFR part 55. HUD requires the 8-step review process for activities occurring in the floodplain such as new construction of infrastructure or substantial improvement of buildings and hospitals. HUD requires that all HUD assisted or financed construction and improvements (including mortgage insurance actions) undergo the 8-step review process unless they are subject to an exception or categorical exclusion under 24 CFR 50.19, 24 CFR 55.12, 24 CFR 58.34, or 24 CFR 58.35(b). For example, the 8-step review process in § 55.20 does not apply to non-critical<sup>7</sup> mortgage insurance actions and other financial assistance for the purchasing, mortgaging or refinancing of existing one-to-four family properties in communities that are in the Regular Program of the National Flood Insurance Program (NFIP) and in good standing, where the property is not located in a floodway or coastal high hazard area, or to financial assistance for minor repairs or improvements on one-to-four family properties. While the 8-step review process may not apply to these activities, HUD's current Minimum Property Standards at 24 CFR 200.926d require that single-family housing newly constructed under HUD mortgage insurance and specific low-rent public

<sup>7</sup> Non-critical actions are any actions that are not critical actions as defined at 24 CFR 55.2(b)(3)(i).

housing programs have its lowest floor at or above the base flood elevation.

## II. This Proposed Rule

### A. Short Summary

The proposed revision to HUD's floodplain regulations uses the framework of Executive Order 11988 which HUD has implemented for almost 40 years and does not change which actions require elevation and floodproofing of structures. This proposed rule would require that non-critical actions be elevated 2 feet above the base flood elevation. In addition, the rule would require that critical actions be elevated above the greater of the 500-year floodplain or 3 feet above the base flood elevation. For structures subject to HUD's floodplain regulation, this proposed rule also would enlarge the horizontal area of interest commensurate with the vertical increase, but the rule does not change the scope of actions to which the floodplain review process or elevation requirements in the floodplains regulations apply. The proposed rule would also revise HUD's Minimum Property Standards for one-to-four-unit housing under HUD mortgage insurance and low-rent public housing programs to require that the lowest floor in both newly constructed and substantially improved structures located within the 100-year floodplain be built at least 2 feet above the base flood elevation as determined by best available information, but does not enlarge the horizontal area of interest.



### B. Detailed Discussion

As communities continue to recover from the devastating effects of Hurricane Sandy and other flood disasters, HUD has determined that their lessons cannot be ignored and point to the need for mitigation and resilience standards that ensure that structures located in flood-prone areas are built or rebuilt stronger, safer, and less vulnerable to future flooding events. As a result, consistent with the FVA described above for HUD assisted or financed actions, this proposed rule would require that structures involving new construction and substantial improvements and subject to 24 CFR part 55 be built to FFRMS and elevated at least 2 feet above the base flood elevation using best available information.<sup>8</sup> For structures that meet the definition of critical actions as described in § 55.2(b)(3)(i), this proposed rule would require that structures in the FFRMS floodplain be elevated to the greater of the 500-year floodplain or 3 feet above the base flood elevation. For new or substantially improved non-residential structures in the FFRMS floodplain that are not critical actions, HUD is proposing that the structure either be elevated to the same level as residential structures, or, alternatively, be designed and constructed such that the structure is floodproofed to at least 2 feet above the base flood elevation.

This proposed rule would also apply a similar new elevation standard to one-to-four family residential structures, located in the 1 percent-annual-chance floodplain, that involve new construction or substantial improvement with mortgages insured by the Federal Housing Administration. This proposed rule would require elevation of these structures at least 2 feet above base flood elevation using the best available information. In order to meet the goal of improving the resilience of such properties while also aligning to the manner in which such programs already operate, the proposed rule excludes the horizontal extent of the FVA described above for such properties, as explained further in later in this preamble.

Elevation standards for manufactured housing receiving mortgage insurance are not covered in this rule change, but HUD expects to address this issue in future rulemaking. However, 24 CFR part 55, subject to exceptions and

exclusions, will continue to apply to manufactured housing that receives assistance that is not in the form of mortgage insurance. This rule does not change the scope of activities that require compliance with the 8-step process, but rather it changes the vertical and horizontal extent of the floodplain for the purposes of 24 CFR part 55.

There are two primary purposes for this rulemaking. First, HUD's experience in the wake of Hurricane Sandy and other flood disasters is that unless structures in flood-prone areas are properly designed, constructed, and elevated, they may not withstand future severe flooding events. As recognized by MitFLG and required by the FFRMS and Executive Order 13690, requiring structures to be elevated an additional elevation above the base flood elevation will increase resiliency and reduce property damage, economic loss, and loss of life, and can also benefit homeowners by reducing flood insurance rates. These higher elevations provide an extra buffer of 2 to 3 feet above the base flood elevation based on the best available information to improve the long term resilience of communities. Second, the higher elevation standards help account for increased flood risk associated with projected sea level rise, which is not considered in current FEMA maps and flood insurance costs. As stated in "Global Sea Level Rise Scenarios for the United States National Climate Assessment" U.S. Department of Commerce, National Oceanic and Atmospheric Administration, December 2012,<sup>9</sup> federal experts have a very high confidence (greater than a 9 in 10 chance) that global mean sea level will rise at least 0.2 meters (8 inches) and no more than 2.0 meters (6.6 feet) by the year 2100. The higher elevation standard will address the lower end of this projection, while also allowing for greater impacts to be addressed as well.

This proposed rule uses the framework of Executive Order 11988 which HUD has implemented for nearly forty years. The proposed rule in 24 CFR part 55 does not change the requirements and guidance specifying when elevation and floodproofing of structures is required. For instance, HUD currently requires that a single family property involving new construction or substantial improvement financed with a HUD grant and located in the 1 percent-

annual-chance floodplain in the effective Flood Insurance Rate Map (FIRM) be elevated to the effective FIRM base flood elevation. This proposed rule would add two feet of additional elevation to the base flood elevation as a resilience standard. Similarly, the proposed rule would not change the requirements or guidance governing rowhomes or structures with basements except to add two feet of additional elevation. As in the past, projects involving substantial improvement to rowhomes would have several options: (1) Elevate the effected home or homes, either by raising the floor within the home or elevating the full block; (2) if the homes are possibly historic, take formal steps to have the home(s) listed on the National Register of Historical Places or on a State Inventory of Historic Places, as structures with historic status are not required to elevate; or (3) alter the design plans so that substantial improvement is not being performed, such that elevation is not required. Likewise, some structures with basements would continue to be affected under the proposed rule. In some cases, raising the floor or filling in basements altogether may be necessary. In non-residential structures, floodproofing could be an option to preserve basements. HUD does not anticipate significant impacts on basements from the proposed rule; since HUD began collecting data on single-family properties basements in 2014, no single-family property has been affected by HUD's current flood elevation requirements.

HUD chose the FVA over the CISA and the 0.2 Percent Flood approaches for a variety of reasons. First, the FVA can be applied consistently to any area participating in the NFIP. The FVA can be calculated using existing flood maps. This is not true for the CISA standard unless HUD were to establish criteria for every community regarding the application of particular climate and greenhouse gas scenarios and associated impacts (*e.g.*, changes in precipitation patterns or relative sea-level rise rates). Rather than requiring this level of review and analysis, HUD chose the more direct FVA. Second, the two alternative approaches to FVA require expertise that may not be available to all communities. The 0.2 Percent Flood is not mapped in all communities, reflects in most coastal areas the stillwater (without storm surge) component of flooding and this is only appropriate for determining the horizontal floodplain extent. Local wave effects associated with the 0.2 percent stillwater flood elevation would need to be determined

<sup>8</sup> Best available information, may be the latest FEMA issued data or guidance, including advisory data (such as Advisory Base Flood Elevations (ABFE)), preliminary Flood Insurance Rate Maps (FIRMs), final FIRMs, or other Federal, State or local information.

<sup>9</sup> Available at <http://cpo.noaa.gov/Home/AllNews/TabId/315/ArtMid/668/ArticleID/80/Global-Sea-Level-Rise-Scenarios-for-the-United-States-National-Climate-Assessment.aspx>.

for the data to be used in establishing first floor or floodproofing elevation or any other engineering application. The 0.2 Percent Flood also requires a significant degree of expertise to map over an area or for an individual site. The same is also true for the CISA standard, which requires not just historical analysis but a greater anticipation of trends and future conditions. Third, HUD anticipates that it will not be cost effective to establish the CISA or the 0.2 Percent Flood for all projects. HUD funds or assists tens of thousands of small projects each year. For example, repaving a road or rehabilitating a single family home may not necessitate the extra amounts of cost required by the CISA and 0.2 Percent Flood approaches. Fourth, as stated earlier, many states and communities already have success applying a higher-elevation approach to floodplains. Due to the familiarity that many communities have with higher elevation standards, the FVA was seen as a very practical approach with documented history of application. For all of these reasons, HUD chose the FVA approach.

Requiring a higher elevation standard will also address increased risk that occurs when flood maps do not reflect the current development footprint. Additional development and impervious surface decrease floodplain capacity and increase flood risk to structures. As more of the floodplain is paved, the floodplain absorbs less water and the area subject to flooding is increased. For this reason and generalized uncertainty in flood modeling processes, two prominent building codes, the International Building Code and International Residential Code<sup>10</sup> both recommend the use of elevation of structures—also

called “freeboard”—to mitigate flood hazards. Freeboard is defined by FEMA to mean a factor of safety usually expressed in feet above base flood elevation for purposes of floodplain management. Freeboard is currently required by 20 States (plus the District of Columbia and Puerto Rico) and 596 localities.<sup>11</sup>

A recent FEMA study also estimated that the size of floodplains and demand for flood insurance coverage will continue to increase.<sup>12</sup> The study estimated that the total number of NFIP insurance policies was projected to increase by approximately 80 percent by 2100. The number of riverine policies may increase by about 100 percent and the number of coastal policies may increase by approximately 60 percent. The increase in the number of policies is due in part to development associated with normal population growth and in part to the effect of climate change on the amount of land in the floodplain within communities.

Requiring additional elevation above the base flood elevation also produces net savings in housing costs over time. HUD’s mission is to create strong, sustainable, inclusive communities and quality affordable homes for all. Flood insurance and rebuilding costs can have drastic adverse effects on the affordability of homes. By elevating additional feet above the base flood elevation, homeowners may benefit from flood insurance premium reductions that will increase long-term affordability. As stated in FEMA’s “Home Builder’s Guide To Coastal Construction, Designing for Flood Levels Above the BFE” Technical Bulletin No. 1.6,<sup>13</sup> constructing or reconstructing structures 2 feet above base flood elevation at a modest cost can result in premium savings of 50 percent in V Zone structures and 48 percent in A Zones. Please see the discussion of other cost reductions and benefits of increasing elevation in the regulatory impact analysis that accompanies this rule.

## 1. Federal Flood Risk Management Standard Floodplain

HUD proposes to implement FFRMS by revising § 55.20, which is HUD’s current 8-step process for evaluating HUD-assisted projects for flood risk and identifying steps to mitigate that risk. The 8-step process is currently triggered whenever a proposed non-critical action falls within the 100-year floodplain, as defined in § 55.2(b)(9), and whenever a critical action falls within the 500-year floodplain, as defined in § 55.2(b)(4). This proposed rule would expand the scope of § 55.20 by applying it to all projects situated at an elevation at or below the FFRMS floodplain.

HUD proposes to define FFRMS floodplain in § 55.2(b)(12) for non-critical actions as land that is less than two feet above the 100-year floodplain. For critical actions, the FFRMS floodplain would be defined to include land that is either within the 500-year floodplain or less than three feet above the 100-year floodplain. Section 55.20(e) of the proposed rule would provide that, in addition to the current mitigation and risk reduction requirements, all actions in the FFRMS floodplain must be elevated or, in certain cases, floodproofed above the FFRMS floodplain. If higher elevations, setbacks, or other floodplain management measures are required by state, tribal, or locally adopted code or standards, HUD would provide that those higher standards would apply.

For non-critical actions that are non-residential structures or multifamily residential structures that have no residential dwelling units below the FFRMS floodplain, HUD is proposing that projects may, as an alternative to being designed and built above the FFRMS floodplain, be designed and constructed such that, below the FFRMS floodplain, the structure is floodproofed. HUD would, except for changing “base flood level” to “FFRMS floodplain,” as defined in § 55.2(b)(12), adopt FEMA’s requirements for floodproofing as provided in FEMA’s regulations at 44 CFR 60.3(c)(3)(ii), which describes “floodproofing” as requiring that structures, “together with attendant utility and sanitary facilities, be designed so that below the base flood level the structure is watertight with walls substantially impermeable to the passage of water and with structural components having the capability of resisting hydrostatic and hydrodynamic loads and effects of buoyancy.” If higher standards are required by the NFIP or state, tribal, or locally adopted codes or standards, or if FEMA revises its NFIP regulation, those higher standards or

<sup>10</sup> The IBC states: G103.1 Permit applications.

The building official shall review all permit applications to determine whether proposed development sites will be reasonably safe from flooding. If a proposed development site is in a flood hazard area, all site development activities (including grading, filling, utility installation and drainage modification), all new construction and substantial improvements (including the placement of prefabricated buildings and manufactured homes) and certain building work exempt from permit under Section 105.2 shall be designed and constructed with methods, practices and materials that minimize flood damage and that are in accordance with this code and ASCE 24.

ASCE 24 then states a few freeboard requirements. See: [http://www.fema.gov/media-library-data/1436288616344-93e90f72a5e4ba75bac2c5bb0c92d251/ASCE24-14\\_Highlights\\_Jan2015\\_revise2.pdf](http://www.fema.gov/media-library-data/1436288616344-93e90f72a5e4ba75bac2c5bb0c92d251/ASCE24-14_Highlights_Jan2015_revise2.pdf). The IRC provides that: Buildings and structures in flood hazard areas designated as Coastal A Zones shall have the lowest floors elevated to or above the base flood elevation plus 1 foot (305 mm), or to the design flood elevation, whichever is higher. R322.2.1 Elevation requirements. [http://publicecodes.cyberregs.com/icod/irc/2012/icod\\_irc\\_2012\\_3\\_sec022.htm](http://publicecodes.cyberregs.com/icod/irc/2012/icod_irc_2012_3_sec022.htm).

<sup>11</sup> Association of State Floodplain Managers, States and Other Communities in FEMA CRS with Building Freeboard Requirements, (2015), available at [http://www.floods.org/ace-files/documentlibrary/FloodRiskMngmtStandard/States\\_with\\_freeboard\\_and\\_CRS\\_Communities\\_with\\_Freeboard\\_in\\_Other\\_states\\_2-27-15.pdf](http://www.floods.org/ace-files/documentlibrary/FloodRiskMngmtStandard/States_with_freeboard_and_CRS_Communities_with_Freeboard_in_Other_states_2-27-15.pdf).

<sup>12</sup> Available at: [http://www.aecom.com/content/wp-content/uploads/2016/06/Climate\\_Change\\_Report\\_AECOM\\_2013-06-11.pdf](http://www.aecom.com/content/wp-content/uploads/2016/06/Climate_Change_Report_AECOM_2013-06-11.pdf)

<sup>13</sup> Available at: [http://www.fema.gov/media-library-data/20130726-1537-20490-8057/fema-1\\_6\\_rev.pdf](http://www.fema.gov/media-library-data/20130726-1537-20490-8057/fema-1_6_rev.pdf)

later regulation would apply; except that notwithstanding any later, less stringent general standard, HUD will continue to require floodproofing to at least the FFRMS floodplain for those projects. In summary, all new construction or substantial rehabilitation of non-residential and certain mixed-use structures within the FFRMS floodplain that are not elevated must be floodproofed consistent with the latest FEMA standards above the level of the FFRMS floodplain. This provision would permit owners of non-residential and certain mixed-use buildings to construct structures in a way that is less expensive than elevation but allows the buildings to withstand flooding, thus appropriately balancing property protection with costs and reflecting the lower risk to human life and safety in non-residential structures or parts of structures.

In the case of multifamily buildings, HUD would provide that the term “lowest floor” must be applied consistent with FEMA’s Elevation Certificate guidance or FEMA’s current guidance that establishes lowest floor. Specifically, HUD would define “lowest floor” to mean the lowest floor of the lowest enclosed area (including basement), except that an unfinished or flood resistant enclosure, usable solely for parking of vehicles, building access or storage in an area other than a basement area is not considered a building’s lowest floor, provided, that such enclosure is not built so as to render the structure in violation of the non-elevation design requirements of 44 CFR 60.3.

The definition of “substantial improvement,” codified at § 55.2(b)(10), would not change but continue to include any repair, reconstruction, modernization or improvement of a structure, the cost of which equals or exceeds 50 percent of the market value of the structure either: (1) Before the improvement or repair is started; or (2) if the structure has been damaged and is being restored, before the damage occurred. The definition of substantial improvement also includes repairs, reconstruction, modernization, or improvements that increase the average peak number of customers or employees likely to be on-site at any one time or the number of dwelling units in residential projects more than 20 percent. “Substantial improvement” does not include alterations to structures listed on the National Register of Historic Places or on a State Inventory of Historic Places or improvement of a structure to comply with existing state or local code

specifications that is solely necessary to assure safe living conditions.

The provisions relating to Letters of Map Amendment (LOMAs) and Letters of Map Revision (LOMRs) at § 55.12(c)(8) as well as the provision at § 55.26 covering the adoption of other agency floodplain and wetland reviews would also be updated to reflect the FFRMS.

## 2. Data Sources

Under this proposed rule, the required data source and best available information under Executive Order 11988 remains the latest FEMA issued data or guidance, which includes advisory data (such as Advisory Base Flood Elevations (ABFE)) or preliminary and final Flood Insurance Rate Maps (FIRM). Executive Order 11988 on floodplain management requires that federal agencies use the best available information to determine the flood risk for locations of projects and activities. Section 55.2(b)(1) provides that when FEMA provides interim flood hazard data, such as ABFE or preliminary maps and studies, HUD or the responsible entity shall use the latest of these sources to establish the floodplain. If FEMA information is unavailable or insufficiently detailed, other federal, state, tribal, or local data may be used as “best available information” in accordance with Executive Order 11988. However, a base flood elevation from an interim or preliminary or non-FEMA source cannot be used if it is lower than the current FIRM and Flood Insurance Study. This proposed rule clarifies, however, that in addition to FIRMs or ABFEs, the use of sources, such as U.S. Global Change Research Program, National Oceanic and Atmospheric Administration, United States Army Corps of Engineers, U.S. Geological Survey, and other FEMA sources, regarding climate impacts and sea level rise may be considered and must be considered for Environmental Impact Statements (EIS). These agencies often offer analyses that are forward-looking and may be more robust than the data offered under NFIP, which does not currently analyze sea level rise in FIRMs. These sources cover subject areas such as estimated sea level rise or catastrophic failure of flood control projects that may lead the reviewer to determine that an elevation greater than the FFRMS floodplain is appropriate. These sources may supplement the FIRM or ABFE but cannot be used as a basis for a lower elevation than otherwise required under this part.

## 3. Other Changes

In addition to increasing the elevation requirement, the rule proposes several other changes to enhance efficiency and consistency. First, the rule would amend the public notice requirements in §§ 55.20(b)(1) and 58.43(a) to allow parties to provide the public with notice of potential actions using government Web sites in lieu of a “local printed news medium” or “newspaper of general circulation in the affected community” as required under the current regulations. Second, the proposed rule also adds the word “method” to § 55.20(c)(1) to make the sentence consistent with language that immediately follows in § 55.20(c)(1)(ii) stating that alternative flood protection method considerations are, in addition to alternative site considerations, required under this subpart. Third, the proposed rule updates the definition of Coastal High Hazard Area (V Zone) to match FEMA’s more thorough definition at 44 CFR 59.1, which is used by the NFIP. The change will have no impact on the function of 24 CFR part 55, because FEMA FIRMs will remain the principal source of V Zone data. Finally, the proposed rule makes a technical correction to a citation located in table 1 in § 55.11(c).

## 4. Minimum Property Standards

This rulemaking also proposes to apply a new elevation standard to one-to-four-family residential structures with mortgages insured by the FHA. Generally, in HUD’s single-family mortgage insurance programs, Direct Endorsement mortgagees submit applications for mortgage insurance to HUD, and Lender Insurance mortgagees endorse loans for insurance, after the structure has been built. Thus, there is no HUD review or approval before the completion of construction. In these instances, HUD is not undertaking, financing or assisting construction or improvements. Thus, the FHA single family mortgage insurance program is not subject to Executive Order 11988, NEPA (42 U.S.C. 4321 *et seq.*), or related environmental laws or authorities. However, newly constructed single-family properties in HUD’s mortgage insurance programs are generally required to meet HUD’s minimum property standards under 24 CFR 200.926 through 200.926e. These property standards require that when HUD insures a mortgage on a property, the property meets basic livability and safety standards and is code compliant. The section relating to construction in flood hazard areas, § 200.926d(c)(4), has

long been included as a property standard.

In alignment with the proposals in this rulemaking that address FFRMS under Executive Order 11988, HUD is also proposing to amend its Minimum Property Standards on site design, and specifically the standards addressing drainage and flood hazard exposure at § 200.926d(c)(4). The purpose of the amendment of the property standard is to decrease potential damage from floods, increase the safety and soundness of the property for residents, and provide for more resilient communities in flood hazard areas. HUD would revise the section by requiring the lowest floor of newly constructed and substantially improved structures, within the 100-year floodplain, with and without basements to be at least 2 feet above the base flood elevation as determined by best available information. For one- to four-unit housing under HUD mortgage insurance and low-rent public housing programs, HUD's Minimum Property Standards in 24 CFR part 200 currently require that a one- to four-unit property involving new construction, located in the 1 percent-annual-chance floodplain in the effective Flood Insurance Rate Map (FIRM), be elevated to the effective FIRM base flood elevation. This proposed rule would add two feet of additional elevation to the base flood elevation as a resilience standard and would apply this standard to substantial improvement as well as new construction of such properties. This rule would not require consideration of the horizontally expanded FFRMS floodplain for single-family mortgage insurance projects governed by the requirements in the Minimum Property Standards.

#### 5. Categorical Exclusion

HUD also proposes to amend § 50.20(a)(2)(i) to revise the categorical exclusion from environmental review under NEPA for minor rehabilitation of one- to four-unit residential properties. Specifically, HUD would remove the qualification that the footprint of the structure may not be increased in a floodplain or wetland when HUD performs the review. HUD recently removed the footprint trigger from the categorical exclusion at § 58.35(a)(3)(i) to allow rehabilitations reviewed by HUD responsible entities this ability to utilize this exclusion. This change will make the review standard the same regardless of whether HUD or a responsible entity is performing the review. Currently, when HUD performs a review under 24 CFR part 50, four units can be constructed in a floodplain

or wetland as an individual action without an environmental assessment under the categorical exclusion in § 50.20(a)(3), but rehabilitated structures in a floodplain or wetland with an increased footprint would require a full environmental assessment. It is logically inconsistent to require a greater review for minor rehabilitations than new construction and to apply a higher level of review for HUD as opposed to grantees.

#### 6. Specific Questions for Comment

In addition to seeking comments on implementing FFRMS, HUD specifically seeks public comments on the impact of the proposed elevation requirement on the accessibility of covered multifamily dwellings under the Fair Housing Act, the Americans with Disabilities Act (ADA), the Architectural Barriers Act (ABA), and section 504 of the Rehabilitation Act of 1973. Elevating buildings as a flood damage mitigation strategy may have a negative impact on affected communities' disabled and elderly populations, unless those buildings are made accessible. As a result, HUD invites comments on strategies it could employ to increase the accessibility of properties so affected in the event the proposed increase in elevation is adopted. Additionally, HUD invites comment on the cost and benefits of such strategies, including data that supports the costs and benefits.

HUD is not including as part of this proposed rule, guidance to determine the horizontal extent of the FFRMS floodplain. In this regard, HUD believes that it is imperative to preserve the option to use new methodologies to determine horizontal extent as they become available. Nevertheless, HUD is seeking public comments on potential limits to the area and horizontal extent of the floodplain beyond the 100-year floodplain when using the FFRMS. Specifically, HUD is considering whether to use HUD's current areawide compliance process described at 24 CFR 55.25 to allow HUD to enter into all voluntary agreements with communities to limit horizontal extent beyond the 100-year floodplain where: (1) Best-available and actionable climate data shows the area and horizontal extent of the two foot freeboard (or three foot for a Critical Action) FFRMS exceeds local, relative sea-level rise rates or other climate-related projections and the 500-year floodplain including wave heights; and

(2) There are limited or no safely or sustainably developable sites in a community outside of the two foot FVA (or three foot for a Critical Action).

HUD also invites comment on other approaches to limit the horizontal extent of the floodplain beyond the 100-year floodplain. Information regarding the cost and benefits of adopting any proposed limit is also requested.

Further information about best-available and actionable climate data and the Climate-Informed Science Approach of the FFRMS is available in Appendix H of the October 8, 2015 Guidelines for Executive Order 11988, Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input (Guidelines).

Finally, HUD invites comments on alternative approaches to define the FFRMS floodplain for critical actions. For structures that meet the definition of critical actions as described in § 55.2(b)(3)(i) (e.g., fire stations, police stations, and hospitals), this proposed rule would require that structures be elevated to the greater of the 500-year floodplain or 3 feet above the base flood elevation. HUD requests alternative suggestions for defining the floodplain for the purposes of these projects for which even a slight chance of flooding is too great.

### III. Findings and Certifications

#### *Regulatory Review—Executive Orders 12866 and 13563*

Under 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) 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 what has been learned." Executive Order 13563 also 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. This rule was determined to be a "significant regulatory action" as defined in section 3(f) of Executive Order 12866 (although not an economically significant regulatory action, as provided under section 3(f)(1) of the Executive Order).

As discussed in this preamble, the proposed regulatory amendments

would, based on Executive Order 13690 and the Guidelines, require, as part of the decisionmaking process established to ensure compliance with Executive Order 11988 (Floodplain Management), that new construction or substantial improvement in a floodplain be elevated or floodproofed 2 feet above the base flood elevation for non-critical actions and above the greater of the 500-year floodplain or 3 feet above the base flood elevation for critical actions based on FEMA's best available data. This proposed rule would also apply a similar new elevation standard to one-to-four family residential structures, located in the 1 percent-annual-chance floodplain, that involve new construction or substantial improvement with mortgages insured by the Federal Housing Administration. This rulemaking also proposes to revise a categorical exclusion available when HUD performs the environmental review by making it consistent with changes to a similar categorical exclusion that is available to HUD grantees or other responsible entities when they perform the environmental review. The rulemaking is part of HUD's commitment under the President's Climate Action plan. Building to these standards would increase resiliency, reduce the risk of flood loss, minimize the impact of floods on human safety, health and welfare, and promote sound, sustainable, long-term planning informed by a more accurate evaluation of risk that takes into account possible sea level rise and increased development associated with population growth.

#### Regulatory Impact Analysis

Increasing the required minimum elevation of HUD-assisted structures located in and around the floodplain will prevent damage caused by flooding and avoid relocation costs to tenants associated with temporary moves when HUD-assisted structures sustain flood damage and are temporarily uninhabitable. These benefits, which are realized throughout the life of HUD-assisted structures, are offset by the one-time increase in construction costs, borne only at the time of construction. Introducing a standard that requires additional freeboard above the base flood elevation takes into consideration FEMA's history of recommending freeboard as a tool for mitigation which extends several decades and provides, in HUD's view, the best assessment of risk to protect federal investments in flood zones.

In addition, the likelihood that floods in coastal areas will become more frequent and damaging due to rising sea

levels in future decades necessitates a stricter standard than the one currently in place. As stated in "Global Sea Level Rise Scenarios for the United States National Climate Assessment" U.S. Department of Commerce, National Oceanic and Atmospheric Administration, December 2012,<sup>14</sup> federal experts have a very high confidence (greater than a 9 in 10 chance) that global mean sea level will rise at least 0.2 meters (8 inches) and no more than 2.0 meters (6.6 feet) by the year 2100. The Intergovernmental Panel on Climate Change (2013) also confirms that the sea level will continue rising throughout the 21st century.<sup>15</sup>

As discussed in the regulatory impact analysis that accompanies this rule, HUD estimates that requiring developers to construct or floodproof HUD-funded or insured properties to two feet above base flood elevation will increase construction costs by \$12.803 million to \$47.525 million. These are one-time costs which occur at the time of construction. Benefits of the increased standard include avoided damage to buildings, as measured by decreased insurance premiums, and avoided costs associated with tenants being displaced. These benefits occur annually over the life of the structures. Over a 30-year period, the present value of aggregate benefits total \$12.336 million to \$50.657 million assuming a 3 percent discount rate and \$8.192 million to \$33.317 million assuming a 7 percent discount rate.

These estimates are based on the annual production of HUD-assisted and insured structures in the floodplain and accounts for the 20 states (in addition to the District of Columbia and Puerto Rico)<sup>16</sup> with existing freeboard requirements. Four of these states require residential structures to be

<sup>14</sup> Available at <http://cpo.noaa.gov/Home/AllNews/TabId/315/ArtMid/668/ArticleID/80/Global-Sea-Level-Rise-Scenarios-for-the-United-States-National-Climate-Assessment.aspx>.

<sup>15</sup> IPCC, 2013: Summary for Policymakers. In: *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Stocker, T.F., D. Qin, G.-K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex and P.M. Midgley (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

<sup>16</sup> Arizona, Colorado, Georgia, Illinois, Iowa, Kansas, Maryland, Maine, Michigan, Minnesota, North Dakota, Nebraska, New Jersey, Oregon, Puerto Rico and Rhode Island require base flood elevation +1 foot. The District of Columbia and Pennsylvania require base flood elevation + 1.5 feet. Indiana, Montana, New York and Wisconsin require base flood elevation + 2 feet. See [http://www.floods.org/ace-files/documentlibrary/FloodRiskMngmtStandard/States\\_with\\_freeboard\\_and\\_CRS\\_Communities\\_with\\_Freeboard\\_in\\_Other\\_states\\_2-27-15.pdf](http://www.floods.org/ace-files/documentlibrary/FloodRiskMngmtStandard/States_with_freeboard_and_CRS_Communities_with_Freeboard_in_Other_states_2-27-15.pdf).

constructed with the lowest floor at least two feet above the base flood elevation (Indiana, Montana, New York and Wisconsin) and 18 states and territories require residential structures to be built with the lowest floor at least one foot above the base flood elevation. The cost of compliance would be lower in these states than it would be in states that have no minimum elevation requirements above the base flood elevation. Further increase in the sea level rise or inland and riverine flooding would increase the benefits of this proposed rule. For a complete description of HUD's analysis, please see the accompanying Regulatory Impact Analysis for this rule on [regulations.gov](http://regulations.gov).

#### 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 would not have a significant economic impact on a substantial number of small entities. HUD's statistics on developers of FHA-insured properties do not precisely correlate with SBA's size standard of a small business for the category of "Real Estate Credit," which size standard is less than \$36.5 million in assets. HUD does have data on net worth and liquidity, however, and for the purposes of this discussion treats these as essentially similar to "assets" as meant in the SBA size standards.

With respect to all entities, including small entities, it is unlikely that the economic impact would be significant. As the Regulatory Impact Analysis (RIA) explains, the benefits of reduced damage offset the construction costs before taking further sea level rise into consideration. Further, small entities may benefit more since they are less likely to endure financial hardships caused by severe flooding.

Based on an engineering study conducted for FEMA,<sup>17</sup> the construction cost of increasing the base of a new residential structure two additional feet of vertical elevation varies from 0.3 percent to 4.8 percent of the base building cost. This results in an increase of up to \$5,074 per single family home and \$70,769 per multi-family property located in states with no existing freeboard requirements. Consequently, this would not pose a significant burden

<sup>17</sup> See Federal Emergency Management Agency, 2013. "2008 Supplement to the 2006 Evaluation of the National Flood Insurance Program's Building Standards".

to small entities in the single family housing development industry.

These costs are likely higher than would actually be caused by the increased standard because most HUD-assisted or insured substantial improvement projects already involve elevation to comply with the current standard, elevation to the base flood elevation (base flood elevation+0). Thus, elevating a structure an additional two feet would be marginal compared to the initial cost of elevation to the floodplain level.

For this reason, the undersigned certifies that there is no significant economic impact on small entities. Notwithstanding HUD's determination that this rule will not have a significant economic impact on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that would meet HUD's program responsibilities.

#### Environmental Impact

A Finding of No Significant Impact (FONSI) with respect to environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact is available for public inspection on *regulations.gov* and between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the FONSI by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the toll-free Federal Relay Service at 800-877-8339.

#### Federalism Impact

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. This rulemaking does not have federalism implications and would not impose substantial direct compliance costs on state and local governments nor preempts state law within the meaning of the Executive order.

#### 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 proposed rule would not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of UMRA.

#### Paperwork Reduction Act

The information collection requirements contained in this rule were reviewed by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB Control Number 2506–0151. 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 valid control number.

#### List of Subjects

##### 24 CFR Part 50

Environmental impact statements.

##### 24 CFR Part 55

Environmental impact statements, Floodplains, Wetlands.

##### 24 CFR Part 58

Community development block grants, Environmental impact statements, Grant programs—housing and community development, Reporting and recordkeeping requirements.

##### 24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Housing standards, Lead poisoning, Loan programs—housing and community development, Mortgage insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

Accordingly, for the reasons stated in the preamble above, HUD proposes to amend 24 CFR parts 50, 55, 58, and 200 as follows:

#### PART 50—PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

■ 1. The authority citation for part 50 continues to read as follows:

**Authority:** 42 U.S.C. 3535(d) and 4332; and Executive Order 11991, 3 CFR, 1977 Comp., p.123.

#### § 50.4 [Amended]

- 2. Amend § 50.4(b)(2) by removing "(3 CFR, 1977 Comp., p. 117)" and adding in its place "as amended by Executive Order 13690, February 4, 2015 (80 FR 6423), (3 CFR, 2015 Comp., p. 6423)."
- 3. Revise § 50.20(a)(2)(i) to read as follows:

#### § 50.20 Categorical exclusions subject to the Federal laws and authorities cited in § 50.4.

(a) \* \* \*

(2) \* \* \*

(i) In the case of a building for residential use (with one to four units), the density is not increased beyond four units, and the land use is not changed;

\* \* \* \* \*

#### PART 55—FLOODPLAIN MANAGEMENT AND PROTECTION OF WETLANDS

■ 4. The authority citation for part 55 is revised to read as follows:

**Authority:** 42 U.S.C. 3535(d), 4001–4128 and 5154a; E.O. 13690, 80 FR 6425, E.O. 11988, 42 FR 26951, 3 CFR, 1977 Comp., p. 117; E.O. 11990, 42 FR 26961, 3 CFR, 1977 Comp., p. 121.

#### § 55.1 [Amended]

- 5. Amend § 55.1 as follows:
  - a. In paragraph (a)(1), add "as amended," after "Floodplain Management"; and
  - b. In paragraph (a)(3), add "as amended," after "Floodplain Management".
- 6. Amend § 55.2 as follows:
  - a. Remove "Floodplain Management Guidelines for Implementing Executive Order 11988 (43 FR 6030, February 10, 1978)" from paragraph (a) and add in its place "Guidelines for Implementing Executive Order 11988, Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input (80 FR 64008, October 22, 2015)";
  - b. Revise paragraphs (b)(1), (4) and (9); and
  - c. Add paragraphs (b)(12) and (13);

The revisions and additions read as follows:

#### § 55.2 Terminology.

\* \* \* \* \*

(b) \* \* \*

(1) *Coastal high hazard area* means an area of special flood hazard extending from offshore to the inland limit of a primary frontal dune along an open coast and any other area subject to high velocity wave action from storms or seismic sources. On a Flood Insurance Rate Map (FIRM), this appears as zone

V1–30, VE or V. FIRMs and Flood Insurance Studies (FISs) are relied upon for the designation of “coastal high hazard areas” as well as “100-year floodplains” (§ 55.2(b)(9)), “500-year floodplains” (§ 55.2(b)(4)), and “floodways” (§ 55.2(b)(5)).

(i) When FEMA provides interim flood hazard data, such as Advisory Base Flood Elevations (ABFE) or preliminary maps and studies, HUD or the responsible entity shall use the latest of these sources.

(ii) If FEMA information is unavailable or insufficiently detailed, other Federal, state, or local data may be used as “best available information” in accordance with Executive Order 11988. A base flood elevation from an interim or preliminary or non-FEMA source may not be used if it is lower than the current FIRM and FIS.

(iii) In addition to FIRMs or ABFEs, the use of data from sources such as the U.S. Global Change Research Program, National Oceanic and Atmospheric Administration, United States Army Corps of Engineers, U.S. Geological

Survey, and other FEMA sources may be considered. When performing an Environmental Impact Statement (EIS), an analysis of the best available, actionable climate science, as determined by HUD or the responsible entity, must be performed using data from these sources. These sources may supplement the FIRM or ABFE in order to better minimize impacts to projects or to elevate or floodproof structures above the risk adjusted floodplain. These sources may not be used as a basis for a lower elevation than otherwise required under this part.

(4) *500-year floodplain* means the area, including the base flood elevation, subject to inundation from a flood having a 0.2 percent chance or greater of being equaled or exceeded in any given year. (See § 55.2(b)(1) for appropriate data sources.)

(9) *100-year floodplain* means the area subject to inundation from a flood having a one percent or greater chance

of being equaled or exceeded in any given year. (See § 55.2(b)(1) for appropriate data sources.)

(12) *FFRMS floodplain* means area in which an action is proposed that:

(i) If a non-critical action, is located on a site less than two feet above the 100-year floodplain; or

(ii) If a critical action, is on a site that is either within the 500-year floodplain or less than three feet above the 100-year floodplain. The larger floodplain and higher elevation must be applied where the 500-year floodplain is mapped.

(13) *Structure* means a walled or roofed building, including a manufactured home and a gas or liquid storage tank that is principally above ground.

■ 7. In § 55.11, revise table 1 to read as follows:

**§ 55.11 Applicability of Subpart C decisionmaking process.**

TABLE 1 TO PART 55

Type of proposed action (new reviewable action or an amendment) <sup>1</sup>	Type of proposed action		
	Floodways	Coastal high hazard areas	Wetlands or FFRMS floodplain outside coastal high hazard area and floodways
Critical Actions as defined in § 55.2(b)(3).	Critical actions not allowed .....	Critical actions not allowed .....	Allowed if the proposed critical action is processed under § 55.20. <sup>2</sup>
Noncritical actions not excluded under § 55.12(b) or (c).	Allowed only if the proposed non-critical action is a functionally dependent use and processed under § 55.20 <sup>2</sup> .	Allowed only if the proposed non-critical action is processed under § 55.20 <sup>2</sup> and is (1) a functionally dependent use, (2) existing construction (including improvements), or (3) reconstruction following destruction caused by a disaster. If the action is not a functionally dependent use, the action must be designed for location in a Coastal High Hazard Area under § 55.1(c)(3).	Allowed if proposed noncritical action is processed under § 55.20. <sup>2</sup>

<sup>1</sup> Under E. O. 11990, the decision making process in § 55.20 only applies to Federal assistance for new construction in wetlands locations.

<sup>2</sup> Or those paragraphs of § 55.20 that are applicable to an action listed in § 55.12(a).

■ 8. Revise § 55.12(c)(8) to read as follows:

**§ 55.12 Inapplicability of 24 CFR part 55 to certain categories of proposed actions.**

(c) \* \* \*

(8) HUD’s or the responsible entity’s approval of financial assistance for a project on any nonwetland site in the FFRMS floodplain for which FEMA has issued:

(i) A final Letter of Map Amendment (LOMA), final Letter of Map Revision (LOMR), or final Letter of Map Revision

Based on Fill (LOMR–F) that presents information that can be used to demonstrate that the property (including ingress and egress on the property) is not located in the FFRMS floodplain; or

(ii) A conditional LOMA, conditional LOMR, or conditional LOMR–F that presents information that can be used to demonstrate that the property (including ingress and egress on the property) will not be located in the FFRMS floodplain if HUD or the responsible entity’s approval is subject

to the requirements and conditions of the conditional LOMA or conditional LOMR;

\* \* \* \* \*

■ 9. In § 55.20, revise paragraphs (a), (b) introductory text, (b)(1), (b)(3), (c) introductory text, (c)(1) introductory text, (c)(1)(i), (d) introductory text, (d)(1) introductory text, (e), (f), (g)(1) introductory text, and (g)(1)(i) to read as follows:

**§ 55.20 Decision making process.**

\* \* \* \* \*



(a) *Step 1.* (1) Determine whether the proposed action occurs in the FFRMS floodplain or results in new construction in a wetland. If the proposed action does not occur in the FFRMS floodplain or result in new construction in a wetland, then no further compliance with this part is required.

(2) The following process shall be followed by HUD (or the responsible entity) in making wetland determinations:

(i) Refer to § 55.28(a) where an applicant has submitted with its application to HUD (or to the recipient under programs subject to 24 CFR part 58) an individual Section 404 permit (including approval conditions and related environmental review).

(ii) Refer to § 55.2(b)(11) for making wetland determinations under this part.

(iii) For proposed actions occurring in both a wetland and the FFRMS floodplain, completion of the decision making process under this section is required regardless of the issuance of a Section 404 permit. In such a case, the wetland will be considered among the primary natural and beneficial functions and values of the FFRMS floodplain.

(b) *Step 2.* Notify the public and agencies responsible for floodplain management or wetlands protection at the earliest possible time of a proposal to consider an action in the FFRMS floodplain or wetland and involve the affected and interested public in the decision making process.

(1) The public notices required by paragraphs (b) and (g) of this section may be combined with other project notices wherever appropriate. Notices required under this part must be bilingual if the affected public is largely non-English speaking. In addition, all notices must be published in an appropriate local news medium or appropriate government Web site, and must be sent to Federal, state, and local public agencies, organizations, and, where not otherwise covered, individuals known to be interested in the proposed action.

(3) A notice under this paragraph shall state: The name, proposed location and description of the activity; the total number of acres of FFRMS floodplain or wetland involved; the related natural and beneficial functions and values of the FFRMS floodplain or wetland that may be adversely affected by the proposed activity; the HUD approving official (or the certifying officer of the responsible entity authorized by 24 CFR part 58); and the phone number to call for information. The notice shall

indicate the hours of HUD or the responsible entity's office, and any Web site at which a full description of the proposed action may be reviewed.

(c) *Step 3.* Identify and evaluate alternatives to locating the proposed action in the FFRMS floodplain or wetland. Where possible, use natural systems, ecosystem processes, and nature-based approaches when developing alternatives for consideration.

(1) Except as provided in paragraph (c)(3) of this section, HUD's or the responsible entity's consideration of practicable alternatives to the proposed site or method should include the following:

(i) Locations outside the FFRMS floodplain or wetland;

\* \* \* \* \*

(d) *Step 4.* Identify the potential direct and indirect impacts associated with the occupancy or modification of the FFRMS floodplain or the wetland and the potential direct and indirect support of FFRMS floodplain and wetland development that could result from the proposed action.

(1) *FFRMS floodplain evaluation.* The focus of the FFRMS floodplain evaluation should be on adverse impacts to lives and property and on natural and beneficial FFRMS floodplain values. Natural and beneficial values include:

\* \* \* \* \*

(e) *Step 5.* Design or modify the proposed action to minimize the potential adverse impacts to and from the FFRMS floodplain or the wetland and to restore and preserve its natural and beneficial functions and values. All calculations in this section of the base flood elevation and 500-year flood elevation must be made using the best available information as required by § 55.2(b)(1). For actions in the FFRMS floodplain, the required elevation described in this section must be documented on an Elevation Certificate or a Floodproofing Certificate in the Environmental Review Record prior to construction, or by such other means as HUD may from time to time direct, provided that notwithstanding any language to the contrary, the minimum elevation or floodproofing requirement shall be the FFRMS floodplain as defined in this section.

(1) If a structure designed principally for residential use undergoing new construction or substantial improvement is located in a floodplain, the lowest floor or FEMA-approved equivalent must be designed using the FFRMS floodplain as the baseline standard for elevation, except where

higher elevations are required by state, tribal, or locally adopted code or standards, in which case those higher elevations apply. Where non-elevation standards such as setbacks or other flood risk reduction standards that have been issued to identify, communicate, or reduce the risks and costs of floods are required by state, tribal, or locally adopted code or standards, those standards shall apply in addition to the FFRMS baseline elevation standard.

(2) New construction and substantial improvement of non-residential structures, or residential structures that have no dwelling units and no residents below the FFRMS floodplain and that are not critical actions as defined at § 55.2(b)(3), shall be designed either:

(i) With the lowest floor, including basement, elevated to or above the FFRMS floodplain; or

(ii) With the structure floodproofed at least up to and below the FFRMS floodplain. Floodproofing standards are as stated in FEMA's regulations at 44 CFR 60.3(c)(3)(ii), or such other regulatory standard as FEMA may issue, and applicable guidance, except that where the standard refers to base flood level, elevation is required above the FFRMS floodplain, as defined in this part.

(3) The term "lowest floor" means the lowest floor of the lowest enclosed area (including basement), except that an unfinished or flood resistant enclosure, usable solely for parking of vehicles, building access or storage in an area other than a basement area is not considered a building's lowest floor; provided, that such enclosure is not built so as to render the structure in violation of the applicable non-elevation design requirements of 44 CFR 60.3. "Lowest floor" must be applied consistent with FEMA's Elevation Certificate guidance or other applicable current FEMA guidance.

(4) Minimization techniques for floodplain and wetlands purposes include, but are not limited to: The use of permeable surfaces; natural landscape enhancements that maintain or restore natural hydrology through infiltration, native plant species, bioswales, rain gardens, or evapotranspiration; stormwater capture and reuse; green or vegetative roofs with drainage provisions; Natural Resource Conservation Service or other conservation easements; WaterSense products; rain barrels and grey water diversion systems; and other low impact development and green infrastructure strategies, technologies, and techniques. For floodplain purposes, minimization also includes floodproofing and elevating structures above the required



FFRMS floodplain. Where possible, use natural systems, ecosystem processes, and nature-based approaches when developing alternatives for consideration.

(5) Appropriate and practicable compensatory mitigation is recommended for unavoidable adverse impacts to more than one acre of wetlands. Compensatory mitigation includes, but is not limited to: Permittee-responsible mitigation, mitigation banking, in-lieu fee mitigation, the use of preservation easements or protective covenants, and any form of mitigation promoted by state or federal agencies. The use of compensatory mitigation may not substitute for the requirement to avoid and minimize impacts to the maximum extent practicable.

(6) All critical actions in the FFRMS floodplain must be modified to include:

- (i) Preparation of and participation in an early warning system;
  - (ii) An emergency evacuation and relocation plan;
  - (iii) Identification of evacuation route(s) out of the FFRMS and 500-year floodplain; and
  - (iv) Identification marks of past or estimated flood levels on all structures.
- (f) *Step 6.* Reevaluate (or evaluate for actions under § 55.12(a)) the proposed action to determine:

(1) Whether the action is still practicable in light of exposure to flood hazards in the FFRMS floodplain or wetland, possible adverse impacts on the FFRMS floodplain or wetland, the extent to which it will aggravate the current and future hazards to other floodplains or wetlands, and the potential to disrupt the natural and beneficial functions and values of floodplains or wetlands; and

(2) Whether alternatives preliminarily rejected at Step 3 (paragraph (c) of this section) are practicable in light of information gained in Steps 4 and 5 (paragraphs (d) and (e) of this section).

(i) The reevaluation of alternatives, or initial evaluation of a no action or non-floodplain alternative for actions under § 55.12(a), shall include the potential impacts avoided or caused inside and outside the FFRMS floodplain or wetlands area. The impacts should include the protection of human life, real property, and the natural and beneficial functions and values served by the floodplain or wetland.

(ii) A reevaluation of alternatives, or initial evaluation of a no action or non-floodplain alternative for actions under § 55.12(a), under this step should include a discussion of economic costs. For floodplain areas, the cost estimates should include savings or the costs of flood insurance (where applicable);

floodproofing; replacement of services or functions of critical actions that might be lost; and elevation to at least the elevation of the FFRMS floodplain, as appropriate on the applicable source under § 55.2(b)(1). For wetlands, the cost estimates should include the cost of new construction activities, including fill, impacting the wetlands, and mitigation.

(g) \* \* \* (1) If the reevaluation results in a determination that there is no practicable alternative to locating the proposal in the FFRMS floodplain or wetland, publish a final notice that includes:

(i) The reasons why the proposal must be located in the FFRMS floodplain or wetland;

\* \* \* \* \*

■ 10. Amend § 55.26 as follows:

■ a. Revise the section heading;

■ b. In paragraph (b)(2), remove the word “and”;

■ b. In paragraph (c), remove the period at the end of the paragraph and add in its place a semicolon and the word “and”;

■ c. Add paragraph (d).

The addition reads as follows:

**§ 55.26 Adoption of another agency’s review under Executive orders.**

\* \* \* \* \*

(d) All actions must at least be elevated or floodproofed two feet above the 100-year floodplain (or to the higher of the 500-year flood elevation or 3 feet above the 100-year floodplain for Critical Actions) unless an agreement is in place to allow for the other Federal agency’s FFRMS elevation standard pursuant to 42 U.S.C. 5189g.

■ 11. Revise § 55.27(a)(2) to read as follows:

**§ 55.27 Documentation.**

(a) \* \* \*

(2) Under § 55.20(e), measures to minimize the potential adverse impacts of the proposed action on the affected floodplain or wetland as identified in § 55.20(d) have been applied to the design for the proposed action. Prior to construction of a project in a floodplain, the documentation must include an elevation certificate or floodproofing certificate (or such other similar certification as HUD may from time to time direct) indicating the FFRMS floodplain elevation was used if required under § 55.20(e).

\* \* \* \* \*

**PART 58—ENVIRONMENTAL REVIEW PROCEDURES FOR ASSUMING HUD ENVIRONMENTAL REVIEW RESPONSIBILITIES**

■ 12. The authority citation for part 58 continues to read as follows:

**Authority:** 12 U.S.C. 1707 note, 1715z–13a(k); 25 U.S.C. 4115 and 4226; 42 U.S.C. 1437x, 3535(d), 3547, 4321–4335, 4852, 5304(g), 12838, and 12905(h); title II of Pub. L. 105–276; E.O. 11514 as amended by E.O. 11991, 3 CFR, 1977 Comp., p. 123.

■ 13. Revise § 58.5(b)(1) to read as follows:

**§ 58.5 Related Federal laws and authorities.**

\* \* \* \* \*

(b) \* \* \*

(1) Executive Order 11988, Floodplain Management, as amended by Executive Order 13690, February 4, 2015 (80 FR 6425), 3 CFR, 2015 Comp., p. 6425, as interpreted in HUD regulations at 24 CFR part 55.

\* \* \* \* \*

■ 14. Revise § 58.43(a) to read as follows:

**§ 58.43 Dissemination and/or publication of the findings of no significant impact.**

(a) If the responsible entity makes a finding of no significant impact, it must prepare a FONSI notice, using the current HUD-recommended format or an equivalent format. As a minimum, the responsible entity must send the FONSI notice to individuals and groups known to be interested in the activities, to the local news media, to the appropriate tribal, local, State and Federal agencies; to the Regional Offices of the Environmental Protection Agency having jurisdiction and to the HUD Field Office (or the State where applicable). The responsible entity may also publish the FONSI notice in a newspaper of general circulation in the affected community or on an appropriate government Web site. If the notice is not published, it must also be prominently displayed in public buildings, such as the local Post Office and within the project area or in accordance with procedures established as part of the citizen participation process.

\* \* \* \* \*

**PART 200—INTRODUCTION TO FHA PROGRAMS**

■ 15. The authority citation for part 200 continues to read as follows:

**Authority:** 12 U.S.C. 1702–1715z–21; 42 U.S.C. 3535(d).

■ 16. In § 200.926, add paragraph (a)(3) to read as follows:

**§ 200.926 Minimum property standards for one and two family dwellings.**

(a) \* \* \*

(3) *Applicability of standards to substantial improvement.* The standards in § 200.926d(c)(4)(i) through (iii) are also applicable to structures that are approved for insurance or other benefits prior to the start of substantial improvement, as defined in § 55.2(b)(10) of this title.

\* \* \* \* \*

■ 17. In § 200.926d, revise paragraphs (c)(4)(i) through (iii), remove paragraph (c)(4)(iv), and redesignate paragraphs (c)(4)(v) and (c)(4)(vi) as paragraphs (c)(4)(iv) and (c)(4)(v), respectively.

The revisions read as follows:

**§ 200.926d Construction requirements.**

\* \* \* \* \*

(c) \* \* \*

(4) \* \* \*

(i) *Residential structures located in Special Flood Hazard Areas.* The elevation of the lowest floor shall be at least two feet above the base flood elevation (see 24 CFR 55.2 for appropriate data sources).

(ii) *Residential structures located in FEMA-designated "coastal high hazard areas".* (A) Basements or any permanent enclosure of space below the lowest floor of a structure are prohibited.

(B) Where FEMA has determined the base flood level without establishing stillwater elevations, the bottom of the lowest structural member of the lowest floor (excluding pilings and columns) and its horizontal supports shall be at least two feet above the base flood elevation.

(iii) *New construction or substantial improvement.* (A) In all cases in which a Direct Endorsement (DE) mortgagee or a Lender Insurance (LI) mortgagee seeks to insure a mortgage on a one- to four-family dwelling that is newly constructed or which undergoes a substantial improvement, as defined in § 55.12(b)(10) of this title (including a manufactured home that is newly erected or undergoes a substantial improvement) that was processed by the DE or LI mortgagee, the DE or LI mortgagee must determine whether the property improvements (dwelling and related structures/equipment essential to the value of the property and subject to flood damage) are located on a site that is within a Special Flood Hazard Area, as designated on maps of the Federal Emergency Management Agency. If so, the DE mortgagee, before submitting the application for insurance to HUD, or the LI mortgagee, before submitting all the required data regarding the mortgage to HUD, must obtain:

(1) A final Letter of Map Amendment (LOMA);

(2) A final Letter of Map Revision (LOMR); or

(3) A signed Elevation Certificate documenting that the lowest floor (including basement) of the property improvements is at least two feet above the base flood elevation as determined by FEMA's best available information.

(B) Under the DE program, these mortgages are not eligible for insurance unless the DE mortgagee submits the LOMA, LOMR, or Elevation Certificate to HUD with the mortgagee's request for endorsement.

\* \* \* \* \*

Dated: September 27, 2016.

**Harriet Tregoning,**

*Principal Deputy Assistant Secretary for Community Planning and Development.*

[FR Doc. 2016-25521 Filed 10-27-16; 8:45 am]

**BILLING CODE 4210-67-P**

**DEPARTMENT OF THE TREASURY****Alcohol and Tobacco Tax and Trade Bureau****27 CFR Part 9**

[Docket No. TTB-2016-0009; Notice No. 163]

**RIN 1513-AC34**

**Proposed Establishment of the Petaluma Gap Viticultural Area and Modification of the North Coast Viticultural Area**

**AGENCY:** Alcohol and Tobacco Tax and Trade Bureau, Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Alcohol and Tobacco Tax and Trade Bureau (TTB) proposes to establish the 202,476-acre "Petaluma Gap" viticultural area in portions of Sonoma and Marin Counties in California. TTB also proposes to expand the boundary of the existing 3 million-acre North Coast viticultural area by 28,077 acres in order to include the entire proposed Petaluma Gap viticultural area within it. The proposed Petaluma Gap viticultural area would also partially extend outside of the established Sonoma Coast viticultural area, but TTB is not proposing to modify the boundary of the Sonoma Coast viticultural area. TTB designates viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase. TTB invites comments on these proposals.

**DATES:** TTB must receive your comments on or before December 27, 2016.

**ADDRESSES:** Please send your comments on this proposal to one of the following addresses:

- <https://www.regulations.gov> (via the online comment form for this document as posted within Docket No. TTB-2016-009 at "[Regulations.gov](https://www.regulations.gov)," the Federal e-rulemaking portal);

- *U.S. mail:* Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005; or

- *Hand delivery/courier in lieu of mail:* Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 400, Washington, DC 20005.

See the Public Participation section of this document for specific instructions and requirements for submitting comments, and for information on how to request a public hearing.

You may view copies of this document, selected supporting materials, and any comments TTB receives about this proposal at <https://www.regulations.gov> within Docket No. TTB-2016-0009. A link to that docket is posted on the TTB Web site at <https://www.ttb.gov/wine/wine-rulemaking.shtml> under Notice No. 163. You also may view copies of this document, all related petitions, maps or other supporting materials, and any comments TTB receives about this proposal by appointment at the TTB Information Resource Center, 1310 G Street NW., Washington, DC 20005. Please call 202-453-2270 to make an appointment.

**FOR FURTHER INFORMATION CONTACT:** Karen A. Thornton, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005; phone 202-453-1039, ext. 175.

**SUPPLEMENTARY INFORMATION:****Background on Viticultural Areas***TTB Authority*

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act provides that these regulations should, among other things, prohibit consumer deception and the use of misleading statements on labels, and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the FAA Act

pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). The Secretary has delegated various authorities through Treasury Department Order 120-01, dated December 10, 2013 (superseding Treasury Order 120-01, dated January 24, 2003), to the TTB Administrator to perform the functions and duties in the administration and enforcement of these provisions.

Part 4 of the TTB regulations (27 CFR part 4) authorizes TTB to establish definitive viticultural areas and regulate the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB regulations (27 CFR part 9) sets forth standards for the preparation and submission of petitions for the establishment or modification of American viticultural areas (AVAs) and lists the approved AVAs.

#### Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region having distinguishing features, as described in part 9 of the regulations, and a name and a delineated boundary, as established in part 9 of the regulations. These designations allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to its geographic origin. The establishment of AVAs allows vintners to describe more accurately the origin of their wines to consumers and helps consumers to identify wines they may purchase. Establishment of an AVA is neither an approval nor an endorsement by TTB of the wine produced in that area.

#### Requirements

Section 4.25(e)(2) of the TTB regulations (27 CFR 4.25(e)(2)) outlines the procedure for proposing an AVA and provides that any interested party may petition TTB to establish a grape-growing region as an AVA. Section 9.12 of the TTB regulations (27 CFR 9.12) prescribes standards for petitions for the establishment or modification of AVAs. Petitions to establish an AVA must include the following:

- Evidence that the area within the proposed AVA boundary is nationally or locally known by the AVA name specified in the petition;
- An explanation of the basis for defining the boundary of the proposed AVA;
- A narrative description of the features of the proposed AVA that affect

viticulture, such as climate, geology, soils, physical features, and elevation, that make the proposed AVA distinctive and distinguish it from adjacent areas outside the proposed AVA boundary;

- The appropriate United States Geological Survey (USGS) map(s) showing the location of the proposed AVA, with the boundary of the proposed AVA clearly drawn thereon; and
- A detailed narrative description of the proposed AVA boundary based on USGS map markings.

#### Petition to Establish the Petaluma Gap AVA and to Modify the Boundary of the North Coast AVA

TTB received a petition from the Petaluma Gap Winegrowers Alliance, proposing to establish the "Petaluma Gap" AVA and to modify the boundary of the existing multi-county North Coast AVA (27 CFR 9.30). The proposed AVA covers portions of Sonoma and Marin Counties, in California. There are 9 bonded wineries and 80 commercial vineyards, covering a total of approximately 4,000 acres, distributed throughout the 202,476-acre proposed AVA.

While the proposed Petaluma Gap AVA is largely located within the existing North Coast AVA, a small portion of the proposed Petaluma Gap AVA would, if established, extend outside the current southern boundary of the established North Coast AVA. To address the potential partial overlap of the two AVAs and account for viticultural similarities between the proposed Petaluma Gap AVA and the larger North Coast AVA, the petition also proposes to expand the boundary of the North Coast AVA so that the entire proposed Petaluma Gap AVA would be included within the North Coast AVA. The proposed expansion would increase the size of the 3 million-acre North Coast AVA boundary by 28,077 acres.

The proposed Petaluma Gap AVA, if established, would also partially overlap the southwestern boundary of the established Sonoma Coast AVA (27 CFR 9.116), but the Marin County portion of the proposed AVA, consisting of approximately 68,130 acres, would extend outside of the Sonoma Coast AVA. However, the petition does not propose to modify the boundary of the Sonoma Coast AVA for reasons which will be discussed later in this document, including the lack of use of the name "Sonoma Coast" outside of Sonoma County.

The distinguishing features of the proposed Petaluma Gap AVA are its topography and wind speeds. Unless otherwise noted, all information and

data contained in the following sections are from the petition to establish the proposed AVA and its supporting exhibits.

#### Proposed Petaluma Gap AVA

##### Name Evidence

The proposed Petaluma Gap AVA derives its name from the city of Petaluma and from the geographical feature known as the "Petaluma Gap," both of which are located within the proposed AVA. The "Petaluma Gap" geographical feature is an area of low-lying hills which allows cool winds to flow inland from the Pacific Ocean. The Bay Area Air Quality Management District (BAAQMD) Web site states, "The region from the Estero Lowlands to the San Pablo Bay is known as the Petaluma Gap. \* \* \* Wind patterns in the Petaluma and Cotati Valleys are strongly influenced by the Petaluma Gap."<sup>1</sup> In a study on the climate of Sonoma County, Paul Vossen, a farm advisor for the University of California Cooperative Extension Service in Sonoma County, wrote that cool marine winds extend inland "through river canyons and the Petaluma gap [sic] to Sonoma Mountain."<sup>2</sup>

The name "Petaluma Gap" is also associated with the wine industry within the proposed AVA. The petitioner provided summaries of several wine-related articles that refer to the region of the proposed AVA as "Petaluma Gap." In his blog "Fermentation: The Daily Wine Blog," Tom Wark writes, "The 'Petaluma Gap' might be a term you've heard of lately, particularly if you are an aficionado of Sonoma County wines."<sup>3</sup> A 2007 article by Rusty Gaffney on his "The Prince of Pinot" blog says, "The Petaluma Gap possesses a very unique microclimate."<sup>4</sup> A 2007 article in the magazine *Wine and Spirits* states, "You can practically smell the ocean, just a few miles away, in the wind that roars between the Sonoma mountains, through the hillside and valley floor vineyards, creating an inland pinot oasis called the Petaluma Gap."<sup>5</sup> A 2008 article titled "Mind the (Petaluma) Gap" in the *Tasting Panel* magazine describes

<sup>1</sup> [www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines%20May%202011.ashx?la=en](http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines%20May%202011.ashx?la=en).

<sup>2</sup> Vossen, Paul, *Sonoma County Climatic Zones*, University of California Cooperative Extension Service, Sonoma County, 1986.

<sup>3</sup> [http://fermentationwineblog.com/2006/05/wind\\_fog\\_wine\\_t/](http://fermentationwineblog.com/2006/05/wind_fog_wine_t/), "Wind, Fog, Wine: The Story of 'The Gap,'" May 8, 2006.

<sup>4</sup> <http://www.princeofpinot.com/article/281>, "Petaluma Gap: Fog Noir." January 15, 2007.

<sup>5</sup> Irwin, Heather. "The Wind Tunnel: Sonoma County's Best Kept Pinot Noir Secret." *Wine and Spirits*, August 2007.

the region of the proposed AVA as follows: “Located at the lower end of the Sonoma Coast AVA and distinguished by its close proximity to the Pacific Ocean, the Petaluma Gap is influenced on a daily basis by misty fog in the mornings, warm afternoons and chilly maritime winds in the evenings.”<sup>6</sup> A 2012 article in *Decanter* magazine describes several regions in California that are “the state’s most marginal sites,” including “the Petaluma Gap within the Sonoma Coast appellation \* \* \*.”<sup>7</sup> A 2012 article in the *Petaluma Post* newspaper states, “The wind and fog are the Petaluma Gap’s trademark.”<sup>8</sup> Finally, a 2014 article in the *Santa Rosa Press Democrat* newspaper states, “The Gap in Petaluma Gap is created by Pacific Ocean winds that flow between Tomales Bay and Bodega Bay through a 15-mile-wide gap in the coastal range mountains.”<sup>9</sup>

**Boundary Evidence**

The proposed Petaluma Gap AVA is located in southern Sonoma County and northern Marin County. The proposed AVA has a northwest-southeast orientation and extends from the Pacific Ocean to San Pablo Bay. The proposed western boundary follows the Pacific coastline from the point where Walker Creek enters Tomales Bay northward to the point where Salmon Creek enters the ocean, just north of Bodega Bay. The proposed northern boundary follows Salmon Creek, the 400-foot elevation contour, and a series of roads and lines drawn between marked elevation points in order to separate the lower elevations and rolling hills of the proposed AVA from the steeper, higher elevations to the north. The proposed eastern boundary follows a series of lines drawn between points on the USGS map, separating the proposed AVA from the higher elevations of Sonoma Mountain and the flatter terrain along Sonoma Creek and San Pablo Bay. The proposed southern boundary follows a series of lines drawn between marked elevation

points in order to separate the proposed AVA from the higher elevations to the south.

**Distinguishing Features**

According to the petition, the distinguishing features of the proposed Petaluma Gap AVA are its topography and wind speed.

**Topography**

Coastal highlands and mountain ranges are characteristic of the California coast. However, within the proposed Petaluma Gap AVA, the highlands are not as pronounced as they are north and south of the proposed AVA. Within the proposed AVA, the topography is characterized by low, rolling hills. Flat land is found along the Petaluma River, especially east of the City of Petaluma and near the mouth of San Pablo Bay. Small valleys and fluvial terraces are also present. Elevations within the proposed AVA do not exceed 600 feet, except in a few places within the ridgelines that form the proposed northern, eastern, and southern boundaries.

According to the petition, the low elevations and gently rolling terrain of the proposed Petaluma Gap create a corridor that allows marine winds to flow relatively unhindered from the Pacific Ocean to San Pablo Bay, particularly during the mid-to-late afternoon. As a result, cool air and marine fog enter the vineyards during the time of day when temperatures would normally be at their highest, bringing heat relief to the vines. The low elevations and rolling hills of the proposed AVA also allow the marine air to enter the proposed AVA at higher speeds than found in the surrounding areas, where higher, steeper mountains disrupt the flow of air. The effects of the high wind speeds on grapes are discussed in detail later in this document.

To the north of the proposed Petaluma Gap AVA, the elevations are much higher, with elevations over 1,000

feet not uncommon in northern Sonoma County. The broad Santa Rosa Plain is also located north of the proposed AVA and has a much flatter topography than the proposed AVA. East of the proposed AVA, the higher elevations of Sonoma Mountain prevent much of the marine airflow that enters the Petaluma Gap from travelling farther east. East of Sonoma Mountain is the Sonoma Valley, which has lower elevations and flatter terrain than the proposed AVA. To the south of the proposed AVA, the elevations can exceed 1,000 feet.

**Wind Speed**

According to the petition, marine air enters the proposed Petaluma Gap AVA at the Pacific coastline, between Bodega Bay and Tomales Bay. The air then flows southeasterly through the proposed AVA and exits at San Pablo Bay. Although marine breezes are present within the proposed AVA during most of the day, the wind speeds increase significantly in the afternoon hours. The petition states that in the mid-to-late afternoon, inland temperatures increase, causing the hot air to rise and pull the cooler, heavier marine air in from the coast and create steady winds. The following table, which was created by TTB from information included in the petition, shows the hourly average wind speed between noon and 6:00 p.m. for locations within the proposed AVA and the surrounding areas during the April–October growing season. Map 5a, included in Addendum 2 to the petition, shows the locations of the weather stations. Because the Pacific Ocean forms the western boundary of the proposed AVA, comparison data is only included from the regions to the north, east, and south of the proposed AVA. The data in the table shows that average hourly afternoon wind speeds within the proposed AVA are consistently higher than those in the surrounding regions.

**TABLE 1—AVERAGE HOURLY AFTERNOON GROWING SEASON WIND SPEEDS**

Location	Average wind speed (miles per hour)						
	12 noon	1 p.m.	2 p.m.	3 p.m.	4 p.m.	5 p.m.	6 p.m.
<b>Within proposed AVA</b>							
Valley Ford <sup>10</sup> .....	13.3	14.4	14.9	14.8	14.0	12.4	10.2
Bloomfield <sup>11</sup> .....	5.4	7.0	7.9	8.3	8.1	7.4	6.0
Mecham Landfill <sup>12</sup> .....	7.7	9.5	12.0	13.7	14.6	14.8	13.8

<sup>6</sup> Sawyer, Christopher. “Mind the (Petaluma) Gap.” The Tasting Panel. February 2008.

<sup>7</sup> Murphy, Linda. “California’s Coolest Pinot.” *Decanter*. March 2010. <http://www.decanter.com/>

*people-and-places/wine-articles/483749/cool-climate-california-pinot.*

<sup>8</sup> Hurson, Von. “The Gap Roars!” *Petaluma Post*. August 1, 2012. <http://www.petalumapost.com/08Aug2012-pages/index.htm>.

<sup>9</sup> Boone, Virginie. “Wines of Wind Country.” The *Press Democrat*. February 4, 2014. <http://www.pressdemocrat.com/news/1855471-181/wines-of-wind-country>.

TABLE 1—AVERAGE HOURLY AFTERNOON GROWING SEASON WIND SPEEDS—Continued

Location	Average wind speed (miles per hour)						
	12 noon	1 p.m.	2 p.m.	3 p.m.	4 p.m.	5 p.m.	6 p.m.
Middle Two Rock <sup>13</sup> .....	8.6	10.8	12.2	13.0	13.1	12.4	10.8
Azaya Vineyard <sup>14</sup> .....	5.2	6.5	7.6	8.1	8.1	7.5	6.4
Petaluma Airport <sup>15</sup> .....	9.5	11.1	12.1	12.2	11.5	10.3	9.0
Sun Chase Vineyard <sup>16</sup> .....	5.4	6.3	6.8	6.9	6.5	5.7	4.2
Sonoma Baylands <sup>17</sup> ....	10.5	11.4	12.0	12.4	12.4	12.0	10.7
<b>Outside proposed AVA (direction)</b>							
Occidental <sup>18</sup> (north) .....	2.0	2.3	2.5	2.5	2.3	2.0	1.6
Bellevue Ranch <sup>19</sup> .....							
(north) .....	2.2	3.0	3.6	3.8	3.8	3.3	2.7
Sonoma Valley <sup>20</sup> (east) .....	1.7	2.0	2.4	2.6	2.5	2.1	1.6
Novato <sup>21</sup> (south) .....	1.4	1.8	2.0	2.2	2.4	2.4	4.1

The petition also includes a table showing the frequency of hourly average afternoon wind speeds of at least 8 miles per hour for locations within the proposed Petaluma Gap AVA and the surrounding regions. The data is summarized in the following table. The period of record for each station is the same as used for Table 1.

TABLE 2—FREQUENCY OF HOURLY AVERAGE GROWING SEASON WIND SPEEDS THAT ARE GREATER THAN OR EQUAL TO 8 MILES PER HOUR

Location	Frequency (percent)
<b>Within proposed AVA</b>	
Valley Ford .....	89.9
Bloomfield .....	44.0
Mecham Landfill .....	81.2
Middle Two Rock .....	82.0
Azaya Vineyard .....	36.7
Petaluma Airport .....	79.5
Sun Chase Vineyard .....	30.3
Sonoma Baylands .....	82.8
<b>Outside proposed AVA (direction)</b>	
Occidental (north) .....	0.6
Novato (north) .....	5.3
Sonoma Valley (east) .....	1.8

<sup>10</sup> Period of record 2009–2014.  
<sup>11</sup> Period of record 2011–2014.  
<sup>12</sup> Period of record 2011–2014.  
<sup>13</sup> Period of record 2011–2014.  
<sup>14</sup> Period of record 2012–2014.  
<sup>15</sup> Period of record 1993–1997. This station stopped collecting hourly data in 1997.  
<sup>16</sup> Period of record 2011–2013. This station was a private weather station that experienced a mechanical failure in February 2014 and was not repaired until after the growing season.  
<sup>17</sup> Period of record 2009–2014.  
<sup>18</sup> Period of record 2009–2014.  
<sup>19</sup> Period of record 2010–2014.  
<sup>20</sup> Period of record 2012–2014.  
<sup>21</sup> Period of record 2009, 2012–2014. The 2010 and 2011 data for this station were largely incomplete and so were not included in the analysis.

TABLE 2—FREQUENCY OF HOURLY AVERAGE GROWING SEASON WIND SPEEDS THAT ARE GREATER THAN OR EQUAL TO 8 MILES PER HOUR—Continued

Location	Frequency (percent)
Bellevue Ranch (south) .....	9.2

The table shows that afternoon wind speeds for locations within the proposed AVA reach or exceed 8 miles per hour with greater frequency than for locations outside the proposed AVA. The petition states that when wind speeds reach 8 miles per hour, the stomata (or small pores) on the underside of the grape leaves close. When the stomata are closed, the rate of photosynthesis slows. The petition states that occasional periods of wind speeds of 8 miles per hour or higher typically have little effect on grape development. However, persistently high wind speeds, such as those found within the proposed Petaluma Gap AVA, reduce photosynthesis to the extent that the grapes have to remain on the vine longer in order to reach a given sugar level (a longer “hang time”), compared to the same grape varietal grown in a less windy location. Grapes grown in windy locations are also typically smaller and have thicker skins than the same varietal grown elsewhere. According to the petition, the smaller grape size, thicker skins, and longer hang time concentrate the flavor compounds in the fruit, allowing grapes that are harvested at lower sugar levels to still have the typical flavor characteristics of the grape varietal.

*Comparison of the Proposed Petaluma Gap AVA to the Existing North Coast AVA*

The North Coast AVA was established by T.D. ATF–145, which was published in the **Federal Register** on September 21, 1983 (48 FR 42973). The AVA includes all or portions of Napa, Sonoma, Mendocino, Solano, Lake, and Marin Counties in California and covers approximately 3 million acres. In the conclusion of the “Geographical Features” section of the preamble, T.D. ATF–145 states that “[d]ue to the enormous size of the North Coast viticultural area, variations exist in climatic features such as temperature, rainfall, and fog intrusion.”

The proposed Petaluma Gap AVA shares the basic viticultural feature of the North Coast AVA—the marine influence that moderates growing season temperatures in the area. However, the proposed AVA is much more uniform in its topography and its climate, as defined by wind speeds, than the diverse, multicounty North Coast AVA. In this regard, TTB notes that in the “Overlapping Viticultural Areas” section, T.D. ATF–145 specifically states that “approval of this viticultural area does not preclude approval of additional areas, either wholly contained within the North Coast, or partially overlapping the North Coast,” and that “smaller viticultural areas tend to be more uniform in their geographical and climatic characteristics, while very large areas such as the North Coast tend to exhibit generally similar characteristics, in this case the influence of maritime air off of the Pacific Ocean and San Pablo Bay.” Thus, the proposal to establish the Petaluma Gap AVA is consistent with what was envisaged when the North Coast AVA was established.

### Proposed Modification of the North Coast AVA

As previously noted, the petition to establish the proposed Petaluma Gap AVA also requests an expansion of the established North Coast AVA. The proposed Petaluma Gap AVA is located in the southwestern portion of the North Coast AVA, along the Sonoma–Marin County line. Most of the proposed Petaluma Gap AVA would, if established, be located within the current boundary of the North Coast AVA. However, unless the boundary of the North Coast AVA is modified, the southwestern portion of the proposed Petaluma Gap AVA in northwestern Marin County would be outside the North Coast AVA. This portion of the proposed Petaluma Gap AVA is roughly defined by the Pacific coastline on the western edge, the Sonoma–Marin County line on the northern edge, State Highway 1 on the eastern edge, and the mouth of Walker Creek on the southern edge. The proposed North Coast AVA boundary modification would increase the size of the established AVA by 28,077 acres and would result in the entire proposed Petaluma Gap AVA being within the North Coast AVA.

According to T.D. ATF–145, the North Coast AVA is characterized by a cool climate with growing degree day (GDD) totals that range from Region I to Region III on the Winkler scale.<sup>22</sup> T.D. ATF–145 states that the western portion of Marin County, which includes the southwestern portion of the proposed Petaluma Gap AVA, was excluded from the North Coast AVA because evidence submitted during the comment period showed that this portion of the county was significantly cooler than the rest of the North Coast AVA. The evidence included data from several Marin County weather stations, including a weather station on Point Reyes, which is southwest of both the North Coast AVA and the proposed Petaluma Gap AVA. In examining the public comment to T.D. ATF–145, TTB has found that the GDD total provided for Point Reyes was 759.

Although the original determination to exclude western Marin County from

the North Coast AVA was based on data from a Point Reyes weather station, which is southwest of the proposed Petaluma Gap AVA, TTB believes that GDD totals from that location are not an accurate basis for determining whether to include the southwestern corner of the proposed Petaluma Gap AVA within the North Coast AVA. The proposed Petaluma Gap AVA petition includes 2013 GDD data from a weather station located in Valley Ford, which is in the southwestern portion of the proposed AVA but outside of the current North Coast AVA boundary, as well as from weather stations within the proposed AVA, including one located two miles north of the town of Bodega Bay, that are within the current boundaries of the North Coast AVA.

The 2013 GDD total for the Valley Ford station was 1,102, which falls into the Region I category on the Winkler scale. For comparison, the 2013 GDD total for the Bodega Bay station was 1,194, which also falls into the Region I category on the Winkler scale. TTB believes, therefore, that this data shows that the climate of the southwestern portion of the proposed Petaluma Gap AVA is within the range of Winkler scale regions that characterizes the current North Coast AVA.

Additionally, in response to a question from TTB, the petitioners confirmed that there is at least one active vineyard growing Pinot Noir grapes in the southwest portion of the proposed Petaluma Gap AVA near Valley Ford, indicating that the GDD total for that region of the proposed AVA is not too low for commercial viticulture. Therefore, because the GDD total of the southwest portion of the proposed Petaluma Gap AVA is within the range of GDD totals that characterize the North Coast AVA and is high enough to support viticulture, TTB believes the petitioner's proposal to expand the North Coast AVA to include the southwest portion of the proposed Petaluma Gap AVA merits consideration and public comment.

#### *Comparison of the Proposed Petaluma Gap AVA to the Existing Sonoma Coast AVA*

The Sonoma Coast AVA was established by T.D. ATF–253, which was published in the **Federal Register** on June 11, 1987 (52 FR 22302). The Sonoma Coast AVA covers approximately 750 square miles within the western portion of Sonoma County. According to T.D. ATF–253, the AVA encompasses the portion of Sonoma County that is under “very strong marine climate influence,” including “persistent fog.” T.D. ATF–253 also

states that temperatures within the AVA are classified as “Coastal Cool” under the temperature classification system developed by Robert L. Sisson. “Coastal Cool” areas are defined as having a cumulative duration of less than 1,000 hours between 70 and 90 degrees Fahrenheit during the months of April through October. Temperatures within the Sonoma Coast AVA are described as significantly cooler than temperatures in the eastern portion of Sonoma County, which are classified as “Coastal Warm.” According to T.D. ATF–253, the average maximum July temperature for the Sonoma Coast AVA is 84 degrees Fahrenheit. T.D. ATF–253 did not distinguish the climate of the Sonoma Coast AVA from that of Marin County, located south of the AVA.

The proposed Petaluma Gap AVA is located in the southern portion of the Sonoma Coast AVA and shares the marine-influenced climate and coastal fog of the established AVA. Additionally, according to the climate data provided in the petition, the average maximum July temperature for the city of Petaluma, at the center of the proposed AVA, is 82 degrees Fahrenheit<sup>23</sup>, which is similar to that of the Sonoma Coast AVA. However, TTB notes that temperature is not a distinguishing feature of the proposed Petaluma Gap AVA, and that consistently high wind speeds and a topography of gently rolling hills are what distinguish the proposed AVA from the surrounding established AVA.

As previously noted, if established, the proposed Petaluma Gap AVA would partially overlap the Sonoma Coast AVA, but also would leave the 68,130-acre Marin County portion of the proposed AVA outside of the established Sonoma Coast AVA. However, the petition requests that TTB allow the partial overlap to remain, primarily because the name “Sonoma Coast” is associated only with the coastal region of Sonoma County and does not extend into Marin County.

Although TTB generally discourages partial overlaps of AVAs because of the potential for consumer confusion, TTB agrees with the petitioners that the Sonoma Coast AVA should not be expanded to include the Marin County portion of the proposed Petaluma Gap AVA. TTB believes that extending the Sonoma Coast AVA would likely cause consumer confusion because the name “Sonoma Coast” is associated with Sonoma County and use of the name does not extend into Marin County. TTB

<sup>22</sup> In the Winkler climate classification system, annual heat accumulation during the growing season, measured in annual growing degree days (GDDs), defines climatic regions. One GDD accumulates for each degree Fahrenheit that a day's mean temperature is above 50 degrees, the minimum temperature required for grapevine growth. The Winkler scale regions are defined as follows: Region I = less than 2,500 GDDs; Region II = 2,501–3,000 GDDs; Region III = 3,001–3,500 GDDs; Region IV = 3,501–4,000 GDDs; Region V = greater than 4,000 GDDs. See Albert J. Winkler, *General Viticulture* (Berkeley: University of California Press, 1974), pages 61–64.

<sup>23</sup> Western Regional Climate Center, [www.wrcc.dri.edu/Climsum.html](http://www.wrcc.dri.edu/Climsum.html), Petaluma Fire Station 3 (046826).

does not believe the potential partial overlap should be resolved by limiting the proposed Petaluma Gap AVA to Sonoma County because the evidence in the petition demonstrates that both the Sonoma County and the Marin County portions of the proposed AVA share similar topographic characteristics and similar wind speeds. TTB also does not believe the proposed AVA should be removed entirely from the Sonoma Coast AVA because the proposed AVA and the established AVA share similar marine-influenced climates. Additionally, TTB notes that removing the proposed AVA from the Sonoma Coast AVA would potentially affect current label holders who use the "Sonoma Coast" appellation on their wines because wines made primarily from grapes grown in the removed region would no longer be eligible to be labeled with that AVA as an appellation of origin. For these reasons, TTB is proposing to leave the current boundaries of the Sonoma Coast AVA unchanged and to allow the partial overlap with the proposed Petaluma Gap AVA.

#### **TTB Determination**

TTB concludes that the petition to establish the 202,476-acre "Petaluma Gap" AVA and to concurrently modify the boundary of the existing North Coast AVA merits consideration and public comment, as invited in this document.

TTB is proposing the establishment of the new AVA and the modification of the existing AVA as one action. Accordingly, if TTB establishes the proposed Petaluma Gap AVA, then the proposed boundary modification of the North Coast would be approved concurrently. If TTB does not establish the proposed Petaluma Gap AVA, then the present North Coast AVA boundary would not be modified as proposed in this document.

#### *Boundary Description*

See the narrative boundary descriptions of the petitioned-for AVA and the boundary modification of the established AVA in the proposed regulatory text published at the end of this document.

#### *Maps*

The petitioner provided the required maps, and they are listed below in the proposed regulatory text.

#### **Impact on Current Wine Labels**

Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. For a wine to be labeled with an AVA name

or with a brand name that includes an AVA name, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name, and the wine must meet the other conditions listed in 27 CFR 4.25(e)(3). If the wine is not eligible for labeling with an AVA name and that name appears in the brand name, then the label is not in compliance and the bottler must change the brand name and obtain approval of a new label. Similarly, if the AVA name appears in another reference on the label in a misleading manner, the bottler would have to obtain approval of a new label. Different rules apply if a wine has a brand name containing an AVA name that was used as a brand name on a label approved before July 7, 1986. See 27 CFR 4.39(i)(2) for details.

If this proposed regulatory text is adopted as a final rule, wine bottlers using "Petaluma Gap" in a brand name, including a trademark, or in another label reference as to the origin of the wine, would have to ensure that the product is eligible to use the viticultural area's full name "Petaluma Gap" as an appellation of origin.

If approved, the establishment of the proposed Petaluma Gap AVA and the proposed modification of the North Coast AVA boundary would allow vintners to use "Petaluma Gap" or "North Coast" as appellations of origin for wines made from grapes grown within the Petaluma Gap AVA, if the wines meet the eligibility requirements for the appellation. Additionally, vintners would be able to use "Sonoma Coast" as an appellation of origin on wines made primarily from grapes grown within the Sonoma County portion of the Petaluma Gap AVA, if the wines meet the eligibility requirements for the appellation.

#### **Public Participation**

##### *Comments Invited*

TTB invites comments from interested members of the public on whether TTB should establish the proposed Petaluma Gap AVA and concurrently modify the boundary of the established North Coast AVA. TTB is interested in receiving comments on the sufficiency and accuracy of the name, boundary, climate, topography, and other required information submitted in support of the Petaluma Gap AVA petition. In addition, given the proposed Petaluma Gap AVA's location within the existing North Coast AVA and Sonoma Coast AVA, TTB is interested in comments on whether the evidence submitted in the petition regarding the distinguishing features of the proposed AVA

sufficiently differentiates it from the existing AVAs. TTB is also interested in comments on whether the geographic features of the proposed AVA are so distinguishable from either the North Coast AVA or the Sonoma Coast AVA that the proposed Petaluma Gap AVA should not be part of one or either established AVA. Please provide any available specific information in support of your comments.

TTB also invites comments on the proposed expansion of the existing North Coast AVA. TTB is especially interested in comments on whether the evidence provided in the petition sufficiently demonstrates that the proposed expansion area is similar enough to the North Coast AVA to be included in the established AVA. Additionally, TTB is interested in comments on whether or not TTB should allow the Marin County portion of the proposed Petaluma Gap AVA to remain outside of the Sonoma Coast AVA. Comments should address the boundaries, climate, topography, soils, and any other pertinent information that supports or opposes the proposed North Coast AVA boundary expansion and/or the partial overlap of the proposed Petaluma Gap AVA with the Sonoma Coast AVA.

Because of the potential impact of the establishment of the proposed Petaluma Gap AVA on wine labels that include the term "Petaluma Gap" as discussed above under Impact on Current Wine Labels, TTB is particularly interested in comments regarding whether there will be a conflict between the proposed area name and currently used brand names. If a commenter believes that a conflict will arise, the comment should describe the nature of that conflict, including any anticipated negative economic impact that approval of the proposed AVA will have on an existing viticultural enterprise. TTB is also interested in receiving suggestions for ways to avoid conflicts, for example, by adopting a modified or different name for the proposed AVA.

##### *Submitting Comments*

You may submit comments on this proposal by using one of the following three methods:

- *Federal e-Rulemaking Portal:* You may send comments via the online comment form posted with this document within Docket No. TTB-2016-0009 on "*Regulations.gov*," the Federal e-rulemaking portal, at <https://www.regulations.gov>. A direct link to that docket is available under Notice No. 163 on the TTB Web site at <https://www.ttb.gov/wine/wine-rulemaking.shtml>. Supplemental files



may be attached to comments submitted via *Regulations.gov*. For complete instructions on how to use *Regulations.gov*, visit the site and click on the “Help” tab at the top of the page.

- *U.S. Mail*: You may send comments via postal mail to the Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005.

- *Hand Delivery/Courier*: You may hand-carry your comments or have them hand-carried to the Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 400, Washington, DC 20005.

Please submit your comments by the closing date shown above in this document. Your comments must reference Notice No. 163 and include your name and mailing address. Your comments also must be made in English, be legible, and be written in language acceptable for public disclosure. We do not acknowledge receipt of comments, and we consider all comments as originals.

Your comment must clearly state if you are commenting on your own behalf or on behalf of an organization, business, or other entity. If you are commenting on behalf of an organization, business, or other entity, your comment must include the entity’s name as well as your name and position title. If you comment via *Regulations.gov*, please enter the entity’s name in the “Organization” blank of the online comment form. If you comment via postal mail, please submit your entity’s comment on letterhead.

You may also write to the Administrator before the comment closing date to ask for a public hearing. The Administrator reserves the right to determine whether to hold a public hearing.

#### Confidentiality

All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or inappropriate for public disclosure.

#### Public Disclosure

TTB will post, and you may view, copies of this document, selected supporting materials, and any online or mailed comments received about this proposal within Docket No. TTB–2016–0009 on the Federal e-rulemaking portal, *Regulations.gov*, at <https://www.regulations.gov>. A direct link to that docket is available on the TTB Web site at <https://www.ttb.gov/wine/wine->

[rulemaking.shtml](#) under Notice No. 163. You may also reach the relevant docket through the *Regulations.gov* search page at <https://www.regulations.gov>. For instructions on how to use *Regulations.gov*, visit the site and click on the “Help” tab at the top of the page.

All posted comments will display the commenter’s name, organization (if any), city, and State, and, in the case of mailed comments, all address information, including email addresses. TTB may omit voluminous attachments or material that it considers unsuitable for posting.

You also may view copies of this document, all related petitions, maps and other supporting materials, and any electronic or mailed comments we receive about this proposal by appointment at the TTB Information Resource Center, 1310 G Street NW., Washington, DC 20005. You may also obtain copies at 20 cents per 8.5- x 11-inch page. Contact our information specialist at the above address or by telephone at 202–453–2265 to schedule an appointment or to request copies of comments or other materials.

#### Regulatory Flexibility Act

TTB certifies that this proposed regulation, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of a viticultural area name would be the result of a proprietor’s efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

#### Executive Order 12866

This proposed rule is not a significant regulatory action as defined by Executive Order 12866. Therefore, it requires no regulatory assessment.

#### Drafting Information

Karen A. Thornton of the Regulations and Rulings Division drafted this document.

#### List of Subjects in 27 CFR Part 9

Wine.

#### Proposed Regulatory Amendment

For the reasons discussed in the preamble, we propose to amend title 27, chapter I, part 9, Code of Federal Regulations, as follows:

#### PART 9—AMERICAN VITICULTURAL AREAS

- 1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

#### Subpart C—Approved American Viticultural Areas

- 2. Section 9.30 is amended as follows:
  - a. The introductory text of paragraph (b) is revised;
  - b. The word “and” is removed from the end of paragraph (b)(2);
  - c. The period is removed from the end of paragraph (b)(3) and a semicolon is added in its place;
  - d. Paragraphs (b)(4) and (5) are added;
  - e. Paragraphs (c)(1) and (2) are revised;
  - f. Paragraphs (c)(3) through (24) are redesignated as paragraphs (c)(7) through (28); and
  - g. Paragraphs (c)(3) through (6) are added.

The revisions and additions read as follows:

#### § 9.30 North Coast.

\* \* \* \* \*

(b) *Approved maps*. The appropriate maps for determining the boundaries of the North Coast viticultural area are five U.S.G.S. maps. They are entitled:

\* \* \*

(4) “Tomales, CA,” scale 1:24,000, edition of 1995; and

(5) “Point Reyes NE., CA,” scale 1:24,000, edition of 1995.

(c) \* \* \*

(1) Then follow the Pacific coastline in a generally southeasterly direction for 9.4 miles, crossing onto the Tomales map, to Preston Point on Tomales Bay;

(2) Then northeast along the shoreline of Tomales Bay approximately 1 mile to the mouth of Walker Creek opposite benchmark (BM) 10 on State Highway 1;

(3) Then southeast in a straight line for 1.3 miles to the marked 714-foot peak;

(4) Then southeast in a straight line for 3.1 miles, crossing onto the Point Reyes NE map, to the marked 804-foot peak;

(5) Then southeast in a straight line 1.8 miles to the marked 935-foot peak;

(6) Then southeast in a straight line 12.7 miles, crossing back onto the Santa Rosa map, to the marked 1,466-foot peak on Barnabe Mountain;

\* \* \* \* \*

- 3. Add § 9. \_\_\_\_\_ to read as follows:

#### § 9. \_\_\_\_\_ Petaluma Gap.

(a) *Name*. The name of the viticultural area described in this section is “Petaluma Gap”. For purposes of part 4 of this chapter, “Petaluma Gap” is a term of viticultural significance.

(b) *Approved maps*. The 12 United States Geological Survey (USGS) 1:24,000 scale topographic maps used to determine the boundary of the Petaluma Gap viticultural area are titled:



(1) Cotati, Calif., 1954; photorevised 1980;

(2) Glen Elle, Calif., 1954; photorevised 1980;

(3) Petaluma River, Calif., 1954; photorevised 1980;

(4) Sears Point, Calif., 1951; photorevised 1968;

(5) Petaluma Point, Calif., 1959; photorevised 1980;

(6) Novato, Calif., 1954; photorevised 1980;

(7) Petaluma, Calif., 1953; photorevised 1981;

(8) Point Reyes NE., CA, 1995;

(9) Tomales, CA, 1995;

(10) Bodega Head, Calif., 1972;

(11) Valley Ford, Calif., 1954;

photorevised 1971; and

(12) Two Rock, Calif., 1954; photorevised 1971.

(c) *Boundary.* The Petaluma Gap viticultural area is located in Sonoma and Marin Counties in California. The boundary of the Petaluma Gap viticultural area is as described below:

(1) The beginning point is on the Cotati map at the intersection of Grange Road, Crane Canyon Road, and the northern boundary of section 16, T6N/R7W. From the beginning point, proceed southeast in a straight line for 1 mile, crossing over Pressley Road, to the intersection of the 900-foot elevation contour and the eastern boundary of section 16, T6N/R7W; then

(2) Proceed east-southeasterly in a straight line for 0.5 mile, crossing onto the Glen Ellen map, to the terminus of an unnamed, unimproved road known locally as Summit View Ranch Road, just north of the southern boundary of section 15, T6N/R7N; then

(3) Proceed southeast in a straight line for 0.6 mile to the intersection of Crane Creek and the 1,200-foot elevation contour, section 22, T6N/R7W; then

(4) Proceed southeast in a straight line for 2.9 miles to the marked 2,271-foot peak on Sonoma Mountain, T6N/R6W; then

(5) Proceed southeast in a straight line for 10.5 miles, crossing over the northeastern corner of the Petaluma River map and onto the Sears Point map, to the marked 682-foot summit of Wildcat Mountain; then

(6) Proceed south-southeasterly in a straight line for 3.3 miles to the intersection of State Highway 121 (also known locally as Arnold Drive) and State Highway 37 (also known locally as Sears Point Road); then

(7) Proceed east-northeasterly along State Highway 37/Sears Point Road for approximately 0.1 mile to Tolay Creek; then

(8) Proceed generally south along the meandering Tolay Creek for 3.9 miles,

crossing onto the Petaluma Point map, to the mouth of the creek at San Pablo Bay; then

(9) Proceed southwesterly along the shore of San Pablo Bay for 2.7 miles, crossing the mouth of the Petaluma River, and continuing southeasterly along the bay's shoreline to Petaluma Point; then

(10) Proceed northwesterly in a straight line for 6.3 miles, crossing over the northeastern corner of the Novato map and onto the Petaluma River map, to the marked 1,558-foot peak of Burdell Mountain; then

(11) Proceed northwest in a straight line for 1.3 miles to the marked 1,193-foot peak; then

(12) Proceed west-southwesterly in a straight line for 2.2 miles, crossing onto the Petaluma map, to the marked 1,209-foot peak; then

(13) Proceed west-southwest in a straight line for 0.8 mile to the marked 1,296-foot peak; then

(14) Proceed west in a straight line for 1 mile to the marked 1,257-foot peak on Red Hill in section 31, T4N/R7W; then

(15) Proceed southwest in a straight line for 2.9 miles to the marked 1,532-foot peak on Hicks Mountain; then

(16) Proceed north-northwesterly in a straight line for 2.7 miles, crossing onto the Point Reyes NE map, to the marked 1,087-foot peak; then

(17) Proceed north-northwesterly in a straight line for 1.5 miles to the marked 1,379-foot peak; then

(18) Proceed west-northwesterly in a straight line for 2.9 miles to the marked 935-foot peak; then

(19) Proceed northwest in a straight line for 1.8 miles to the marked 804-foot peak; then

(20) Proceed west-northwesterly in a straight line for 3.1 miles, crossing onto the Tomales map, to the marked 741-foot peak; then

(21) Proceed northwesterly in a straight line for 1.3 miles to benchmark (BM) 10 on State Highway 1, at the mouth of Walker Creek in Tomales Bay; then

(22) Proceed southwesterly, then northwesterly along the shoreline of Tomales Bay to Sand Point, on Bodega Bay, and continuing northerly along the shoreline of Bodega Bay, crossing over the Valley Ford map and onto the Bodega Head map, circling the shoreline of Bodega Harbor to the Pacific Ocean and continuing northerly along the shoreline of the Pacific Ocean to the mouth of Salmon Creek, for a total of 19.5 miles; then

(23) Proceed easterly along Salmon Creek for 9.6 miles, crossing onto the Valley Ford map and passing Nolan Creek, to the second intermittent stream

in the Estero Americano land grant, T6N/R10W; then

(24) Proceed east in a straight line for 1 mile to vertical angle benchmark (VABM) 724 in the Estero Americano land grant, T6N/R10W; then

(25) Proceed south-southeasterly in a straight line for 0.8 mile to BM 61 on an unmarked light duty road known locally as Freestone Valley Ford Road in the Cañada de Pogolimi land grant, T6N/R10W; then

(26) Proceed southeast in a straight line for 0.6 mile to the marked 448-foot peak in the Cañada de Pogolimi land grant, T6N/R10W; then

(27) Proceed southeast in a straight line for 0.1 mile to the northern terminus of an unnamed, unimproved road in the Cañada de Pogolimi land grant, T6N/R10W; then

(28) Proceed northeasterly, then southeasterly for 0.9 mile along the unnamed, unimproved road to the 400-foot elevation contour in the Cañada de Pogolimi land grant, T6N/R10W; then

(29) Proceed easterly along the meandering 400-foot elevation contour for 6.7 miles, crossing onto the Two Rocks map, to Burnside Road in the Cañada de Pogolimi land grant, T6N/R10W; then

(30) Proceed south on Burnside Road for 0.1 mile to an unnamed medium duty road known locally as Bloomfield Road in the Cañada de Pogolimi land grant, T6N/R9W; then

(31) Proceed southeast in a straight line for 0.6 mile to the marked 610-foot peak in the Blucher land grant, T6N/R9W; then

(32) Proceed east-southeasterly in a straight line for 0.8 mile to the marked 641-foot peak in the Blucher land grant, T6N/R9W; then

(33) Proceed northeast in a straight line for 1.2 miles, crossing through the intersection of an intermittent stream with Canfield Road, to the common Range 8/9 boundary; then

(34) Proceed southeast in a straight line for 0.5 mile to the marked 542-foot peak; then

(35) Proceed southeast in a straight line for 0.8 mile to the intersection of an unnamed, unimproved road (leading to four barn-like structures) known locally as Carniglia Lane and an unnamed medium duty road known locally as Roblar Road, T6N/R8W; then

(36) Proceed south in a straight line for 0.5 mile to the marked 678-foot peak, T6N/R8W; then

(37) Proceed east-southeast in a straight line for 0.8 mile to the marked 599-foot peak, T5N/R8W; then

(38) Proceed east-southeast in a straight line for 0.7 mile to the marked 604-foot peak, T5N/R8W; then

(39) Proceed east-southeast in a straight line for 0.9 mile, crossing onto the Cotati map, to the intersection of Meacham Road and an unnamed light duty road leading to a series of barn-like structures, T5N/R8W; then

(40) Proceed north-northeast along Meacham Road for 0.8 mile to Stony Point Road, T5N/R8W; then

(41) Proceed southeast along Stony Point Road for 1.1 miles to the 200-foot elevation contour, T5N/R8W; then

(42) Proceed north-northeast in a straight line for 0.5 mile to the intersection of an intermittent creek with U.S. Highway 101, T5N/R8W; then

(43) Proceed north along U.S. Highway 101 for 1.5 miles to State Highway 116 (also known locally as Graverstein Highway), T6N/R8W; then

(44) Proceed northeast in a straight line for 3.4 miles to the intersection of Crane Creek and Petaluma Hill Road, T6N/R7W; then

(45) Proceed easterly along Crane Creek for 0.8 mile to the intersection of Crane Creek and the 200-foot elevation line, T6N/R7W; then

(46) Proceed northwesterly along the 200-foot elevation contour for 1 mile to the intersection of the contour line and an intermittent stream just south of Crane Canyon Road, T6N/R7W; then

(47) Proceed east then northeasterly along the northern branch of the intermittent stream for 0.3 mile to the intersection of the stream with Crane Canyon Road, T6N/R7W; then

(48) Proceed northeasterly along Crane Canyon Road for 1.2 miles, returning to the beginning point.

Signed: October 21, 2016.

**John J. Manfreda,**  
Administrator.

[FR Doc. 2016-25972 Filed 10-27-16; 8:45 am]

**BILLING CODE 4810-31-P**

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## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

#### 29 CFR Chapter XVII

#### Informal Discussion on Hazard Communication Rulemaking

**AGENCY:** Occupational Safety and Health Administration (OSHA), Department of Labor.

**ACTION:** Notice of public meeting.

**SUMMARY:** This notice is to advise interested persons that on Wednesday, November 16, 2016, OSHA will conduct a public meeting to informally discuss potential updates to the Hazard Communication Standard. The purpose

of this meeting is to invite stakeholders to identify topics or issues they would like OSHA to consider in the rulemaking.

**DATES:** Wednesday November 16, 2016.

**ADDRESSES:** OSHA's informal discussion on Hazard Communication rulemaking will be held Wednesday, November 16, 2016 from 9:00 a.m.–12:30 p.m. at the Mine Safety and Health Administration (MSHA) Headquarters, Suite 700, 201 12th Street South, Arlington, VA 22202.

**FOR FURTHER INFORMATION CONTACT:** Ms. Maureen Ruskin, OSHA Directorate of Standards and Guidance, Department of Labor, Washington, DC 20210, telephone: (202) 693-1950, email: [ruskin.maureen@dol.gov](mailto:ruskin.maureen@dol.gov).

**SUPPLEMENTARY INFORMATION:**

*Advanced Meeting Registration:* OSHA requests that attendees pre-register for this meeting by completing the form at <https://www.surveymonkey.com/r/CRPK2YY>. Please note if you are attending in person MSHA, who is hosting this meeting, requires pre-registration seven days before the meeting. Failure to pre-register for this event will prevent your access into the MSHA Headquarters building. Additionally, if you are attending in-person, OSHA suggests you plan to arrive early to allow time for the security checks necessary to access the building. Conference call-in and WebEx capability will be provided for this meeting. Specific information on the MSHA Headquarters building access, and call-in and WebEx meeting access will be posted when available in the Highlights box on OSHA's Hazard Communication Web site at: <https://www.osha.gov/dsg/hazcom/index.html>. OSHA is beginning its rulemaking efforts to maintain alignment of the Hazard Communication Standard (HCS) with the most recent revision of the United Nations Globally Harmonized system of Classification and Labelling of chemicals (GHS). The purpose of this meeting is to request feedback from stakeholders and informally discuss potential topics or issues that OSHA should consider during a rulemaking to update the HCS. OSHA will also solicit suggestions about the types of publications stakeholders might find helpful in complying with the standard and which topics on which they would like OSHA to prepare additional compliance materials in the future.

*Authority and Signature:* This document was prepared under the direction of David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, pursuant to sections 4, 6, and 8 of the Occupational

Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), and Secretary's Order 1-2012 (77 FR 3912), (Jan. 25, 2012).

Signed at Washington, DC, on October 24, 2016.

**David Michaels,**

*Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. 2016-26003 Filed 10-27-16; 8:45 am]

**BILLING CODE 4510-26-P**

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## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

#### 37 CFR Part 1

[Docket No.: PTO-P-2011-0030]

RIN 0651-AC58

#### Revision of the Duty To Disclose Information in Patent Applications and Reexamination Proceedings

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The United States Patent and Trademark Office (Office or PTO) is proposing revisions to the materiality standard for the duty to disclose information in patent applications and reexamination proceedings (duty of disclosure) in light of a 2011 decision by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). The Office previously issued a notice of proposed rulemaking on July 21, 2011, and due to the passage of time since the comment period closed in 2011, the Office considers it appropriate to seek additional comments from our stakeholders before issuing a final rulemaking. In the current notice of proposed rulemaking, the Office is seeking public comments on the rules of practice, as revised in response to the comments received from our stakeholders.

**DATES:** *Comment Deadline Date:* The Office is soliciting comments from the public on this proposed rule change. Written comments must be received on or before December 27, 2016 to ensure consideration. No public hearing will be held.

**ADDRESSES:** Comments concerning this notice should be sent by electronic mail message over the Internet (email) addressed to [AC58.comments@uspto.gov](mailto:AC58.comments@uspto.gov). Comments may also be submitted by postal mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, marked to the attention of Matthew

Sked, Legal Advisor, Office of Patent Legal Administration, Office of the Associate Commissioner for Patent Examination Policy. Comments may also be sent by email via the Federal eRulemaking Portal. See the Federal eRulemaking Portal Web site (<http://www.regulations.gov>) for additional instructions on providing comments via the Federal eRulemaking Portal.

Although comments may be submitted by postal mail, the Office prefers to receive comments via email to facilitate posting on the Office's Internet Web site. Plain text is preferred, but comments may also be submitted in ADOBE® portable document format or MICROSOFT WORD® format. Comments not submitted electronically should be submitted on paper in a format that facilitates convenient scanning into ADOBE® portable document format.

The comments will be available for public inspection, upon request, at the Office of the Commissioner for Patents, located in Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia. Comments also will be available for viewing via the Office's Internet Web site (<http://www.uspto.gov>) and at <http://www.regulations.gov>. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

**FOR FURTHER INFORMATION CONTACT:**

Matthew J. Sked, Legal Advisor ((571) 272-7627) or Nicole Dretar Haines, Senior Legal Advisor ((571) 272-7717), Office of Patent Legal Administration, Office of the Deputy Commissioner for Patent Examination Policy.

**SUPPLEMENTARY INFORMATION:**

**Executive Summary:**

*Purpose:* This notice proposes changes to the relevant rules of practice to harmonize the materiality standard for the duty of disclosure before the Office with the but-for materiality standard for establishing inequitable conduct before the courts in light of the Federal Circuit's decision in *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276 (Fed. Cir. 2011) (*en banc*).

*Summary of Major Provisions:* The Office proposes to revise the rules of practice to adopt the but-for standard for materiality required to establish inequitable conduct set forth in the Federal Circuit's decision in *Therasense* as the standard for materiality for the duty to disclose information in patent applications and reexamination

proceedings. The Office also proposes to revise the rules of practice to explicitly reference "affirmative egregious misconduct" as set forth in the Federal Circuit's decision in *Therasense*.

*Costs and Benefits:* This rulemaking is not economically significant as that term is defined in Executive Order 12866 (Sept. 30, 1993).

**Background**

On May 25, 2011, the Federal Circuit issued the *en banc Therasense* decision, modifying the standard for materiality required to establish inequitable conduct before the courts. The Federal Circuit tightened the materiality standard to "reduce the number of inequitable conduct cases before the courts and . . . cure the problem of overdisclosure of marginally relevant prior art to the PTO." *Therasense*, 649 F.3d at 1291. In *Therasense*, the Federal Circuit held that "the materiality required to establish inequitable conduct is but-for materiality." *Id.* The Federal Circuit explained that "[w]hen an applicant fails to disclose prior art to the PTO, that prior art is but-for material if the PTO would not have allowed a claim had it been aware of the undisclosed prior art." *Id.* The Federal Circuit further explained that "in assessing the materiality of a withheld reference, the court must determine whether the PTO would have allowed the claim if it had been aware of the undisclosed reference[,] . . . apply[ing] the preponderance of the evidence standard and giv[ing] claims their broadest reasonable construction." *Id.* at 1291-92. Examples of where the Federal Circuit found information to be but-for material include *Transweb, LLC v. 3M Innovative Properties Co.*, 812 F.3d 1295 (Fed. Cir. 2016), and *Apotex, Inc. v. UCB Inc.*, 763 F.3d 1354 (Fed. Cir. 2014).

In addition, the Federal Circuit recognized that the materiality prong of inequitable conduct may also be satisfied in cases of affirmative egregious misconduct. *Id.* at 1292. See also *The Ohio Willow Wood Co. v. Alps South, LLC*, 735 F.3d 1333, 1351 (Fed. Cir. 2013); *Intellect Wireless, Inc. v. HTC Corp.*, 732 F.3d 1339, 1344 (Fed. Cir. 2013). The Federal Circuit explained that "[t]his exception to the general rule of requiring but-for proof incorporates elements of the early unclean hands cases before the Supreme Court, which dealt with 'deliberately planned and carefully executed scheme[s]' to defraud the PTO and the courts." *Therasense*, 649 F.3d at 1292. The Federal Circuit reasoned that "a patentee is unlikely to go to great lengths to deceive the PTO with a

falsehood unless it believes that the falsehood will affect issuance of the patent." *Id.* Further, the Federal Circuit clarified that while the filing of an unmistakably false affidavit would constitute affirmative egregious misconduct, "neither mere nondisclosure of prior art references to the PTO nor failure to mention prior art references in an affidavit constitutes affirmative egregious misconduct." *Id.* at 1292-93. Rather, "claims of inequitable conduct that are based on such omissions require proof of but-for materiality." *Id.* at 1293.

A notice of proposed rulemaking was previously published in the **Federal Register** (76 FR 43631) on July 21, 2011. Comments were due on September 19, 2011. The Office received 24 written comments in response to the notice. In addition to considering the public comments, the Office monitored further Federal Circuit decisions regarding the application of the inequitable conduct standard. Based upon the passage of time since the end of the comment period and the significant changes to patent law as a result of the successful implementation of the Leahy-Smith America Invents Act, the Office considered it appropriate to obtain public comment on the proposed changes to the rules of practice regarding the duty of disclosure. Therefore, the Office is publishing the current notice of proposed rulemaking to provide the public with an opportunity to comment on the proposed revisions, which take into account the comments received in response to the 2011 notice of proposed rulemaking.

Like the previously proposed rule, the currently proposed rule would harmonize the materiality standard for the duty of disclosure before the Office with the but-for materiality standard set forth in *Therasense* for establishing inequitable conduct before the courts. Specifically, the currently proposed rule would modify 37 CFR 1.56(a) and 37 CFR 1.555(a) to recite that the materiality standard for the duty of disclosure is but-for materiality, and would modify 37 CFR 1.56(b) and 37 CFR 1.555(b) to define the but-for materiality standard as set forth in *Therasense*. Further, in view of the Federal Circuit's recognition that affirmative egregious misconduct satisfies the materiality prong of inequitable conduct, the currently proposed rule would amend 37 CFR 1.56(a) and 37 CFR 1.555(a) to explicitly incorporate affirmative egregious misconduct.

In the previous notice of proposed rulemaking, the Office proposed only to

amend 37 CFR 1.56(b) and 37 CFR 1.555(b) by combining in the same provision both an explicit reference to the *Therasense* materiality standard and a definition of the materiality standard, which included an explicit recitation of affirmative egregious misconduct. See *Revision of the Materiality to Patentability Standard for the Duty to Disclose Information in Patent Applications*, 76 FR 43631, 43634 (July 21, 2011). Prior to making a final decision on whether to modify the previously proposed rule, the Office considered all public comments and monitored the petition for certiorari to the Supreme Court in *1st Media, LLC v. Electronic Arts, Inc.*, 694 F.3d 1367 (Fed. Cir. 2012), *cert. denied*, 134 S.Ct. 418 (2013) and the further developments regarding the application of the inequitable conduct standard by the Federal Circuit. Accordingly, the Office has decided to modify the previously proposed rule language to avoid potential confusion by moving the language regarding affirmative egregious misconduct from the definition of the materiality standard for disclosure of information in 37 CFR 1.56(b)(2) and 37 CFR 1.555(b)(2), as previously proposed, to 37 CFR 1.56(a) and 37 CFR 1.555(a), respectively. Therefore, in the currently proposed rule, 37 CFR 1.56(b) and 37 CFR 1.555(b) would define the but-for materiality standard as set forth in *Therasense*, while 37 CFR 1.56(a) and 37 CFR 1.555(a) would incorporate affirmative egregious misconduct.

In the previous notice of proposed rulemaking, the Office also proposed to amend 37 CFR 1.56(b) and 37 CFR 1.555(b) to explicitly reference the *Therasense* ruling. Comments received in response to the previous notice of proposed rulemaking questioned explicitly referencing the *Therasense* decision directly in the rules out of concern that the rules could be affected as the *Therasense* ruling is interpreted and applied, or if *Therasense* is overruled. While the currently proposed rule removes the explicit reference to the *Therasense* decision, explicitly referencing the court decision is not necessary to link the materiality standard for the duty of disclosure before the Office with the but-for materiality standard set forth in *Therasense* for establishing inequitable conduct before the courts. The recitation of but-for materiality in 37 CFR 1.56(a) and 1.555(a) and the definition of but-for materiality in 37 CFR 1.56(b) and 1.555(b) would establish that the materiality standard for the duty of disclosure in this currently proposed rule is the same as the but-for

materiality standard set forth in *Therasense* and its interpretations and applications.

As discussed previously, *Therasense* was decided by the Federal Circuit *en banc*. This precedential decision can only be overturned by another *en banc* decision of the Federal Circuit or by a decision of the Supreme Court. See, e.g., *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068 n.5 (Fed. Cir. 1998) (Federal Circuit precedent may not be changed by a panel.). The Office's explicit reference to and definition of the but-for materiality standard set forth in *Therasense* in currently proposed 37 CFR 1.56 and 37 CFR 1.555 would avoid divergence between the Office's materiality standard for the duty of disclosure and the but-for inequitable conduct materiality standard set forth in *Therasense*. This approach should benefit the public by providing a consistent materiality standard without the need for continuous revisions to the rules as the *Therasense* standard is interpreted or applied. In the event the Supreme Court, or Federal Circuit acting *en banc*, chooses to revise the but-for materiality standard in *Therasense*, the Office will reconsider the rules at that time. Further, the Office will keep the public informed of its understanding of how the Federal Circuit interprets the standard through future revisions to the Manual of Patent Examining Procedure (MPEP).

Historically, the Federal Circuit connected the materiality standard for inequitable conduct with the Office's materiality standard for the duty of disclosure. That is, the Federal Circuit has invoked the materiality standard for the duty of disclosure to measure materiality in cases raising claims of inequitable conduct. In doing so, the Federal Circuit has utilized both the "reasonable examiner" standard set forth in the 1977 version of 37 CFR 1.56(b) and the *prima facie* case of unpatentability standard set forth in the 1992 version of 37 CFR 1.56(b). See, e.g., *Am. Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1363 (Fed. Cir. 1984); *Bruno Indep. Living Aids, Inc. v. Acorn Mobility Servs., Ltd.*, 394 F.3d 1348, 1352–53 (Fed. Cir. 2005). In *Therasense*, the Federal Circuit eliminated what existed of the historical connection between the two materiality standards and did not indicate that the Office must apply the but-for standard for materiality required to establish inequitable conduct under *Therasense* as the standard for determining materiality under 37 CFR 1.56 or 37 CFR 1.555. Thus, while *Therasense* does not require the Office to harmonize its

materiality standard underlying the duty of disclosure and the Federal Circuit's but-for materiality standard underlying the inequitable conduct doctrine, there are important reasons to amend 37 CFR 1.56 and 37 CFR 1.555 to do so.

A unitary materiality standard is simpler for the patent system as a whole. Under the single but-for standard of materiality, patent applicants will not be put in the position of having to meet one standard of materiality as set forth in *Therasense* in defending against inequitable conduct allegations and a second, different materiality standard when complying with the duty of disclosure before the Office. Also, the Office expects that by adopting the *Therasense* but-for standard for materiality in this currently proposed rule, the frequency with which charges of inequitable conduct are raised against applicants and practitioners for failing to disclose material information to the Office will be reduced.

Similarly, the Office expects that adopting the but-for materiality standard would reduce the incentive to submit marginally relevant information in information disclosure statements (IDSs). As such, this currently proposed rule would further the Office's goal of enhancing patent quality. The adoption of the but-for standard for materiality should lead to more focused prior art submissions by applicants, which in turn will assist examiners in more readily recognizing the most relevant prior art.

At the same time, the Office also expects this currently proposed rule would continue to encourage applicants to comply with their duty of candor and good faith. The Office recognizes that it previously considered, and rejected, a but-for standard for the duty of disclosure in 1992 when it promulgated the *prima facie* case of unpatentability standard that would be replaced under this proposed rule. *Duty of Disclosure*, 57 FR 2021, 2024 (Jan. 17, 1992). The Office was concerned about the types of potential misconduct that could occur unchecked under a pure but-for standard. By including a provision for affirmative egregious misconduct in the currently proposed rule, the Office's long-standing concern would be mitigated. In *Therasense*, the Federal Circuit stated, "creating an exception to punish affirmative egregious acts without penalizing the failure to disclose information that would not have changed the issuance decision . . . strikes a necessary balance between encouraging honesty before the PTO and preventing unfounded accusations of inequitable conduct." *Id.* at 1293.

### Discussion of Specific Rules

The following is a description of the amendments PTO is proposing:

*Section 1.56:* Section 1.56(a) as proposed to be amended would provide that the materiality standard for the duty of disclosure is but-for materiality. Further, § 1.56(a) as proposed would provide that a patent will not be granted on an application in which affirmative egregious misconduct was engaged in.

Section 1.56(b) as proposed to be amended would replace the *prima facie* case of unpatentability materiality standard with the definition of the but-for materiality standard. As proposed, § 1.56(b) would provide that information is but-for material to patentability if the Office would not find a claim patentable if the Office were aware of the information, applying the preponderance of the evidence standard and giving the claim its broadest reasonable construction consistent with the specification.

Previously proposed § 1.56(b) included two discrete sentences. The first sentence stated information is material to patentability if it is material under the standard set forth in *Therasense*, and the second sentence stated information is material to patentability under *Therasense* if (1) the Office would not allow a claim if it were aware of the information, or (2) the applicant engages in affirmative egregious misconduct before the Office as to the information. See *Revision of the Materiality to Patentability Standard for the Duty to Disclose Information in Patent Applications*, 76 FR at 43634. The explicit reference to the *Therasense* decision and the recitation of affirmative egregious misconduct in previously proposed § 1.56(b) have not been retained in this currently proposed rule in view of public comments received. Currently proposed § 1.56(a) now recites that the materiality standard for the duty of disclosure is but-for materiality. Currently proposed § 1.56(b) defines the but-for materiality standard as set forth in *Therasense*.

As set forth above, an explicit reference to the *Therasense* decision is not necessary to link the materiality standard for the duty of disclosure to the but-for materiality standard for inequitable conduct set forth in *Therasense*. The Office has determined that reciting “but-for material[ity]” and its definition as it is recited in *Therasense* makes clear that the standard for materiality is the but-for standard set forth in *Therasense* and its interpretations and applications. Also, by moving the language regarding affirmative egregious misconduct from

previously proposed § 1.56(b)(2) to § 1.56(a), the Office has separated the definition of the materiality standard for the duty to disclose information from the recitation of affirmative egregious misconduct.

Additionally, the Office has modified the previously proposed rule language to state that a claim is given its broadest reasonable construction “consistent with the specification.” The Office did not intend the previously proposed omission of this language that is present in existing §§ 1.56(b) and 1.555(b) as an indication that claims would no longer be given their broadest reasonable construction consistent with the specification. While the Federal Circuit in *Therasense* did not specifically state that the broadest reasonable construction is a construction that is consistent with the specification, the Federal Circuit referenced MPEP § 2111 (8th ed. 2001) (Rev. 9, Aug. 2012) in establishing that a claim is given its broadest reasonable construction. *Therasense*, 649 F.3d at 1292. MPEP § 2111 states that “(d)uring patent examination, the pending claims must be ‘given their broadest reasonable interpretation consistent with the specification.’” See also *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (“The Patent and Trademark Office (‘PTO’) determines the scope of claims in patent applications not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction ‘in light of the specification as it would be interpreted by one of ordinary skill in the art.’”). In addition, the Federal Circuit has indicated that the phrases “broadest reasonable interpretation” and “broadest reasonable interpretation consistent with the specification” have the same meaning as it would be unreasonable to ignore any interpretive guidance afforded by the written description. See *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997). Nevertheless, in order to make clear that any construction made by the Office in the application of § 1.56 must be consistent with the specification, the currently proposed rules have been amended accordingly.

*Section 1.555:* Section 1.555(a) as proposed to be amended would provide that the materiality standard for the duty of disclosure in a reexamination proceeding is but-for materiality. Further, § 1.555(a) as proposed to be amended would provide that the duties of candor, good faith, and disclosure have not been complied with if affirmative egregious misconduct was engaged in by, or on behalf of, the

patent owner in the reexamination proceeding.

Section 1.555(b) as proposed to be amended would provide that information is but-for material to patentability if, for any matter proper for consideration in reexamination, the Office would not find a claim patentable if the Office were aware of the information, applying the preponderance of the evidence standard and giving the claim its broadest reasonable construction consistent with the specification. The explicit reference to the *Therasense* decision and recitation of affirmative egregious misconduct in previously proposed § 1.555(b) have not been retained in this currently proposed rule in view of public comments received. Currently proposed § 1.555(a) now recites that the materiality standard for the duty of disclosure in a reexamination proceeding is but-for materiality. Currently proposed § 1.555(b) defines the but-for materiality standard as set forth in *Therasense*.

Additionally, § 1.555(b) as proposed would provide that the but-for materiality standard covers the disclosure of information as to any matter that is proper for consideration in a reexamination proceeding. Previously proposed § 1.555(b) was silent as to the types of information that are appropriate for consideration in a reexamination proceeding, and existing § 1.555(b) limits the types of information that could be considered in reexamination to patents and printed publications. In view of public comments received, this currently proposed rule would amend § 1.555(b) to again recite the types of information that are appropriate for consideration in a reexamination proceeding but, unlike the existing rule, this currently proposed rule encompasses disclosure of information as to any matter that is appropriate for consideration in a reexamination proceeding (e.g., admissions by patent owner), as opposed to being limited to patents and printed publications.

It is noted that § 1.933 is also directed to the duty of disclosure in *inter partes* reexamination proceedings; however, the statement as to materiality of information in § 1.933 incorporates § 1.555. Thus, § 1.933 has not been amended in this currently proposed rule.

### Comments and Response to Comments

The Office published a notice on July 21, 2011, proposing to change the rules of practice to revise the standard for materiality of the duty to disclose information in patent applications and

reexamination proceedings in light of the decision of the Federal Circuit in *Therasense*. See *Revision of the Materiality to Patentability Standard for the Duty to Disclose Information in Patent Applications*, 76 FR at 43631. The Office received 24 written comments (from intellectual property organizations, academic and research institutions, companies, and individuals) in response to that notice. The comments and the Office's responses to the comments follow:

- A. Previously Proposed §§ 1.56(b)(1) and 1.555(b)(1)
- B. Cumulative Information
- C. Affirmative Egregious Misconduct
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*A. Previously Proposed §§ 1.56(b)(1) and 1.555(b)(1)*

*Comment 1:* Several comments suggested amending previously proposed §§ 1.56(b)(1) and 1.555(b)(1) to add the phrase "consistent with the specification" following the phrase "broadest reasonable construction" to ensure the Office would be giving a claim its broadest reasonable construction consistent with the specification.

*Response:* As discussed in the preamble, the Office has modified the previously proposed rule language to add "consistent with the specification" after "broadest reasonable construction."

*Comment 2:* One comment suggested amending previously proposed §§ 1.56(b)(1) and 1.555(b)(1) to change the perspective from the present to the time when information was withheld from the Office. In particular, this comment suggested changing the phrase "would not allow a claim if it were aware of the information" in proposed § 1.56(b)(1) to "would not have allowed a claim if it were aware of the information," and changing the phrase "would not find a claim patentable if it were aware of the information" in proposed § 1.555(b)(1) to "would not have found a claim patentable if it were aware of the information." Another comment requested clarification regarding whether proposed §§ 1.56(b)(1) and 1.555(b)(1) would apply to any application pending on, or applications filed after, the effective date of any final rule.

*Response:* While the first comment suggested specific language found in the *Therasense* holding be added to the rules, the *Therasense* holding pertains to inequitable conduct analysis by the courts, which is applied from a different

perspective than the duty of disclosure analysis by applicants. The duty of disclosure is a prospective analysis, while inequitable conduct is a retrospective analysis. In other words, an applicant determines materiality in the present, not retroactively as a court would determine inequitable conduct. Additionally, with respect to Office proceedings, §§ 1.56(b) and 1.555(b) as proposed in this rule would apply to any application or reexamination proceeding pending on, filed on, or filed after the effective date of any final rule.

*Comment 3:* Several comments requested clarification regarding whether "a claim" in proposed §§ 1.56(b)(1) and 1.555(b)(1) is the finally allowed claim or any claim pending during prosecution, such as restricted claims, withdrawn claims, amended claims, etc.

*Response:* Currently proposed § 1.56(a) explicitly states "[t]he duty to disclose information exists with respect to each pending claim until the claim is cancelled or withdrawn from consideration, or the application becomes abandoned." Similarly, § 1.555(a) states "[t]he duty to disclose the information exists with respect to each claim pending in the reexamination proceeding until the claim is cancelled." Therefore, the duty of disclosure pertains to all claims while they are pending. The duty does not pertain to information that is only material to claims that have been cancelled or withdrawn.

*B. Cumulative Information*

*Comment 4:* Several comments suggested the rules maintain the language from existing §§ 1.56(b) and 1.555(b), which provide that information is material to patentability "when it is not cumulative to information already of record or being made of record."

*Response:* Sections 1.56 and 1.555 in this currently proposed rule do not include the language regarding cumulative information set forth in existing §§ 1.56 and 1.555. The Office, however, is not requesting that applicants submit cumulative information. Information that is merely cumulative to information already on the record would not be material under the but-for standard.

*Comment 5:* One comment stated that non-disclosed cumulative information may meet the but-for test in the situation where the Office erred in allowing a claim over the originally cited art and the applicant is in possession of art that is cumulative to the originally cited art.

*Response:* The applicant is under a duty to refrain from filing and prosecuting claims that are known to be unpatentable whether based on information already of record and not recognized by the examiner or cumulative information not submitted. See §§ 11.18, 11.301, and 11.303. In such an instance, the applicant should amend the claims accordingly.

*C. Affirmative Egregious Misconduct*

*Comment 6:* Several comments stated that combining the but-for test of §§ 1.56(b)(1) and 1.555(b)(1) and the affirmative egregious misconduct test of §§ 1.56(b)(2) and 1.555(b)(2) in the previously proposed rules will lead to confusion because the but-for test involves the materiality of information while the "affirmative egregious misconduct" test is related to the nature of the conduct. Several comments, in particular, suggested moving the "affirmative egregious misconduct" exception into §§ 1.56(a) and 1.555(a).

*Response:* In order to alleviate any potential confusion by including affirmative egregious misconduct in §§ 1.56(b) and 1.555(b), this currently proposed rule amends §§ 1.56 and 1.555 by moving the language regarding affirmative egregious misconduct from previously proposed §§ 1.56(b)(2) and 1.555(b)(2) to §§ 1.56(a) and 1.555(a), respectively. In particular, § 1.56(a) as currently proposed would provide that a patent will not be granted on an application where any individual associated with the filing or prosecution of the application engages in affirmative egregious misconduct. Section 1.555(a) as currently proposed would provide that the duties of candor, good faith, and disclosure have not been complied with if any individual associated with the patent owner in a reexamination proceeding engages in affirmative egregious misconduct. Thus, §§ 1.56(b) and 1.555(b), as currently proposed, are limited to defining the but-for materiality standard for the duty to disclose information.

*Comment 7:* Several comments stated that the phrase "affirmative egregious misconduct" in previously proposed rules §§ 1.56(b)(2) and 1.555(b)(2) is a vague and undefined term and, therefore, should not be included in the rules. In addition, several comments requested that the Office incorporate the definition of affirmative egregious misconduct from *Therasense* directly into the rule. Several comments requested guidance, such as examples, on what sort of conduct constitutes affirmative egregious misconduct in previously proposed §§ 1.56(b) and 1.555(b). One other comment suggested

clarifying affirmative egregious misconduct to prevent affirmative egregious misconduct from “swallowing” the but-for rule and requiring affirmative egregious misconduct to have a realistic potential to impact patentability. Several comments also stated that it is unclear how affirmative egregious misconduct relates to the Office’s other rules such as §§ 1.56(a) and 10.23. (While § 10.23 was in effect at the time the comment was made, it has since been removed and § 11.804 was adopted. *See Changes to Representation of Others Before The United States Patent and Trademark Office*, 78 FR 20188 (Apr. 3, 2013).) These comments are applicable to the currently proposed rules as well.

*Response:* As discussed previously, the Office has retained and moved the recitation of affirmative egregious misconduct to currently proposed §§ 1.56(a) and 1.555(a). Affirmative egregious misconduct is recited in currently proposed § 1.56(a) in addition to the other forms of misconduct that would preclude a patent from being granted. Similarly, affirmative egregious misconduct is recited in currently proposed § 1.555(a) in addition to the other forms of misconduct engaged in by, or on behalf of, the patent owner in the reexamination proceeding that would cause a violation of the duties of candor, good faith, and disclosure. The discussion of affirmative egregious misconduct in *Therasense* and subsequent cases, as well as the lengthy jurisprudence of the unclean hands doctrine, offers guidance as to the boundaries of affirmative egregious misconduct. Specifically, in *Therasense*, the Federal Circuit likened affirmative egregious misconduct to the doctrine of unclean hands that “dealt with ‘deliberately planned and carefully executed scheme[s] to defraud the PTO and the courts.’” *Therasense*, 649 F.3d at 1292. The Federal Circuit also described several examples of behavior that would constitute affirmative egregious misconduct including “perjury, the manufacture of false evidence, and the suppression of evidence,” as well as filing an “unmistakably false affidavit.” *Id.* at 1287, 1292. *See also The Ohio Willow Wood Co. v. Alps South, LLC*, 735 F.3d at 1351 (finding that misrepresenting evidence to the Board of Patent Appeals and Interferences was “tantamount to filing an unmistakably false affidavit”); *Intellect Wireless, Inc. v. HTC Corp.*, 732 F.3d at 1344 (stating “the materiality prong of inequitable conduct is met when an applicant files a false affidavit and fails to cure the misconduct”). The Federal Circuit

clarified, however, that “neither mere nondisclosure of prior art references to the PTO nor failure to mention prior art references in an affidavit constitutes affirmative egregious misconduct.” *Therasense*, 649 F.3d at 1292–93. Further, the Federal Circuit has provided additional guidance on the type of activity that would not constitute affirmative egregious misconduct. *See, e.g., Powell v. Home Depot U.S.A., Inc.*, 663 F.3d 1221, 1235 (Fed. Cir. 2011) (failing to update a Petition to Make Special “is not the type of unequivocal act, ‘such as filing an unmistakably false affidavit,’ that would rise to the level of ‘affirmative egregious misconduct.’”).

*Comment 8:* Several comments suggested that acts of “affirmative egregious misconduct” in previously proposed §§ 1.56(b) and 1.555(b) should not be limited solely to “the applicant.”

*Response:* The Office does not interpret the Federal Circuit’s use of “patentee” in *Therasense* when describing affirmative egregious misconduct as limiting the misconduct to only the applicant or patent owner. All of the parties identified in §§ 1.56(c) and 1.555(a) are subject to the affirmative egregious misconduct provisions of currently proposed §§ 1.56(a) and 1.555(a), respectively.

*Comment 9:* One comment suggested striking previously proposed § 1.555(b)(2), which was directed to affirmative egregious misconduct, as unnecessary. The comment asserts that the previously proposed rule invites potential third party abuse and confusion during reexamination since third parties will see the rule as a license to argue a lack of candor with respect to previous patent holder submissions to the Office.

*Response:* While the currently proposed rule no longer includes § 1.555(b)(2), the recitation of affirmative egregious misconduct has been moved to currently proposed § 1.555(a). As proposed, this rule would address a patent owner’s duty of candor and good faith in dealing with the Office, including the patent owner’s duty of disclosure. It would not establish an opportunity in a reexamination proceeding for a third party to challenge the duty of candor and good faith of a patentee. Conduct is not grounds on which reexamination may be requested and is not appropriate to be raised during a reexamination proceeding. *See* MPEP § 2616. The conduct of the patent owner may be raised by the patent owner during a supplemental examination proceeding. If the conduct of the patent owner is raised by the patent owner in the

supplemental examination proceeding, it may be addressed by the Office in the supplemental examination proceeding and in any reexamination proceeding resulting from that supplemental examination proceeding.

#### D. *Therasense* Language

*Comment 10:* Several comments stated that the previously proposed rules should not explicitly reference *Therasense*. The comments questioned whether an explicit reference would allow the rules to change as the *Therasense* standard changes or lock the Office into the standard set forth in the decision even if the standard is later changed. Further, the comments asserted that an explicit reference creates uncertainty in the rules since the rules will become a moving target not subject to interpretation on their face and that a rule cannot be understood on its face without need to interpret the *Therasense* decision. The comments also asserted that tying the rule to an evolving standard will cause currently pending applications to stand as test cases until the standard is fully articulated. Finally, the comments asserted that the incorporation by reference sets a standard based on private litigation where the Office is not a party and grants an administrative agency’s rulemaking authority to the judicial branch, which has different goals than the Office.

*Response:* The currently proposed rules no longer include the language addressed by the comment. Notwithstanding the removal of an explicit reference to *Therasense* in currently proposed §§ 1.56(b) and 1.555(b), the recitation of the but-for materiality standard for the duty to disclose information in currently proposed §§ 1.56(b) and 1.555(b) accomplishes what a reference to the court decision would accomplish in adopting the but-for standard set forth in *Therasense*. As discussed previously, the Office has determined that to adopt the but-for standard of materiality set forth in *Therasense*, § 1.56 need not incorporate a specific reference to the court decision that has created that standard. Accordingly, the reference to the *Therasense* court decision in § 1.56, as previously proposed, has not been retained in the currently proposed rule.

The reference to the but-for standard should benefit the public by providing a consistent materiality standard for the duty to disclose information without the need for continuous revisions to the rules as the but-for standard in *Therasense* is interpreted or applied. As discussed previously, *Therasense* was decided by the Federal Circuit *en banc*



and can only be overturned by another *en banc* decision of the Federal Circuit or by a decision of the Supreme Court. In the event that the Supreme Court, or Federal Circuit acting *en banc*, chooses to revise the but-for materiality standard set forth in *Therasense*, the Office will reconsider the rules at that time.

Finally, the Office is not conveying its rulemaking authority to the judicial branch. Instead, the Office is exercising its rulemaking authority to adopt a standard used by the Federal Circuit. By using its rulemaking authority to adopt a common standard, the Office is providing the public with a uniform materiality standard for the duty to disclose information. If the Office should determine the uniform standard no longer provides a benefit to the public, the Office retains the ability to invoke its rulemaking authority and change the rules at any time.

*Comment 11:* One comment stated that the previously proposed rules incorporate two alternative statements within the rules. Specifically, the previously proposed rules include a first sentence that states that information is material to patentability if it is material under the standard set forth in *Therasense* and a second sentence that states information is material to patentability under *Therasense* if (1) the Office would not allow a claim if it were aware of the information, or (2) the applicant engages in affirmative egregious misconduct before the Office as to the information. The comment questioned whether these two sentences were equivalent and, if they were, whether they would remain equivalent as the *Therasense* decision evolves in the Federal Circuit.

*Response:* As discussed previously, this currently proposed rule modifies previously proposed §§ 1.56(b) and 1.555(b) to remove the sentence that explicitly references the *Therasense* decision. Sections 1.56(b) and 1.555(b) in this currently proposed rule would define the but-for materiality standard for the duty to disclose information as set forth in *Therasense*.

#### E. General Language Comments

*Comment 12:* One comment suggested that previously proposed rule § 1.555(b) should preserve the language that patents and printed publications are the appropriate types of information for consideration in reexamination.

*Response:* As discussed previously, unlike existing § 1.555(b), which limits the types of information that could be considered in reexamination to patents and printed publications, the currently proposed rule broadly recites that it is applicable to any matter proper for

consideration in a reexamination (*e.g.*, admissions by patent owner as well as patents and printed publications).

*Comment 13:* Several comments asserted the previously proposed rules are difficult for applicants to apply and interpret prospectively. Specifically, the comments assert that the proposed rules require the applicant to make legal conclusions in determining how to comply with the rule.

*Response:* As stated in the previous notice of proposed rulemaking, the Office recognizes the tension in basing the disclosure requirement on unpatentability. *See Revision of the Materiality to Patentability Standard for the Duty to Disclose Information in Patent Applications*, 76 FR at 43633. However, since the existing provisions of §§ 1.56(b) and 1.555(b) require applicants to determine if there is a *prima facie* case of unpatentability, applicants are accustomed to making such determinations when complying with the duty of disclosure. Further, the but-for standard set forth in this currently proposed rule should not be any more difficult for applicants to apply during prosecution than the *prima facie* case of unpatentability standard that would be replaced by this currently proposed rule. Both standards require the applicant to reassess materiality as claims are amended, cancelled, and added. Lastly, the Office believes the but-for standard, as articulated by the Federal Circuit in *Therasense*, would also provide applicants with guidance on what information the applicant is required to submit to the Office.

#### F. Application of Rule Standards

*Comment 14:* Several comments addressed the scope of evidence to be considered when materiality or egregious misconduct determinations are made by the Office during application of these proposed rules, including whether the Office would take into account rebuttal evidence or whether the scope would be limited to the record before the Office.

*Response:* The Office would utilize all available evidence when making determinations of materiality or affirmative egregious misconduct, including rebuttal evidence. Limiting determinations of materiality or affirmative egregious misconduct to the record before the Office might promote fraud and bad faith in practicing before the Office and may lead to erroneous decisions.

*Comment 15:* Several comments requested the Office to stay Office of Enrollment and Discipline (OED) proceedings until a final court

resolution regarding inequitable conduct is obtained in the courts.

*Response:* This currently proposed rule would only modify the materiality standard for the duty of disclosure required in §§ 1.56 and 1.555. OED proceedings are governed by procedures outlined in 37 CFR part 11, and the timeline under which the OED must commence disciplinary proceedings is subject to 35 U.S.C. 32 as amended by the America Invents Act (AIA). *See* Public Law 112–29, section 3(k), 125 Stat. 340, section 3(k) (2011).

#### G. General Comments

*Comment 16:* One comment proposed the Office tailor the discipline for failing to comply with the duty of disclosure to sanctions other than rendering patents unenforceable.

*Response:* The Office does not render a patent unenforceable for an applicant's failure to comply with the duty of disclosure. Rather, a court may hold a patent unenforceable due to inequitable conduct.

*Comment 17:* Several comments suggested proposing rules for materiality for each new post-issuance proceeding under the America Invents Act (AIA), such as post grant review, *inter partes* review, and covered business method patents review. The comment suggested that, since each post-issuance proceeding is different, separate materiality standards may be necessary.

*Response:* This comment is outside the scope of this rulemaking. The Office, however, has adopted § 42.11 to govern the duty of candor owed to the Office in the new post-issuance proceedings under the AIA. Additionally, the existing regulations at § 42.51 require a party to serve relevant information that is inconsistent with a position advanced during the proceedings.

*Comment 18:* Several comments asserted the Office should not require applicants to explain or clarify the relationship of the prior art to the claimed invention as suggested by the Office in the previous notice of proposed rulemaking. *See Revision of the Materiality to Patentability Standard for the Duty to Disclose Information in Patent Applications*, 76 FR at 43632. In addition, several comments suggested that, if the Office requires such an explanation, applicants should be given a safe harbor so that such explanation would not be regarded as an act of affirmative egregious misconduct.

*Response:* The contemplated required explanation from the previous notice of proposed rulemaking addressed by the comment is not included in this currently proposed rulemaking.



*Comment 19:* Several comments stated that the proposed but-for standard for materiality will not reduce the incentive to submit marginally relevant information to the Office. In addition, one comment asserted that the stated rationale for the but-for standard does not justify the rule change since the 1992 version of the rule, which contained a *prima facie* case of unpatentability standard, did not contribute to the over-disclosure to the Office or the overuse of inequitable conduct in litigation. This comment stated that, as long as the penalty for inequitable conduct is the loss of enforceability of the patent, applicants will continue to submit voluminous amounts of information to the Office to avoid a finding of inequitable conduct.

*Response:* The Office appreciates that a patent may be found unenforceable due to a finding of inequitable conduct. However, the Office's proposed adoption of the but-for standard of materiality articulated by the Federal Circuit in the *Therasense* decision, as well as the *Therasense* decision itself, should incentivize applicants not to submit marginally relevant information to the Office as this information would not meet the articulated standard.

*Comment 20:* Several comments requested that the Office no longer require the cross-citation of prior art found in related applications. The comments also requested the Office to provide a safe harbor provision under which information from related applications is not material and need not be submitted or, in the alternative, the definition of a related application is limited to "family cases" (*i.e.*, those cases for which there is some chain of priority claim), "similar claims cases" (*i.e.*, those cases under a common obligation of assignment for which the claims are not patentably distinct), and "team exception cases" (*i.e.*, those cases for which the provisions of 35 U.S.C. 102(b)(2)(c) apply (35 U.S.C. 103(c) for pre-AIA applications)).

*Response:* An applicant is under a duty of disclosure to provide all known material information to the Office no matter how the applicant becomes aware of the information. An applicant is in the best position to know of any material information, especially when an applicant learns about the information from prosecution in related applications such as in applications for which priority or benefit is claimed. Having all material information in front of the examiner as early as possible will expedite prosecution and improve examination quality. But under the standard in this currently proposed rule, an applicant would be under no duty to

provide information from related applications unless that information is but-for material.

*Comment 21:* Several comments requested the Office provide a standard method of cross-citation for information in related cases so examiners will automatically review the information in the corresponding application without the applicant having to submit the information in an IDS.

*Response:* The Office is currently exploring an initiative to provide examiners with information (*e.g.*, prior art, search reports, etc.) from applicant's related applications as early as possible to increase patent examination quality and efficiency. In the interim, applicants must comply with the requirements of §§ 1.97 and 1.98.

*Comment 22:* Several comments suggested incentivizing the filing of non-material disclosures. Essentially, the comments believed that the submission of a reference will be interpreted as an admission that it meets that materiality standard and, therefore, applicants will not submit non-material information. As an incentive to submit non-material information, the comments suggested relaxing or eliminating any burdens, such as waiving fees.

*Response:* The Office does not construe any submission of information as an admission of materiality. Section 1.97(h) specifically states, "[t]he filing of an information disclosure statement shall not be construed to be an admission that the information cited in the statement is, or is considered to be, material to patentability as defined in § 1.56(b)." Therefore, the proposal to incentivize the submission of non-material information is not necessary.

*Comment 23:* One comment stated that, while the Office will not regard information disclosures as admissions of unpatentability for any claims in the application under § 1.97(h), the Office does not have the authority to make this promise on behalf of the courts. The comment asserted that the courts will inevitably hold that any disclosure of prior art is an admission that some pending claim is unpatentable.

*Response:* The comment did not provide any support for the asserted proposition that the courts treat the disclosure of prior art as an admission that at least one pending claim is unpatentable, and the Office is not aware of any court decision with such a holding.

*Comment 24:* Several comments requested the duty of disclosure end upon payment of the issue fee rather than the patent grant.

*Response:* It is in the applicant's and the public's best interest to have all

material information known to the applicant considered by the examiner before a patent is granted. This will result in a stronger patent and avoid unnecessary post-grant proceedings and litigation. Section 1.97(d) thus provides for information to be submitted to the Office after a final action, notice of allowance, or action that otherwise closes prosecution is mailed, provided the IDS is filed on or before payment of the issue fee and is accompanied by the appropriate fee and statement under § 1.97(e). If the conditions of § 1.97(d) cannot be met, an applicant must file a request for continued examination (RCE) to have information considered by the examiner. Further, once the issue fee has been paid, the applicant must comply with § 1.313(c) (*i.e.*, file a petition to withdraw from issue for consideration of an RCE) in order to have information considered by the examiner. In order to alleviate the burden on applicants in this situation, the Office has instituted the Quick Path Information Disclosure Statement (QPIDS) pilot program. The QPIDS pilot program eliminates the requirement for processing an RCE with an IDS after payment of the issue fee where the IDS is accompanied by the appropriate fee and statement under § 1.97(e) and the examiner determines that no item of information in the IDS necessitates reopening prosecution. For more information visit the QPIDS Web site at [www.uspto.gov/patents/init\\_events/qpids.jsp](http://www.uspto.gov/patents/init_events/qpids.jsp).

*Comment 25:* Several comments proposed giving an applicant a "safe harbor" so the duty of disclosure for the applicant ends when the applicant provides the information to counsel.

*Response:* The purpose of the duty of disclosure requirement is to ensure that all material information known by the applicant is provided to the Office in the manner prescribed by §§ 1.97(b)–(d) and 1.98. Ending that duty upon the submission of the documents to counsel could potentially delay or prevent material information from being filed with the Office, resulting in, for example, a reduction in patent quality or a delay in the patent grant.

*Comment 26:* Several comments requested the Office abrogate the duty of disclosure. The comments provided numerous reasons, such as harmonization with the patent offices that do not have such a duty. In the alternative, several comments suggested modifying the materiality standard to include only information that is not available to the public because most of the information submitted is readily searchable public information.

*Response:* The public interest is best served, and the most effective and highest quality patent examination occurs, when the Office is aware of, and evaluates the teachings of, all information material to patentability during examination. Since the applicant is in the best position to be aware of material information in the art, it serves the public interest to require that the applicant submit this information to the Office during examination. Even if this information is publicly available, there is no guarantee that the examiner will find the information. Further, requiring the examiner to locate this information when the applicant is already aware of it unnecessarily expends government resources, increases search time, and could reduce examination quality. It is also noted that limiting materiality to information that is not available to the public would essentially abrogate the duty of disclosure because most information that is not available to the public is unlikely to meet the prior art requirements of 35 U.S.C. 102, hence preventing pertinent prior art from being seen by the examiner.

*Comment 27:* One comment asked the Office to clarify whether the new rules create any duty to investigate.

*Response:* Sections 1.56 and 1.555 in the currently proposed rule would not create any new or additional duty to investigate. However, practitioners and non-practitioners are reminded of the duty under § 11.18(b)(2) to make an “inquiry reasonable under the circumstances” when presenting any paper to the Office.

## Rulemaking Considerations

### A. Administrative Procedure Act

This currently proposed rule would harmonize the rules of practice concerning the materiality standard for the duty of disclosure with the but-for materiality standard for inequitable conduct set forth in *Therasense*. The changes in this currently proposed rule would not alter the substantive criteria of patentability. Therefore, the changes in this currently proposed rule involve rules of agency practice and procedure and/or interpretive rules. See *Bachow Commc'ns, Inc. v. F.C.C.*, 237 F.3d 683, 690 (D.C. Cir. 2001) (Rules governing an application process are procedural under the Administrative Procedure Act.); *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 350 (4th Cir. 2001) (Rules for handling appeals were procedural where they did not change the substantive standard for reviewing claims.); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir.

2001) (Rule that clarifies interpretation of a statute is interpretive.).

Accordingly, prior notice and opportunity for public comment are not required pursuant to 5 U.S.C. 553(b) or (c) (or any other law). See *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1336–37 (Fed. Cir. 2008) (stating that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), does not require notice and comment rulemaking for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice” (quoting 5 U.S.C. 553(b)(3)(A))). The Office, however, is publishing the currently proposed rule for comment to seek the benefit of the public’s views on the Office’s proposed revision of the materiality standard for the duty to disclose information to the Office.

### B. Regulatory Flexibility Act

For the reasons set forth herein, the Deputy General Counsel for General Law of the United States Patent and Trademark Office has certified to the Chief Counsel for Advocacy of the Small Business Administration that changes proposed in this notice will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 605(b).

This notice proposes to harmonize the standard for materiality under §§ 1.56 and 1.555 for the duty of disclosure with the but-for materiality standard for inequitable conduct set forth in *Therasense*. The harmonized materiality standard should reduce the incentives to submit marginally relevant information in information disclosure statements (IDSs). The changes in this currently proposed rule involve rules of agency practice and procedure and/or interpretive rules and would not result in any additional fees or requirements on patent applicants or patentees. Therefore, the changes proposed in this rulemaking will not have a significant economic impact on a substantial number of small entities.

### C. Executive Order 12866 (Regulatory Planning and Review)

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

### D. Executive Order 13563 (Improving Regulation and Regulatory Review)

The Office has complied with Executive Order 13563. Specifically, the Office has, to the extent feasible: (1) Used the best available techniques to quantify costs and benefits and considered values such as equity, fairness, and distributive impacts; (2) involved the public in an open

exchange of information and perspectives among experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole, and provided on-line access to the rulemaking docket; (3) attempted to promote coordination, simplification, and harmonization across government agencies and identified goals designed to promote innovation; (4) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (5) ensured the objectivity of scientific and technological information and processes.

### E. Executive Order 13132 (Federalism)

This rulemaking does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

### F. Executive Order 13175 (Tribal Consultation)

This rulemaking will not: (1) Have substantial direct effects on one or more Indian tribes; (2) impose substantial direct compliance costs on Indian tribal governments; or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under Executive Order 13175 (Nov. 6, 2000).

### G. Executive Order 13211 (Energy Effects)

This rulemaking is not a significant energy action under Executive Order 13211 because this rulemaking is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

### H. Executive Order 12988 (Civil Justice Reform)

This rulemaking meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

### I. Executive Order 13045 (Protection of Children)

This rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr. 21, 1997).

### J. Executive Order 12630 (Taking of Private Property)

This rulemaking will not effect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

### K. Congressional Review Act

Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), prior to issuing any final rule, the PTO will submit a report containing this final rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the Government Accountability Office. The changes in this notice do not result in an annual effect on the economy of 100 million dollars or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this notice is not expected to result in a "major rule" as defined in 5 U.S.C. 804(2).

### L. Unfunded Mandates Reform Act of 1995

The changes in this notice do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of 100 million dollars (as adjusted) or more in any one year or a Federal private sector mandate that will result in the expenditure by the private sector of 100 million dollars (as adjusted) or more in any one year and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1501 *et seq.*

### M. National Environmental Policy Act

This rulemaking will not have any effect on the quality of environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. *See* 42 U.S.C. 4321 *et seq.*

### N. National Technology Transfer and Advancement Act

The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rulemaking does not contain provisions which involve the use of technical standards.

### O. Paperwork Reduction Act

The changes in this rulemaking involve information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501

*et seq.*). The collection of information involved in this final rule has been reviewed and approved by OMB under OMB control number 0651-0031. This rulemaking proposes to harmonize the standard for materiality under §§ 1.56 and 1.555 for the duty of disclosure with the but-for standard for materiality for inequitable conduct set forth in *Therasense*. This notice does not adopt any additional fees or information collection requirements on patent applicants or patentees.

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

### List of Subjects in 37 CFR Part 1

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

For the reasons set forth in the preamble, 37 CFR part 1 is proposed to be amended as follows:

### PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

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

■ 2. Section 1.56 is amended by revising paragraphs (a) and (b) to read as follows:

#### § 1.56 Duty to disclose information material to patentability.

(a) A patent by its very nature is affected with a public interest. The public interest is best served, and the most effective patent examination occurs when, at the time an application is being examined, the Office is aware of and evaluates the teachings of all information material to patentability. Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability under the but-for materiality standard as defined in paragraph (b) of this section. The duty to disclose information exists with respect to each pending claim until the claim is cancelled or withdrawn from consideration or the application becomes abandoned. Information material to the patentability of a claim that is cancelled or withdrawn from

consideration need not be submitted if the information is not material to the patentability of any claim remaining under consideration in the application. There is no duty to submit information which is not material to the patentability of any existing claim. The duty to disclose all information known to be material to patentability is deemed to be satisfied if all information known to be material to patentability of any claim issued in a patent was cited by the Office or submitted to the Office in the manner prescribed by §§ 1.97(b) through (d) and 1.98. However, no patent will be granted on an application in connection with which affirmative egregious misconduct was engaged in, fraud on the Office was practiced or attempted, or the duty of disclosure was violated through bad faith or intentional misconduct. The Office encourages applicants to carefully examine:

(1) Prior art cited in search reports of a foreign patent office in a counterpart application, and

(2) The closest information over which individuals associated with the filing or prosecution of a patent application believe any pending claim patentably defines, to make sure that any material information contained therein is disclosed to the Office.

(b) Information is but-for material to patentability if the Office would not allow a claim if the Office were aware of the information, applying the preponderance of the evidence standard and giving the claim its broadest reasonable construction consistent with the specification.

\* \* \* \* \*

■ 3. Section 1.555 is amended by revising paragraphs (a) and (b) to read as follows:

#### § 1.555 Information material to patentability in *ex parte* reexamination and *inter partes* reexamination proceedings.

(a) A patent by its very nature is affected with a public interest. The public interest is best served, and the most effective reexamination occurs when, at the time a reexamination proceeding is being conducted, the Office is aware of and evaluates the teachings of all information material to patentability in a reexamination proceeding. Each individual associated with the patent owner in a reexamination proceeding has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability in a reexamination proceeding under the but-for materiality standard as defined in paragraph (b) of this section. The individuals who have

a duty to disclose to the Office all information known to them to be material to patentability in a reexamination proceeding are the patent owner, each attorney or agent who represents the patent owner, and every other individual who is substantively involved on behalf of the patent owner in a reexamination proceeding. The duty to disclose the information exists with respect to each claim pending in the reexamination proceeding until the claim is cancelled. Information material to the patentability of a cancelled claim need not be submitted if the information is not material to patentability of any claim remaining under consideration in the reexamination proceeding. The duty to disclose all information known to be material to patentability in a reexamination proceeding is deemed to be satisfied if all information known to be material to patentability of any claim in the patent after issuance of the reexamination certificate was cited by the Office or submitted to the Office in an information disclosure statement. However, the duties of candor, good faith, and disclosure have not been complied with if affirmative egregious misconduct was engaged in, any fraud on the Office was practiced or attempted, or the duty of disclosure was violated through bad faith or intentional misconduct by, or on behalf of, the patent owner in the reexamination proceeding. Any information disclosure statement must be filed with the items listed in § 1.98(a) as applied to individuals associated with the patent owner in a reexamination proceeding and should be filed within two months of the date of the order for reexamination or as soon thereafter as possible.

(b) Information is but-for material to patentability if, for any matter proper for consideration in reexamination, the Office would not find a claim patentable if the Office were aware of the information, applying the preponderance of the evidence standard and giving the claim its broadest reasonable construction consistent with the specification.

\* \* \* \* \*

Dated: October 21, 2016.

**Michelle K. Lee,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. 2016-25966 Filed 10-27-16; 8:45 am]

**BILLING CODE 3510-16-P**

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

#### 37 CFR Part 2

[Docket No. PTO-T-2010-0016]

RIN 0651-AC41

#### Revival of Abandoned Applications, Reinstatement of Abandoned Applications and Cancelled or Expired Registrations, and Petitions to the Director

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The United States Patent and Trademark Office (Office or USPTO) proposes to amend its rules regarding petitions to revive an abandoned application and petitions to the Director of the USPTO (Director) regarding other matters, and to codify USPTO practice regarding requests for reinstatement of abandoned applications and cancelled or expired registrations. The proposed changes will permit the USPTO to provide more detailed procedures regarding the deadlines and requirements for requesting revival, reinstatement, or other action by the Director. These rules will thereby ensure that the public has notice of the deadlines and requirements for making such requests, facilitate the efficient and consistent processing of such requests, and promote the integrity of application/registration information in the trademark electronic records system as an accurate reflection of the status of applications and registrations.

**DATES:** Comments must be received by December 27, 2016 to ensure consideration.

**ADDRESSES:** The USPTO prefers that comments be submitted via electronic mail message to [TMFRNotices@uspto.gov](mailto:TMFRNotices@uspto.gov). Written comments also may be submitted by mail to the Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451, attention Jennifer Chicowski; by hand delivery to the Trademark Assistance Center, Concourse Level, James Madison Building—East Wing, 600 Dulany Street, Alexandria, VA 22314, attention Jennifer Chicowski; or by electronic mail message via the Federal eRulemaking Portal at <http://www.regulations.gov>. See the Federal eRulemaking Portal Web site for additional instructions on providing comments via the Federal eRulemaking Portal. All comments submitted directly to the USPTO or provided on the Federal eRulemaking

Portal should include the docket number (PTO-T-2010-0016).

The comments will be available for public inspection on the USPTO's Web site at <http://www.uspto.gov>, on the Federal eRulemaking Portal, and at the Office of the Commissioner for Trademarks, Madison East, Tenth Floor, 600 Dulany Street, Alexandria, VA 22314. Because comments will be made available for public inspection, information that is not desired to be made public, such as an address or phone number, should not be included.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Chicowski, Office of the Deputy Commissioner for Trademark Examination Policy, by email at [TMPolicy@uspto.gov](mailto:TMPolicy@uspto.gov), or by telephone at (571) 272-8943.

#### SUPPLEMENTARY INFORMATION:

**Purpose:** The USPTO proposes to revise the rules in part 2 of title 37 of the Code of Federal Regulations to provide more detailed procedures regarding the deadlines and requirements for petitions to revive an abandoned application under 37 CFR 2.66 and petitions to the Director under 37 CFR 2.146. The proposed changes also codify USPTO practice regarding requests for reinstatement of applications that were abandoned, and registrations that were cancelled or expired, due to Office error. By providing more detailed procedures regarding requesting revival, reinstatement, or other action by the Director, the proposed rule will benefit applicants, registrants, and the public because it will promote the integrity of application/registration information in the trademark electronic records system as an accurate reflection of the status of live applications and registrations, clarify the time periods in which applications or registrations can be revived or reinstated after abandonment or cancellation as well as inform of the related filing requirements, clarify the deadline for requesting that the Director take action regarding other matters, and facilitate the efficient and consistent handling of such requests.

The public relies on the trademark electronic records system to determine whether a chosen mark is available for use or registration. Applicants are encouraged to utilize the trademark electronic search system, which provides access to text and images of marks, to determine whether a mark in any pending application or current registration is similar to their mark and used on the same or related products or for the same or related services. The search system also indicates the status of an application or registration, that is,

whether the application or registration is live or dead. A “live” status indicates the application or registration is active and may bar the registration of a similar mark in a new application. A “dead” status indicates the application has become abandoned or the registration is cancelled or expired, and does not serve as a bar to registration of a similar mark in a new application unless it is restored to a live status pursuant to a corresponding rule.

When a party’s search discloses a potentially confusingly similar mark, that party may incur a variety of resulting costs and burdens, such as those associated with investigating the actual use of the disclosed mark to assess any conflict, proceedings to cancel the registration or oppose the application of the disclosed mark, civil litigation to resolve a dispute over the mark, or changing plans to avoid use of the party’s chosen mark. In order to determine whether to undertake one or more of these actions, the party would refer to the status of the conflicting application/registration and would need to consult the relevant rule to determine whether the application or registration is within the time period in which the applicant or registrant may request revival, reinstatement, or other action by the Director. Thus, the effective notice provided by the USPTO’s records plays a critical role in a party’s decision-making to clearly distinguish between the “dead” marks that are no longer candidates for, or protected by, a federal registration and those that are still able to be restored to active status.

The USPTO estimates that it receives annually approximately 20,000 petitions to revive an application under § 2.66 abandoned for failure to respond to an Office action or a notice of allowance, 1,200 petitions to the Director under § 2.146, and 300 requests for reinstatement of applications and registrations. If the trademark electronic records system indicates that an application or registration is dead because it is abandoned, cancelled, or expired, and there is any doubt as to whether the application or registration might be eligible for revival, reinstatement, or other action by the Director, the costs and burdens discussed above may be incurred unnecessarily. By providing more detailed procedures as to the deadlines and requirements for requesting revival, reinstatement, or other action by the Director, the proposed rules will help the public avoid such needless costs and burdens and promote the efficient and consistent processing of such requests by the Office.

## Background

*Petition to Revive:* The statutory period for responding to an examining attorney’s Office action is six months from the Office action’s date of issuance. 15 U.S.C. 1062(b); 37 CFR 2.62(a). If no response is received by the USPTO within the statutory period, and the Office action was sent to the correspondence address in the USPTO’s records, the application is then abandoned in full or in part, as appropriate. 37 CFR 2.65(a); *Trademark Manual of Examining Procedure* (TMEP) § 718.06.

The statutory period for filing a statement of use, or a request for an extension of time to file a statement of use, in response to a notice of allowance issued under section 1063(b)(2) of the Trademark Act (Act), is also six months. 15 U.S.C. 1051(d)(1), (2); 37 CFR 2.88(a), 2.89(a). Thus, an application is abandoned if the applicant fails to file a statement of use or request for an extension of time to file a statement of use within the statutory period or within a previously granted extension period. 37 CFR 2.88(k); TMEP § 718.04.

An application is considered to be abandoned as of the day after the date on which a response to an Office action or notice of allowance is due. However, to accommodate timely mailed paper submissions and to ensure that the required response was not received and placed in the record of another application (*e.g.*, if the applicant enters the incorrect serial number on its response), the USPTO generally waits one month after the due date to update the trademark electronic records system to reflect the abandonment. TMEP § 718.06. When the trademark electronic records system is updated, the USPTO sends a computer-generated notice of abandonment to the correspondence address listed in the application. *Id.* If an application becomes abandoned for failure to respond to an Office action or notice of allowance within the statutory period, and the delay in responding was unintentional, the application may be revived upon proper submission of a petition under 37 CFR 2.66. Currently, the deadlines for filing the petition are within two months after the date of issuance of the notice of abandonment or within two months of actual knowledge of the abandonment, if the applicant did not receive the notice of abandonment and the applicant was diligent in checking the status of the application every six months. 37 CFR 2.66(a).

*Request for Reinstatement:* Under current practice, if an applicant has proof that an application was

inadvertently abandoned due to a USPTO error, an applicant may file a request to reinstate the application, instead of a petition to revive. TMEP § 1712.01. The following is a non-exhaustive list of examples of situations in which the USPTO may reinstate an application held abandoned for failure to respond to an Office action or notice of allowance: (1) The applicant presents proof that a response to an Office action, statement of use, or request for extension of time to file a statement of use was timely filed through the Trademark Electronic Application System (TEAS); (2) there is an image of the timely filed response, statement of use, or extension request in the trademark electronic records system; or (3) the applicant supplies a copy of the document and proof that it was timely mailed to the USPTO in accordance with the requirements of 37 CFR 2.197. *Id.* Under current practice, a request for reinstatement must be filed within two months of the issuance date of the notice of abandonment. *Id.* If the applicant asserts that it did not receive a notice of abandonment, the request must be filed within two months of the date the applicant had actual knowledge that the application was abandoned, and the applicant must have been duly diligent in monitoring the status of the application every six months. *Id.*

Similarly, under current practice, a registrant may file a request to reinstate a cancelled or expired registration if the registrant has proof that a required document was timely filed and that USPTO error caused the registration to be cancelled or expired. TMEP § 1712.02. The following is a non-exhaustive list of examples of situations in which the USPTO may reinstate a cancelled or expired registration: (1) The registrant presents proof that a required document was timely filed through TEAS; (2) the registrant presents proof of actual receipt of the required document in the USPTO in the form of a return postcard showing a timely USPTO date stamp or label, on which the registrant specifically refers to the document; or (3) the USPTO sent an Office action to the wrong address due to a USPTO error, *i.e.*, the USPTO either entered the correspondence address incorrectly or failed to enter a proper notice of change of address filed before the issuance date of the action. *Id.* There is currently no deadline for filing a request to reinstate a cancelled/expired registration and the USPTO has generally not invoked the requirement for due diligence when there is proof that a registration was cancelled or

expired solely due to USPTO error. TMEP § 1712.02(a).

*Petition to the Director Under 37 CFR 2.146:* Applicants, registrants, and parties to inter partes proceedings before the Trademark Trial and Appeal Board (TTAB) who believe they have been injured by certain adverse actions of the USPTO, or who believe that they cannot comply with the requirements of the Trademark Rules of Practice (37 CFR parts 2, 3, 6, and 7) because of an extraordinary situation, may seek equitable relief by filing a petition under 37 CFR 2.146. A variety of issues may be reviewed on petition under this section. Some of the more common examples are when a party petitions the Director to: (1) Review an examining attorney's formal requirement, if the requirement is repeated or made final and the subject matter is appropriate for petition; (2) review the action of the Post Registration Unit refusing an affidavit of use or excusable nonuse under section 8 or section 71 of the Act, 15 U.S.C. 1058, 1141k, a renewal application under section 9 of the Act, 15 U.S.C. 1059, or a proposed amendment to a registration under section 7 of the Act, 15 U.S.C. 1057; or (3) review the refusal of the Madrid Processing Unit to certify an application for international registration. See TMEP § 1703. Generally, unless a specific deadline is specified elsewhere in the rules or within this section, such as the deadlines for petitions regarding actions of the TTAB under § 2.146(e), a petition must be filed within two months of the date of issuance of the action from which relief is requested and no later than two months from the date when Office records are updated to show that a registration has been cancelled or has expired under § 2.146(d). However, under current § 2.146(i), if a petitioner seeks to reactivate an application or registration that was abandoned, cancelled, or expired because documents not received by the Office were lost or mishandled, the petitioner is also required to be duly diligent in checking the status of the application or registration. The section has traditionally been invoked when papers submitted pursuant to the mailing rules in § 2.197 and § 2.198 were lost. However, the occurrence of such incidents is minimal. Further, the USPTO believes that if an applicant or registrant has proof that documents mailed in accordance with the requirements of § 2.197 or § 2.198 were lost or mishandled by the USPTO, thereby causing the abandonment of an application or cancellation/expiration of a registration, the proper recourse will

be to seek relief under the proposed rule for requesting reinstatement.

*Establishing Due Diligence:* As noted above, if an applicant or registrant does not receive a notice from the USPTO regarding the abandonment of its application, cancellation/expiration of its registration, or denial of some other request, but otherwise learns of the abandonment, cancellation/expiration, or denial, the applicant or registrant must have been duly diligent in tracking the status of its application or registration in order to be granted revival, reinstatement, or other action by the Director. Section 2.146(i) sets out the standard of due diligence for petitions to revive and to reactivate an application or registration that was abandoned, cancelled, or expired because documents were lost or mishandled. To be considered duly diligent, an applicant must check the status of the application at least every six months between the filing date of the application and issuance of a registration. 37 CFR 2.146(i)(1). After filing an affidavit of use or excusable nonuse under section 8 or section 71 of the Act or a renewal application under section 9 of the Act, a registrant must check the status of the registration every six months until the registrant receives notice that the affidavit or renewal application has been accepted. 37 CFR 2.146(i)(2). Section 2.146(d) sets out the standard currently followed for requests to reinstate an application abandoned due to Office error. TMEP § 1712.01. When a party seeks to revive an application that was abandoned or reinstate a registration that was cancelled or expired, either due to the failure of the applicant or registrant to file a required document or to the loss or mishandling of documents sent to or from the USPTO, or asks the Director to take some other action, the USPTO may deny the request if the petitioner was not diligent in checking the status of the application or registration, even if the petitioner can show that the USPTO actually received documents, or declares that a notice from the USPTO was never received by the petitioner. 37 CFR 2.146(i).

The USPTO generally processes applications, responses, and other documents in the order in which they are received, and it is reasonable to expect some notice or acknowledgement from the USPTO regarding action on a pending matter within six months of the filing or receipt of a document. A party who has not received a notice or acknowledgement from the USPTO within that time frame has the burden of inquiring as to the status of action on its filing, and requesting in writing that

corrective action be taken when necessary, to protect third parties who may be harmed by reliance on inaccurate information regarding the status of an application or registration in the trademark electronic records system. See TMEP § 1705.05. For example, a third party may have searched USPTO records and begun using a mark because the search showed that an earlier-filed application, or prior registration, for a conflicting mark had been abandoned or cancelled. In other cases, an examining attorney may have searched USPTO records and approved for publication a later-filed application for a conflicting mark because the earlier-filed application was shown as abandoned or a prior registration was shown as cancelled.

The due-diligence requirement means that any petition filed more than two months after the notice of abandonment or cancellation was issued, or no later than two months after Office records are updated, is likely to be dismissed as untimely because the applicant or registrant will be unable to establish that it was duly diligent. For example, if an applicant files an application in July 1, 2016 and an Office action is issued on October 15, 2016, a response must be filed on or before April 15, 2017. If the applicant does not respond, the trademark electronic records system will be updated to show the application as abandoned and a notice of abandonment will be sent to the applicant on or about May 15, 2017. If the applicant does not receive the notice of abandonment, and only checks the trademark electronic records system in August 2017 (*i.e.*, more than two months after the issue date of the notice of abandonment and more than a year after filing), and thereafter files a petition to revive, that petition would be denied as untimely. Even if the applicant asserts that it only became aware of the issuance of the Office action and the notice of abandonment on, for example, July 18, 2017 (actual notice), the petition would be denied as untimely because the applicant could not prove that it was duly diligent in monitoring the status of the application by checking the status every six months.

Moreover, in some situations when an applicant or owner of a registration asserts that it did not receive a notice of abandonment or cancellation, it is often difficult for the USPTO to determine when the party had actual notice of the abandonment/cancellation and whether the party was duly diligent in prosecuting the application or maintaining the registration. By effectively mandating that applicants and registrants conduct the requisite

status checks of Office records every six months from the filing of a document, whether an application or a submission requesting action by the Office, parties would be aware of the acceptance or refusal of their submission with enough notice to timely respond in the vast majority of circumstances. For example, if a document is filed on January 2, and an Office action requiring a response within six months is issued on February 2, if the submitting party is duly diligent and reviews the trademark electronic records system on July 2, it would learn of the issuance of the action, even if the party did not receive it. In that situation, the party would still have one month in which to timely respond.

### Discussion of Proposed Changes and Rulemaking Goals

*Establish Certainty Regarding Timeliness:* The goals of the proposed changes are to harmonize the deadlines for requesting revival, reinstatement, or other action by the Director and remove any uncertainty for applicants, registrants, third parties, and the Office as to whether a request is timely.

Under this proposed rule, the USPTO adds §§ 2.64(a)(1)(i) and (b)(1)(i) and amends §§ 2.66(a)(1) and 2.146(d)(1) to clarify that applicants and registrants would be on notice that if they receive an official document from the USPTO, such as a notice of abandonment or cancellation, a post-registration Office action, or a denial of certification of an international registration, they must file a petition to revive, request for reinstatement, or petition to the Director to take another action, by not later than two months after the issue date of the notice. The proposed addition of §§ 2.64(a)(1)(i) and (b)(1)(i) codifies this deadline for parties seeking reinstatement of an application or registration abandoned or cancelled due to Office error and makes it consistent with the deadline in § 2.66(a)(1). The proposed amendment to § 2.66(a) clarifies that the deadline applies to abandonments in full or in part. Finally, the proposed change to § 2.146(d)(1) deletes the requirement that a petition be filed no later than two months from the date when Office records are updated to show that a registration is cancelled or expired. As noted below, this deadline is extended to not later than six months after the date the trademark electronic records system indicates that the registration is cancelled/expired to harmonize the deadlines across the relevant sections.

To establish certainty and ensure consistency, the proposed rule also adds §§ 2.64(a)(1)(ii) and (b)(1)(ii) to codify the deadline for all applicants and

registrants who assert that they did not receive an abandonment notice from the Office and thereafter seek reinstatement. This deadline is identical to the deadlines proposed in §§ 2.66(a)(2) and 2.146(d)(2) for applicants and registrants who assert that they did not receive a notice from the Office and thereafter seek relief. Under proposed §§ 2.64(a)(1)(ii) and (b)(1)(ii), if the applicant or registrant did not receive the notice, or no notice was issued, a petition must be filed by not later than two months of actual knowledge that a notice was issued or that an action was taken by the Office, and not later than six months after the date the trademark electronic records system is updated to indicate the action taken by the Office. Thus, this proposed rule makes clear that applicants and registrants must check the status of their applications and registrations every six months and thereby remove any uncertainty in the Office's assessment of whether an applicant or registrant was duly diligent.

*Balance Duties of USPTO to Registrants and Third Parties:* Under this proposed rule, the USPTO would add § 2.64(b)(2)(ii) and amend § 2.146(d)(2)(ii) to include the requirement for due diligence in tracking the status of a registration. Registrants who seek reinstatement of a registration cancelled due to Office error, but who assert that they did not receive a notice of cancellation/expiration, must file the request by not later than two months of actual knowledge of the cancellation and not later than six months after the date the trademark electronic records system indicates that the registration is cancelled/expired.

As noted above, the USPTO has generally not invoked the requirement for due diligence when there is proof that a registration was cancelled or expired solely due to Office error. Although the USPTO has a duty to correct its errors, the USPTO has a concurrent duty toward third parties to ensure that the trademark electronic records system accurately reflects the status of applications and registrations, especially given that the USPTO encourages such third parties to search the trademark electronic records system prior to adopting or seeking to register a mark. Therefore, the USPTO must balance its duty to third parties who rely on the accuracy of the trademark electronic records system and to registrants whose registration may have been cancelled as a result of Office error. The USPTO believes that, in order to fulfill its duty to all parties, the requirement for due diligence should

apply equally to registrants who did not receive a notice of cancellation/expiration and who request reinstatement of their registrations, as it does to all other applicants and registrants who do not receive notice of any other action taken by the Office. As noted above, it is reasonable to expect some notice or acknowledgement from the USPTO regarding action on a pending matter within six months of the filing of a document. A registrant who has not received a notice or acknowledgement from the USPTO regarding a post-registration maintenance, renewal, or amendment document within that time frame has the burden of inquiring as to the status of the USPTO's action on the filing, and requesting in writing that corrective action be taken when necessary, to protect third parties who may be harmed by reliance on inaccurate information regarding the status of its registration in the trademark electronic records system.

*Maintain Pendency:* The USPTO proposes changes to § 2.66 to prevent applicants from utilizing the revival process to delay prosecution by repeatedly asserting non-receipt of an Office action or notice of allowance. Specifically, the regulations at § 2.66(b) are amended to clarify that a response to the outstanding Office action is required or, if the applicant asserts it did not receive the Office action, that the applicant may not assert more than once that the unintentional delay is based on non-receipt of the same Office action. The USPTO also adds § 2.66(b)(3)(i)–(ii) to clarify the requirements for requesting revival when the abandonment occurred after a final Office action.

An application is considered to be abandoned as of the day after the date on which a response to the Office action or notice of allowance is due. However, to accommodate timely mailed paper submissions and to ensure that the required response was not received and placed in the record of another application (e.g., if the applicant enters the incorrect serial number on its response), the USPTO generally waits until one month after the due date to send the notice of abandonment and update the trademark electronic records system to indicate that the application is abandoned.

In some situations, an application will become abandoned multiple times for failure to respond to an Office action or notice of allowance and the applicant will assert that it did not receive the same Office action or the notice of allowance each time that it petitions to revive the application. Under the



proposed regulations at § 2.66(b), the Office would limit the applicant's ability to assert more than once that the unintentional delay is based on non-receipt of the same Office action. When an applicant becomes aware that its application has been abandoned, either via receipt of a notice of abandonment or after checking the status of the application, the applicant is thereby on notice that the Office has taken action on the application. If the applicant then files a petition to revive an application held abandoned for failure to respond to an Office action which states that the applicant did not receive the action, and the petition is granted, the USPTO will issue a new Office action, if there are additional issues since the original Office action was sent, and provide the applicant with a new six-month response period. If all issues previously raised remain the same, after reviving the application, the USPTO will send a notice to the applicant directing the applicant to view the previously issued Office action in the electronic file for the application available on the USPTO's Web site and provide the applicant with a new six-month response period. When a petition to revive an application for failure to respond to a notice of allowance states that the applicant did not receive the notice, and the petition is granted, the USPTO will cancel the original notice of allowance and issue a new notice, giving the applicant a new six-month period in which to file a statement of use or request for extension of time to file a statement of use.

In either situation, the USPTO sends the new Office action or notice of allowance to the correspondence address of record. In general, under the current regulations at 37 CFR 2.18, the owner of an application has a duty to maintain a current and accurate correspondence address with the USPTO, which may be either a physical or email address. If the correspondence address changes, the USPTO must be promptly notified in writing of the new address. If the correspondence address has not changed in the USPTO records since the filing of the application, the applicant is on notice that documents regarding its application are being sent to that address by virtue of its awareness of the abandonment of the application and its subsequent filing of the petition to revive.

Allowing an applicant who is on notice that the Office has taken action in an application to continually assert non-receipt of the same Office action or notice of allowance significantly delays prosecution of the application. It also results in uncertainty for the public,

which relies on the trademark electronic records system to determine whether a chosen mark is available for use or registration. Therefore, because the applicant is on notice that documents regarding its application are being sent to the address of record, this proposed rule would limit an applicant to asserting only once that the unintentional delay is based on non-receipt of the same Office action or notice of allowance. If the correspondence address has changed since the filing of the application, the applicant is responsible for updating the address, as noted above, so that any further Office actions or notices will be sent to the correct address.

*Codify Requirements for Reinstatement:* The USPTO proposes new regulations at § 2.64 to codify the requirements for seeking reinstatement of an application that was abandoned or a registration that was cancelled or expired due to Office error. The proposed regulations indicate that there is no fee for requesting reinstatement. They also set out the deadlines for submitting such requests, as discussed under the heading "Establish Certainty Regarding Timeliness," and the nature of proof necessary to support an allegation of Office error in the abandonment of the relevant application or cancellation of the relevant registration. Further, the proposed regulation provides an avenue for requesting waiver of the requirements if the applicant or registrant is not entitled to reinstatement.

The rationale for the proposed changes to the deadline for requesting reinstatement of a registration when the registrant did not receive a notice of cancellation is discussed above. The TMEP currently sets out the deadlines for requesting reinstatement of an application or registration that was abandoned, cancelled, or expired due to Office error. TMEP §§ 1712.01, 1712.02(a). Other requirements, such as the nature of proof required to establish Office error, are also set out in the TMEP. However, although the TMEP sets out the deadlines and guidelines for submitting and handling requests for reinstatement, it does not have the force of law. Codifying the deadlines for filing a request for reinstatement in a separate rule that also lists the types of proof necessary to warrant such remedial action would provide clear and definite standards regarding an applicant's or registrant's burden. It would also furnish the legal underpinnings of the Office's authority to grant or deny a request for reinstatement as well as provide applicants and owners of registrations with the benefit of an

entitlement to relief when the standards of the rules are met.

If an applicant or registrant is found not to be entitled to reinstatement, the proposed rule also provides a possible avenue of relief in that the request may be construed as a petition to the Director under § 2.146 or a petition to revive under § 2.66, if appropriate. In addition, if the applicant or registrant is unable to meet the timeliness requirement for filing the request, the proposed rule provides that the applicant or registrant may submit a petition to the Director under § 2.146(a)(5) to request a waiver of that requirement.

*Summary of Major Provisions:* As stated above, the USPTO proposes to revise the rules in part 2 of title 37 of the Code of Federal Regulations to clarify the requirements for seeking revival of an abandoned application, reinstatement of an application or registration, or submitting a petition to the Director to take some other action.

#### **Discussion of Proposed Regulatory Changes**

The USPTO proposes to add § 2.64 and to amend §§ 2.66 and 2.146 to clarify the requirements for submitting petitions to revive an abandoned application and petitions to the Director regarding other matters, as described in the section-by-section analysis below.

The USPTO proposes to add § 2.64 to codify the requirements for requests to reinstate an application that was abandoned, or a registration that was cancelled or expired, due to Office error.

The USPTO proposes to amend the title of § 2.66 to "Revival of applications abandoned in full or in part due to unintentional delay."

The USPTO proposes to amend § 2.66(a) by adding the title "Deadline" and the wording "in full or in part" and "by not later than;" to amend § 2.66(a)(1) by indicating that the deadline is not later than two months after the issue date of the notice of abandonment in full or in part; and to amend § 2.66(a)(2) by revising the deadline if the applicant did not receive the notice of abandonment.

The USPTO proposes to amend § 2.66(b) by adding the title "Petition to Revive Application Abandoned in Full or in Part for Failure to Respond to an Office Action" and rewording the paragraph for clarity and to add "in full or in part"; revising § 2.66(b)(3) to clarify that a response to the outstanding Office action is required or, if the applicant asserts it did not receive the Office action, that the applicant may not assert more than once that the unintentional delay is based on non-receipt of the same Office action; and



adding § 2.66(b)(3)(i)–(ii) to set out the requirements for requesting revival when the abandonment occurs after a final Office action.

The USPTO proposes to amend § 2.66(c) by adding the title “Petition to Revive Application Abandoned for Failure to Respond to a Notice of Allowance;” adding § 2.66(c)(2)(i)–(iv) to incorporate and further clarify requirements in current §§ 2.66(c)(4) and (5); deleting current § 2.66(c)(3)–(4); and redesignating current § 2.66(c)(5) as § 2.66(c)(3) and deleting the wording prior to “the applicant must file.”

The USPTO proposes to amend § 2.66(d) by adding the title “Statement of Use or Petition to Substitute a Basis May Not Be Filed More Than 36 Months After Issuance of the Notice of Allowance” and rewording the paragraph for clarity.

The USPTO proposes to delete current § 2.66(e).

The USPTO proposes to redesignate current § 2.66(f) as § 2.66(e), add the title “Request for Reconsideration,” reword the paragraph for clarity, and revise paragraphs (1) and (2) to clarify the requirements for requesting reconsideration of a petition to revive that has been denied.

The USPTO proposes to amend § 2.146(b) by deleting the wording “considered to be.”

The USPTO proposes to amend § 2.146(d) by deleting the current paragraph and adding a sentence introducing new § 2.146(d)(1)–(2)(iii), which sets out the deadlines for filing a petition.

The USPTO proposes to amend § 2.146(e)(1) by changing the wording “within fifteen days from the date of issuance” and “within fifteen days from the date of service” to “by not later than fifteen days after the issue date” and “by not later than fifteen days after the date of service.” The USPTO proposes to amend § 2.146(e)(2) by changing the wording “within thirty days after the date of issuance” and “within fifteen days from the date of service” to “by not later than thirty days after the issue date” and “by not later than fifteen days after the date of service.”

The USPTO proposes to delete current § 2.146(i).

The USPTO proposes to redesignate current § 2.146(j) as new § 2.146(i), to delete the wording “the petitioner,” and to revise paragraphs (1) and (2) to clarify the requirements for requesting reconsideration of a petition to revive that has been denied.

### Rulemaking Considerations

*Administrative Procedure Act:* The changes in this proposed rulemaking

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

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

*Regulatory Flexibility Act:* Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), whenever an agency is required by 5 U.S.C. 553 (or any other law) to publish a notice of proposed rulemaking (NPRM), the agency must prepare and make available for public comment an Initial Regulatory Flexibility Analysis, unless the agency certifies under 5 U.S.C. 605(b) that the proposed rule, if implemented, will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 605.

For the reasons set forth herein, the Deputy General Counsel for General Law of the United States Patent and Trademark Office has certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b).

This proposed rule would amend the regulations to provide detailed deadlines and requirements for petitions to revive an abandoned application and petitions to the Director regarding other

matters, and to codify USPTO practice regarding requests for reinstatement of abandoned applications and cancelled or expired registrations. The proposed rule will apply to all persons seeking a revival or reinstatement of an abandoned trademark application or registration, or other equitable action by the Director. Applicants for a trademark are not industry specific and may consist of individuals, small businesses, non-profit organizations, and large corporations. The USPTO does not collect or maintain statistics on small-versus large-entity applicants, and this information would be required in order to determine the number of small entities that would be affected by the proposed rule.

The burdens to all entities, including small entities, imposed by these rule changes will be minor procedural requirements on parties submitting petitions to revive an abandoned application and petitions to the Director regarding other matters, and those submitting requests for reinstatement of abandoned applications and cancelled or expired registrations. The proposed changes do not impose any additional economic burden in connection with the proposed changes as they merely clarify existing requirements or codify existing procedures.

*Executive Order 12866 (Regulatory Planning and Review):* This proposed rulemaking has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

*Executive Order 13563 (Improving Regulation and Regulatory Review):* The USPTO has complied with Executive Order 13563 (Jan. 18, 2011). Specifically, the USPTO has, to the extent feasible and applicable: (1) Made a reasoned determination that the benefits justify the costs of the rule changes; (2) tailored the rules to impose the least burden on society consistent with obtaining the regulatory objectives; (3) selected a regulatory approach that maximizes net benefits; (4) specified performance objectives; (5) identified and assessed available alternatives; (6) provided the public with a meaningful opportunity to participate in the regulatory process, including soliciting the views of those likely affected prior to issuing a notice of proposed rulemaking, and provided online access to the rulemaking docket; (7) attempted to promote coordination, simplification, and harmonization across government agencies and identified goals designed to promote innovation; (8) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and

technological information and processes, to the extent applicable.

*Executive Order 13132 (Federalism):* This proposed rulemaking does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

*Congressional Review Act:* Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), prior to issuing any final rule, the USPTO will submit a report containing the final rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the Government Accountability Office. The changes in this notice are not expected to result in an annual effect on the economy of 100 million dollars or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this notice is not expected to result in a "major rule" as defined in 5 U.S.C. 804(2).

*Unfunded Mandates Reform Act of 1995:* The changes in this proposed rulemaking do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of 100 million dollars (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of 100 million dollars (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. See 2 U.S.C. 1501 *et seq.*

*Paperwork Reduction Act:* This rulemaking involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The collection of information involved in this rule has been reviewed and previously approved by OMB under control numbers 0651-0051, 0651-0054, and 0651-0061.

You may send comments regarding the collections of information associated with this rule, including suggestions for reducing the burden, to (1) The Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10202, 725 17th Street NW., Washington, DC

20503, Attention: Nicholas A. Fraser, the Desk Officer for the United States Patent and Trademark Office; and (2) The Commissioner for Trademarks, by mail to P.O. Box 1451, Alexandria, VA 22313-1451, attention Catherine Cain; by hand delivery to the Trademark Assistance Center, Concourse Level, James Madison Building—East Wing, 600 Dulany Street, Alexandria, VA 22314, attention Catherine Cain; or by electronic mail message via the Federal eRulemaking Portal. All comments submitted directly to the USPTO or provided on the Federal eRulemaking Portal should include the docket number (PTO-T-2010-0016).

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

#### List of Subjects in 37 CFR Part 2

Administrative practice and procedure, Trademarks.

For the reasons stated in the preamble and under the authority contained in 15 U.S.C. 1123 and 35 U.S.C. 2, as amended, the Office proposes to amend part 2 of title 37 as follows:

#### PART 2—RULES OF PRACTICE IN TRADEMARK CASES

■ 1. The authority citation for 37 CFR Part 2 continues to read as follows:

**Authority:** 15 U.S.C. 1113, 15 U.S.C. 1123, 35 U.S.C. 2, Section 10(c) of Pub. L. 112-29, unless otherwise noted.

■ 2. Add § 2.64 to read as follows:

#### § 2.64 Reinstatement of applications and registrations abandoned, cancelled, or expired due to Office error.

(a) *Request for Reinstatement of an Abandoned Application.* The applicant may file a written request to reinstate an application abandoned due to Office error. There is no fee for a request for reinstatement.

(1) *Deadline.* The applicant must file the request by not later than:

(i) Two months after the issue date of the notice of abandonment; or

(ii) Two months after the date of actual knowledge of the abandonment and not later than six months after the date the trademark electronic records system indicates that the application is abandoned, where the applicant declares under § 2.20 or 28 U.S.C. 1746 that it did not receive the notice of abandonment.

(2) *Requirements.* A request to reinstate an application abandoned due to Office error must include:

(i) Proof that a response to an Office action, a statement of use, or a request for extension of time to file a statement of use was timely filed and a copy of the relevant document;

(ii) Proof of actual receipt by the Office of a response to an Office action, a statement of use, or a request for extension of time to file a statement of use and a copy of the relevant document;

(iii) Proof that the Office processed a fee in connection with the filing at issue and a copy of the relevant document;

(iv) Proof that the Office sent the Office action or notice of allowance to an address different than that designated by the applicant as the correspondence address; or

(v) Other evidence, or factual information supported by a declaration under § 2.20 or 28 U.S.C. 1746, demonstrating Office error in abandoning the application.

(b) *Request for Reinstatement of Cancelled or Expired Registration.* The registrant may file a written request to reinstate a registration cancelled or expired due to Office error. There is no fee for the request for reinstatement.

(1) *Deadline.* The registrant must file the request by not later than:

(i) Two months after the issue date of the notice of cancellation/expiration; or

(ii) Two months after the date of actual knowledge of the cancellation/expiration and not later than six months after the date the trademark electronic records system indicates that the registration is cancelled/expired, where the registrant declares under § 2.20 or 28 U.S.C. 1746 that it did not receive the notice of cancellation/expiration or the Office did not issue a notice.

(2) *Requirements.* A request to reinstate a registration cancelled/expired due to Office error must include:

(i) Proof that an affidavit or declaration of use or excusable nonuse, a renewal application, or a response to an Office action was timely filed and a copy of the relevant document;

(ii) Proof of actual receipt by the Office of an affidavit or declaration of use or excusable nonuse, a renewal application, or a response to an Office action and a copy of the relevant document;

(iii) Proof that the Office processed a fee in connection with the filing at issue and a copy of the relevant document;

(iv) Proof that the Office sent the Office action to an address different than that designated by the registrant as the correspondence address; or

(v) Other evidence, or factual information supported by a declaration under § 2.20 or 28 U.S.C. 1746, demonstrating Office error in cancelling/expiring the registration.

(c) *Request for Reinstatement May be Construed as Petition.* If an applicant or registrant is not entitled to reinstatement, a request for reinstatement may be construed as a petition to the Director under § 2.146 or a petition to revive under § 2.66, if appropriate. If the applicant or registrant is unable to meet the timeliness requirement under paragraphs (a)(ii) or (b)(ii) for filing the request, the applicant or registrant may submit a petition to the Director under § 2.146(a)(5) to request a waiver of the rule.

■ 3. Revise § 2.66 to read as follows:

**§ 2.66 Revival of applications abandoned in full or in part due to unintentional delay.**

(a) *Deadline.* The applicant may file a petition to revive an application abandoned in full or in part because the applicant did not timely respond to an Office action or notice of allowance, if the delay was unintentional. The applicant must file the petition by not later than:

(1) Two months after the issue date of the notice of abandonment in full or in part; or

(2) Two months after the date of actual knowledge of the abandonment and not later than six months after the date the trademark electronic records system indicates that the application is abandoned in full or in part, where the applicant declares under § 2.20 or 28 U.S.C. 1746 that it did not receive the notice of abandonment.

(b) *Petition to Revive Application Abandoned in Full or in Part for Failure to Respond to an Office Action.* A petition to revive an application abandoned in full or in part because the applicant did not timely respond to an Office action must include:

(1) The petition fee required by § 2.6;

(2) A statement, signed by someone with firsthand knowledge of the facts, that the delay in filing the response on or before the due date was unintentional; and

(3) A response to the Office action, signed pursuant to § 2.193(e)(2), or a statement that the applicant did not receive the Office action. The applicant may only assert once that the unintentional delay is based on non-receipt of the same Office action. When the abandonment is after a final Office action, the response is treated as a request for reconsideration under § 2.63(b)(3) and the applicant must also file:

(i) A notice of appeal to the Trademark Trial and Appeal Board under § 2.141 or a petition to the Director under § 2.146, if permitted by § 2.63(b)(2)(iii); or

(ii) A statement that no appeal or petition is being filed from the final refusal(s) or requirement(s).

(c) *Petition to Revive Application Abandoned for Failure to Respond to a Notice of Allowance.* A petition to revive an application abandoned because the applicant did not timely respond to a notice of allowance must include:

(1) The petition fee required by § 2.6;

(2) A statement, signed by someone with firsthand knowledge of the facts, that the delay in filing the statement of use (or request for extension of time to file a statement of use) on or before the due date was unintentional; and one of the following:

(i) A statement of use under § 2.88, signed pursuant to § 2.193(e)(1), and the required fees for the number of requests for extensions of time to file a statement of use that the applicant should have filed under § 2.89 if the application had never been abandoned;

(ii) A request for an extension of time to file a statement of use under § 2.89, signed pursuant to § 2.193(e)(1), and the required fees for the number of requests for extensions of time to file a statement of use that the applicant should have filed under § 2.89 if the application had never been abandoned;

(iii) A statement that the applicant did not receive the notice of allowance and a request to cancel said notice and issue a new notice. The applicant may only assert once that the unintentional delay is based on non-receipt of the notice of allowance; or

(iv) In a multiple-basis application, an amendment, signed pursuant to § 2.193(e)(2), deleting the section 1(b) basis and seeking registration based on section 1(a) and/or section 44(e) of the Act.

(3) The applicant must file any further requests for extensions of time to file a statement of use under § 2.89 that become due while the petition is pending, or file a statement of use under § 2.88.

(d) *Statement of Use or Petition to Substitute a Basis May Not Be Filed More Than 36 Months After Issuance of the Notice of Allowance.* In an application under section 1(b) of the Act, the Director will not grant a petition under this section if doing so would permit an applicant to file a statement of use, or a petition under § 2.35(b) to substitute a basis, more than 36 months after the issue date of the

notice of allowance under section 13(b)(2) of the Act.

(e) *Request for Reconsideration.* If the Director denies a petition to revive under this section, the applicant may request reconsideration, if:

(1) The applicant files the request by not later than:

(i) Two months after the issue date of the decision denying the petition; or

(ii) Two months after the date of actual knowledge of the decision denying the petition and not later than six months after the issue date of the decision where the applicant declares under § 2.20 or 28 U.S.C. 1746 that it did not receive the decision; and

(2) The applicant pays a second petition fee under § 2.6.

■ 4. Revise § 2.146 to read as follows:

**§ 2.146 Petitions to the Director.**

(a) Petition may be taken to the Director:

(1) From any repeated or final formal requirement of the examiner in the ex parte prosecution of an application if permitted by § 2.63(a) and (b);

(2) In any case for which the Act of 1946, or Title 35 of the United States Code, or this Part of Title 37 of the Code of Federal Regulations specifies that the matter is to be determined directly or reviewed by the Director;

(3) To invoke the supervisory authority of the Director in appropriate circumstances;

(4) In any case not specifically defined and provided for by this Part of Title 37 of the Code of Federal Regulations; or

(5) In an extraordinary situation, when justice requires and no other party is injured thereby, to request a suspension or waiver of any requirement of the rules not being a requirement of the Act of 1946.

(b) Questions of substance arising during the ex parte prosecution of applications, including, but not limited to, questions arising under sections 2, 3, 4, 5, 6, and 23 of the Act of 1946, are not appropriate subject matter for petitions to the Director.

(c) Every petition to the Director shall include a statement of the facts relevant to the petition, the points to be reviewed, the action or relief requested, and the fee required by § 2.6. Any brief in support of the petition shall be embodied in or accompany the petition. The petition must be signed by the petitioner, someone with legal authority to bind the petitioner (e.g., a corporate officer or general partner of a partnership), or a practitioner qualified to practice under § 11.14 of this chapter, in accordance with the requirements of § 2.193(e)(5). When facts are to be

proved on petition, the petitioner must submit proof in the form of verified statements signed by someone with firsthand knowledge of the facts to be proved, and any exhibits.

(d) Unless a different deadline is specified elsewhere in this chapter, a petition under this section must be filed by not later than:

(1) Two months after the issue date of the action, or date of receipt of the filing, from which relief is requested; or

(2) Where the applicant or registrant declares under § 2.20 or 28 U.S.C. 1746 that it did not receive the action or no action was issued, the petition must be filed by not later than:

(i) Two months of actual knowledge of the abandonment of an application and not later than six months after the date the trademark electronic records system indicates that the application is abandoned in full or in part;

(ii) Two months after the date of actual knowledge of the cancellation/expiration of a registration and not later than six months after the date the trademark electronic records system indicates that the registration is cancelled/expired; or

(iii) Two months after the date of actual knowledge of the denial of certification of an international application under § 7.13(b) and not later than six months after the trademark electronic records system indicates that certification is denied.

(e)(1) A petition from the grant or denial of a request for an extension of time to file a notice of opposition must be filed by not later than fifteen days after the issue date of the grant or denial of the request. A petition from the grant of a request must be served on the attorney or other authorized representative of the potential opposer, if any, or on the potential opposer. A petition from the denial of a request must be served on the attorney or other authorized representative of the applicant, if any, or on the applicant. Proof of service of the petition must be made as provided by § 2.119. The potential opposer or the applicant, as the case may be, may file a response by not later than fifteen days after the date of service of the petition and must serve a copy of the response on the petitioner, with proof of service as provided by § 2.119. No further document relating to the petition may be filed.

(2) A petition from an interlocutory order of the Trademark Trial and Appeal Board must be filed by not later than thirty days after the issue date of the order from which relief is requested. Any brief in response to the petition must be filed, with any supporting exhibits, by not later than fifteen days

after the date of service of the petition. Petitions and responses to petitions, and any documents accompanying a petition or response under this subsection, must be served on every adverse party pursuant to § 2.119.

(f) An oral hearing will not be held on a petition except when considered necessary by the Director.

(g) The mere filing of a petition to the Director will not act as a stay in any appeal or inter partes proceeding that is pending before the Trademark Trial and Appeal Board, nor stay the period for replying to an Office action in an application, except when a stay is specifically requested and is granted or when §§ 2.63(a) and (b) and 2.65(a) are applicable to an ex parte application.

(h) Authority to act on petitions, or on any petition, may be delegated by the Director.

(i) If the Director denies a petition, the petitioner may request reconsideration, if:

(1) The petitioner files the request by not later than:

(i) Two months after the issue date of the decision denying the petition; or

(ii) Two months after the date of actual knowledge of the decision denying the petition and not later than six months after the issue date of the decision where the petitioner declares under § 2.20 or 28 U.S.C. 1746 that it did not receive the decision; and

(2) The petitioner pays a second petition fee under § 2.6.

Dated: October 21, 2016.

**Michelle K. Lee,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. 2016-26035 Filed 10-27-16; 8:45 am]

**BILLING CODE 3510-16-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R06-OAR-2016-0450; FRL-9953-95-Region 6]

#### Approval and Promulgation of Implementation Plans; Louisiana; Prevention of Significant Deterioration Significant Monitoring Concentration for Fine Particulates

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve two revisions to the Louisiana State Implementation Plan (SIP) that revise

the Louisiana Prevention of Significant Deterioration (PSD) permitting program to establish the significant monitoring concentration (SMC) for fine particles (PM<sub>2.5</sub>) at a zero microgram per cubic meter (0 µg/m<sup>3</sup>) threshold level consistent with federal permitting requirements. The EPA is proposing this action under section 110 and part C of the Clean Air Act (CAA or Act).

**DATES:** Written comments should be received on or before November 28, 2016.

**ADDRESSES:** Submit your comments, identified by EPA-R06-OAR-2016-0450, at <http://www.regulations.gov> or via email to [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov). For additional information on how to submit comments see the detailed instructions in the **ADDRESSES** section of the direct final rule located in the rules section of this **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Adina Wiley, (214) 665-2115, [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov).

**SUPPLEMENTARY INFORMATION:** In the Rules and Regulations section of this issue of the **Federal Register**, the EPA is approving the State's SIP submittal as a direct rule without prior proposal because the Agency views this as noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no relevant adverse comments are received in response to this action no further activity is contemplated. If the EPA receives relevant adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

For additional information, see the direct final rule which is located in the Rules and Regulations section of this **Federal Register**.

Dated: October 21, 2016.

**Ron Curry,**

*Regional Administrator, Region 6.*

[FR Doc. 2016-25991 Filed 10-27-16; 8:45 am]

**BILLING CODE 6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 147**

[EPA-HQ-OW-2015-0372; FRL 9953-36-OW]

**Commonwealth of Kentucky Underground Injection Control (UIC) Class II Program; Primacy Approval****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) proposes to approve the Commonwealth of Kentucky Underground Injection Control (UIC) Class II Program for primacy. The EPA determined that the state's program is consistent with the provisions of the Safe Drinking Water Act (SDWA) at section 1425 to prevent underground injection activities that endanger underground sources of drinking water. The agency's approval allows the state to implement and enforce state regulations for UIC Class II injection wells only located within the state. The Commonwealth's authority excludes the regulation of injection well Classes I, III, IV, V and VI and all wells on Indian lands, as required by rule under the SDWA. The agency requests public comment on this proposed rule and supporting documentation. In the "Rules and Regulations" section of this **Federal Register**, the agency published EPA's approval of the state's program as a direct final rule without a prior proposed rule. If the agency receives no adverse comment, EPA will not take further action on this proposed rule.

**DATES:** Written comments must be received by November 28, 2016.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OW-2015-0372, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or

other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:**

Holly S. Green, Drinking Water Protection Division, Office of Ground Water and Drinking Water (4606M), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 566-0651; fax number: (202) 564-3754; email address: [green.holly@epa.gov](mailto:green.holly@epa.gov); or Nancy H. Marsh, Safe Drinking Water Branch, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303; telephone number (404) 562-9450; fax number: (404) 562-9439; email address: [marsh.nancy@epa.gov](mailto:marsh.nancy@epa.gov).

**SUPPLEMENTARY INFORMATION:****Why is EPA issuing this proposed rule?**

The EPA proposes to approve the Commonwealth of Kentucky's UIC Program primacy application for Class II injection wells located within the state (except all wells on Indian lands), as required by rule under the SDWA. The proposed rule grants Kentucky primary enforcement authority to prevent Class II (oil and gas-related) underground injection activities that endanger underground sources of drinking water. Accordingly, the agency proposes to codify the state's program in the *Code of Federal Regulations* (CFR) at 40 CFR part 147. EPA will continue to administer the UIC Program for injection well Classes I, III, IV, V and VI and wells on Indian lands, if any such lands exist in the state in the future. The agency has published a direct final rule in the "Rules and Regulations" section of today's **Federal Register**, approving the state's program because EPA views this approval as noncontroversial and anticipates no adverse comment. The agency provided reasons for the approval and additional supplementary information in the preamble to the direct final rule. If EPA receives no adverse comment, the agency will not take further action on this proposed rule. If EPA receives adverse comment, the agency will withdraw the direct final rule and it will not take effect. The agency would then address all public comments in any subsequent final rule based on this proposed rule. The agency does not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further

information, please contact the persons listed in the **FOR FURTHER INFORMATION CONTACT** section.

Dated: October 19, 2016.

**Gina McCarthy**,  
Administrator.

[FR Doc. 2016-25929 Filed 10-27-16; 8:45 am]

BILLING CODE 6560-50-P

**LEGAL SERVICES CORPORATION****45 CFR Parts 1600, 1630, and 1631****Definitions; Cost Standards and Procedures; Purchasing and Property Management****AGENCY:** Legal Services Corporation.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Legal Services Corporation (LSC or Corporation) is issuing this notice of proposed rulemaking to request comment on the Corporation's proposed revisions to its Definitions and Cost Standards and Procedures rules and the creation of a new part from LSC's Property Acquisition and Management Manual (PAMM).

**DATES:** Comments must be submitted by December 27, 2016.**ADDRESSES:** You may submit comments by any of the following methods:

*Email:* [lscrulemaking@lsc.gov](mailto:lscrulemaking@lsc.gov). Include "Parts 1630/1631 Rulemaking" in the subject line of the message.

*Fax:* (202) 337-6519.

*Mail:* Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW., Washington, DC 20007, ATTN: Parts 1630/1631 Rulemaking.

*Hand Delivery/Courier:* Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW., Washington, DC 20007, ATTN: Parts 1630/1631 Rulemaking.

LSC prefers electronic submissions via email with attachments in Acrobat PDF format. LSC may not consider written comments sent via any other method or received after the end of the comment period.

**FOR FURTHER INFORMATION, CONTACT:**

Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW., Washington, DC 20007, (202) 295-1563 (phone), (202) 337-6519 (fax), [sdavis@lsc.gov](mailto:sdavis@lsc.gov).

**SUPPLEMENTARY INFORMATION:****I. Regulatory Background of Part 1630 and the PAMM**

The purpose of 45 CFR part 1630 is "to provide uniform standards for allowability of costs and to provide a

comprehensive, fair, timely, and flexible process for the resolution of questioned costs.” 45 CFR 1630.1. LSC last revised part 1630 in 1997, when it published a final rule intended to “bring the Corporation’s cost standards and procedures into conformance with applicable provisions of the Inspector General Act, the Corporation’s appropriations [acts], and relevant Office of Management and Budget (OMB) Circulars.” 62 FR 68219, Dec. 31, 1997. Although the OMB Circulars are not binding on LSC because LSC is not a federal agency, LSC adopted relevant provisions from the OMB Circulars pertaining to non-profit grants, audits, and cost principles into the final rule for part 1630. *Id.* at 68219–20 (citing OMB Circulars A–50, A–110, A–122, and A–133).

LSC published the PAMM in 2001 “to provide recipients with a single complete and consolidated set of policies and procedures related to property acquisition, use and disposal.” 66 FR 47688, Sept. 13, 2001. Prior to the PAMM’s issuance, such policies and procedures were “incomplete, outdated and dispersed among several different LSC documents.” *Id.* The PAMM contains policies and procedures that govern both real and non-expendable personal property, but, with the exception of contract services for capital improvements, the PAMM does not apply to contracts for services. *Id.* at 47695. The PAMM’s policies and procedures were developed with guidance from the Federal Acquisition Regulation at 48 CFR parts 1–52, federal property management regulations, and OMB Circular A–110. *Id.* at 47688. The PAMM also incorporates several references to provisions of part 1630 pertaining to costs that require LSC’s prior approval and the proper allocation of derivative income. *Id.* at 47696–98 (containing references to 45 CFR 1630.5(b)(2)–(4), 1630.5(c), and 1630.12, respectively).

## II. Impetus for This Rulemaking

Part 1630 and the PAMM have not been revised since 1997 and 2001, respectively. Since then, procurement practices and cost-allocation principles applicable to awards of federal funds have changed significantly. For instance, in 2013, OMB revised and consolidated several Circulars, including the Circulars LSC relied upon to develop part 1630, into a single Uniform Guidance. 78 FR 78589, Dec. 26, 2013; 2 CFR part 200. OMB consolidated and simplified its guidance to “reduce administrative burden for non-Federal entities receiving Federal awards while

reducing the risk of waste, fraud and abuse.” 78 FR 78590, Dec. 26, 2013.

LSC has determined that it should undertake regulatory action at this time for three reasons. The first reason is to account, where appropriate for LSC, for changes in Federal grants policy. The second reason is to address the difficulties that LSC and its grantees experience in applying ambiguous provisions of Part 1630 and the PAMM. Finally, LSC believes rulemaking is appropriate at this time to address the limitations that certain provisions of both documents place on LSC’s ability to ensure clarity, efficiency, and accountability in its grant-making and grants oversight practices.

## III. Procedural History of This Rulemaking

In July 2014, the Operations and Regulations Committee (Committee) of LSC’s Board of Directors (Board) approved Management’s proposed 2014–2015 rulemaking agenda, which included revising Part 1630 and the PAMM as a priority item. On July 7, 2015, Management presented the Committee with a Justification Memorandum recommending publication of an Advance Notice of Proposed Rulemaking (ANPRM) to seek public comment on possible revisions to Part 1630 and the PAMM. Management stated that collecting input from the regulated community through an ANPRM would significantly aid LSC in determining the scope of this rulemaking and in developing a more accurate understanding of the potential costs and benefits that certain revisions may entail. On July 18, 2015, the LSC Board authorized rulemaking and approved the preparation of an ANPRM to revise Part 1630 and the PAMM.

Pursuant to LSC’s Rulemaking Protocol, on October 4, 2015, the Committee voted to authorize publication of this ANPRM in the **Federal Register** for notice and comment. The ANPRM was published on October 9, 2015, with a 45-day comment period closing on December 8, 2015. 80 FR 61142, Oct. 9, 2015. After receiving comments on the ANPRM, LSC sought authorization from the Committee to conduct a series of rulemaking workshops to obtain additional stakeholder input on the questions asked in the ANPRM. The Committee authorized the workshops and publication of a **Federal Register** notice announcing the topics to be discussed and soliciting participants for the workshops. 81 FR 9410, Feb. 25, 2016.

LSC held workshops on April 20, May 18, and June 15, 2016, at its

headquarters in Washington, DC. The three topics discussed were:

*Topic 1: Requirements of Other Funders—* How do LSC’s proposed changes to its cost standards and procedures and property acquisition and disposition requirements interact with the requirements imposed by recipients’ other funders, including the requirements governing intellectual property created using various sources of funding?

*Topic 2: LSC’s Proposals—* In the ANPRM, LSC proposed to regulate services contracts. LSC also proposed to require recipients to seek prior approval of aggregate purchases of personal property, acquisitions of personal and real property purchased or leased using LSC funds, and disposal of real or personal property purchased or leased using LSC funds.

*Topic 3: Establishing Standards Based on* the Office of Management and Budget’s (OMB) Uniform Guidance. LSC proposed to establish minimum standards for recipients’ procurement policies based on the OMB Uniform Guidance. LSC also proposed to revise part 1630 for consistency with the Uniform Guidance, where appropriate.

81 FR 9410, 9411, Feb. 25, 2016. The participants in the workshops were:

- Steve Pelletier, Northwest Justice Project.
- George Elliott, Legal Aid of Northwest Texas.
- Dilip Shah, Legal Aid of Northwest Texas.
- Steve Ogilvie, Inland Counties Legal Services.
- AnnaMarie Johnson, Nevada Legal Services.
- Shamim Huq, Legal Aid Society of Northeastern New York.
- Patrick McClintock, Iowa Legal Aid Foundation.
- Jonathan Asher, Colorado Legal Services.
- Michael Maher, Legal Action of Wisconsin, Inc.
- Frank Bittner, California Rural Legal Assistance, Inc.
- Jose Padilla, California Rural Legal Assistance, Inc.
- Diana White, Legal Aid Foundation of Metropolitan Chicago.
- Nikole Nelson, Alaska Legal Services Corporation.
- Tracey Janssen, Alaska Legal Services Corporation.
- Robin Murphy, National Legal Aid and Defender Association.

All materials related to the workshops, including agendas, audio recordings, and transcripts, are available at the rulemaking page for part 1630 on LSC’s Web site, <http://www.lsc.gov/rulemaking-cost-standards-and-property-management-acquisition-and-disposal>.

## IV. Discussion of Proposed Changes

### A. Part 1600

LSC proposes to add or revise several definitions to Chapter XVI. First, LSC proposes to add a new definition for the terms *Corporation funds* and *LSC funds*.

LSC currently uses these terms interchangeably throughout Chapter XVI, but does not define either term. LSC does define the term *financial assistance* as “annualized funding from the Corporation granted under section 1006(a)(1)(A) for the direct delivery of legal assistance to eligible clients.” 45 CFR 1600.1. LSC uses this term in very few places in Chapter XVI.

LSC believes that new definitions are necessary for three reasons. The first is to account for the widespread use of the terms *Corporation funds* and *LSC funds* throughout its regulations. The second is to distinguish between appropriated funds granted by LSC, which generally are governed by LSC’s regulations, and private funds granted by LSC, which must be used consistent with 45 CFR part 1610. The third reason is to formalize LSC’s longstanding policy that its regulations apply to all grant awards that LSC makes to carry out the purposes of the Legal Services Corporation Act, not just those grants described in the definition of *financial assistance*.

In recent years, LSC has begun receiving funds from private sources to make grants for specified purposes, not all of which are for the delivery of legal assistance to eligible clients. For example, LSC receives funding from the Arnold & Porter Foundation to make grants to LSC recipients to support leadership development training. Grants made through the G. Duane Vieth Leadership Development Program may be used to pay for individuals in leadership positions at LSC grantees to receive training, coaching, or other professional development in nonprofit leadership skills. Because the funding for this program is provided by a private foundation, it is not subject to LSC’s regulations, which govern only those grants made with funds that Congress appropriated for the purpose of carrying out activities authorized by the LSC Act.

Since 1996, Congress has placed restrictions on how funds it appropriates to LSC may be used. In its annual directive, Congress does not distinguish between funds appropriated to make grants to provide legal assistance to eligible clients—Basic Field Grants—and funds that LSC may use to make other types of grants authorized by the LSC Act. At the current time, LSC uses the funds that Congress appropriates to carry out the purposes of the LSC Act to make awards in the following programs: (1) Basic Field Grants, (2) Technology Initiative Grants, and (3) the Pro Bono Innovation Fund. In addition to these grant programs, LSC uses recovered funds to award emergency relief grants to

grantees in areas with government-declared emergencies on an as-needed basis. LSC historically has considered its regulations applicable to all three grant programs and grants made with recovered funds, as well as to any other funds that Congress occasionally appropriates to LSC for the purposes of carrying out the LSC Act. An example of the latter would be the 2013 supplemental appropriation to “carry out the purposes of the Legal Services Corporation Act by providing for necessary expenses related to the consequences of Hurricane Sandy[.]” Public Law 113–2, Div. A, Title X, Chap. 2, 127 Stat. 4, Jan. 29, 2013.

Against this background, LSC believes that it is necessary to define the terms *Corporation funds* and *LSC funds*, rather than to revise the regulations to replace those terms with the more limited term *financial assistance*. LSC proposes to define these terms to mean “any funds appropriated by Congress to carry out the purposes of the Legal Services Corporation Act of 1974, 42 U.S.C. 2996 *et seq.*, as amended.” LSC believes that the proposed definition accurately describes the funds implicated by the use of these terms throughout Chapter XVI.

Second, LSC proposes to define the term *non-LSC funds*. LSC proposes to define the term in reference to the new definition of *Corporation funds* or *LSC funds*. LSC proposes this definition to make clear that the term *non-LSC funds* has the same meaning throughout LSC’s regulations.

#### B. Part 1630

*Organizational note.* LSC proposes to reorganize part 1630 into four subparts. Subpart A will contain provisions generally applicable to all of part 1630. These provisions include the purpose and definitions. Subpart B will contain the sections governing the allocability and allowability of costs charged to LSC grants. It will also set forth the process that recipients should use to request prior approval for certain classes of costs. Subpart C will contain the sections governing questioned cost proceedings. In Subpart D, LSC will establish the rules governing the closeout of an LSC grant when a recipient stops receiving LSC funds. LSC believes that restructuring part 1630 in this way will improve the organization and coherence of the rule.

#### Subpart A—General Provisions

*§ 1630.1 Purpose.* LSC proposes to make no changes to this section.

*§ 1630.2 Definitions.* LSC proposes several revisions to this section. LSC proposes to remove the definition of the

term *allowed cost* from § 1630.2(a) as that term is not used in part 1630. LSC also proposes to delete the definition of the term *final action* and remove references to *final action* throughout part 1630 because the term does not appear to have legal significance in this part. The remaining definitions will be redesignated as appropriate.

LSC proposes to revise definitions that are currently taken from the Inspector General Act, 5 U.S.C. Appx., as amended, to track the Uniform Guidance issued by the Office of Management and Budget (OMB), 2 CFR part 200. LSC believes that the OMB-defined terms are more appropriate in the context of LSC’s cost standards and disallowance procedures, which are more similar to an agency’s standards and procedures than to an inspector general’s operations.

*§ 1630.2(c) Disallowed cost.* In addition to renumbering this definition, LSC proposes to revise the definition to substantially mirror the definition of *disallowed cost* contained in the Uniform Guidance, 2 CFR 200.31.

*§ 1630.2(d) Final written decision.* LSC proposes to replace the term *management decision* with the term *final written decision*. *Management decision* was adopted from section 5(f)(5) of the Inspector General Act, as the decision of an agency head “concerning its response to such findings and recommendations” made in an audit report issued by the agency’s inspector general. For LSC’s purposes, the decision described is not a final decision made by LSC management. Rather, the decision that this term refers to is made by an officer of LSC below the President after reviewing the evidentiary record supporting a staff determination that certain costs should be disallowed. In addition to replacing the term, LSC proposes to redefine the term to mean (1) the decision issued by the Vice President for Grants Management after reviewing a recipient’s response to a questioned cost notice, or (2) that the notice of questioned costs will become the final written decision after 30 days if the recipient does not file a response.

*§ 1630.2(e) Membership fees or dues.* LSC proposes to adopt the definition of this term from part 1627 in substantial part. As noted in the April 20, 2015 NPRM, LSC proposed to relocate this section of part 1627 to part 1630 in order to limit the scope of part 1627 to the oversight of subgrants. 80 FR 21692, 21698, Apr. 20, 2015. LSC proposes to add a nonexclusive description of the types of fees or dues that recipients may use LSC funds to pay. Such fees or dues include those that an attorney must pay



to the highest court of a state or a bar organization acting on behalf of the court or in another governmental capacity in order to practice law in the jurisdiction.

**§ 1630.2(f) Questioned cost.** LSC proposes to revise this definition to make clear that a questioned cost is one that LSC itself is questioning. This definition was adopted from section 5(f)(1) of the Inspector General Act. As currently drafted, the term indicates that the Office of Inspector General, the General Accounting Office (now the Government Accountability Office), and other authorized auditors may also question costs. While it is true that any of those entities may question costs, it is ultimately LSC's decision whether to issue a notice of questioned costs. Additionally, LSC may question costs based on information developed through its own oversight and program quality activities or as a result of information received from the public or whistleblowers. Finally, the text of existing § 1630.5(a) provides that LSC may question costs based on findings issued by the entities listed in the existing definition of *questioned costs*. For these reasons, LSC proposes to revise the definition of *questioned costs*.

**§ 1630.3 Time.** As part of the proposed reorganization of part 1630, LSC proposes to relocate existing § 1630.13 to § 1630.3 without change. This section prescribes the method for computing time periods under part 1630.

**§ 1630.4 Burden of proof.** LSC proposes no changes to this section.

#### Subpart B—Cost Standards and Prior Approval

**§ 1630.5 Standards governing allowability of costs under LSC grants or contracts.** LSC proposes to redesignate existing § 1630.3 as § 1630.5 within Subpart B as part of the restructuring of part 1630. Except as described below, LSC proposes to make only technical edits to this section.

LSC proposes to delete paragraph (a)(8) from this section. The preamble to the 1986 final rule for part 1630 describes paragraph (a)(8) as “a standard federal provision to ensure that [matching funds for federal grants] must be raised from a source other than the federal treasury and taxpayer.” 51 FR 29076, 29077, Aug. 13, 1986. Under existing § 1630.3(a)(8), recipients may use LSC funds to satisfy the matching requirement of a federal grant program only if “the agency whose funds are being matched determines in writing that Corporation funds may be used for federal matching purposes[.]” LSC introduced this language in response to

comments expressing concern that because LSC makes grants from appropriated funds, those grants could not be used to match, for example, grants awarded by the Administration on Aging within the U.S. Department of Health and Human Services. *Id.* LSC's approach is unique in requiring recipients to obtain a written determination from the agency whose grant the LSC funds are intended to match that the LSC funds may be used to satisfy the match. It is not clear from the regulatory history of the 1986 final rule why LSC believed it was appropriate for a different agency to find that LSC's funds could be used to match the agency's funds in order for the recipient to use LSC funds in that manner.

The 1986 preamble was correct that federal funds cannot be used to satisfy the matching requirement of another federal grant unless specifically authorized by law. *See* U.S. Government Accountability Office, “Principles of Federal Appropriations Law,” 3rd Ed., Vol. II, at 10–97 (Feb. 2006). But section 1005 of the Legal Services Corporation Act states that, “[e]xcept as otherwise specifically provided in [the Act],” LSC is not “considered a department, agency, or instrumentality, of the Federal Government.” 42 U.S.C. 2996d(e)(1). Therefore, LSC funds are not “federal funds” for matching purposes. Several federal agencies, including the Department of the Treasury, the Department of Justice, and the General Accountability Office, have reached the same conclusion and do not consider LSC funds to be “federal funds” subject to federal grant policy. *See, e.g.,* Department of Treasury Memorandum GLS–107648 (Mar. 26, 2011); U.S. Gen. Accounting Office, *Legal Services Corporation: Governance and Accountability Practices Need to Be Modernized and Strengthened* (2007).

Based on this language, LSC is reversing its prior policy with respect to the use of LSC funds to match grants awarded by federal agencies. LSC believes that recipients may use LSC grant funds to satisfy cost-sharing or matching requirements of federal awards as long as the funds are used consistent with LSC's governing statutes and regulations. LSC is considering other mechanisms for communicating its position on the use of LSC funds to satisfy cost-sharing or cost-matching requirements to federal agency funders.

**§ 1630.6 Prior approval.** LSC proposes to redesignate existing § 1630.5, which lists costs requiring LSC's prior approval, as § 1630.6 with substantive changes. LSC proposes no

changes to paragraph (a) (Advance understandings.) or (c) (Duration.).

LSC proposes to simplify paragraph (b) and relocate all provisions pertaining to prior approval for purchases and leases of personal property, contracts for services, purchases of real estate, contracts for capital improvements, and use of LSC funds to pay costs after the cessation of an LSC grant. LSC proposes to relocate the provisions governing prior approval of purchases and contracts to proposed part 1631. LSC also proposes to create a new Subpart D in part 1630 that will establish the procedures for closing out an LSC grant, including the use of LSC funds to complete the closeout process. Because LSC does not permit applicants for funding to charge costs incurred prior to the start date of the grant to LSC funds, LSC proposes to eliminate pre-award costs from the list of costs for which recipients must seek prior approval.

Consistent with the proposal to relocate the prior approval provisions, LSC also proposes to eliminate existing § 1630.6—Timetable and basis for granting prior approval.

Finally, LSC proposes to redesignate newly transferred §§ 1630.14 (Membership fees or dues), 1630.15 (Contributions), and 1630.16 (Tax-sheltered annuities, retirement accounts, and penalties) as §§ 1630.7–1630.9, respectively, with no changes.

#### Subpart C—Questioned Cost Proceedings

For readability and ease of reference, LSC proposes to split existing § 1630.7 into two discrete sections. Proposed § 1630.10 will govern only LSC's initial decision to question costs, and proposed § 1630.11 will describe the process by which a recipient may appeal a disallowed cost of \$2,500 or more to the LSC President. Finally, LSC proposes to redesignate existing §§ 1630.8–1630.12 as §§ 1630.12–1630.16 with only minor technical changes.

**§ 1630.10 Review of questioned costs.** LSC proposes to redesignate § 1630.7(a)–(d) as § 1630.10(a)–(b) and (e)–(f), respectively. In order to locate all provisions governing questioned costs in one section, LSC proposes to move the second sentence of existing § 1630.4(b) to paragraph (c) of this section. In that paragraph, LSC states that when it disallows a cost solely because the cost is excessive, LSC will disallow only the amount that LSC has determined is excessive.

LSC is proposing to eliminate the five-year lookback period within which LSC may recover questioned costs. The LSC Act does not place any temporal limitation on LSC's ability to recover



costs inappropriately charged by a recipient to its LSC grant. LSC adopted the five-year period when it revised part 1630 in 1997. 62 FR 68219, 68226, Dec. 31, 1997. This requirement is located currently at 45 CFR 1630.7(b) and states that LSC must provide a recipient with notice when LSC “determines that there is a basis for disallowing a questioned cost, and if not more than five years have elapsed since the recipient incurred the cost[.]”

Since LSC first promulgated part 1630 in 1986, it has chosen to limit the amount of time for which it may recover questioned costs from a recipient. LSC adopted a six-year period in the original version of § 1630.7(b), which it shortened to five years in 1997. 51 FR 29076, 29083, Aug. 13, 1986 (1986 final rule); 62 FR 68219, 68226, Dec. 31, 1997 (1997 final rule). The preamble to the 1997 final rule contains the most substantive discussion about LSC’s intent regarding the limitation. Initially, the Board proposed a three-year limitation period on the recovery of questioned costs. 62 FR 68223. LSC Management and the Office of Inspector General recommended that the Board adopt a five-year period

on the grounds that a three-year time period might be too short to enable the Corporation to fulfill its statutory obligation to follow up on questioned costs which might arise during the course of a GAO or OIG audit, or during a complaint investigation by Corporation management. Such an audit or investigation might occur at the end of the three-year period, and the time limitation in the proposed rule would prevent the Corporation from following up on a questioned cost finding.

*Id.* The Board accepted the recommendation and adopted a five-year lookback period.

Based on its oversight experience in the intervening years, LSC has come to the conclusion that limiting its ability to recover misspent costs is not consistent with its duty to responsibly administer appropriated funds. In LSC’s experience, some misuses of funds are not discovered within the five-year period, even though LSC conscientiously reviews the reports and other documentation it requires recipients to provide. In some cases, recipients have failed to represent uses of LSC funds accurately, and those misrepresentations have come to LSC’s attention only through complaints to LSC itself or via the Office of Inspector General. LSC also proposes to streamline the questioned costs review procedure. In the current version of § 1630.7, a recipient has 30 days from the date it receives a questioned cost notice from LSC to respond with

evidence and an argument for why LSC should not disallow the cost. 45 CFR 1630.7(c). If the recipient does not respond within 30 days, LSC management must issue a second decision. LSC believes that this second step is redundant. It places an unnecessary administrative burden on LSC to confirm its own action in the absence of a challenge by the recipient. LSC proposes to replace this step with a new paragraph (d)(2), which states that if the recipient does not respond within 30 days, the notice of questioned costs automatically converts to LSC’s final written decision.

**§ 1630.11 Appeals to the President.** LSC proposes to move existing § 1630.7(e)–(g) to § 1630.11 with one substantive change. LSC proposes to introduce paragraph (a)(2), which prohibits a recipient from appealing a final written decision to the LSC President when the recipient did not seek review of the initial notice of questioned costs. In LSC’s view, a senior manager with direct oversight of the office that issues a notice of questioned costs should have the first opportunity to review the evidence relating to the decision to question costs for two reasons. First, reviews of questioned cost notices may involve consultations with several offices within LSC, as well as several rounds of engagement with the recipient to obtain all of the information necessary to fairly consider the recipient’s request for review. Second, an intermediate level of review may provide the recipient with the relief sought, reduce the amount of the costs LSC proposes to disallow, or narrow the issues in dispute. The effort needed to fully evaluate the recipient’s defenses and narrow down the amount and issues in dispute is better invested at an earlier, lengthier stage in the process than during review by the President, who is the ultimate decision-maker for the Corporation. The President has only 30 days to make a decision on the recipient’s appeal under § 1630.11(c), compared to the 60 days provided for review at the senior management stage in § 1630.10(e).

**§ 1630.12 Recovery of disallowed costs and other corrective action.** LSC proposes to redesignate existing § 1630.8 to § 1630.12 with only minor technical changes to reflect the removal of *final action* from the rule.

**§ 1630.13 Other remedies; effect on other parts.** LSC proposes to redesignate existing § 1630.9 as § 1630.13 with only minor technical edits. LSC proposes to remove the references to denials of refunding under part 1625 as obsolete. In paragraph (b), which describes types of sanctions that are not equivalent to a

disallowed cost proceeding, LSC proposes to include limited reductions of funding under part 1606. LSC added limited reductions of funding as an enforcement mechanism in 2013. 78 FR 10085, Feb. 13, 2013.

LSC proposes to redesignate existing §§ 1630.10 (Applicability to subgrants.); 1630.11 (Applicability to non-LSC funds.); and 1630.12 (Applicability to derivative income.) to §§ 1630.13–16 without change.

#### Subpart D—Closeout Procedures

LSC proposes to create Subpart D to formalize its procedures to close out grants whenever a recipient ceases to receive LSC funding. LSC’s closeout procedures are currently located on its Web site at <http://www.lsc.gov/orderly-conclusion-role-responsibilities-recipient-lsc-funds>. LSC proposes to promulgate the procedures as rules in the interest of formalizing and consolidating its grant requirements. The procedures established in Subpart D reflect LSC’s current process for closing out grants.

**§ 1630.17 Applicability.** In this section, LSC proposes to describe when the procedures of Subpart D apply. Cessation of LSC funding may occur either voluntarily or involuntarily and may take different forms. Changes requiring closeout of the LSC grant include merger or termination with another LSC funding recipient, changes to the recipient’s current identity or status as a legal entity, or the recipient’s decision to stop receiving LSC grants. Involuntary termination occurs when LSC decides to stop funding a recipient. Terminations may occur during or at the end of a grant period.

**§ 1630.18 Closeout plan; Timing.** LSC proposes to require recipients who stop receiving funding to provide LSC with a plan for the orderly closeout of the grant. Recipients who are merging or consolidating with another LSC recipient, changing legal status, or opting out of further LSC grants must provide LSC with notice and the closeout plan no less than 60 days prior to the change ending the grant. If LSC involuntarily terminates a recipient’s funding, the recipient must provide LSC with the closeout plan no more than 15 business days after receiving the notice of termination from LSC.

LSC proposes to maintain the required elements of a closeout plan on its Web site and to provide recipients with a link to the relevant page in the grant award documents. Currently, LSC provides the link in the annual grant assurances that recipients must sign. LSC proposes to continue this practice, which is similar to the approach that

LSC has taken in other rules that require compliance with statutes or policies that may be updated without needing to go through the regulatory process. For example, when LSC updated 45 CFR part 1640—Application of Federal Law to LSC Recipients in 2015, it undertook an obligation to post and maintain the list of applicable federal laws on its Web site. 80 FR 21654, 21655, Apr. 20, 2015. LSC believes this approach is desirable because it allows LSC the flexibility to change the information it needs to ensure that grants are closed out properly without having to engage in rulemaking.

**§ 1630.19 Closeout costs.** In this section, LSC proposes to formalize its policies for approving the use of LSC funds to complete closeout activities. Recipients must submit a detailed budget and timeline for completing the activities described in the closeout plan. LSC must approve both the budget and the proposed timeline before closeout activities may begin. In paragraphs (b) and (c) LSC proposes to restate its policy of withholding any unreleased funds until the recipient has satisfactorily completed all closeout activities.

**§ 1630.20 Returning funds to LSC.** In new § 1630.20, LSC proposes to formalize the procedures for recipients to return to LSC excess fund balances and derivative income received after the end of the LSC grant period. The procedure for returning derivative income described in paragraph (b) applies only to derivative income attributable to work performed by the recipient during the term of and attributable to work funded by the LSC grant.

### C. Part 1631

In the ANPRM, LSC asked for comments on whether the PAMM should remain a separate manual or be incorporated into Chapter XVI of the Code of Federal Regulations as an official rule. Only the National Legal Aid and Defender Association (NLADA) responded to this item, recommending against codifying the PAMM as a rule. NLADA stated that making the PAMM into a rule would “deprive LSC of flexibility and impose rigid rules on LSC and the programs in an ever-evolving delivery system where modifications will need to be made.” Instead, NLADA advocated that LSC publish a regulation that provides “a very general description of the overall guidelines with references to a resource that consolidates the LSC Accounting Guide, Property Management Guide and other LSC documents with fiscal, property and accounting policies.”

As indicated in the ANPRM, LSC believes that incorporating the PAMM into Chapter XVI of the Code of Federal Regulations will “promote and preserve the effectiveness and consistency of LSC’s property acquisition, use, and disposal policies and procedures.” 80 FR 61142, 61142, Oct. 9, 2015. The LSC Act requires LSC to publish all rules, regulations, and guidelines for public comment, and to publish all rules, regulations, guidelines, and instructions in the **Federal Register** for 30 days prior to their effective date, which deprives LSC of flexibility to make changes quickly to even informal grants administration guidelines and instructions. In fact, the PAMM itself was published after a notice and comment process, even though it is not a formal rule. 66 FR 47688, Sept. 13, 2001.

LSC thus proposes to introduce a new procurement and property management rule at 45 CFR part 1631. The new part 1631 will draw substantially from the existing PAMM, but will differ from the PAMM in three significant respects. First, LSC proposes to require that recipients adopt policies for making purchases with LSC funds. Second, LSC proposes to expand the rule to include contracts for services made with LSC funds. Lastly, LSC proposes to restructure the PAMM into five discrete subparts: Subpart A—General Provisions; Subpart B—Procurement Policies and Procedures; Subpart C—Personal Property Management; Subpart D—Real Estate Acquisition and Capital Improvements; and Subpart E—Real Estate Management. LSC proposes this restructuring to improve the coherence and usability of the rule.

#### Subpart A—General Provisions

**§ 1631.1 Purpose.** LSC proposes to describe the purpose of part 1631 as twofold: (1) Setting standards for policies governing the purchase of property, including real estate, or contracts for services with LSC funds; and (2) establishing the requirements governing the use and disposition of property purchased with LSC funds.

**§ 1631.2 Definitions.** LSC proposes to adopt several definitions from the PAMM into part 1631. LSC also proposes to add new definitions.

**§ 1631.2(a) Capital improvements.** LSC proposes to adopt the definition of this term from the PAMM with technical changes for ease of readability.

**§ 1631.2(b) LSC property interest agreement.** LSC proposes to adopt the PAMM definition of this term with only technical changes.

**§ 1631.2(c) Personal property.** LSC proposes to simplify the PAMM

definition of this term to mean any property other than real estate. LSC intends the revised definition to include both expendable property (e.g., supplies) and non-expendable property (e.g., equipment, furniture, law books). LSC believes this change is appropriate for several reasons. First, LSC is proposing to require recipients to establish procurement policies that apply to all purchases of property, so that continuing to exclude supplies (expendable property) from the definition no longer makes sense. Second, and similarly, LSC is proposing to require recipients to seek prior approval for all purchases of personal property that exceed a specific dollar threshold. LSC does not believe it is appropriate to distinguish between expendable and non-expendable personal property under this proposal.

**§ 1631.2(d) Purchase.** LSC proposes to revise this definition for simplicity and to include contracts for services.

**§ 1631.2(3) Quote.** LSC proposes to adopt the PAMM definition of this term with only minor technical changes.

**§ 1631.2(f) Real estate.** LSC proposes to revise the PAMM definition of the term *real property* for clarity. LSC does not intend the change from “land, buildings, and appurtenances, including capital improvements thereto, but not including moveable personal property” in the existing PAMM to limit, narrow, or expand the scope of property captured by the revised definition.

**§ 1631.2(g) Services.** Because LSC is proposing to expand the scope of the PAMM to include contracts for services, LSC believes it is necessary to define the types of services it intends to regulate. LSC proposes to adopt a definition of services that reflects how the term is used in the Uniform Guidance, particularly 2 CFR 200.431 and 200.459.

LSC proposes to define *services* as those professional and consultant services provided to a recipient by members of a particular profession or individuals having a specific skill who are not employees of the recipient. Such individuals would include, but are not limited to, management consultants, payroll administrators, custodians, plumbers, and computer maintenance personnel. LSC does not, however, propose to include fringe benefits, such as health insurance, pensions, and unemployment benefits, within the scope of services regulated by part 1631.

During the rulemaking workshops, several commenters identified an issue that LSC had not considered when drafting the NPRM. Those commenters noted that their largest contracts for services were contracts with their employee insurance providers or

insurance brokers. They expressed concerns that (1) the process of obtaining bids and negotiating terms with health insurance providers is a time-sensitive process that would be complicated by having to simultaneously engage in a prior approval process with LSC; (2) their health insurance was provided by the county in which their offices were located and it was not possible for them to negotiate terms with the government agency providing the benefits; (3) there is only one provider in the area, so it is not possible to obtain multiple quotes for insurance; and (4) they use a healthcare administrator to handle employee claims for benefits. *See, e.g.*, Transcript of April 20, 2016 Rulemaking Workshop, at 67–68 (comments of Steve Pelletier), 69 (comments of AnnaMarie Johnson); Transcript of May 18, 2015 Rulemaking Workshop, at 55–56 (comments of Steve Pelletier), 63–64 (comments of Diana White). When LSC proposed to regulate services contracts, it did not consider whether employee benefits were services that should be subject to part 1631. After the commenters raised the concern that employee benefits could be covered by the proposed rule, LSC considered the issue and determined that employee benefits are not the type of services over which LSC intended to increase its oversight. Consequently, LSC proposes to exclude contracts for employee benefits from the definition of *services*. LSC notes that contracts for employee benefits are subject to the reasonable and necessary standard of part 1630 for costs charged to the LSC grant.

*§ 1631.2(h) Source.* LSC proposes to adopt the PAMM definition of this term with technical changes to reflect the inclusion of contracts for services within part 1631.

*§ 1631.3 Prior approval process.* LSC proposes to relocate the provisions governing the timetable and basis for granting prior approval from existing § 1630.6 to new § 1631.3. LSC proposes to require recipients to obtain prior approval for (1) all purchases and leases of personal property, (2) contracts for services, and (3) capital improvements when the cost of any of those transactions exceeds \$25,000 of LSC funds. LSC also proposes to increase the prior approval threshold. Currently, the prior approval threshold in the PAMM is \$10,000. LSC established this threshold when it revised part 1630 in 1986. 51 FR 29076, 29082, Aug. 13, 1986. In its comments on the ANPRM, Northwest Justice Project (NJP) encouraged LSC to increase this threshold to \$25,000 to account for inflation in the intervening years. LSC

agrees that an increase in the threshold is appropriate. Consistent with NJP's recommendation and reasoning, LSC proposes to increase the prior approval threshold to \$25,000.

LSC proposes to expand the prior approval process to include contracts for services and all purchases of personal property, whether the purchase is for a single item or multiple items, exceeding the \$25,000 threshold. Throughout the initial stages of this rulemaking, commenters opposed the potential application of the prior approval requirement to contracts for services. In its response to the ANPRM, NLADA stated that its members “strongly oppose prior approval of service contracts.” NLADA observed that recipients need the flexibility to make rapid decisions about how to address, for example, a computer system crash. NLADA also asserted that whatever policy LSC adopted should allow recipients to enter into sole-source contracts for reasons other than exigent circumstances. As examples, NLADA discussed the situations where a recipient purchases hardware or software from a vendor that includes routine maintenance, or the service is a specialty service for which only one vendor is available in the recipient's area. NLADA concluded that “[s]ound fiscal policies and internal controls will promote clarity, efficiency, and accountability while not unduly burdening the recipient.”

Workshop panelists discussed the problems with expanding the prior approval requirement to both contracts for services and aggregate purchases of property. Like NLADA, panelists discussed the need to react quickly in emergency situations, which generally makes prior approval impractical as well as impossible. *See, e.g.*, Transcript of April 20, 2016 Workshop at 72–73 (statement of AnnaMarie Johnson); May 18, 2016 Workshop at 57–58 (statement of Jonathan Asher), 69–71 (statement of Jose Padilla). Panelists also observed that some situations in which they must contract for services, such as labor-management negotiations or mediating employment issues, are sensitive situations in which it is inappropriate for LSC to weigh in on the recipient's choice of contractor. *See* Transcript of May 18, 2016 Workshop at 57 (statement of Jonathan Asher), 59–63 (statement of Jose Padilla), 67–69 (statement of Jonathan Asher), 69–72 (statement of Jose Padilla).

Panelists opined as well on the issue of prior approval of aggregate purchases. Several panelists expressed concern that the concept of aggregate purchases was ambiguous, with respect to both

timing—did LSC mean a purchase of multiple items occurring at one time, or several purchases of the same type of item over a certain period?—and nature—do all items in the purchase have to be the same, or would aggregate purchase include a copier and all of the accessories needed to operate it?—of the purchase. *See, e.g.*, Transcript of April 20, 2016 Workshop at 53–54 (statements of Steve Pelletier and George Elliott), 62–65 (statement of Jonathan Asher), 70–71 (statement of George Elliott), 72–73 (statement of Michael Maher); Transcript of May 18, 2016 Workshop at 13–14 (statement of Jonathan Asher). Panelists discussed and questioned the value of obtaining prior approval for regular purchases of supplies throughout the course of the year, in contrast to obtaining prior approval for major purchases that they have planned for. *See* Transcript of May 18, 2016 Workshop at 20–22 (statements of Shamim Huq and Steve Pelletier). One panelist calculated the amount of time that would be required of his staff if LSC were to implement a prior approval requirement for all purchases of personal property at the current threshold of \$10,000. He stated that based on his organization's purchasing patterns, his staff would need to put in an additional 105 work hours to comply with such a requirement. *See* Transcript of April 20, 2016 Workshop at 59 (statement of Shamim Huq).

LSC understands recipients' need to react quickly to prevent or mitigate damage caused by unexpected crises. To address that concern, LSC proposes to allow recipients to purchase personal property or contract for services without first seeking prior approval in limited emergency circumstances. Proposed § 1631.3(d)(1) permits a recipient to use more than \$25,000 in LSC funds to obtain personal property or services when the purchase is necessary to avoid imminent harm to, remediate, or mitigate damage to the recipient's personnel, physical facilities, or systems. Under proposed § 1631.3(d)(2), the recipient would have to provide LSC with the information it normally would submit as a request for prior approval within a reasonable time after the situation requiring the emergency purchase or contract has ended.

Regarding contracts for labor counsel, mediators, or other services needed to address sensitive personnel issues, LSC observes that recipients do not need to disclose in the prior approval request the nature of the problems they are attempting to address. LSC proposes to require only that recipients describe how the services will further their legal service delivery. In these circumstances,

a statement that the service is necessary to ensure the efficient functioning of the office may satisfy that requirement. Additionally, LSC notes that at the current time, contracts for services are subject to 45 CFR part 1630. Part 1630 requires that recipients document that any costs charged to the LSC grant are incurred in the performance of the grant, reasonable and necessary for the performance of the grant, and allocable to the grant. 45 CFR 1630.3(a)(1)–(3). Requiring prior approval for service contracts does nothing more than give LSC the ability to oversee costs recipients intend to use LSC funds to pay prior to the costs being incurred, rather than after. Prior approval may prevent the funds from being misspent, whereas an after-the-fact review of the cost could lead to sanctions, disallowed costs, suspension, or termination, depending on the magnitude of the wrongdoing. All of these after-the-fact proceedings are time consuming for both LSC and the recipient and do not prevent the misuse of funds. LSC believes that for large purchases or contracts, regardless of the nature of the property or service involved, prior approval is a more effective tool for preventing fraud, waste, and abuse than post hoc review.

Finally, with respect to aggregate purchases of property, LSC believes that the proposals to require recipients to adopt procurement policies and to seek prior approval for purchases and contracts using \$25,000 or more of LSC funds will eliminate the ambiguities and burdens identified by commenters. The proposed rule makes clear that recipients must seek prior approval for any single purchase whose cost exceeds \$25,000 in LSC funds, regardless of whether that purchase is of a single item of personal property, several unrelated items of personal property, or a combination of personal property and services. Additionally, the proposed increase of the threshold to \$25,000 will relieve recipients of the burden of seeking prior approval for relatively small purchases of personal property.

LSC specifically requests comment on the number of purchases recipients have made in the preceding five years for which they would have had to seek prior approval under the new threshold, including purchases of services. LSC believes that the proposed \$25,000 threshold is appropriate as it corresponds to inflation over the 30-year period since LSC adopted the current \$10,000 threshold. Recipients, however, are in the best position to provide information regarding the impact that LSC's proposals to both increase the prior approval threshold and require

recipients to seek prior approval of all purchases exceeding the proposed threshold are likely to have.

LSC proposes to simplify the procedure described in current § 1630.7 by committing to make a decision or inform the requester of the date by which LSC expects to make a decision within a specific time frame. For purchases or leases of personal property, contracts for services, or capital improvements, LSC will make a decision or give notice of the date by which it expects to make a decision within 30 days of receiving the request. For purchases of real estate, the time frame for decision or notice is 60 days.

Finally, as LSC did in the revisions to part 1627, LSC is eliminating language that suggests recipients may incur costs without receiving prior approval if LSC has not made a decision within the regulatory time frame. LSC does not believe that responsible grants administration practices should permit the expenditure of large amounts of LSC funds without LSC's prior approval. At the same time, LSC commits itself to making a decision or communicating the anticipated decision date to the requester within the time frames specified in § 1631.3(b).

*§ 1631.4 Effective date and governing regulations.* In this section, LSC proposes to require that the provisions of part 1631 apply to all purchases of real estate, purchases and leases of personal property, and contracts for services occurring after the effective date of part 1631. LSC also proposes to make Subparts A (General Provisions), C (Personal Property Management), and E (Real Estate Management) applicable to all personal property leased or purchased with LSC funds and real estate leased or owned by recipients on the effective date of part 1631. LSC recognizes that recipients will need time to develop procurement policies and procedures, obtain insurance for real property, and ensure that real estate leased or purchased with LSC funds meets the new maintenance standards. LSC therefore proposes to require that recipients comply no later than 90 days after the effective date of part 1631. LSC specifically seeks comment on whether 90 days is the appropriate transition period to come into compliance.

*§ 1631.5 Use of funds.* Sections 6 and 7 of the PAMM require recipients and former recipients of LSC funds to repay LSC for its contributions to purchases of personal property or real estate in certain circumstances. Both sections have paragraphs stating that LSC will use funds repaid upon disposition of property purchased in

whole or in part with LSC funds to make emergency and special grants. Because the provisions have the exact same language, LSC proposes to consolidate them in § 1631.5 with only minor changes to reflect the consolidation.

*§ 1631.6 Recipient policies, procedures, and recordkeeping.* LSC proposes to require recipients to adopt written policies and procedures implementing part 1631. LSC also proposes to require that recipients maintain documentation sufficient to demonstrate compliance with this part. The documentation described in this section includes documentation showing that the procedures followed for each lease or purchase of personal property, purchase of real estate, or contract for services complied with the recipients' policies.

#### Subpart B—Procurement Policies and Procedures

*§ 1631.7 Characteristics of procurements.* Concurrent with this NPRM, LSC issued a final rule implementing revisions to 45 CFR part 1627 regarding subgrants. The primary purpose of that rulemaking was to distinguish between awards from recipients to third parties to help recipients carry out the delivery of legal assistance and awards to provide property or services, such as janitorial services, to recipients. In part 1627, LSC adopted the characteristics of subgrants from the Office of Management and Budget's (OMB) Uniform Guidance, 2 CFR 200.330(a), to help recipients determine when their proposed awards of LSC funds to third parties constitute subgrants that must comply with LSC's governing statutes and regulations. LSC now proposes to adopt a parallel list of characteristics of procurement contracts in part 1631.

Like the characteristics of subgrants, the characteristics of procurement contracts originated in OMB's Uniform Guidance, 2 CFR 200.330. The characteristics describe awards that recipients make to obtain goods or services necessary to administer their programs, rather than those that recipients give to other legal aid providers or bar associations to help them achieve the goals of their grant awards. LSC proposes to make only minor revisions to the characteristics to reflect their use in the LSC grant context. As with the characteristics of a subgrant in part 1627, not all of the characteristics of a contract need be present for an award to be considered a contract, and recipients must use judgment in evaluating whether a particular award should be considered a

subgrant under part 1627 or a contract under part 1631.

*§ 1631.8 Procurement policies and procedures.* In the ANPRM, LSC proposed to revise part 1630 and the PAMM “to incorporate minimum standards for recipient procurement policies.” 80 FR 61142, 61146, Oct. 9, 2015. LSC noted that unlike the Uniform Guidance, part 1630 and the PAMM do not require LSC funding recipients to have procurement policies and procedures. LSC sought comment on whether LSC should revise part 1630 and the PAMM to incorporate contracting provisions similar to those contained in the Uniform Guidance or to be consistent with the policies and procedures required by recipients’ other funders. LSC also sought comment about whether the same or different standards should apply to contracts for services.

NLADA recommended that LSC refrain from adopting the contracting standards in the Uniform Guidance. They described the procurement standards in the Uniform Guidance as “one-size-fits-all” and stated that they “would be quite burdensome for grantees and unnecessary for recipients to be accountable for following reasonable and responsible procurement standards.” NLADA described the procurement requirements and guidelines currently in the PAMM and LSC’s Accounting Guide for Recipients as “procedures [that] maintain accountability, while allowing programs necessary flexibility to meet their programs’ needs effectively and efficiently.” NLADA continued to describe the unique needs faced by some of LSC’s statewide and rural recipients:

In many circumstances, it is simply not feasible or practical for programs to obtain competitive bids, let alone use sealed bidding processes referenced in the Uniform Guidance. For example, programs that cover large rural and/or are located in remote areas, have difficulty locating one vendor, let alone three. In these situations, there is no one financial threshold or type of service that would address when a bidding process should be used versus sole source procurement. Sole source procurement is appropriate and necessary for a service where a program needs unique expertise and/or time is of the essence.

With respect to the proposal to regulate contracts for services, NLADA stated that their members recommended that LSC “not go beyond requiring that grantees have policies and procedures covering service contracts in place approved by their board.” They observed that recipients need the flexibility to make rapid decisions about

how to address, for example, a computer system crash. They also asserted that whatever policy LSC adopted should allow recipients to enter into sole-source contracts for reasons other than exigent circumstances, such as when the vendor that a recipient purchased software or hardware from offers maintenance coverage or when the service is a specialty service for which only one vendor is available in the area. NLADA concluded that “[s]ound fiscal policies and internal controls will promote clarity, efficiency, and accountability while not unduly burdening the recipient.”

CLS provided similar comments in its response. Like NLADA, CLS opined that recipients must have the ability to enter into contracts for services quickly when they experience emergencies. CLS also observed that all contracts for services must be reasonable and necessary for carrying out the LSC grant if LSC funds are to be expended on the contracts.

In December, 2015, LSC’s Office of Inspector General issued a compendium report of its audit findings regarding recipients’ internal controls over a two-year period. *See* Compendium of Internal Control Audit Findings & Recommendations from Reports Issued October 1, 2013 through September 30, 2015, available at [https://oig.lsc.gov/images/Final\\_Compendium\\_Report\\_-\\_ISSUED.pdf](https://oig.lsc.gov/images/Final_Compendium_Report_-_ISSUED.pdf) (“Compendium Report”). In the report, the OIG stated that it had issued 18 internal control audit reports containing a total of 166 recommendations for improvement. Of those recommendations, 67 pertained to weaknesses in recipients’ written policies and procedures and 24 pertained to contracting. *See* Compendium Report at 3. Of the 67 recommendations for improvement of written policies and procedures, 13 pertained to weaknesses in recipients’ procurement policies. *Id.* All 18 reports contained recommendations to improve recipients’ written policies and procedures.

With respect to written policies and procedures, OIG found that several recipients’ policies lacked terms that complied with LSC’s Accounting Guide for Recipients. Specifically, OIG identified “procedures for securing various types of contracts, competition requirements, approval authorities, dollar thresholds for approvals, documentation requirement to support contracting decisions and contract oversight responsibilities [and documentation of] deviations from approved contracting processes” as missing from many procurement policies. *See* Compendium Report at 6.

OIG grouped the findings of weaknesses in recipients’ contracting practices into six categories: Inadequate supporting documentation; failure to ensure that a contract was valid and formalized; poor adherence to written policies; failure to maintain a centralized filing system for procurement-related documents; failure to periodically evaluate long-term contracts and put them out for bids when appropriate; and failure to cross-train employees on contracting procedures. *See* Compendium Report at 7–12. Notably, OIG found that “[i]n certain cases, the contracting process and payments made to vendors conformed to LSC regulations and guidelines; however, supporting documentation justifying the process used to obtain the contracts, some of which were sole-sourced, did not exist or was not adequate.” *Id.* at 8. OIG also found that some recipients’ “current practices were not in accordance with their current contracting policy or LSC’s *Fundamental Criteria.*” *Id.* at 9.

In response to the Compendium Report, LSC issued Program Letter 16–3, “Procurement Policy Drafting Guidance for LSC Recipients.” The letter was accompanied by a document explaining in detail the elements of an effective procurement policy and factors that recipients should consider when developing their own policies. In the guidance document, LSC identified four areas that it believes are critical to an effective procurement policy:

1. Competition—How to identify, evaluate, and select vendors;
2. Negotiating terms—Identification of rights and responsibilities of each party to the contract;
3. Documentation—How to verify best value in purchasing; and
4. Internal controls—How to increase opportunity for vendors and reduce opportunities for fraud, waste, and abuse of LSC funds.

“Procurement Policy Drafting 101: Guidance for LSC Grantees” at 1; available at <http://www.lsc.gov/procurement-policy-drafting-101-guidance-lsc-grantees>.

Based on the feedback received in the comments to the ANPRM and the rulemaking workshops and on the findings in OIG’s Compendium Report, LSC proposes a rule requiring recipients to develop policies and procedures governing purchases of personal property and contracts for services made with LSC funds. Rather than adopting the procurement rules in OMB’s Uniform Guidance, LSC proposes to create a rule based substantially on the guidance provided in Program Letter 16–3 and the accompanying guidance

documents. The rule will identify generally the elements that a recipient's policy must have, but it will not prescribe the specific procedures that recipients must follow when making purchases with LSC funds. The proposed rule will replace the specific requirements currently contained in Sections 3(a) and 3(d) (personal property) and 4(f) (capital expenditures) of the PAMM. LSC is also proposing to revise the parts of Section 4 of the PAMM that govern the use of LSC funds to acquire real property. Those changes will be discussed in more detail below.

In § 1631.8, LSC proposes to require that recipients develop procurement policies that have the following elements:

- Identification of competition thresholds that establish the basis for the level of competition required at each threshold. LSC expects recipients to consider the types of purchases and contracts for services that they make using LSC funds and to develop procedures for making each type of purchase. For example, a recipient may determine that its purchasing patterns require different levels of competition based on the type of purchase, such as a lease of a copier or a contract for a management consultant, while another may decide that the level of competition depends on the amount that it intends to spend regardless of the type of purchase.

- Establish the grounds for sole-source purchases. During the workshops, several panelists discussed various justifiable reasons why LSC recipients may award contracts or make purchases on a non-competitive basis. One reason was that in remote or rural areas, there may be only one vendor for a particular service or type of property. Another reason was that recipients sometimes require experts or professionals with a particular skill type, such as handwriting analysis, and award contracts for such services based on recommendations from trusted colleagues rather than through competition. LSC generally believes that competition among vendors is the best way to ensure that recipients are getting best value in their purchases. LSC understands, however, that there are times outside of emergency situations when recipients may need to make contracts on a non-competitive basis. LSC does not propose to limit the situations in which recipients can make sole-source contracts to exigent circumstances, but LSC does expect recipients to develop procurement policies that establish standards for making sole-source purchases and procedures for justifying the purchase, selecting the vendor, and documenting the transaction.

- Establish the level of documentation necessary to justify procurements. Like the first element, this requirement anticipates that recipients may tie the level of documentation needed to justify a purchase to the nature of the purchase or to the competition thresholds. LSC does not propose to require recipients to maintain a particular form or type of documentation, but

expects recipients to determine a level of documentation that is appropriate to the type of purchase and that will support a showing that the purchase was reasonable and necessary for the purposes of the LSC grant.

- Establish internal controls that, at a minimum, provide for segregation of duties in the procurement process; identify which employees, officers, or directors have authority to make purchases for the recipient; and identify procedures for approving purchases. In its most recent annual compliance guidance, LSC identified weaknesses in segregation of duties and approval of financial transactions by an "appropriate level of management" as two of the most common compliance issues identified through Office of Compliance and Enforcement oversight visits to grantees. See Program Letter 16-7, Compliance Guidance, Aug. 19, 2016; available at <http://www.lsc.gov/program-letter-16-7>. The Accounting Guide for LSC Recipients currently requires recipients to have internal controls to safeguard program resources that should include the authority given to recipient employees to make and approve financial transactions, including purchases. Accounting Guide for LSC Recipients, § 3-5.1, p. 28. LSC proposes to formalize this requirement and expand upon it in part 1631. LSC does not propose to prescribe the assignment of procurement responsibilities among recipient staff, nor does it propose to require recipients to follow certain procedures when making purchases. LSC simply proposes to require that recipients establish procurement policies that address each of these elements.

- Establish procedures to ensure quality and cost control in purchasing. LSC intends to address two issues through this requirement: Evaluating purchases in the first instance, and review and evaluation of existing contracts. In order to ensure best value for all purchases, recipients should develop fair and objective criteria for evaluating sources and procedures for selecting among sources. The rigor of the selection procedures at each competition threshold should be commensurate with the level of competition and documentation required. During the workshops, several panelists stated that they had longstanding, non-competitive contracts with service providers. LSC has also learned of this practice through its regular oversight activities. LSC believes that the efficient, responsible administration of appropriated funds requires recipients to evaluate their long-term and multi-year contracts regularly for continued quality of services or products and for best price. LSC does not propose to require recipients to evaluate their longstanding contracts or open them up for bids on a prescribed schedule. LSC expects recipients to establish policies for regularly evaluating the value and quality of each of their contracts and for establishing standards to determine when continuing versus recompeting each contract is appropriate.

- Establish procedures for identifying and preventing conflicts of interest in the purchasing process. For several years, LSC has required recipients of TIG and Pro Bono Innovation Fund grants to adhere to an LSC-

created "Policy on Disclosure of Interests for Determination of Conflicts." LSC did not require recipients of Basic Field Grants to develop or follow conflicts of interest policies until grant year 2016. Beginning in 2016, the grant assurances for the Basic Field Grant program required recipients to develop conflicts of interest policies, to distribute the policies to their staff, and to train all covered staff on the policies. LSC now proposes to formalize in a rule the requirement to develop conflicts of interest policies applicable to the purchasing process. As with all of the other elements proposed in this section, LSC does not propose to dictate the terms of recipients' conflicts of interest policies. LSC merely expects recipients to adopt, comply with, and document compliance with the policies they develop.

LSC strongly encourages recipients to look to Program Letter 16-3 and its accompanying documents, as well as the Accounting Guide, for guidance when drafting their procurement policies. In particular, LSC recommends that recipients consider establishing annual purchasing plans and contract management procedures if they have not done so already. In addition to thoughtful procurement policies, well-considered purchasing plans and effective contract management procedures can reduce the risk of fraud, waste, and abuse of LSC funds.

**§ 1631.9 Prior approval.** In this section, LSC proposes to prescribe the contents of a request for prior approval. A request must include a statement explaining how the personal property or services will further the delivery of legal services to eligible clients and documentation showing that the recipient followed the procurement policy and procedures it developed under § 1631.8. This language is adopted from §§ 3(d) and 4(f) of the PAMM, but has been revised to reflect LSC's proposal to require general procurement policies, rather than to incorporate the current purchase-specific procedures.

**§ 1631.10 Applicability of part 1630.** Because LSC is proposing to limit the prior approval requirement to all purchases of real property, purchases and leases of personal property costing more than \$25,000 in LSC funds, and contracts for services exceeding \$25,000 in LSC funds, LSC also proposes to include a section restating the applicability of part 1630 to all leases, purchases, and contracts made using LSC funds.

#### Subpart C—Personal Property Management

**§ 1631.11 Use of property in compliance with LSC's statutes and regulations.** LSC proposes to adopt § 5(a), (d), and (e) of the PAMM in this



section with only minor technical changes.

§ 1631.12 *Intellectual property.* In this section, LSC proposes to adopt § 5(g) of the PAMM without change.

§ 1631.13 *Disposing of personal property purchased with LSC funds.* In this section, LSC proposes to adopt § 6(d), (e), (f), and (g) of the PAMM with one substantive change. In proposed paragraph (a)(2), LSC proposes to explicitly authorize recipients to determine the appropriate method to dispose of personal property that has little or no fair market value at the time of disposal. The recipient does not have to notify LSC of its intent to dispose of such property, nor does it have to compensate LSC out of the proceeds from any sale of the property. LSC proposes to include this provision in response to feedback it received from panelists during the rulemaking workshops that prior approval to dispose of personal property with nominal or no monetary value is unnecessary. See, e.g., Transcript of April 20, 2016 Rulemaking Workshop at 94 (Statement of Jonathan Asher); Transcript of May 18, 2016 Rulemaking Workshop at 101 (Statements of Steve Pelletier and Diana White). Additionally, LSC proposes to reorganize the paragraphs taken from the PAMM for ease of reference.

§ 1631.14 *Use of derivative income from sale of personal property purchased with LSC funds.* In § 1631.14(a), LSC proposes to adopt § 6(e) of the PAMM without change. LSC also proposes to include paragraph (b), which requires recipients to account for income earned from the sale, rent, or lease of personal property purchased with LSC funds as required by § 1630.16—Applicability to derivative income.

#### Subpart D—Real Estate Acquisition and Capital Improvements

§ 1631.15 *Purchasing real property with LSC funds.* LSC proposes to adopt in significant part the requirements of § 4 of the PAMM. In paragraph (a), LSC proposes to consolidate and restructure existing paragraphs (a)–(c) of § 4 of the PAMM. LSC also proposes to introduce paragraph (a)(3), which allows a recipient who cannot evaluate three properties to explain why such an evaluation is not possible. For example, a recipient may not be able to compare three properties if the inventory of commercial properties suitable for the recipient's activities is extremely limited.

LSC proposes to adopt § 4(d) of the PAMM in significant part in paragraph (b). LSC proposes to revise two specific

provisions to allow recipients additional flexibility when purchasing real property. In § 1631.15(b)(6), LSC proposes to allow a recipient to provide documentation that the recipient's governing body approves of the purchase, even if the governing body's approval is contingent upon LSC's approval. LSC understands that some recipient governing bodies may be reluctant to authorize a real estate purchase if they are not assured that one of the proposed funding sources consents to the purchase. As a funder, LSC similarly wants to know that a recipient's governing body has been informed about a proposed purchase and agrees that the purchase is in the recipient's interest. Consequently, LSC proposes to revise existing § 4(d)(4) of the PAMM to allow for contingent approvals.

Additionally, LSC proposes to revise existing § 4(d)(5) of the PAMM and promulgate it as § 1631.15(b)(8). Currently, § 4(d)(5) requires a recipient to include in its request for prior approval a “statement of handicapped accessibility sufficient to meet the requirements of 45 CFR 1624.5(c)[.]” On several occasions, LSC has received simultaneous requests to purchase real estate and to make capital improvements to the property for the purpose of making it accessible to persons with disabilities. For this reason, LSC proposes to revise this requirement to allow the recipient to provide a statement that the property will be accessible once the requested capital improvements have been completed. LSC expects the recipient to act expeditiously to make the requested improvements if LSC approves both the purchase and the capital expenditures. Consequently, LSC proposes to require that any capital improvements authorized under this section be completed within 60 days of the date the real estate purchase is completed.

LSC proposes to add three additional elements to the list of requested information currently contained in § 4(d) of the PAMM and proposed for inclusion in § 1631.15(b). First, LSC proposes to require that recipients provide the information described in paragraph (a) as part of the prior approval request. Second, LSC proposes to require recipients to provide a breakdown of the sources of funds it intends to use toward the purchase. In other words, recipients would provide an estimate of the amount of LSC funds and non-LSC funds, respectively, that it intends to put toward the acquisition costs of the building and subsequent mortgage payments for the life of the financing arrangement. Third, LSC

proposes to require recipients to provide a comparison of available loan terms considered by the recipient. LSC proposes this requirement to encourage recipients to investigate various options for financing a building purchase to obtain the best value.

In § 1631.15(c), LSC proposes to adopt § 4(e) of the PAMM with only a minor conforming change. LSC does, however, propose to add subparagraph (c)(4), which will require a recipient to agree not to dispose of real estate purchased with LSC funds without prior approval.

§ 1631.16 *Capital improvements.* In this section, LSC proposes to adopt § 4(f) of the PAMM in substantial part. LSC proposes to replace existing § 4(1)(ii) of the PAMM, which requires a recipient to provide a description of the contractor selection process, with a requirement to provide documentation showing that the recipient complied with the procurement process it developed under § 1631.8. LSC also proposes to add language requiring a recipient to maintain adequate supporting documentation to identify and account for any LSC funds used to make capital improvements.

#### Subpart E—Real Estate Management

§ 1631.17 *Using real estate purchased with LSC funds.* LSC proposes to adopt § 5(a), (d), and (f) of the PAMM with only minor technical changes.

§ 1631.18 *Maintenance.* LSC proposes to introduce a section requiring recipients to maintain real estate purchased with LSC funds in efficient operating condition and in compliance with state and local property standards and building codes. From previous requests to dispose of real estate, LSC has learned of recipient facilities falling into disrepair. LSC believes that it is essential that recipients maintain assets purchased with appropriated funds in compliance with state and local standards and building codes. LSC also believes it is critical to the delivery of legal services for recipients to provide services in space that is clean, in good repair, and welcoming to clients. For these reasons, LSC proposes to prescribe the facilities standards that recipients must meet if they use LSC funds to purchase real estate.

§ 1631.19 *Insurance.* LSC proposes to introduce minimum standards for the insurance of real estate acquired or improved with LSC funds. Similar to the rationale for prescribing minimum maintenance standards, LSC believes it is essential for recipients to provide the same level of insurance for real estate acquired or improved with appropriated

funds as they do for non-LSC funded real estate and in a manner that protects LSC's interest in the event of a title failure or physical destruction of the property. LSC proposes to adopt the insurance standard from the regulations governing facilities purchases under the Head Start program, 45 CFR 1309.23.

**§ 1631.20 Accounting and reporting to LSC.** LSC proposes to require recipients to maintain records showing, for each piece of real estate purchased in whole or in part with LSC funds, the amount of LSC funds it spends each year on the property. Costs that recipients should account for include, but are not limited to, acquisition costs in the year of purchase; mortgage payments; insurance, maintenance, and taxes; and costs associated with capital improvements made using LSC funds. LSC also proposes to require recipients to provide LSC with the accounting in one of two ways. The first is by submitting the accounting to LSC no later than April 30 of the calendar year following the calendar year in which the recipient incurred the costs. In other words, if a recipient uses LSC funds to purchase a new office building in March, 2017, it must provide LSC with an accounting of all LSC funds used in 2017 to support the purchase and maintenance for the building by April 30, 2018. The second method is to provide LSC with the required accounting in the audited financial statements that recipients must submit to LSC annually.

**§ 1631.21 Disposing of real estate purchased with LSC funds.** In this section, LSC proposes to adopt § 7 of the PAMM in substantial part. In a change from the PAMM, LSC proposes to require that all proposed dispositions of real estate acquired using LSC funds be subject to LSC's prior approval. This approach is consistent with the federal government's policy regarding grantee disposal of property purchased with federal funds. See 2 CFR 200.311(c). LSC believes that the federal government's policy on the disposition of real property purchased with federal funds is more appropriate to its oversight role than the policy that currently exists in the PAMM. Under the PAMM, organizations must seek LSC's approval prior to disposing of property purchased with LSC funds only when they are no longer receiving LSC funds. In LSC's experience, it is far more common for LSC recipients to sell real estate acquired with LSC funds while they are still receiving LSC funds. At the present time, the PAMM does not require recipients to seek LSC's approval before selling such property, although LSC's property interest

agreements generally contain terms requiring recipients to seek approval before encumbering or selling the property. LSC believes it is appropriate for the requirement to be formalized in a rule.

LSC proposes to establish the prior approval process for disposition of real estate in § 1631.21(c). LSC proposes to require a recipient or former recipient to seek prior approval at least 60 days before the recipient proposes to dispose of the property. In its request, the recipient or former recipient should tell LSC how it proposes to dispose of the property and why; provide documentation of the fair market value of the property; if selling, describe its process for advertising the property and receiving offers; account for all LSC funds used in the acquisition and capital improvement of the property; and identify the proposed transferee. The requester should also provide a document describing the terms of transfer or sale. LSC also proposes to clarify that LSC's percentage interest in the proceeds of a real estate sale is equal to the percentage of the costs of the original acquisition and any capital improvements made to the real estate over the life of the property that were paid using LSC funds.

**§ 1631.22 Retaining income from sale of real property purchased with LSC funds.** LSC proposes to consolidate §§ 6(e) and 8(c) of the PAMM in this section. LSC proposes to make only technical edits to reflect the redesignation of § 1630.12 as § 1630.16.

#### List of Subjects

##### 45 CFR Part 1600

Legal services.

##### 45 CFR Part 1630

Accounting, Government contracts, Grant programs—law, Hearing and appeal procedures, Legal services, Questioned costs.

##### 45 CFR Part 1631

Legal services, Government contracts, Grant programs—law, Real property acquisition.

For the reasons stated in the preamble, the Legal Services Corporation proposes to amend 45 CFR Chapter XVI as follows:

#### PART 1600—DEFINITIONS

■ 1. The authority citation for part 1600 is revised to read as follows:

**Authority:** 42 U.S.C. 2996g(e).

■ 2. Amend § 1600.1 by adding, in alphabetical order, the definitions for

“Corporation funds” and “Non-LSC funds” to read as follows:

#### § 1600.1 Definitions.

\* \* \* \* \*

*Corporation funds or LSC funds* means any funds appropriated by Congress to carry out the purposes of the Legal Services Corporation Act of 1974, 42 U.S.C. 2996 *et seq.*, as amended.

\* \* \* \* \*

*Non-LSC funds* means any funds that are not Corporation funds or LSC funds.

■ 3. Revise part 1630 to read as follows:

#### PART 1630—COST STANDARDS AND PROCEDURES

##### Subpart A—General Provisions

Sec.

- 1630.1 Purpose.
- 1630.2 Definitions.
- 1630.3 Time.
- 1630.4 Burden of proof.

##### Subpart B—Cost Standards and Prior Approval

- 1630.5 Standards governing allowability of costs under LSC grants or contracts.
- 1630.6 Prior approval.
- 1630.7 Membership fees or dues.
- 1630.8 Contributions.
- 1630.9 Tax-sheltered annuities, retirement accounts, and penalties.

##### Subpart C—Questioned Cost Proceedings

- 1630.10 Review of questioned costs.
- 1630.11 Appeals to the president.
- 1630.12 Recovery of disallowed costs and other corrective action.
- 1630.13 Other remedies; effect on other parts.
- 1630.14 Applicability to subgrants.
- 1630.15 Applicability to non-LSC funds.
- 1630.16 Applicability to derivative income.

##### Subpart D—Closeout Procedures

- 1630.17 Applicability.
- 1630.18 Closeout plan; Timing.
- 1630.19 Closeout costs.
- 1630.20 Returning funds to LSC.

**Authority:** 42 U.S.C. 2996g(e).

##### Subpart A—General Provisions

#### § 1630.1 Purpose.

This part is intended to provide uniform standards for allowability of costs and to provide a comprehensive, fair, timely, and flexible process for the resolution of questioned costs.

#### § 1630.2 Definitions.

(a) *Corrective action* means action taken by a recipient that:

- (1) Corrects identified deficiencies;
- (2) Produces recommended improvements; or
- (3) Demonstrates that audit or other findings are either invalid or do not warrant recipient action.



(b) *Derivative income* means income earned by a recipient from LSC-supported activities during the term of an LSC grant or contract, and includes, but is not limited to, income from fees for services (including attorney fee awards and reimbursed costs), sales and rentals of real or personal property, and interest earned on LSC grant or contract advances.

(c) *Disallowed cost* means those charges to an LSC award that LSC determines to be unallowable, in accordance with the applicable statutes, regulations, or terms and conditions of the grant award.

(d) *Final written decision* means either:

(1) The decision issued by the Vice President for Grants Management after reviewing all information provided by a recipient in response to a notice of questioned costs; or

(2) the notice of questioned costs if a recipient does not respond to the notice within 30 days of receipt.

(e) *Membership fees or dues* means payments to an organization on behalf of a program or individual to be a member thereof, or to acquire voting or participatory rights therein. *Membership fees or dues* include, but are not limited to, fees or dues paid to a state supreme court or to a bar organization acting as an administrative arm of the court or in some other governmental capacity if such fees or dues are required for an attorney to practice law in that jurisdiction.

(f) *Questioned cost* means a cost that LSC has questioned because of an audit or other finding that:

(1) There may have been a violation of a provision of a law, regulation, contract, grant, or other agreement or document governing the use of LSC funds;

(2) The cost is not supported by adequate documentation; or

(3) The cost incurred appears unnecessary or unreasonable and does not reflect the actions a prudent person would take in the circumstances.

#### **§ 1630.3 Time.**

(a) *Computation.* Time limits specified in this part shall be computed in accordance with Rules 6(a) and 6(e) of the Federal Rules of Civil Procedure.

(b) *Extensions.* LSC may, on a recipient's written request for good cause, grant an extension of time and shall so notify the recipient in writing.

#### **§ 1630.4 Burden of proof.**

The recipient shall have the burden of proof under this part.

### **Subpart B—Cost Standards and Prior Approval**

#### **§ 1630.5 Standards governing allowability of costs under LSC grants or contracts.**

(a) *General criteria.* Expenditures are allowable under an LSC grant or contract only if the recipient can demonstrate that the cost was:

(1) Actually incurred in the performance of the grant or contract and the recipient was liable for payment;

(2) Reasonable and necessary for the performance of the grant or contract as approved by LSC;

(3) Allocable to the grant or contract;

(4) In compliance with the Act, applicable appropriations law, LSC rules, regulations, guidelines, and instructions, the Accounting Guide for LSC Recipients, the terms and conditions of the grant or contract, and other applicable law;

(5) Consistent with accounting policies and procedures that apply uniformly to both LSC-funded and non-LSC-funded activities;

(6) Accorded consistent treatment over time;

(7) Determined in accordance with generally accepted accounting principles; and

(8) Adequately and contemporaneously documented in business records accessible during normal business hours to LSC management, the Office of Inspector General, the General Accounting Office, and independent auditors or other audit organizations authorized to conduct audits of recipients.

(b) *Reasonable costs.* A cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by a prudent person under the same or similar circumstances prevailing at the time the decision was made to incur the cost. In determining the reasonableness of a given cost, consideration shall be given to:

(1) Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the recipient or the performance of the grant or contract;

(2) The restraints or requirements imposed by such factors as generally accepted sound business practices, arms-length bargaining, Federal and State laws and regulations, and the terms and conditions of the grant or contract;

(3) Whether the recipient acted with prudence under the circumstances, considering its responsibilities to its clients and employees, the public at large, the Corporation, and the Federal government; and

(4) Significant deviations from the recipient's established practices, which

may unjustifiably increase the grant or contract costs.

(c) *Allocable costs.* (1) A cost is allocable to a particular cost objective, such as a grant, project, service, or other activity, in accordance with the relative benefits received. Costs may be allocated to LSC funds either as direct or indirect costs according to the provisions of this section.

(2) A cost is allocable to an LSC grant or contract if it is treated consistently with other costs incurred for the same purpose in like circumstances and if it:

(i) Is incurred specifically for the grant or contract;

(ii) Benefits both the grant or contract and other work and can be distributed in reasonable proportion to the benefits received; or

(iii) Is necessary to the recipient's overall operation, although a direct relationship to any particular cost objective cannot be shown.

(3) Recipients must maintain accounting systems sufficient to demonstrate the proper allocation of costs to each of their funding sources.

(d) *Direct costs.* Direct costs are those that can be identified specifically with a particular grant award, project, service, or other direct activity of an organization. Costs identified specifically with grant awards are direct costs of the awards and are to be assigned directly thereto. Direct costs include, but are not limited to, the salaries and wages of recipient staff who are working on cases or matters that are identified with specific grants or contracts. Salary and wages charged directly to LSC grants and contracts must be supported by personnel activity reports.

(e) *Indirect costs.* Indirect costs are those that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective. A recipient may treat any direct cost of a minor amount as an indirect cost for reasons of practicality where the accounting treatment for such cost is consistently applied to all final cost objectives. Indirect costs include, but are not limited to, the costs of operating and maintaining facilities, and the costs of general program administration, such as the salaries and wages of program staff whose time is not directly attributable to a particular grant or contract. Such staff may include, but are not limited to, executive officers and personnel, accounting, secretarial and clerical staff.

(f) *Allocation of indirect costs.* Where a recipient has only one major function, *i.e.*, the delivery of legal services to low-income clients, allocation of indirect costs may be by a simplified allocation

method, whereby total allowable indirect costs (net of applicable credits) are divided by an equitable distribution base and distributed to individual grant awards accordingly. The distribution base may be total direct costs, direct salaries and wages, attorney hours, numbers of cases, numbers of employees, or another base which results in an equitable distribution of indirect costs among funding sources.

(g) *Exception for certain indirect costs.* Some funding sources may refuse to allow the allocation of certain indirect costs to an award. In such instances, a recipient may allocate a proportional share of another funding source's share of an indirect cost to LSC funds, provided that the activity associated with the indirect cost is permissible under the LSC Act, LSC appropriations statutes, and regulations.

(h) *Applicable credits.* Applicable credits are those receipts or reductions of expenditures which operate to offset or reduce expense items that are allocable to grant awards as direct or indirect costs. Applicable credits include, but are not limited to, purchase discounts, rebates or allowances, recoveries or indemnities on losses, insurance refunds, and adjustments of overpayments or erroneous charges. To the extent that such credits relate to allowable costs, they shall be credited as a cost reduction or cash refund in the same fund to which the related costs are charged.

(i) *Guidance.* The regulations and circulars of the Office of Management and Budget shall provide guidance for all allowable cost questions arising under this part when relevant policies or criteria therein are not inconsistent with the provisions of the Act, applicable appropriations law, this part, the Accounting Guide for LSC Recipients, LSC rules, regulations, guidelines, instructions, and other applicable law.

#### **§ 1630.6 Prior approval.**

(a) *Advance understandings.* Under any given grant award, the reasonableness and allocability of certain cost items may be difficult to determine. In order to avoid subsequent disallowance or dispute based on unreasonableness or nonallocability, a recipient may seek a written understanding from LSC in advance of incurring special or unusual costs. If a recipient elects not to seek an advance understanding from LSC, the absence of an advance understanding on any element of a cost will not affect the reasonableness or allocability of the cost.

(b) *Costs requiring prior approval.* (1) A recipient must obtain LSC's prior approval before charging costs attributable to any of the transactions below to its LSC grant when the cost of the transaction exceeds \$25,000 of LSC funds:

- (i) Purchases or leases of personal property;
- (ii) Contracts for services;
- (iii) Purchases of real estate; and
- (iv) Capital improvements.

(2) The process and substantive requirements for requests for prior approval are located in 45 CFR part 1631—Purchasing and Property Management.

(c) *Duration.* LSC's advance understanding or approval shall be valid for one year, or for a greater period of time which LSC may specify in its approval or advance understanding.

#### **§ 1630.7 Membership fees or dues.**

(a) LSC funds may not be used to pay membership fees or dues to any private or nonprofit organization, whether on behalf of the recipient or an individual.

(b) Paragraph (a) of this section does not apply to the payment of membership fees or dues mandated by a governmental organization to engage in a profession, or to the payment of membership fees or dues from non-LSC funds.

#### **§ 1630.8 Contributions.**

Any contributions or gifts of LSC funds to another organization or to an individual are prohibited.

#### **§ 1630.9 Tax-sheltered annuities, retirement accounts, and penalties.**

No provision contained in this part shall be construed to affect any payment by a recipient on behalf of its employees for the purpose of contributing to or funding a tax-sheltered annuity, retirement account, or pension fund.

#### **Subpart C—Questioned Cost Proceedings**

##### **§ 1630.10 Review of questioned costs.**

(a) LSC may identify questioned costs:

- (1) When the Office of Inspector General, the General Accounting Office, or an independent auditor or other audit organization authorized to conduct an audit of a recipient has identified and referred a questioned cost to LSC;
- (2) In the course of its oversight of recipients; or
- (3) As a result of complaints filed with LSC.

(b) If LSC determines that there is a basis for disallowing a questioned cost, LSC must provide the recipient with written notice of its intent to disallow the cost. The notice of questioned costs

must state the amount of the cost and the factual and legal basis for disallowing it.

(c) If a questioned cost is disallowed solely on the ground that it is excessive, only the amount that is larger than reasonable shall be disallowed.

(d)(1) Within 30 days of receiving the notice of questioned costs, the recipient may respond with written evidence and argument to show that the cost was allowable, or that LSC, for equitable, practical, or other reasons, should not recover all or part of the amount, or that the recovery should be made in installments.

(2) If the recipient does not respond to LSC's written notice within 30 days, the written notice shall become LSC's final written decision.

(e) Within 60 days of receiving the recipient's written response to the notice of questioned costs, LSC management must issue a final written decision stating whether or not the cost has been disallowed and the reasons for the decision.

(f) If LSC has determined that the questioned cost should be disallowed, the final written decision must:

(1) State that the recipient may appeal the decision as provided in § 1630.11 and describe the process for seeking an appeal;

(2) Describe how it expects the recipient to repay the cost, including the method and schedule for collection of the amount of the cost;

(3) State whether LSC is requiring the recipient to make financial adjustments or take other corrective action to prevent a recurrence of the circumstances giving rise to the disallowed cost.

##### **§ 1630.11 Appeals to the president.**

(a)(1) If the amount of a disallowed cost exceeds \$2,500, the recipient may appeal in writing to LSC's President within 30 days of receiving LSC's final written decision to disallow the cost. The recipient should state in detail the reasons why LSC should not disallow part or all of the questioned cost.

(2) If the recipient did not respond to LSC's notice of questioned costs and the notice became LSC's final written decision pursuant to § 1630.11(d)(2), the recipient may not appeal the final written decision.

(b) If the President has had prior involvement in the consideration of the disallowed cost, the President shall designate another senior LSC employee who has not had prior involvement to review the recipient's appeal. In circumstances where the President has not had prior involvement in the disallowed cost proceeding, the President has discretion to designate

another senior LSC employee who also has not had prior involvement in the proceeding to review the appeal.

(c) Within 30 days of receiving the recipient's written appeal, the President or designee will adopt, modify, or reverse LSC's final written decision.

(d) The decision of the President or designee shall be final and shall be based on the written record, consisting of LSC's notice of questioned costs, the recipient's response, LSC's final written decision, the recipient's written appeal, any additional response or analysis provided to the President or designee by LSC staff, and the relevant findings, if any, of the Office of Inspector General, General Accounting Office, or other authorized auditor or audit organization. Upon request, LSC shall provide the recipient with a copy of the written record.

**§ 1630.12 Recovery of disallowed costs and other corrective action.**

(a) LSC will recover any disallowed costs from the recipient within the time limits and conditions set forth in either LSC's final written decision or the President's decision on an appeal. Recovery of the disallowed costs may be in the form of a reduction in the amount of future grant checks or in the form of direct payment from you to LSC.

(b) LSC shall ensure that a recipient who has incurred a disallowed cost takes any additional necessary corrective action within the time limits and conditions set forth in LSC's final written decision or the President's decision.

**§ 1630.13 Other remedies; effect on other parts.**

(a) In cases of serious financial mismanagement, fraud, or defalcation of funds, LSC shall refer the matter to the Office of Inspector General and may take appropriate action pursuant to parts 1606, 1623, and 1640 of this chapter.

(b) The recovery of a disallowed cost according to the procedures of this part does not constitute a permanent reduction in a recipient's annualized funding level, nor does it constitute a limited reduction of funding or termination of financial assistance under part 1606, or a suspension of funding under part 1623.

**§ 1630.14 Applicability to subgrants.**

When disallowed costs arise from expenditures incurred under a subgrant of LSC funds, the recipient and the subrecipient will be jointly and severally responsible for the actions of the subrecipient, as provided by 45 CFR part 1627, and will be subject to all

remedies available under this part. Both the recipient and the subrecipient shall have access to the review and appeal procedures of this part.

**§ 1630.15 Applicability to non-LSC funds.**

(a) No costs attributable to a purpose prohibited by the LSC Act, as defined by 45 CFR 1610.2(a), may be charged to private funds, except for tribal funds used for the specific purposes for which they were provided.

(b) No cost attributable to an activity prohibited by or inconsistent with Public Law 103-134, tit. V, § 504, as defined by § 1610.2(b), may be charged to non-LSC funds, except for tribal funds used for the specific purposes for which they were provided.

(c) LSC may recover from a recipient's LSC funds an amount not to exceed the amount improperly charged to non-LSC funds. A decision to recover under this paragraph is subject to the review and appeal procedures of §§ 1630.11 and 1630.12.

**§ 1630.16 Applicability to derivative income.**

(a) Derivative income resulting from an activity supported in whole or in part with LSC funds shall be allocated to the fund in which the recipient's LSC grant is recorded in the same proportion that the amount of LSC funds expended bears to the total amount expended by the recipient to support the activity.

(b) Derivative income allocated to the LSC fund in accordance with paragraph (a) of this section is subject to the requirements of this part.

**Subpart D—Closeout Procedures**

**§ 1630.17 Applicability.**

This subpart applies when a recipient of LSC funds:

(a) Merges or consolidates functions with another LSC recipient;

(b) Changes its current identity or status as a legal entity; or

(c) Otherwise ceases to receive funds directly from LSC. This may include voluntary termination by the recipient or involuntary termination by LSC of the recipient's LSC grant, and may occur at the end of a grant term or during the grant term.

**§ 1630.18 Closeout plan; timing.**

(a) A recipient must provide LSC with a plan for the orderly conclusion of the recipient's role and responsibilities. LSC will maintain a list of the required elements for the closeout plan on its Web site. LSC will provide recipients with a link to the list in the grant award documents.

(b)(1) A recipient must notify LSC no less than 60 days prior to any of the

above events, except for an involuntary termination of its LSC grant by LSC. The recipient must submit the closeout plan described in § 1630.19 at the same time.

(2) If LSC terminates a recipient's grant, the recipient must submit the closeout plan described in § 1630.19 within 15 days of being notified by LSC that it is terminating the recipient's grant.

**§ 1630.19 Closeout costs.**

(a) The recipient must submit to LSC a detailed budget and timeline for all closeout procedures described in the closeout plan. LSC must approve the budget, either as presented or after negotiations with the recipient, before the recipient may proceed with implementing the budget, timeline, and plan.

(b) LSC will withhold funds for all closeout expenditures, including costs for the closing audit, all staff and consultant services needed to perform closeout activities, and file storage and retention.

(c) LSC will release any funding installments that the recipient has not received as of the date it notified LSC of a merger, change in status, or voluntary termination or that LSC notified the recipient of an involuntary termination of funding only upon the recipient's satisfactory completion of all closeout obligations.

**§ 1630.20 Returning funds to LSC.**

(a) *Excess fund balance.* If the recipient has an LSC fund balance after the termination of funding and closeout, the recipient must return the full amount of the fund balance to LSC at the time it submits the closing audit to LSC.

(b) *Derivative income.* Any attorneys' fees claimed or collected and retained by the recipient after funding ceases that result from LSC-funded work performed during the grant term are derivative income attributable to the LSC grant. Such derivative income must be returned to LSC within 15 days of the date on which the recipient receives the income.

■ 4. Add part 1631 to read as follows:

**PART 1631—PURCHASING AND PROPERTY MANAGEMENT**

**Subpart A—General Provisions**

Sec

1631.1 Purpose.

1631.2 Definitions.

1631.3 Prior approval process.

1631.4 Effective dates.

1631.5 Use of funds.

1631.6 Recipient policies, procedures, and recordkeeping.

**Subpart B—Procurement Policies and Procedures**

- 1631.7 Characteristics of procurements.  
 1631.8 Procurement policies and procedures.  
 1631.9 Requests for prior approval.  
 1631.10 Applicability of part 1630.

**Subpart C—Personal Property Management**

- 1631.11 Use of property in compliance with LSC's statutes and regulations.  
 1631.12 Intellectual property.  
 1631.13 Disposing of personal property purchased with LSC funds.  
 1631.14 Use of derivative income from sale of personal property purchased with LSC funds.

**Subpart D—Real Estate Acquisition and Capital Improvements**

- 1631.15 Purchasing real property with LSC funds.  
 1631.16 Capital improvements.

**Subpart E—Real Estate Management**

- 1631.17 Using real estate purchased with LSC funds.  
 1631.18 Maintenance.  
 1631.19 Insurance.  
 1631.20 Accounting and reporting to LSC.  
 1631.21 Disposing of real estate purchased with LSC funds.  
 1631.22 Retaining income from sale of real property purchased with LSC funds.

**Authority:** 42 U.S.C. 2996g(e).

**Subpart A—General Provisions****§ 1631.1 Purpose.**

The purpose of this part is to set standards for purchasing, leasing, using, and disposing of LSC-funded personal property and real estate and using LSC funds to contract for services.

**§ 1631.2 Definitions.**

(a) *Capital improvement* means spending more than \$25,000 of LSC funds to improve real estate through construction or the addition of fixtures that become an integral part of real estate.

(b) *LSC property interest agreement* means a formal written agreement between the recipient and LSC establishing the terms of LSC's legal interest in real estate purchased with LSC funds.

(c) *Personal property* means property other than real estate.

(d) *Purchase* means buying personal property or real estate or contracting for services with LSC funds.

(e) *Quote* means a quotation or bid from a potential source interested in selling or leasing property or providing services to a recipient.

(f) *Real estate* means land, buildings (including capital improvements), and property interests in land and buildings (e.g., tenancies, life estates, remainders, reversions, easements), excluding moveable personal property.

(g) *Services* means professional and consultant services rendered by persons who are members of a particular profession or possess a special skill and who are not officers or employees of an LSC recipient. *Services* includes, but is not limited to intangible products such as accounting, banking, cleaning, consultants, training, expert services, maintenance of equipment, and transportation. For purposes of this section, *services* do not include services provided by recipients to their employees as compensation in addition to regular salaries and wages, including but not limited to employee insurance, pensions, and unemployment benefit plans.

(h) *Source* means a seller, supplier, vendor, or contractor who has agreed:

- (1) To sell or lease property to the recipient through a purchase or lease agreement; or
- (2) to provide services to the recipient through a contract.

**§ 1631.3 Prior approval process.**

(a) LSC shall grant prior approval of a cost listed in § 1630.6(b) if the recipient has provided sufficient written information to demonstrate that the cost would be consistent with the standards and policies of this part. LSC may request additional information if necessary to make a decision on the recipient's request.

(b)(1) For purchases or leases of personal property, contracts for services, and capital improvements, LSC will make a decision to approve or deny a request for prior approval within 30 days of receiving the request.

(2) For purchases of real estate, LSC will make a decision within 60 days of receiving the request.

(3) If LSC cannot make a decision whether to approve the request within the allotted time, it will provide the requester with a date by which it expects to make a decision.

(c) If LSC denies a request for prior approval, LSC shall provide the recipient with a written explanation of the grounds for denying the request.

(d) *Exigent circumstances.* (1) A recipient may use more than \$25,000 of LSC funds to purchase personal property or award a contract for services without seeking LSC's prior approval if the purchase or contract is necessary;

(i) to avoid imminent harm to the recipient's personnel, physical facilities, or systems; or

(ii) to remediate or mitigate damage to the recipient's personnel, physical facilities or systems.

(2) The recipient must provide LSC with a description of the exigent circumstances and the information

described in paragraph (b) within a reasonable time after the circumstances necessitating the purchase or contract have ended.

**§ 1631.4 Effective dates.**

(a) All provisions of this part apply to purchases and leases of personal property, contracts for services, and purchases of real estate made 90 days after the effective date of this rule.

(b) Subparts A, C, and E become effective 90 days after the effective date for all personal property and real property leased or purchased by recipients using LSC funds prior to the effective date of this part.

**§ 1631.5 Use of funds.**

When LSC receives funds from a disposition of property under this section, LSC will use those funds to make emergency and other special grants to recipients. LSC generally will make such grants to the same service area as the returned funds originally supported.

**§ 1631.6 Recipient policies, procedures, and recordkeeping.**

Each recipient shall adopt written policies and procedures to guide its staff in complying with this part and shall maintain records sufficient to document the recipient's compliance with this part.

**Subpart B—Procurement Policies and Procedures****§ 1631.7 Characteristics of procurements.**

(a) Characteristics indicative of a procurement relationship between a recipient and another entity are when the other entity:

- (1) Provides the goods and services within its normal business operations;
- (2) Provides similar goods or services to many different purchasers;
- (3) Normally operates in a competitive environment;
- (4) Provides goods or services that are ancillary to the operation of the LSC grant; and
- (5) Is not subject to LSC's compliance requirements as a result of the agreement, though similar requirements may apply for other reasons.

(b) In determining whether an agreement between a recipient and another entity constitutes a contract under this part or a subgrant under part 1627, the substance of the relationship is more important than the form of the agreement. All of the characteristics above may not be present in all cases, and a recipient must use judgment in classifying each agreement as a subgrant or a contract.

**§ 1631.8 Procurement policies and procedures.**

Recipients must have written procurement policies and procedures. These policies must:

(a) Identify competition thresholds that establish the basis (for example, price, risk level, or type of purchase) for the level of competition required at each threshold (for example, certification that a purchase reflects the best value to the recipient; a price comparison for alternatives that the recipient considered; or requests for information, quotes, or proposals);

(b) Establish the grounds for non-competitive purchases;

(c) Establish the level of documentation necessary to justify procurements. The level of documentation needed may be proportional to the nature of the purchase or tied to competition thresholds;

(d) Establish internal controls that, at a minimum, provide for segregation of duties in the procurement process, identify which employees, officers, or directors who have authority to make purchases for the recipient, and identify procedures for approving purchases;

(e) Establish procedures to ensure quality and cost control in purchasing, including procedures for selecting sources, fair and objective criteria for selecting sources; and

(f) Establish procedures for identifying and preventing conflicts of interest in the purchasing process.

**§ 1631.9 Requests for prior approval.**

(a) As required by § 1630.6 of this chapter and § 1631.3, a recipient using more than \$25,000 of LSC funds to purchase or lease personal property or contract for services must request and receive LSC's prior approval.

(b) A request for prior approval must include:

(1) A statement explaining how the personal property or services will further the delivery of legal services to eligible clients; and

(2) Documentation showing that the recipient followed its procurement policies and procedures in soliciting, reviewing, and approving the purchase, lease, or contract for services.

**§ 1631.10 Applicability of part 1630.**

All purchases and leases of personal property and contracts for services made with LSC funds must comply with the provisions of 45 CFR part 1630 (Cost Standards and Procedures).

**Subpart C—Personal Property Management****§ 1631.11 Use of property in compliance with LSC's statutes and regulations.**

(a) A recipient may use personal property purchased or leased, in whole or in part, with LSC funds primarily to deliver legal services to eligible clients under the requirements of the LSC Act, applicable appropriations acts, and LSC regulations.

(b) A recipient may use personal property purchased or leased, in whole or in part, with LSC funds for the performance of an LSC grant or contract for other activities, if such other activities do not interfere with the performance of the LSC grant or contract.

(c) If a recipient uses personal property purchased or leased, in whole or in part, with LSC funds to provide services to an organization that engages in activity restricted by the LSC Act, LSC regulations, or other applicable law, the recipient must charge the organization a fee no less than that which private nonprofit organizations in the same area charge for the same services under similar conditions.

**§ 1631.12 Intellectual property.**

Recipients may copyright any work that is subject to copyright and was developed, or for which ownership was obtained, under an LSC grant or contract, provided that LSC reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use work copyrighted by recipients, when the work is obtained in whole or in part with LSC funds.

**§ 1631.13 Disposing of personal property purchased with LSC funds.**

(a) *Disposal by LSC recipients.* During the term of an LSC grant or contract, a recipient may dispose of personal property purchased with LSC funds by:

(1) Trading in the personal property when it acquires replacement property;

(2) Selling or otherwise disposing of the personal property with no further obligation to LSC when the fair market value of the personal property is negligible;

(3) Selling the property at a reasonable negotiated price, without advertising for quotes, where the current fair market value of the personal property is \$15,000 or less;

(4) Selling the property after having advertised for and received quotes, where the current fair market value of the personal property exceeds \$15,000;

(5) Transferring the property to another recipient of LSC funds; or

(6) With the approval of LSC, transferring the personal property to another nonprofit organization serving the poor in the same service area.

(b) *Disposal when no longer a recipient.* When a recipient stops receiving LSC funds, it must obtain LSC's approval to dispose of personal property purchased with LSC funds in one of the following ways:

(1) Transferring the property to another recipient of LSC funds, in which case the former recipient will be entitled to compensation in the amount of the percentage of the property's current fair market value that is equal to the percentage of the property's purchase cost borne by non-LSC funds;

(2) Transferring the property to another nonprofit organization serving the poor in the same service area, in which case LSC will be entitled to compensation from the recipient for the percentage of the property's current fair market value that is equal to the percentage of the property's purchase cost borne by LSC funds;

(3) Selling the property and retaining the proceeds from the sale after compensating LSC for the percentage of the property's current fair market value that is equal to the percentage of the property's purchase cost borne by LSC funds; or

(4) Retaining the property, in which case LSC will be entitled to compensation from the recipient for the percentage of the property's current fair market value that is equal to that percentage of the property's purchase cost borne by LSC funds.

(c) *Disposal upon merger with or succession by another LSC recipient.* When a recipient stops receiving LSC funds because it merged with or is succeeded by another grantee, the recipient may transfer the property to the new recipient, if the two entities execute an LSC-approved successor in interest agreement that requires the new recipient to use the property primarily to provide legal services to eligible clients under the requirements of the LSC Act, applicable appropriations acts, and LSC regulations.

(d) *Prohibition.* A recipient may not dispose of personal property by sale, donation, or other transfer of the property to its board members or employees.

**§ 1631.14 Use of derivative income from sale of personal property purchased with LSC funds.**

(a) During the term of an LSC grant or contract, a recipient may retain and use income from any sale of personal property purchased with LSC funds according to 45 CFR 1630.16 (Cost

Standards and Procedures: Applicability to derivative income.) and 45 CFR 1628.3 (Recipient Fund Balances: Policy.).

(b) The recipient must account for income earned from the sale, rent, or lease of personal property purchased with LSC funds according to the requirements of 45 CFR 1630.16.

#### **Subpart D—Real Estate Acquisition and Capital Improvements**

##### **§ 1631.15 Purchasing real property with LSC funds.**

###### *(a) Pre-purchase planning*

*requirements.* (1) Before purchasing real property with LSC funds, a recipient must conduct an informal market survey and evaluate at least three potential equivalent properties.

(2) When a recipient evaluates potential properties, it must consider:

(i) The average annual cost of the purchase, including the costs of a down payment, interest and principal payments on a mortgage financing the purchase; closing costs; renovation costs; and the costs of utilities, maintenance, and taxes, if any;

(ii) The estimated total costs of buying and using the property throughout the mortgage term compared to the estimated total costs of leasing and using a similar property over the same period of time;

(iii) The property's quality; and

(iv) Whether the property is conducive to delivering legal services (e.g. property is accessible to the client population (ADA compliant) and near public transportation, courts, and other government or social services agencies).

(3) If a recipient cannot evaluate three potential properties, it must be able to explain why such evaluation was not possible.

(b) *Prior approval.* Before a recipient may purchase real property with LSC funds, LSC must approve the purchase as required by 45 CFR 1630.6 and 1631.3. The request for approval must be in writing and include:

(1) A statement of need explaining how the purchase will further the delivery of legal services to eligible clients, including:

(i) The information obtained and considered in paragraph (a);

(ii) Trends in funding and program staffing levels in relation to space needs;

(iii) Why the recipient needs to purchase real property; and

(iv) Why purchasing real estate is reasonable and necessary to performing the LSC grant.

(2) A brief analysis comparing:

(i) The estimated average annual cost of the purchase including the costs of a

down payment, interest and principal payments on a mortgage financing the purchase; closing costs; renovation costs; and the costs of utilities, maintenance, and taxes, if any; and

(ii) The estimated average annual cost of leasing or purchasing similar property over the same period of time;

(3) Anticipated financing of the purchase, including:

(i) The estimated total acquisition costs, including capital improvements, taxes, recordation fees, maintenance costs, insurance costs, and closing costs;

(ii) The anticipated breakdown of LSC funds and non-LSC funds to be applied toward the total costs of the purchase;

(iii) The monthly amount of principal and interest payments on debt secured to finance the purchase, if any;

(4) A current, independent appraisal sufficient to secure a mortgage;

(5) A comparison of available loan terms considered by the recipient before selecting the chosen financing method;

(6) Board approval of the purchase in either a board resolution or board minutes, including Board approvals that are contingent on LSC's approval;

(7) Whether the property will replace or supplement existing program offices;

(8) A statement of handicapped accessibility for the disabled sufficient to meet the requirements of 45 CFR 1624.5 or a statement that the property will be accessible upon the completion of any necessary capital improvements. Such improvements must be completed within 60 days of the date of purchase; and

(9) A copy of a purchase agreement, contract, or other document containing a description of the property and the terms of the purchase.

(c) *Property interest agreement.* Once LSC approves the purchase, the recipient must enter into a written property interest agreement with LSC. The agreement must include:

(1) The recipient's agreement to use the property consistent with § 1631.16;

(2) The recipient's agreement to record, under appropriate state law, LSC's interest in the property;

(3) The recipient's agreement not to encumber the property without prior LSC approval; and

(4) The recipient's agreement not to dispose of the property without prior LSC approval.

##### **§ 1631.16 Capital improvements.**

(a) As required by § 1630.6 of this chapter and § 1631.3, a recipient must obtain LSC's prior written approval before using more than \$25,000 LSC funds to make capital improvements to real estate.

(b) The written request must include:

(1) A statement of need explaining how the improvement will further the delivery of legal services to eligible clients;

(2) A brief description of the nature of the work to be done, the name of the sources performing the work, and the total expected cost of the improvement; and

(3) Documentation showing that the recipient followed its procurement policies and procedures in competing, selecting, and awarding contracts to perform the work.

(c) A recipient must maintain supporting documentation to accurately identify and account for any use of LSC funds to make capital improvements to real estate owned by the recipient.

#### **Subpart E—Real Estate Management**

##### **§ 1631.17 Using real estate purchased with LSC funds.**

(a) A recipient must use real estate purchased or leased, in whole or part, with LSC funds primarily to deliver legal services to eligible clients consistent with the requirements of the LSC Act, applicable appropriations acts, and LSC regulations.

(b) A recipient may use real estate purchased or leased, in whole or part, with LSC funds for the performance of an LSC grant or contract for other activities, if they do not interfere with the performance of the LSC grant or contract.

(c) If a recipient uses real estate purchased or leased, in whole or part, with LSC funds to provide space to an organization that engages in activity restricted by the LSC Act, applicable appropriations acts, LSC regulations, or other applicable law, the recipient must charge the organization rent no less than that which private nonprofit organizations in the same area charge for the same amount of space under similar conditions.

##### **§ 1631.18 Maintenance.**

A recipient must maintain real estate acquired with LSC funds:

(a) In an efficient operating condition; and

(b) In compliance with state and local government property standards and building codes.

##### **§ 1631.19 Insurance.**

At the time of purchase, a recipient must obtain insurance coverage for real estate purchased with LSC funds which is not lower in value than coverage it has obtained for other real property it owns and which provides at least the following coverage:

(a) Title insurance that:

(1) Insures the fee interest in the property for an amount not less than the full appraised value as approved by LSC, or the amount of the purchase price, whichever is greater; and

(2) Contains an endorsement identifying LSC as a loss payee to be reimbursed if the title fails.

(3) If no endorsement naming LSC as loss payee is made, the recipient must pay LSC the title insurance proceeds it receives in the event of a failure.

(b) A physical destruction insurance policy, including flood insurance where appropriate, which insures the full replacement value of the facility from risk of partial and total physical destructions. The recipient must maintain this policy for the period of time that the recipient owns the real estate.

#### **§ 1631.20 Accounting and reporting to LSC.**

A recipient must maintain an accounting of the amount of LSC funds relating to the purchase or maintenance of real estate purchased with LSC funds. The accounting must include the amount of LSC funds used to pay for acquisition costs, financing, and capital improvements. The recipient must provide the accounting for each year to LSC no later than April 30 of the following year or in its annual audited financial statements submitted to LSC.

#### **§ 1631.21 Disposing of real estate purchased with LSC funds.**

(a) *Disposal by LSC recipients.* During the term of an LSC grant or contract, a recipient must seek LSC's prior written approval to dispose of real estate purchased with LSC funds by:

(1) Selling the property after having advertised for and received offers; or

(2) Transferring the property to another recipient of LSC funds, in which case the recipient may be compensated by the recipient receiving the property for the percentage of the property's current fair market value that is equal to the percentage of the costs of the original acquisition and costs of any capital improvements borne by non-LSC funds.

(b) *Disposal after a recipient no longer receives LSC funding.* When a recipient who owns real estate purchased with LSC funds stops receiving LSC funds, it must seek LSC's prior written approval to dispose of the property in one of the following ways:

(1) Transfer the property title to another grantee of LSC funds, in which case the recipient may be compensated the percentage of the property's current fair market value that is equal to the percentage of the costs of the original

acquisition and costs of any capital improvements by non-LSC funds;

(2) Buyout LSC's interest in the property (*i.e.*, pay LSC the percentage of the property's current fair market value proportional to its percent interest in the property); or

(3) Sell the property to a third party and pay LSC a share of the sale proceeds proportional to its interest in the property, after deducting actual and reasonable closing costs, if any.

(4) When a recipient stops receiving LSC funds because it merged with or is succeeded by another recipient, it may transfer the property to the new recipient. The two entities must execute an LSC-approved successor in interest agreement that requires the transferee to use the property primarily to provide legal services to eligible clients under the requirements of the LSC Act, applicable appropriations acts, and LSC regulations.

(c) *Prior approval process.* No later than 60 days before a recipient or former recipient proposes to dispose of real estate purchased with LSC funds, the recipient or former recipients must submit a written request for prior approval to dispose of the property to LSC. The request must include:

(1) The proposed method of disposition and an explanation of why the proposed method is in the best interests of LSC and the recipient;

(2) Documentation showing the fair market value of the property at the time of transfer or sale, including, but not limited to, an independent appraisal of the property and competing bona fide offers to purchase the property;

(3) A description of the recipient's process for advertising the property for sale and receiving offers;

(4) An accounting of all LSC funds used in the acquisition and any capital improvements of the property. The accounting must include the amount of LSC funds used to pay for acquisition costs, financing, and capital improvements; and

(5) Information on the proposed transferee or buyer of the property and a document evidencing the terms of transfer or sale.

#### **§ 1631.22 Retaining income from sale of real property purchased with LSC funds.**

(a) During the term of an LSC grant or contract, a recipient may retain and use income from any sale of real property purchased with LSC funds according to §§ 1630.16 and 1628.3 of this chapter.

(b) The recipient must account for income earned from the sale, rent, or lease of real or personal property purchased with LSC funds according to

the requirements of § 1630.16 of this chapter.

Dated: October 20, 2016.

**Stefanie K. Davis,**

*Assistant General Counsel.*

[FR Doc. 2016-25831 Filed 10-27-16; 8:45 am]

BILLING CODE 7050-01-P

## **FEDERAL COMMUNICATIONS COMMISSION**

### **47 CFR Part 73**

[GN Docket No. 12-268; MB Docket No. 16-306; DA 16-1164]

### **Media Bureau Seeks Comment on Updates to Catalog of Reimbursement Expenses**

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule; request for comment.

**SUMMARY:** In this document the Media Bureau of the Federal Communications Commission (Commission) seeks comment on updates to the catalog of eligible reimbursement expenses (Catalog) which contains costs for equipment and services that broadcasters and multichannel-video-programming-distributors (MVPDs) may incur as a result of the post-incentive auction repack and channel reassignment. In order to disburse money from the \$1.75 billion TV Broadcaster Relocation Fund in accordance with the Spectrum Act and the *Incentive Auction Report and Order*, the Media Bureau seeks comment on changes to the Catalog, which include: Increases to the baseline costs previously proposed, the addition of new categories of reimbursement expenses, and the removal of other categories of expenses due to discontinuance or technological advancements. The Media Bureau also seeks comment on a proposed economic methodology for adjusting the baseline costs listed in the Catalog annually throughout the three-year reimbursement period.

**DATES:** Comments are due on November 14, 2016. Reply Comments are due on November 29, 2016.

**ADDRESSES:** All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission, 445 12th Street SW., Washington, DC 20554. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service



first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington DC 20554.

**FOR FURTHER INFORMATION CONTACT:**

Pamela Gallant, 202-418-0614, or Raphael Sznajder, 202-418-1648, of the Media Bureau, Video Division.

**SUPPLEMENTARY INFORMATION:** With the assistance of a third-party contractor, Widelity, Inc., and based on the record to date, the Media Bureau has developed and now updated the catalog of eligible reimbursement expenses (Catalog) for reimbursement-eligible entities to use as a guide. The Catalog is not intended to be a definitive list of all reimbursable expenses, but, rather, as a means of facilitating the process for reimbursement-eligible entities to claim reimbursement during the post-incentive auction repacking. This Public Notice (available at: [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db1013/DA-16-1164A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1013/DA-16-1164A1.pdf)), seeks comment not only on the updated categories and prices for the reimbursement expenses listed, but also on the proposed economic methodology that the Media Bureau will employ to update the prices in the Catalog throughout the three-year

reimbursement period. The Media Bureau proposes to modify the baseline costs contained in the Catalog annually based upon the Producer Price Indexes (PPI) annual average, specifically the WPUFD4 series, as calculated by the Bureau of Labor Statistics, and seeks comment on its proposal to do so. After considering the comments received, the Catalog the Media Bureau adopts will be embedded in the on-line Reimbursement Form, FCC Form 2100, Schedule 399, which will be used by entities seeking reimbursement to file estimated costs and reimbursement claims for actual costs incurred. The record obtained in response to this Public Notice will allow the Media Bureau to adopt an updated Catalog, reflecting current baseline costs for listed reimbursement expenses, and to determine the methodology it will use to adjust the listed expenses in the Catalog during throughout the reimbursement period. After considering the comments filed in connection with the updated Catalog and our proposed economic methodology for adjusting the baseline costs, we will finalize the Catalog and the Reimbursement Form. Thereafter, we will resubmit the Reimbursement

Form to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act (PRA) of the changes resulting from the modifications to the Catalog, as well as other minor modifications to the Reimbursement Form that are designed to assist filers in describing their claims. The public will have an opportunity to comment on the incremental data collections contained in the finalized Reimbursement Form, as required by the PRA, after we receive comments in response to the updated Catalog, and the finalized Reimbursement Form is submitted to OMB for approval under the PRA. This is a summary of the FCC's document GN Docket No. 12-268; MB Docket No. 16-306; DA 16-1164 (released October 13, 2016). The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY-A257), 445 12th Street SW., Washington, DC 20554.

Federal Communications Commission.

**Barbara A. Kreisman,**

*Chief, Video Division, Media Bureau.*

[FR Doc. 2016-26059 Filed 10-27-16; 8:45 am]

**BILLING CODE 6712-01-P**

# Notices

Federal Register

Vol. 81, No. 209

Friday, October 28, 2016

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

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

October 25, 2016.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden 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.

Comments regarding this information collection received by November 28, 2016 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW., Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: [OIRA\\_Submission@OMB.EOP.GOV](mailto:OIRA_Submission@OMB.EOP.GOV) or fax (202) 395-5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250-7602. Copies of the submission(s) may be obtained by calling (202) 720-8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control

number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

### Office of Advocacy and Outreach

*Title:* USDA Minority Farm Register.

*OMB Control Number:* 0508-0005.

*Summary of Collection:* The Minority Farm Register is a voluntary register of minority farm and ranch operators, landowners, tenants, and others with an interest in farming or agriculture. The Register will promote equity among minority farmers. The collected information is a tool to promote equal access to USDA Farm programs and services for minority farmers and ranchers with agricultural interests. The authority for the collection of this information can be found in Section 10707 of the Farm Security and Rural Investment Act of 2002 (Pub. L. 107-171) (7 U.S.C. 2279(a) (4) (b)).

*Need and Use of the Information:* The Office of Advocacy and Outreach (OAO) will collect the name, address, phone number, farm location, race, ethnicity, gender and signature on the Minority Farm Register permission form, AD-2035. The OAO uses the collected information to better inform minority farmers about U.S. Department of Agriculture programs and services.

*Description of Respondents:* Individuals or households.

*Number of Respondents:* 5,000.

*Frequency of Responses:* Reporting: Other (once).

*Total Burden Hours:* 4,667.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2016-26076 Filed 10-27-16; 8:45 am]

**BILLING CODE 3412-88-P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-523-812]

### Circular Welded Carbon-Quality Steel Pipe From the Sultanate of Oman: Final Determination of Sales at Less Than Fair Value

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) determines that circular welded carbon-quality steel pipe (CWP) from the Sultanate of Oman (Oman) is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is October 1, 2014, through September 30, 2015. The final weighted-average dumping margins of sales at LTFV are listed below in the "Final Determination" section of this notice.

**DATES:** Effective October 28, 2016.

**FOR FURTHER INFORMATION CONTACT:** Katherine Johnson or Aqmar Rahman, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482-4929 and (202) 482-0768, respectively.

### SUPPLEMENTARY INFORMATION:

#### Background

On June 8, 2016, the Department published the *Preliminary Determination*.<sup>1</sup> A summary of the events that occurred since the Department published the *Preliminary Determination*, as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum, which is incorporated by reference and hereby adopted by this notice.<sup>2</sup>

<sup>1</sup> See *Circular Welded Carbon-Quality Steel Pipe From the Sultanate of Oman: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 81 FR 36871 (June 8, 2016) (*Preliminary Determination*).

<sup>2</sup> See Memorandum to Ronald K. Lorentzen, "Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Circular Welded Carbon-

### Scope of the Investigation

The scope of the investigation covers CWP from Oman. For a complete description of the scope of the investigation, see Appendix I.

### Scope Comments

In the *Preliminary Determination*, the Department set aside a period of time for parties to address scope issues in case briefs or other written comments on scope issues. No interested parties submitted scope comments in case or rebuttal briefs; therefore, for this final determination, the scope of this investigation remains unchanged from that published in the *Preliminary Determination*.

### Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties in this investigation are addressed in the Issues and Decision Memorandum. A list of the issues raised is attached to this notice as Appendix II. 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> and it is available to all parties in the Central Records Unit, Room B-8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <http://enforcement.trade.gov/frn/index.html>. The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

### Verification

As provided in section 782(i) of the the Tariff Act of 1930, as amended (the Act), in July and August 2016, we conducted verification of the sales and cost information submitted by Al Jazeera Steel Products Co. SAOG (Al Jazeera) for use in our final determination. We used standard verification procedures, including an examination of relevant accounting and production records, and original source documents provided by Al Jazeera.<sup>3</sup>

Quality Steel Pipe From the Sultanate of Oman," dated concurrently with this notice (Issues and Decision Memorandum).

<sup>3</sup> For discussion of our verification findings, see the following memoranda: Memorandum to the File from Katherine Johnson, Aqmar Rahman and Jesus Saenz, "Verification of the Sales Responses of Al Jazeera Steel Products Co. SAOG in the Antidumping Duty Investigation of Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman," dated August 31, 2016; and Memorandum to the File from Robert B. Greger, "Verification of

### Changes Since the Preliminary Determination

Based on our analysis of the comments received and our findings at verification, we made certain changes to the margin calculations for Al Jazeera since the *Preliminary Determination*. For a discussion of these changes, see the Issues and Decision Memorandum.

### Final Determination

The final weighted-average dumping margins are as follows:

Exporter/Manufacturer	Weighted-average dumping margin (percent)
Al Jazeera Steel Products Co. SAOG .....	7.24
All-Others .....	7.24

### All-Others Rate

Consistent with section 735(c)(5) of the Act, the Department also calculated an estimated all-others rate. Section 735(c)(5)(A) of the Act provides that the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act. In this investigation, the "All-Others" rate is based on the weighted-average dumping margin calculated for Al Jazeera, the only company individually examined and for which the Department calculated a rate.<sup>4</sup>

### Disclosure

We will disclose the calculations performed to interested parties in this proceeding within five days of the public announcement of this final determination in accordance with 19 CFR 351.224(b).

### Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, the Department will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all appropriate entries of CWP from Oman, as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption on or after June 8,

Al Jazeera Steel Products Co. SAOG in the Antidumping Duty Investigation of Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman," dated August 22, 2016.

<sup>4</sup> See section 735(c)(5)(A) of the Act.

2016, the date of publication of the *Preliminary Determination* of this investigation in the **Federal Register**.

### International Trade Commission (ITC) Notification

In accordance with section 735(d) of the Act, we will notify the ITC of the final affirmative determination of sales at LTFV. Because the final determination in this proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of CWP from Oman no later than 45 days after our final determination. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all cash deposits will be refunded. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess, upon further instruction by the Department, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

### Notification Regarding Administrative Protective Orders (APO)

This notice serves as a 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 notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination and this notice are issued and published pursuant to sections 735(d) and 777(i)(1) of the Act.

Dated: October 21, 2016.

**Ronald K. Lorentzen,**

Acting Assistant Secretary for Enforcement and Compliance.

### Appendix I

#### Scope of the Investigation

This investigation covers welded carbon-quality steel pipes and tube, of circular cross-section, with an outside diameter (O.D.) not more than nominal 16 inches (406.4 mm), regardless of wall thickness, surface finish (e.g., black, galvanized, or painted), end finish (plain end, beveled end, grooved, threaded, or threaded and coupled), or industry specification (e.g., American Society for Testing and Materials International (ASTM), proprietary, or other), generally known as standard pipe, fence pipe and tube,

sprinkler pipe, and structural pipe (although subject product may also be referred to as mechanical tubing). Specifically, the term “carbon quality” includes products in which:

- (a) Iron predominates, by weight, over each of the other contained elements;
- (b) the carbon content is 2 percent or less, by weight; and
- (c) none of the elements listed below exceeds the quantity, by weight, as indicated:
  - (i) 1.80 percent of manganese;
  - (ii) 2.25 percent of silicon;
  - (iii) 1.00 percent of copper;
  - (iv) 0.50 percent of aluminum;
  - (v) 1.25 percent of chromium;
  - (vi) 0.30 percent of cobalt;
  - (vii) 0.40 percent of lead;
  - (viii) 1.25 percent of titanium;
  - (ix) 0.30 percent of tungsten;
  - (x) 0.15 percent of molybdenum;
  - (xi) 0.10 percent of niobium;
  - (xii) 0.41 percent of titanium;
  - (xiii) 0.15 percent of vanadium; or
  - (xiv) 0.15 percent of zirconium.

Covered products are generally made to standard O.D. and wall thickness combinations. Pipe multi-stenciled to a standard and/or structural specification and to other specifications, such as American Petroleum Institute (API) API-5L specification, may also be covered by the scope of these investigations. In particular, such multi-stenciled merchandise is covered when it meets the physical description set forth above, and also has one or more of the following characteristics: Is 32 feet in length or less; is less than 2.0 inches (50 mm) in outside diameter; has a galvanized and/or painted (e.g., polyester coated) surface finish; or has a threaded and/or coupled end finish.

Standard pipe is ordinarily made to ASTM specifications A53, A135, and A795, but can also be made to other specifications. Structural pipe is made primarily to ASTM specifications A252 and A500. Standard and structural pipe may also be produced to proprietary specifications rather than to industry specifications.

Sprinkler pipe is designed for sprinkler fire suppression systems and may be made to industry specifications such as ASTM A53 or to proprietary specifications.

Fence tubing is included in the scope regardless of certification to a specification listed in the exclusions below, and can also be made to the ASTM A513 specification. Products that meet the physical description set forth above but are made to the following nominal outside diameter and wall thickness combinations, which are recognized by the industry as typical for fence tubing, are included despite being certified to ASTM mechanical tubing specifications:

O.D. in inches (nominal)	Wall thickness in inches (nominal)	Gage
1.315	0.035	20
1.315	0.047	18
1.315	0.055	17
1.315	0.065	16
1.315	0.072	15
1.315	0.083	14
1.315	0.095	13
1.660	0.055	17

O.D. in inches (nominal)	Wall thickness in inches (nominal)	Gage
1.660	0.065	16
1.660	0.083	14
1.660	0.095	13
1.660	0.109	12
1.900	0.047	18
1.900	0.055	17
1.900	0.065	16
1.900	0.072	15
1.900	0.095	13
1.900	0.109	12
2.375	0.047	18
2.375	0.055	17
2.375	0.065	16
2.375	0.072	15
2.375	0.095	13
2.375	0.109	12
2.375	0.120	11
2.875	0.109	12
2.875	0.165	8
3.500	0.109	12
3.500	0.165	8
4.000	0.148	9
4.000	0.165	8
4.500	0.203	7

The scope of this investigation does not include:

- (a) Pipe suitable for use in boilers, superheaters, heat exchangers, refining furnaces and feedwater heaters, whether or not cold drawn, which are defined by standards such as ASTM A178 or ASTM A192;
- (b) finished electrical conduit, i.e., Electrical Rigid Steel Conduit (also known as Electrical Rigid Metal Conduit and Electrical Rigid Metal Steel Conduit), Finished Electrical Metallic Tubing, and Electrical Intermediate Metal Conduit, which are defined by specifications such as American National Standard (ANSI) C80.1-2005, ANSI C80.3-2005, or ANSI C80.6-2005, and Underwriters Laboratories Inc. (UL) UL-6, UL-797, or UL-1242;
- (c) finished scaffolding, i.e., component parts of final, finished scaffolding that enter the United States unassembled as a “kit.” A kit is understood to mean a packaged combination of component parts that contains, at the time of importation, all of the necessary component parts to fully assemble final, finished scaffolding;
- (d) tube and pipe hollows for redrawing;
- (e) oil country tubular goods produced to API specifications;
- (f) line pipe produced to only API specifications, such as API 5L, and not multi-stenciled; and
- (g) mechanical tubing, whether or not cold-drawn, other than what is included in the above paragraphs.

The products subject to this investigation are currently classifiable in Harmonized Tariff Schedule of the United States (HTSUS) statistical reporting numbers 7306.19.1010, 7306.19.1050, 7306.19.5110, 7306.19.5150, 7306.30.1000, 7306.30.5015, 7306.30.5020, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085, 7306.30.5090, 7306.50.1000, 7306.50.5030, 7306.50.5050, and 7306.50.5070. The HTSUS subheadings

above are provided for convenience and U.S. Customs purposes only. The written description of the scope of the investigation is dispositive.

**Appendix II**

**List of Topics Discussed in the Issues and Decision Memorandum**

- I. Summary
- II. Background
- III. Scope of the Investigation
- IV. Margin Calculations
- V. Discussion of Issues
  - 1. Al Jazeera’s Reported System Weights
  - 2. Al Jazeera’s Pipe Coating Reporting
  - 3. Returned Sales in the Home Market Sales Database
  - 4. Reported Production Quantities
  - 5. Weighted-Average Costs
  - 6. General & Administrative Expense Ratio

[FR Doc. 2016-26108 Filed 10-27-16; 8:45 am]

**BILLING CODE 3510-DS-P**

**DEPARTMENT OF COMMERCE**

**International Trade Administration**

**[A-535-903]**

**Circular Welded Carbon-Quality Steel Pipe From Pakistan: Final Affirmative Determination of Sales at Less Than Fair Value**

**AGENCY:** Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce.

**SUMMARY:** The U.S. Department of Commerce (the Department) determines that circular welded carbon-quality steel pipe (circular welded pipe) from Pakistan is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is October 1, 2014, through September 30, 2015. The final dumping margins of sales at LTFV are listed below in the “Final Determination” section of this notice.

**DATES:** Effective October 28, 2016.

**FOR FURTHER INFORMATION CONTACT:** David Lindgren, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482-3870.

**SUPPLEMENTARY INFORMATION:**

**Background**

On June 8, 2016, the Department published the *Preliminary Determination*.<sup>1</sup> We invited interested

<sup>1</sup> See *Circular Welded Carbon-Quality Steel Pipe From Pakistan: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination and Extension of Provisional Measures*, 81 FR 36867 (June 8, 2016) (*Preliminary Determination*).

parties to submit comments on the *Preliminary Determination*, but we received no comments. Additionally, no party requested a hearing.

#### Scope of the Investigation

The scope of the investigation covers circular welded pipe from Pakistan. For a complete description of the scope of this investigation, see Appendix I.

#### Analysis of Comments Received

As noted above, we received no comments since the publication of the *Preliminary Determination*.

#### Changes Since the Preliminary Determination and Use of Adverse Facts Available

As stated in the *Preliminary Determination*, we found that the sole mandatory respondent, International Industries Limited (IIL) did not cooperate to the best of its ability and, accordingly we determined it appropriate to apply facts otherwise available with adverse inferences in accordance with section 776(a)–(b) of the Tariff Act of 1930, as amended (the Act). For the purposes of this final determination, the Department has made no changes to the *Preliminary Determination*.

#### All-Others Rate

As discussed in the *Preliminary Determination*, in accordance with section 735(c)(5)(B) of the Act, the Department based the selection of the “All-Others” rate on the petition rate of 11.80 percent. We have made no changes to the selection of this rate for this final determination.

#### Final Determination

The final weighted-average dumping margins are as follows:

Exporter/ Producer	Weighted- average margin (percent)
International Industries Limited ...	11.80.
All-Others .....	11.80.

#### Disclosure

The weighted-average dumping margin assigned to IIL in the *Preliminary Determination* was based on adverse facts available. As we have made no changes to the margin since the *Preliminary Determination*, no disclosure of calculations is necessary for this final determination.

#### Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, the Department

will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all appropriate entries of circular welded pipe from Pakistan, as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption on or after June 8, 2016, the date of publication of the *Preliminary Determination*.

Further, CBP will instruct CBP to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price as shown above. Where the subject merchandise under investigation is also subject to a concurrent countervailing duty (CVD) investigation, we normally instruct CBP to require a cash deposit less the amount of any countervailing duties determined to be export subsidies.<sup>2</sup> In the concurrent CVD investigation in this case, the Department did not determine any of the countervailable subsidies to be export subsidies. Accordingly, in the event that a CVD order is issued and suspension of liquidation is resumed in the companion CVD investigation, the Department will make no adjustment to the cash deposit rate to account for export subsidies.

#### International Trade Commission Notification

In accordance with section 735(d) of the Act, we will notify the U.S. International Trade Commission (ITC) of the final affirmative determination of sales at LTFV. Because the final determination in this proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury by reason of imports of circular welded pipe from Pakistan no later than 45 days after this final determination. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all cash deposits will be refunded. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess, upon further instruction by the Department, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

<sup>2</sup> See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 From India*, 69 FR 67306, 67307 (November 17, 2004); and *Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea*, 77 FR 17413 (March 26, 2012).

#### Notification Regarding Administrative Protective Orders

This notice serves as a reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely notification of the return of destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: October 21, 2016.

**Ronald K. Lorentzen,**

*Acting Assistant Secretary for Enforcement and Compliance.*

#### Appendix I

##### Scope of the Investigation

This investigation covers welded carbon-quality steel pipes and tube, of circular cross-section, with an outside diameter (O.D.) not more than nominal 16 inches (406.4 mm), regardless of wall thickness, surface finish (e.g., black, galvanized, or painted), end finish (plain end, beveled end, grooved, threaded, or threaded and coupled), or industry specification (e.g., American Society for Testing and Materials International (ASTM), proprietary, or other), generally known as standard pipe, fence pipe and tube, sprinkler pipe, and structural pipe (although subject product may also be referred to as mechanical tubing). Specifically, the term “carbon quality” includes products in which:

- (a) Iron predominates, by weight, over each of the other contained elements;
- (b) the carbon content is 2 percent or less, by weight; and
- (c) none of the elements listed below exceeds the quantity, by weight, as indicated:
  - (i) 1.80 percent of manganese;
  - (ii) 2.25 percent of silicon;
  - (iii) 1.00 percent of copper;
  - (iv) 0.50 percent of aluminum;
  - (v) 1.25 percent of chromium;
  - (vi) 0.30 percent of cobalt;
  - (vii) 0.40 percent of lead;
  - (viii) 1.25 percent of nickel;
  - (ix) 0.30 percent of tungsten;
  - (x) 0.15 percent of molybdenum;
  - (xi) 0.10 percent of niobium;
  - (xii) 0.41 percent of titanium;
  - (xiii) 0.15 percent of vanadium; or
  - (xiv) 0.15 percent of zirconium.

Covered products are generally made to standard O.D. and wall thickness combinations. Pipe multi-stenciled to a standard and/or structural specification and to other specifications, such as American Petroleum Institute (API) API-5L specification, may also be covered by the scope of these investigations. In particular, such multi-stenciled merchandise is covered when it meets the physical description set forth above, and also has one or more of the

following characteristics: Is 32 feet in length or less; is less than 2.0 inches (50 mm) in outside diameter; has a galvanized and/or painted (e.g., polyester coated) surface finish; or has a threaded and/or coupled end finish.

Standard pipe is ordinarily made to ASTM specifications A53, A135, and A795, but can also be made to other specifications.

Structural pipe is made primarily to ASTM specifications A252 and A500. Standard and structural pipe may also be produced to proprietary specifications rather than to industry specifications.

Sprinkler pipe is designed for sprinkler fire suppression systems and may be made to industry specifications such as ASTM A53 or to proprietary specifications.

Fence tubing is included in the scope regardless of certification to a specification listed in the exclusions below, and can also be made to the ASTM A513 specification. Products that meet the physical description set forth above but are made to the following nominal outside diameter and wall thickness combinations, which are recognized by the industry as typical for fence tubing, are included despite being certified to ASTM mechanical tubing specifications:

O.D. in inches (nominal)	Wall thickness in inches (nominal)	Gage
1.315	0.035	20
1.315	0.047	18
1.315	0.055	17
1.315	0.065	16
1.315	0.072	15
1.315	0.083	14
1.315	0.095	13
1.660	0.055	17
1.660	0.065	16
1.660	0.083	14
1.660	0.095	13
1.660	0.109	12
1.900	0.047	18
1.900	0.055	17
1.900	0.065	16
1.900	0.072	15
1.900	0.095	13
1.900	0.109	12
2.375	0.047	18
2.375	0.055	17
2.375	0.065	16
2.375	0.072	15
2.375	0.095	13
2.375	0.109	12
2.375	0.120	11
2.875	0.109	12
2.875	0.165	8
3.500	0.109	12
3.500	0.165	8
4.000	0.148	9
4.000	0.165	8
4.500	0.203	7

The scope of this investigation does not include:

(a) Pipe suitable for use in boilers, superheaters, heat exchangers, refining furnaces and feedwater heaters, whether or not cold drawn, which are defined by standards such as ASTM A178 or ASTM A192;

(b) finished electrical conduit, i.e., Electrical Rigid Steel Conduit (also known as

Electrical Rigid Metal Conduit and Electrical Rigid Metal Steel Conduit), Finished Electrical Metallic Tubing, and Electrical Intermediate Metal Conduit, which are defined by specifications such as American National Standard (ANSI) C80.1–2005, ANSI C80.3–2005, or ANSI C80.6–2005, and Underwriters Laboratories Inc. (UL) UL–6, UL–797, or UL–1242;

(c) finished scaffolding, i.e., component parts of final, finished scaffolding that enter the United States unassembled as a “kit.” A kit is understood to mean a packaged combination of component parts that contains, at the time of importation, all of the necessary component parts to fully assemble final, finished scaffolding;

(d) tube and pipe hollows for redrawing;

(e) oil country tubular goods produced to API specifications;

(f) line pipe produced to only API specifications, such as API 5L, and not multi-stenciled; and

(g) mechanical tubing, whether or not cold-drawn, other than what is included in the above paragraphs.

The products subject to this investigation are currently classifiable in Harmonized Tariff Schedule of the United States (HTSUS) statistical reporting numbers 7306.19.1010, 7306.19.1050, 7306.19.5110, 7306.19.5150, 7306.30.1000, 7306.30.5015, 7306.30.5020, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085, 7306.30.5090, 7306.50.1000, 7306.50.5030, 7306.50.5050, and 7306.50.5070. The HTSUS subheadings above are provided for convenience and U.S. Customs purposes only. The written description of the scope of the investigation is dispositive.

[FR Doc. 2016–26113 Filed 10–27–16; 8:45 am]

**BILLING CODE 3510–DS–P**

**DEPARTMENT OF COMMERCE**

**International Trade Administration**

**[A–520–807]**

**Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Final Determination of Sales at Less Than Fair Value**

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce

**SUMMARY:** The Department of Commerce (the Department) determines that circular welded carbon-quality steel pipe (CWP) from the United Arab Emirates (UAE) is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is October 1, 2014, through September 30, 2015. The final dumping margins of sales at LTFV are listed below in the “Final Determination” section of this notice.

**DATES:** Effective October 28, 2016.

**FOR FURTHER INFORMATION CONTACT:** Blaine Wiltse or Manuel Rey, AD/CVD

Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–6345 and (202) 482–5518, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On June 8, 2016, the Department published the *Preliminary Determination*.<sup>1</sup> A summary of the events that occurred since the Department published the *Preliminary Determination*, as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum, which is hereby adopted by this notice.<sup>2</sup>

**Scope of the Investigation**

The scope of the investigation covers CWP from the UAE. For a complete description of the scope of the investigation, see Appendix I.

**Scope Comments**

In the *Preliminary Determination*, the Department set aside a period of time for parties to address scope issues in case briefs or other written comments on scope issues. No interested parties submitted scope comments in case or rebuttal briefs; therefore, for this final determination, the scope of this investigation remains unchanged from that published in the *Preliminary Determination*.

**Analysis of Comments Received**

All issues raised in the case and rebuttal briefs by parties in this investigation are addressed in the Issues and Decision Memorandum. A list of the issues raised is attached to this notice as Appendix II. 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> and it is available to all parties in the Central Records Unit,

<sup>1</sup> See *Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 81 FR 36881 (June 8, 2016) (*Preliminary Determination*).

<sup>2</sup> See Memorandum to Ronald K. Lorentzen, “Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates,” dated concurrently with this notice (Issues and Decision Memorandum).

room B-8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <http://enforcement.trade.gov/frn/index.html>. The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

#### Verification

As provided in section 782(i) of the Tariff Act of 1930, as amended (the Act), in June, July, and August 2016, we conducted verification of the sales and cost information submitted by Ajmal Steel Tubes & Pipes Ind. L.L.C. (Ajmal Steel) and Universal Tube and Plastic Industries, LLC—Jebel Ali Branch, Universal Tube and Pipe Industries, and KHK Scaffolding and Framework LLC (collectively, Universal) for use in our final determination. We used standard verification procedures, including an examination of relevant accounting and production records, and original source documents provided by Ajmal Steel and Universal.<sup>3</sup>

#### Changes Since the Preliminary Determination

Based on our analysis of the comments received and our findings at verification, we made certain changes to the margin calculations for Ajmal Steel and Universal. For a discussion of these changes, see the Issues and Decision Memorandum.

<sup>3</sup> For discussion of our verification findings, see the following memoranda: Memorandum to the File from Blaine Wiltse and Whitley Herndon, entitled "Verification of UTP Pipe USA Corp. and Prime Metal Corp. in the Antidumping Duty Investigation of Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates," dated August 17, 2016; see also Memorandum to the File from Blaine Wiltse and E. Whitley Herndon, entitled "Verification of the Sales Response of Universal Tube and Plastic Industries, Ltd.—Jebel Ali Branch in the Antidumping Investigation of Circular Welded Carbon Steel Pipe from United Arab Emirates," dated August 16, 2016; Memorandum to the File from Blaine Wiltse and E. Whitley Herndon, entitled "Verification of the Sales Response of Dayal Steel Suppliers LLC in the Antidumping Investigation of Circular Welded Carbon Steel Pipe from the United Arab Emirates," dated August 22, 2016; Memorandum to the File from Dennis McClure and Manuel Rey, entitled "Verification of the Sales Response of Ajmal Steel Tubes & Pipes Ind. L.L.C. in the Antidumping Investigation of Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates," dated August 22, 2016; Memorandum to the File from Michael Martin and Christopher Zimpo, entitled "Verification of the Cost Response of Universal in the Antidumping Duty Investigation of Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates," dated August 24, 2016; and Memorandum to the File from Christopher J. Zimpo, entitled "Verification of the Cost Response of Ajmal Steel Tubes & Pipes Ind. L.L.C. in the Antidumping Duty Investigation of Circular Welded Carbon Steel Pipe from the United Arab Emirates," dated August 25, 2016.

#### All-Others Rate

Section 735(c)(5)(A) of the Act provides that the estimated all-others rate shall be an amount equal to the weighted-average of the estimated weighted-average dumping margins established for exporters and producers individually investigated excluding any zero or *de minimis* margins, and margins determined entirely under section 776 of the Act. For the final determination, the Department calculated the "all others" rate based on a weighted average of Ajmal Steel's and Universal's margins using publicly-ranged quantities of their sales of subject merchandise.<sup>4</sup>

#### Final Determination

The final weighted-average dumping margins are as follows:

Exporter/Manufacturer	Weighted-average dumping margin (percent)
Ajmal Steel Tubes & Pipes Ind. L.L.C. ....	6.43
Universal Tube and Plastic Industries, LLC—Jebel Ali Branch, Universal Tube and Pipe Industries, and KHK Scaffolding and Framework LLC .....	5.58
All Others .....	5.95

#### Disclosure

We will disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

#### Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, the Department will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all appropriate entries of

<sup>4</sup> See Memorandum to the File from Whitley Herndon, Analyst, entitled, "Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Calculation of the Final Margin for All Other Companies," dated July 14, 2016. With two respondents, we normally calculate (A) a weighted-average of the dumping margins calculated for the mandatory respondents; (B) a simple average of the dumping margins calculated for the mandatory respondents; and (C) a weighted-average of the dumping margins calculated for the mandatory respondents using each company's publicly-ranged values for the merchandise under consideration. We compare (B) and (C) to (A) and select the rate closest to (A) as the most appropriate rate for all other companies. See *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part*, 75 FR 53661, 53663 (September 1, 2010).

CWP from UAE, as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption on or after June 8, 2016, the date of publication of the preliminary determination of this investigation in the **Federal Register**.

Further, the Department will instruct CBP to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price as shown above.

#### International Trade Commission (ITC) Notification

In accordance with section 735(d) of the Act, we will notify the ITC of the final affirmative determination of sales at LTFV. Because the final determination in this proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of CWP from UAE no later than 45 days after our final determination. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all cash deposits will be refunded. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess, upon further instruction by the Department, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

#### Notification Regarding Administrative Protective Orders (APO)

This notice serves as a 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 notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination and this notice are issued and published pursuant to sections 735(d) and 777(i)(1) of the Act.

Dated: October 21, 2016.

**Ronald K. Lorentzen,**  
Acting Assistant Secretary for Enforcement and Compliance.

#### Appendix I

##### Scope of the Investigation

This investigation covers welded carbon-quality steel pipes and tube, of circular cross-



section, with an outside diameter (O.D.) not more than nominal 16 inches (406.4 mm), regardless of wall thickness, surface finish (e.g., black, galvanized, or painted), end finish (plain end, beveled end, grooved, threaded, or threaded and coupled), or industry specification (e.g., American Society for Testing and Materials International (ASTM), proprietary, or other), generally known as standard pipe, fence pipe and tube, sprinkler pipe, and structural pipe (although subject product may also be referred to as mechanical tubing). Specifically, the term "carbon quality" includes products in which:

- (a) iron predominates, by weight, over each of the other contained elements;
- (b) the carbon content is 2 percent or less, by weight; and
- (c) none of the elements listed below exceeds the quantity, by weight, as indicated:
  - (i) 1.80 percent of manganese;
  - (ii) 2.25 percent of silicon;
  - (iii) 1.00 percent of copper;
  - (iv) 0.50 percent of aluminum;
  - (v) 1.25 percent of chromium;
  - (vi) 0.30 percent of cobalt;
  - (vii) 0.40 percent of lead;
  - (viii) 1.25 percent of nickel;
  - (ix) 0.30 percent of tungsten;
  - (x) 0.15 percent of molybdenum;
  - (xi) 0.10 percent of niobium;
  - (xii) 0.41 percent of titanium;
  - (xiii) 0.15 percent of vanadium; or
  - (xiv) 0.15 percent of zirconium.

Covered products are generally made to standard O.D. and wall thickness combinations. Pipe multi-stenciled to a standard and/or structural specification and to other specifications, such as American Petroleum Institute (API) API-5L specification, may also be covered by the scope of these investigations. In particular, such multi-stenciled merchandise is covered when it meets the physical description set forth above, and also has one or more of the following characteristics: Is 32 feet in length or less; is less than 2.0 inches (50 mm) in outside diameter; has a galvanized and/or painted (e.g., polyester coated) surface finish; or has a threaded and/or coupled end finish.

Standard pipe is ordinarily made to ASTM specifications A53, A135, and A795, but can also be made to other specifications. Structural pipe is made primarily to ASTM specifications A252 and A500. Standard and structural pipe may also be produced to proprietary specifications rather than to industry specifications.

Sprinkler pipe is designed for sprinkler fire suppression systems and may be made to industry specifications such as ASTM A53 or to proprietary specifications.

Fence tubing is included in the scope regardless of certification to a specification listed in the exclusions below, and can also be made to the ASTM A513 specification. Products that meet the physical description set forth above but are made to the following nominal outside diameter and wall thickness combinations, which are recognized by the industry as typical for fence tubing, are included despite being certified to ASTM mechanical tubing specifications:

O.D. in inches (nominal)	Wall thickness in inches (nominal)	Gauge
1.315	0.035	20
1.315	0.047	18
1.315	0.055	17
1.315	0.065	16
1.315	0.072	15
1.315	0.083	14
1.315	0.095	13
1.660	0.055	17
1.660	0.065	16
1.660	0.083	14
1.660	0.095	13
1.660	0.109	12
1.900	0.047	18
1.900	0.055	17
1.900	0.065	16
1.900	0.072	15
1.900	0.095	13
1.900	0.109	12
2.375	0.047	18
2.375	0.055	17
2.375	0.065	16
2.375	0.072	15
2.375	0.095	13
2.375	0.109	12
2.375	0.120	11
2.875	0.109	12
2.875	0.165	8
3.500	0.109	12
3.500	0.165	8
4.000	0.148	9
4.000	0.165	8
4.500	0.203	7

The scope of this investigation does not include:

- (a) pipe suitable for use in boilers, superheaters, heat exchangers, refining furnaces and feedwater heaters, whether or not cold drawn, which are defined by standards such as ASTM A178 or ASTM A192;
- (b) finished electrical conduit, *i.e.*, Electrical Rigid Steel Conduit (also known as Electrical Rigid Metal Conduit and Electrical Rigid Metal Steel Conduit), Finished Electrical Metallic Tubing, and Electrical Intermediate Metal Conduit, which are defined by specifications such as American National Standard (ANSI) C80.1-2005, ANSI C80.3-2005, or ANSI C80.6-2005, and Underwriters Laboratories Inc. (UL) UL-6, UL-797, or UL-1242;
- (c) finished scaffolding, *i.e.*, component parts of final, finished scaffolding that enter the United States unassembled as a "kit." A kit is understood to mean a packaged combination of component parts that contains, at the time of importation, all of the necessary component parts to fully assemble final, finished scaffolding;
- (d) tube and pipe hollows for redrawing;
- (e) oil country tubular goods produced to API specifications;
- (f) line pipe produced to only API specifications, such as API 5L, and not multi-stenciled; and
- (g) mechanical tubing, whether or not cold-drawn, other than what is included in the above paragraphs.

The products subject to this investigation are currently classifiable in Harmonized

Tariff Schedule of the United States (HTSUS) statistical reporting numbers 7306.19.1010, 7306.19.1050, 7306.19.5110, 7306.19.5150, 7306.30.1000, 7306.30.5015, 7306.30.5020, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085, 7306.30.5090, 7306.50.1000, 7306.50.5030, 7306.50.5050, and 7306.50.5070. The HTSUS subheadings above are provided for convenience and U.S. Customs purposes only. The written description of the scope of the investigation is dispositive.

**Appendix II**

**List of Topics Discussed in the Issues and Decision Memorandum**

- I. Summary
- II. Background
- III. Scope of the Investigation
- IV. Margin Calculations
- V. Discussion of the Issues
  - 1. Management Fees
  - 2. Weight Basis for Ajmal Steel
  - 3. Ajmal Steel's Rebate Adjustment
  - 4. Depreciation on Revalued Assets for Ajmal Steel
  - 5. General and Administrative and Financial Expenses for Ajmal Steel
  - 6. Revision of Ajmal Steel's POI Depreciation Analysis
  - 7. Universal's Level of Trade Adjustment
  - 8. Credit Expenses for one of Universal's U.S. Customers
  - 9. U.S. Packing Costs for Universal
  - 10. Sales to Universal's Affiliated Reseller Al Zaher Building Materials LLC
- VI. Recommendation

[FR Doc. 2016-26107 Filed 10-27-16; 8:45 am]

**BILLING CODE 3510-DS-P**

**DEPARTMENT OF COMMERCE**

**International Trade Administration**

**[A-570-032]**

**Certain Iron Mechanical Transfer Drive Components From the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value**

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the "Department") determines that certain iron mechanical transfer drive components ("IMTDC") from the People's Republic of China ("PRC") are being, or are likely to be, sold in the United States at less than fair value ("LTFV"). The period of investigation ("POI") is April 1, 2015 through September 30, 2015. The final weighted-average dumping margins of sales at LTFV are listed in the "Final Determination Dumping Margins" section of this notice.

**DATES:** Effective October 28, 2016.

**FOR FURTHER INFORMATION CONTACT:** Krishna Hill or Jonathan Hill, 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) 482-4037 or (202) 482-3518, respectively.

#### SUPPLEMENTARY INFORMATION:

##### Background

On June 8, 2016, the Department published in the **Federal Register** its preliminary affirmative determination in the LTFV investigation of IMTDC from the PRC.<sup>1</sup>

A summary of the events that occurred since the Department published the *Preliminary Determination*, as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum.<sup>2</sup> 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 <http://access.trade.gov>, and is available to all parties in the Central Records Unit, Room B8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <http://enforcement.trade.gov/frn/>. The signed Issues and Decision Memorandum and the electronic version are identical in content.

##### Period of Investigation

The period of investigation ("POI") is April 1, 2015, through September 30, 2015.

##### Scope of the Investigation

The products covered by this investigation are iron mechanical transfer drive components. These products are properly classified under Harmonized Tariff Schedule of the

United States ("HTSUS") subheadings 8483.30.8090, 8483.50.6000, 8483.50.9040, 8483.50.9080, 8483.90.3000, 8483.90.8080. Covered merchandise may also enter under the following HTSUS subheadings: 7325.10.0080, 7325.99.1000, 7326.19.0010, 7326.19.0080, 8431.31.0040, 8431.31.0060, 8431.39.0010, 8431.39.0050, 8431.39.0070, 8431.39.0080, and 8483.50.4000. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive. For a complete description of the scope of the investigation, see Appendix I to this notice.

##### Scope Comments

Since the *Preliminary Determination*, Petitioner, as well as interested parties Caterpillar Inc., Carrier Corporation, Dahua Machine Manufacturing Co. Ltd., General Motors Corporation, Kohler Co., Mercury Marine, Otis Elevator Company, Speed Solutions International Inc., ZF Services, LLC, and Vibracoustic North America LP, commented on the scope of this investigation as well as the companion IMTDCs LTFV investigation from the Canada and IMTDCs countervailing duty investigation from the PRC. The Department reviewed these comments and has incorporated into the scope of these investigations Petitioner's exclusion for certain flywheels with a permanently attached outer ring gear and for certain parts of torsional vibration dampers. For further discussion, see the "Final Scope Decision Memorandum."<sup>3</sup> The scope in Appendix I reflects the final modified scope language.

##### Analysis of Comments Received

All issues raised in the case and rebuttal briefs that were submitted by parties in this investigation are addressed in either the Final Determination Scope Decision Memorandum or the Issues and Decision Memorandum accompanying this notice, which is hereby adopted by this notice. A list of the issues

<sup>3</sup> See Memorandum from Abdelali Elouaradia, Director, Office IV, Antidumping and Countervailing Duty Operations, to Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, regarding "Antidumping Duty Investigations of Certain Iron Mechanical Transfer Drive Components from Canada and the People's Republic of China and Countervailing Duty Investigation of Certain Iron Mechanical Transfer Drive Components from the People's Republic of China: Scope Decision Memorandum for the Final Determinations," ("Final Scope Decision Memorandum") dated concurrently with this final determination.

addressed in the Issues and Decision Memorandum is attached to this notice at Appendix II.

##### Verification

As provided in section 782(i) of the Tariff Act of 1930, as amended ("the Act"), in June 2016, we verified the sales and factors of production information submitted by Powermach Import & Export Co., Ltd. ("Powermach"),<sup>4</sup> the sole participating individually examined respondent. We used standard verification procedures, including an examination of relevant accounting and production records, and original source documents provided by Powermach.<sup>5</sup>

##### Separate Rates

In the *Preliminary Determination*, the Department granted separate-rate status to all of the companies which provided separate rates information, except NOK (Wuxi) Vibration Control China Co. Ltd. ("NVCC"), which withdrew from participation as a mandatory respondent in this investigation, and Baldor Electric Canada ("Baldor") and Yueqing Bethel Shaft Collar Manufacturing Co., Ltd. ("Yueqing Bethel"), which failed to respond to the Department's request for supplemental information. In this final determination, the Department has continued to treat these three companies as part of the PRC-wide entity and is also treating Zhejiang Dongxing Auto Parts Co., Ltd. ("Dongxing") as part of the PRC-wide entity. For a full discussion of the Department's separate rates determinations with respect to Baldor, Yueqing Bethel, and Dongxing (no parties commented on the Department's separate rate determination with respect to NVCC)

<sup>4</sup> We have continued to treat Powermach Import & Export Co., Ltd., Sichuan Dawn Precision Technology Co., Ltd., Sichuan Dawn Foundry Co., Ltd., and Powermach Co., Ltd. as a single entity based upon consideration of the factors in 19 CFR 351.401(f). See Memorandum from Krishna Hill, International Trade Analyst, AD/CVD Operations, Office IV through Howard Smith, Program Manager, AD/CVD Operations, Office IV to Abdelali Elouaradia, Office Director, AD/CVD Operations, Office IV, regarding "Certain Iron Mechanical Transfer Drive Components from The People's Republic of China: Preliminary Affiliation and Collapsing Memorandum" (May 31, 2016).

<sup>5</sup> See Memorandum from Krishna Hill, International Trade Compliance Analyst, Office IV, Enforcement and Compliance and Jonathan Hill, International Trade Compliance Analyst, Office IV, Enforcement and Compliance through Howard Smith, Program Manager, Office IV Enforcement and Compliance to The File "Verification Report of the Sales and Factors Responses of Powermach Import & Export Co., Ltd. (Sichuan), Sichuan Dawn Precision Technology Co., Ltd., Sichuan Dawn Foundry Co., Ltd., and Powermach Co., Ltd. in the Antidumping Duty Investigation of Certain Iron Mechanical Transfer Drive Components from the People's Republic of China," dated August 3, 2016.

<sup>1</sup> See *Certain Iron Mechanical Transfer Drive Components From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 81 FR 36876 (June 8, 2016) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum.

<sup>2</sup> See Memorandum from Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald Lorentzen, Acting Assistant Secretary for Enforcement and Compliance, "Antidumping Duty Investigation of Certain Iron Mechanical Transfer Drive Components from the People's Republic of China: Issues and Decision Memorandum for the Final Determination of Sales at Less-Than-Fair-Value," ("Issues and Decision Memorandum"), dated concurrently with this determination and hereby adopted by this notice.

see the Issues and Decision Memorandum.

**Changes to the Dumping Margin Calculations Since the Preliminary Determination**

Based on the Department’s analysis of the comments received and findings at verification, we made certain changes to our dumping margin calculations. For a discussion of these changes, see the Issues and Decision Memorandum.

**Dumping Margins for Non-Individually Examined Respondents**

Under section 735(c)(5)(A) of the Act, the estimated rate for all companies that have not been individually examined is normally equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually examined, excluding any zero and *de minimis* dumping margins, and any dumping margins determined entirely on the basis of facts available. In this final determination, we calculated a weighted-average dumping margin for Powermach (the only cooperating mandatory respondent) which is not

zero, *de minimis*, or based entirely on facts available. Accordingly, we assigned Powermach’s weighted-average dumping margin to non-individually examined PRC exporters qualifying for a separate rate.

**PRC-Wide Rate**

In our *Preliminary Determination*, we found that the PRC-wide entity, which includes certain PRC exporters and/or producers that did not respond to the Department’s requests for information, failed to provide necessary information, failed to provide information in a timely manner, and significantly impeded this proceeding by not submitting the requested information. We also find that they failed to cooperate. As a result, we preliminarily determined to calculate the PRC-wide dumping margin on the basis of adverse facts available (“AFA”) pursuant to section 776(b) of the Act. We compared the petition dumping margins to the dumping margins that we calculated for Powermach, the participating individually examined respondent, in order to determine the probative value of the dumping margins

in the petition for use as AFA. We continue to find that the highest petition dumping margin, 401.68 percent, is reliable and relevant because it is within the range of the transaction-specific dumping margins on the record for Powermach. Therefore, we assigned this dumping margin (*i.e.*, 401.68 percent) to the PRC-wide entity.

**Combination Rates**

In the *Initiation Notice*, the Department stated that it would calculate combination rates for the respondents that are eligible for a separate rate in this investigation.<sup>6</sup> Policy Bulletin 05.1 describes this practice.<sup>7</sup>

**Final Determination Dumping Margins**

For this final determination, the Department determines that IMTDC are being or likely to be sold in the United States at LTFV, as provided in section 735 of the Act. The Department determines that the following weighted-average dumping margins exist during the period April 1, 2015, through September 30, 2015:

Exporter	Producer	Weighted-average dumping margin (percent)
Powermach Import & Export Co., Ltd. (Sichuan)/Sichuan Dawn Precision Technology Co., Ltd./Sichuan Dawn Foundry Co., Ltd./Powermach Co., Ltd.	Powermach Import & Export Co., Ltd. (Sichuan)/Sichuan Dawn Precision Technology Co., Ltd./Sichuan Dawn Foundry Co., Ltd./Powermach Co., Ltd.	13.64
Fuqing Jiacheng Trading Corporation Limited	Fuzhou Min Yue Mechanical & Electrical Co., Ltd	13.64
Haiyang Jingweida Gearing Co., Ltd	Haiyang Jingweida Gearing Co., Ltd	13.64
Hangzhou Powertrans Co., Ltd	Shijiazhuang CAPT Power Transmission Co., Ltd	13.64
Hangzhou Powertrans Co., Ltd	Shanghai CPT Machinery Co., Ltd	13.64
Hangzhou Powertrans Co., Ltd	Yueqing Bethel Shaft Collar Manufacturing Co., Ltd	13.64
Hangzhou Powertrans Co., Ltd	Kezheng (Fuzhou) Mechanical & Electrical Manufacture Co., Ltd.	13.64
Hangzhou Powertrans Co., Ltd	Handan Hengfa Transmission Co., Ltd	13.64
Hangzhou Powertrans Co., Ltd	Shijiazhuang Lihua Mechanical Manufacturing Co., Ltd	13.64
Hangzhou Powertrans Co., Ltd	Xingtai Shengjia Machinery and Equipment Factory	13.64
Hangzhou Powertrans Co., Ltd	Shanghai Keli Machinery Co., Ltd	13.64
Hangzhou Powertrans Co., Ltd	Jiangsu Zhengya Technology Co., Ltd	13.64
Hangzhou Powertrans Co., Ltd	Taizhou Feiyang Metal Spinning Co., Ltd	13.64
Hangzhou Powertrans Co., Ltd	Taizhou Pengxun Machinery Manufacturing Co., Ltd	13.64
Hangzhou Powertrans Co., Ltd	Guangde Ronghua Machinery Manufacturing Co., Ltd	13.64
Hangzhou Powertrans Co., Ltd	Qiuxian Hengxin Machinery Co., Ltd	13.64
Hangzhou Powertrans Co., Ltd	Reach Machinery Enterprise	13.64
Hangzhou Powertrans Co., Ltd	Chengdu Novo Machinery Co., Ltd	13.64
Hangzhou Powertrans Co., Ltd	Chengdu Leno Machinery Co., Ltd	13.64
Shijiazhuang CAPT Power Transmission Co., Ltd	Shijiazhuang CAPT Power Transmission Co., Ltd	13.64
Xinguang Technology Co. Ltd of Sichuan Province	Sichuan Dawn Precision Technology Co., Ltd	13.64
PRC-Wide Entity		401.68

**Continuation of Suspension of Liquidation**

Pursuant to section 735(c)(1)(B) of the Act, the Department will instruct U.S.

Customs and Border Protection (“CBP”) to continue to suspend liquidation of all entries of IMTDC from the PRC, which were entered, or withdrawn from

warehouse, for consumption on or after June 8, 2016, the date of publication in the **Federal Register** of the affirmative *Preliminary Determination*. Further,

<sup>6</sup> See *Initiation Notice*, 81 FR at 9438–39.  
<sup>7</sup> See Enforcement and Compliance’s Policy Bulletin No. 05.1, regarding, “Separate-Rates

Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries,” dated April 5, 2005 (Policy

Bulletin 05.1), available on the Department’s Web site at <http://enforcement.trade.gov/policy/bull05-1.pdf>.

pursuant to section 735(c)(1)(B)(ii) of the Act, the Department will instruct CBP to require a cash deposit equal to the amount by which the normal value exceeds U.S. price, adjusted where appropriate for export subsidies and estimated domestic subsidy pass-through,<sup>8</sup> as follows: (1) For the exporter/producer combinations listed in the table above, the cash deposit rate is the weighted-average dumping margin listed for that combination in the table; (2) for all combinations of PRC exporters/producers of merchandise under consideration not listed in the table above, the cash deposit rate is the weighted average dumping margin listed for the PRC-wide entity in the table above; and (3) for all non-PRC exporters of merchandise under consideration not listed in the table above, the cash deposit rate is the cash deposit rate applicable to the PRC exporter/producer combination that supplied that non-PRC exporter. The suspension of liquidation instructions will remain in effect until further notice.

In a LTFV investigation with a companion countervailing duty (“CVD”) investigation, we normally adjust antidumping duty cash deposit rates by the amount of export subsidies, where appropriate. In the companion CVD investigation, we found that Powermach did not receive export subsidies. The countervailing duty rate for all-others companies in the CVD case is based on Powermach’s countervailing duty rate, and thus all-others companies were not assigned an export subsidy rate. Therefore, no offset to Powermach’s or the separate rate entities’ antidumping duty cash deposit rates for export subsidies is necessary. Additionally, we likewise are not adjusting the antidumping duty cash deposit rate applicable to the PRC-wide entity for export subsidies.

Pursuant to 777A(f) of the Act, we are not adjusting the antidumping duty cash deposit rates for estimated domestic subsidy pass-through. Based on the data on the record of this investigation, the Department continues to find that there was not a general decrease in the U.S. average import price during the relevant period. Thus, the Department continues to find that the requirement under section 777A(f)(1)(B) of the Act has not been met, and has not made an adjustment to the antidumping duty cash deposit rates under section 777A(f) of the Act.

<sup>8</sup> See sections 772(c)(1)(C) and 777A(f) of the Act, respectively.

## Disclosure

We intend to disclose to parties in this proceeding the calculations performed for this final determination within five days of the date of public announcement of our final determination, in accordance with 19 CFR 351.224(b).

## International Trade Commission (“ITC”) Notification

In accordance with section 735(d) of the Act, we will notify the ITC of our final affirmative determination of sales at LTFV. Because the final determination in this proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of IMTDC from the PRC no later than 45 days after our final determination. If the ITC determines that such injury does not exist, this proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess, upon further instruction by the Department, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

## Notification Regarding Administrative Protective Orders

This notice will serve as a reminder to the parties subject to administrative protective order (“APO”) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing this determination in accordance with sections 735(d) and 777(i)(1) of the Act and 19 CFR 351.210(c).

Dated: October 21, 2016.

**Ronald K. Lorentzen,**  
*Acting Assistant Secretary for Enforcement and Compliance.*

## Appendix I

### Scope of the Investigation

The products covered by this investigation are iron mechanical transfer drive components, whether finished or unfinished (*i.e.*, blanks or castings). Subject iron

mechanical transfer drive components are in the form of wheels or cylinders with a center bore hole that may have one or more grooves or teeth in their outer circumference that guide or mesh with a flat or ribbed belt or like device and are often referred to as sheaves, pulleys, flywheels, flat pulleys, idlers, conveyer pulleys, synchronous sheaves, and timing pulleys. The products covered by this investigation also include bushings, which are iron mechanical transfer drive components in the form of a cylinder and which fit into the bore holes of other mechanical transfer drive components to lock them into drive shafts by means of elements such as teeth, bolts, or screws.

Iron mechanical transfer drive components subject to this investigation are those not less than 4.00 inches (101 mm) in the maximum nominal outer diameter.

Unfinished iron mechanical transfer drive components (*i.e.*, blanks or castings) possess the approximate shape of the finished iron mechanical transfer drive component and have not yet been machined to final specification after the initial casting, forging or like operations. These machining processes may include cutting, punching, notching, boring, threading, mitering, or chamfering.

Subject merchandise includes iron mechanical transfer drive components as defined above that have been finished or machined in a third country, including but not limited to finishing/machining processes such as cutting, punching, notching, boring, threading, mitering, or chamfering, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the iron mechanical transfer drive components.

Subject iron mechanical transfer drive components are covered by the scope of the investigation regardless of width, design, or iron type (*e.g.*, gray, white, or ductile iron). Subject iron mechanical transfer drive components are covered by the scope of the investigation regardless of whether they have non-iron attachments or parts and regardless of whether they are entered with other mechanical transfer drive components or as part of a mechanical transfer drive assembly (which typically includes one or more of the iron mechanical transfer drive components identified above, and which may also include other parts such as a belt, coupling and/or shaft). When entered as a mechanical transfer drive assembly, only the iron components that meet the physical description of covered merchandise are covered merchandise, not the other components in the mechanical transfer drive assembly (*e.g.*, belt, coupling, shaft). However, the scope excludes flywheels with a ring gear permanently attached onto the outer diameter. A ring gear is a steel ring with convex external teeth cut or machined into the outer diameter, and where the diameter of the ring exceeds 200 mm and doesn’t exceed 2,244.3 mm.

For purposes of this investigation, a covered product is of “iron” where the article has a carbon content of 1.7 percent by weight or above, regardless of the presence and amount of additional alloying elements.

Excluded from the scope are finished torsional vibration dampers (TVDs). A

finished TVD is an engine component composed of three separate components: an inner ring, a rubber ring and an outer ring. The inner ring is an iron wheel or cylinder with a bore hole to fit a crank shaft which forms a seal to prevent leakage of oil from the engine. The rubber ring is a dampening medium between the inner and outer rings that effectively reduces the torsional vibration. The outer ring, which may be made of materials other than iron, may or may not have grooves in its outer circumference. To constitute a finished excluded TVD, the product must be composed of each of the three parts identified above and the three parts must be permanently affixed to one another such that both the inner ring and the outer ring are permanently affixed to the rubber ring. A finished TVD is excluded only if it meets the physical description provided above; merchandise that otherwise meets the description of the scope and does not satisfy the physical description of excluded finished TVDs above is still covered by the scope of the investigation regardless of end use or identification as a TVD.

Also excluded from the scope are certain TVD inner rings. To constitute an excluded TVD inner ring, the product must have each of the following characteristics: (1) A single continuous curve forming a protrusion or indentation on outer surface, also known as a sine lock, with a height or depth not less than 1.5 millimeters and not exceeding 4.0 millimeters and with a width of at least 10 millimeters as measured across the sine lock from one edge of the curve to the other;<sup>9</sup> (2) a face width of the outer diameter of greater than or equal to 20 millimeters but less than or equal to 80 millimeters; (3) an outside diameter greater than or equal to 101 millimeters but less than or equal to 300 millimeters; and (4) a weight not exceeding 7 kilograms. A TVD inner ring is excluded only if it meets the physical description provided above; merchandise that otherwise meets the description of the scope and does not satisfy the physical description of excluded TVD inner rings is still covered by the scope of this investigation regardless of end use or identification as a TVD inner ring. The scope also excludes light-duty, fixed-pitch, non-synchronous sheaves (“excludable LDFPN sheaves”) with each of the following

characteristics: made from grey iron designated as ASTM (North American specification) Grade 30 or lower, GB/T (Chinese specification) Grade HT200 or lower, DIN (German specification) GG 20 or lower, or EN (European specification) EN-GJL 200 or lower; having no more than two grooves; having a maximum face width of no more than 1.75 inches, where the face width is the width of the part at its outside diameter; having a maximum outside diameter of not more than 18.75 inches; and having no teeth on the outside or datum diameter. Excludable LDFPN sheaves must also either have a maximum straight bore size of 1.6875 inches with a maximum hub diameter of 2.875 inches; or else have a tapered bore measuring 1.625 inches at the large end, a maximum hub diameter of 3.50 inches, a length through tapered bore of 1.0 inches, exactly two tapped holes that are 180 degrees apart, and a 2.0- inch bolt circle on the face of the hub. Excludable LDFPN sheaves more than 6.75 inches in outside diameter must also have an arm or spoke construction.<sup>10</sup> Further, excludable LDFPN sheaves must have a groove profile as indicated in the table below:

Size (belt profile)	Outside diameter	Top width range of each groove (inches)	Maximum height (inches)	Angle (°)
MA/AK (A, 3L, 4L) .....	≤5.45 in .....	0.484–0.499	0.531	34
MA/AK (A, 3L, 4L) .....	>5.45 in. but ≤18.75 in .....	0.499–0.509	0.531	38
MB/BK (A, B, 4L, 5L) .....	≤7.40 in .....	0.607–0.618	0.632	34
MB/BK (A, B, 4L, 5L) .....	>7.40 in. but ≤18.75 in .....	0.620–0.631	0.635	38

In addition to the above characteristics, excludable LDFPN sheaves must also have a maximum weight (pounds-per-piece) as follows: for excludable LDFPN sheaves with one groove and an outside diameter of greater than 4.0 inches but less than or equal to 8.0 inches, the maximum weight is 4.7 pounds; for excludable LDFPN sheaves with two grooves and an outside diameter of greater than 4.0 inches but less than or equal to 8.0 inches, the maximum weight is 8.5 pounds; for excludable LDFPN sheaves with one groove and an outside diameter of greater than 8.0 inches but less than or equal to 12.0 inches, the maximum weight is 8.5 pounds; for excludable LDFPN sheaves with two grooves and an outside diameter of greater than 8.0 inches but less than or equal to 12.0 inches, the maximum weight is 15.0 pounds; for excludable LDFPN sheaves with one groove and an outside diameter of greater than 12.0 inches but less than or equal to 15.0 inches, the maximum weight is 13.3 pounds; for excludable LDFPN sheaves with two grooves and an outside diameter of greater than 12.0 inches but less than or equal to 15.0 inches, the maximum weight is 17.5 pounds; for excludable LDFPN sheaves with one groove and an outside diameter of greater than 15.0 inches but less than or

equal to 18.75 inches, the maximum weight is 16.5 pounds; and for excludable LDFPN sheaves with two grooves and an outside diameter of greater than 15.0 inches but less than or equal to 18.75 inches, the maximum weight is 26.5 pounds. The scope also excludes light-duty, variable-pitch, non-synchronous sheaves with each of the following characteristics: made from grey iron designated as ASTM (North American specification) Grade 30 or lower, GB/T (Chinese specification) Grade HT200 or lower, DIN (German specification) GG 20 or lower, or EN (European specification) EN-GJL 200 or lower; having no more than 2 grooves; having a maximum overall width of less than 2.25 inches with a single groove, or of 3.25 inches or less with two grooves; having a maximum outside diameter of not more than 7.5 inches; having a maximum bore size of 1.625 inches; having either one or two identical, internally-threaded (*i.e.*, with threads on the inside diameter), adjustable (rotating) flange(s) on an externally-threaded hub (*i.e.*, with threads on the outside diameter) that enable(s) the width (opening) of the groove to be changed; and having no teeth on the outside or datum diameter.

The scope also excludes certain IMTDC bushings. An IMTDC bushing is excluded only if it has a tapered angle of greater than or equal to 10 degrees, where the angle is measured between one outside tapered surface and the directly opposing outside tapered surface. The merchandise covered by this investigation is currently classifiable under Harmonized Tariff Schedule of the United States (“HTSUS”) subheadings 8483.30.8090, 8483.50.6000, 8483.50.9040, 8483.50.9080, 8483.90.3000, 8483.90.8080. Covered merchandise may also enter under the following HTSUS subheadings: 7325.10.0080, 7325.99.1000, 7326.19.0010, 7326.19.0080, 8431.31.0040, 8431.31.0060, 8431.39.0010, 8431.39.0050, 8431.39.0070, 8431.39.0080, and 8483.50.4000. These HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the investigation is dispositive.

**Appendix II**  
**List of Topics in the Issues and Decision Memorandum**  
 I. Summary  
 II. Background

<sup>9</sup> The edges of the sine lock curve are defined as the points where the surface of the inner ring is no longer parallel to the plane formed by the inner surface of the bore hole that attaches the ring to the crankshaft.

<sup>10</sup> An arm or spoke construction is where arms or spokes (typically 3 to 6) connect the outside diameter of the sheave with the hub of the sheave. This is in contrast to a block construction (in which the material between the hub and the outside

diameter is solid with a uniform thickness that is the same thickness as the hub of the sheave) or a web construction (in which the material between the hub and the outside diameter is solid but is thinner than at the hub of the sheave).

- III. Scope Comments  
 IV. Scope of the Investigation  
 V. Discussion of the Issues:  
 Comment 1: Treatment of Input  
 Comment 2: Per-Unit Consumption  
 Comment 3: Generated Iron Scrap  
 Comment 4: By-Product Offset  
 Comment 5: Underreported Consumption  
 Comment 6: Mold Workshop Labor  
 Comment 7: Separate Rate Status for Baldor Electric Company Canada  
 Comment 8: Separate Rate Status for Zhejiang Damon Industrial Equipment Co., Ltd.  
 Comment 9: Separate Rate Status for Zhejiang Dongxing Auto Parts Co., Ltd.  
 Comment 10: Separate Rate Status for Yueqing Bethel Shaft Collar Manufacturing Co., Ltd.  
 Comment 11: Surrogate Value for Labor  
 Comment 12: Surrogate Value for Baking Coal  
 Comment 13: Surrogate Value for Anti-tarnish Paper  
 Comment 14: Surrogate Value for Spheroidizing Agent  
 Comment 15: Surrogate Value for Rail Freight  
 Comment 16: Selection of Financial Statements  
 Comment 17: SG&A Expense Calculation in Thai Ductile Industry Co. Ltd.'s Financial Statements  
 VI. Recommendation

[FR Doc. 2016-26104 Filed 10-27-16; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[C-570-031]

#### Countervailing Duty Investigation of Certain Iron Mechanical Transfer Drive Components From the People's Republic of China: Final Affirmative Determination

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the "Department") determines that countervailable subsidies are being provided to producers and exporters of certain iron mechanical transfer drive components ("IMTDCs") from the People's Republic of China (the "PRC"). For information on the estimated subsidy rates, see the "Final Determination and Suspension of Liquidation" section of this notice.

**DATES:** Effective October 28, 2016.

**FOR FURTHER INFORMATION CONTACT:** Robert Galantucci, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone (202) 482-2923.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Department published the *Preliminary Determination* on April 11, 2016.<sup>1</sup> A summary of the events that occurred since the Department published the *Preliminary Determination*, as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum<sup>2</sup> issued concurrently with 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 <http://access.trade.gov>, and is available to all parties in the Central Records Unit, Room B8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <http://enforcement.trade.gov/fn/>. The signed Issues and Decision Memorandum and the electronic version are identical in content.

##### Period of Investigation

The period of investigation for which we are measuring subsidies is January 1, 2014 through December 31, 2014.

##### Scope Comments

The Department set aside a period of time for parties to address scope issues.<sup>3</sup> For a summary of the product coverage comments submitted to the record of this final determination, and the Department's discussion and analysis of all comments timely received, see the Final Scope Decision Memorandum.<sup>4</sup>

<sup>1</sup> See *Countervailing Duty Investigation of Certain Iron Mechanical Transfer Drive Components From the People's Republic of China: Preliminary Affirmative Determination and Alignment of Final Determination With Final Antidumping Duty Determination*, 81 FR 21316 (April 11, 2016) ("*Preliminary Determination*") and accompanying Issues and Decision Memorandum ("*Preliminary Decision Memorandum*").

<sup>2</sup> See Memorandum, "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Iron Mechanical Transfer Drive Components from the People's Republic of China," dated concurrently with this determination and hereby adopted by this notice ("*Issues and Decision Memorandum*").

<sup>3</sup> See Memorandum, "Certain Iron Mechanical Transfer Drive Components from Canada and the People's Republic of China: Deadline for Scope Comments," July 19, 2016.

<sup>4</sup> See Memorandum, "Antidumping Duty Investigations of Certain Iron Mechanical Transfer Drive Components from Canada and the People's Republic of China and Countervailing Duty Investigation of Certain Iron Mechanical Transfer Drive Components from the People's Republic of China: Scope Decision Memorandum for the Final

The Final Scope Decision Memorandum is incorporated by, and hereby adopted by, this notice.

##### Scope of the Investigation

The products covered by this investigation are IMTDCs from the PRC. For a complete description of the scope of this investigation, see the "Scope of the Investigation," in Appendix II of this notice.

##### Analysis of Subsidy Programs and Comments Received

The subsidy programs under investigation, and the issues raised in the case and rebuttal briefs submitted by the parties, are discussed in the Issues and Decision Memorandum. A list of the issues that parties raised, and to which we responded in the Issues and Decision Memorandum, is attached to this notice at Appendix I.

##### Use of Adverse Facts Available ("AFA")

In making its findings, the Department relied, in part, on facts available. For mandatory respondent NOK (Wuxi) Vibration Control China Co. Ltd. ("NOK Wuxi"), we are basing the countervailing duty ("CVD") rate on facts otherwise available, pursuant to sections 776(a)(2)(C) and (D) of the Tariff Act of 1930, as amended (the "Act"). Further, because NOK Wuxi did not cooperate to the best of its ability in this investigation, we determine that an adverse inference is warranted, pursuant to section 776(b) of the Act. The Department has applied a total AFA rate to NOK Wuxi. Similarly, the Department has applied a total AFA rate to 30 companies that failed to respond to the Department's quantity and value questionnaire.<sup>5</sup>

Additionally, in several instances the Department has applied partial AFA to calculate subsidy rates for the other mandatory respondent Powermach Import & Export Co., Ltd. (Sichuan) ("Powermach I&E"). For further information, see the section titled "Use of Facts Otherwise Available and Adverse Inferences," in the Issues and Decision Memorandum.

##### Changes Since the Preliminary Determination

Based on our review and analysis of the comments received from parties,

Determinations," ("*Final Scope Decision Memorandum*") dated concurrently with this final determination; see also Memorandum, "Certain Iron Mechanical Transfer Drive Components from Canada and the People's Republic of China: Scope Comments Decision Memorandum for the Preliminary Determinations," dated May 31, 2016.

<sup>5</sup> See *Preliminary Determination* at 81 FR 21317-21318.

and minor corrections presented at verification, we made certain changes to Powermach I&E's subsidy rate calculations since the *Preliminary Determination*. For a discussion of these changes, see the Issues and Decision Memorandum and the Final Analysis Memorandum.<sup>6</sup>

**Final Determination and Suspension of Liquidation**

In accordance with section 705(c)(1)(B)(i)(I) of the Act, we established rates for Powermach I&E (the only individually investigated exporter/producer of the subject merchandise that participated in this

investigation), and for NOK Wuxi (which was assigned a rate based on AFA).

In accordance with sections 705(c)(1)(B)(i)(I) and 705(c)(5)(A)(i) of the Act, for companies not individually investigated, we apply an "all-others" rate. The all-others rate is normally calculated by weight averaging the subsidy rates of the individual companies selected for individual examination with those companies' export sales of the subject merchandise to the United States, excluding any zero and *de minimis* rates calculated for the exporters and producers individually investigated, and any rates determined

entirely under section 776 of the Act. Consistent with section 705(c)(5)(A)(i) of the Act, we therefore have excluded the AFA rate assigned to NOK Wuxi from our calculation of the all-others rate.

Because the only individually calculated rate that is not zero, *de minimis*, or based on facts otherwise available is the rate calculated for Powermach I&E, in accordance with section 705(c)(5)(A)(i) of the Act, the rate calculated for Powermach I&E is assigned as the all-others rate. The estimated countervailable subsidy rates are summarized in the table below.

Company	Subsidy rate (percent)
Powermach Import & Export Co., Ltd. (Sichuan), Sichuan Dawn Precision Technology Co., Ltd., Sichuan Dawn Foundry Co. Ltd., and Powermach Machinery Co., Ltd. ....	33.26
NOK (Wuxi) Vibration Control China Co., Ltd., and Wuxi NOK—Freudenberg Oil Seal Co., Ltd.* .....	163.46
Changzhou Baoxin Metallurgy Equipment Manufacturing Co. Ltd.* .....	163.46
Changzhou Changjiang Gear Co., Ltd.* .....	163.46
Changzhou Gangyou Lifting Equipment Co., Ltd.* .....	163.46
Changzhou Juling Foundry Co., Ltd.* .....	163.46
Changzhou Liangjiu Mechanical Manufacturing Co Ltd.* .....	163.46
Changzhou New Century Sprocket Group Company* .....	163.46
Changzhou Xiangjin Precision Machinery Co., Ltd.* .....	163.46
FIT Bearings* .....	163.46
Fuzhou Minyue Mechanical & Electrical Co., Ltd.* .....	163.46
Hangzhou Chinabase Machinery Co., Ltd.* .....	163.46
Hangzhou Ever Power Transmission Group* .....	163.46
Hangzhou Vision Chain Transmission Co., Ltd.* .....	163.46
Hangzhou Xingda Machinery Co., Ltd.* .....	163.46
Henan Xinda International Trading Co., Ltd.* .....	163.46
Henan Zhiyuan Machinery Sprocket Co. Ltd.* .....	163.46
Jiangsu Songlin Automobile Parts Co., Ltd.* .....	163.46
Martin Sprocket & Gear (Changzhou) Co., Ltd.* .....	163.46
Ningbo Blue Machines Co., Ltd.* .....	163.46
Ningbo Fulong Synchronous Belt Co., Ltd.* .....	163.46
Ningbo Royu Machinery Co., Ltd.* .....	163.46
Praxair Surface Technologies* .....	163.46
Qingdao Dazheng Jin Hao International Trade Co., Ltd.* .....	163.46
Quanzhou Licheng Xintang Automobile Parts Co., Ltd. ("XTP Auto Parts")* .....	163.46
Shangyu Shengtai Machinery Co., Ltd.* .....	163.46
Shenzhen Derui Sourcing Co., Ltd.* .....	163.46
Shengzhou Shuangdong Machinery Co., Ltd.* .....	163.46
Shengzhou Xinglong Machinery* .....	163.46
Sichuan Reach Jiayuan Machinery Co. Ltd.* .....	163.46
Tran-Auto Industries Co. Ltd.* .....	163.46
Ubet Machinery* .....	163.46
All-Others .....	33.26

\* Non-cooperative company to which an AFA rate is being applied. See Issues and Decision Memorandum and Preliminary Decision Memorandum for additional information.

As a result of our *Preliminary Determination*, and pursuant to sections 703(d)(1)(B) and (2) of the Act, we instructed U.S. Customs and Border Protection ("CBP") to suspend liquidation of all entries of merchandise under consideration from the PRC that were entered or withdrawn from warehouse, for consumption, on or after April 11, 2016, the date of publication

**of the Preliminary Determination in the Federal Register.**

In accordance with section 703(d) of the Act, we later issued instructions to CBP to discontinue the suspension of liquidation for CVD purposes for subject merchandise entered, or withdrawn from warehouse, on or after August 9, 2016, but to continue the suspension of

liquidation of all entries between April 11, 2016 and August 8, 2016.

If the U.S. International Trade Commission (the "ITC") issues a final affirmative injury determination, we will issue a CVD order and will reinstate the suspension of liquidation under section 706(a) of the Act and will require a cash deposit of estimated CVDs for such entries of subject

<sup>6</sup> See Issues and Decision Memorandum; see also Memorandum, "Countervailing Duty Investigation

of Certain Iron Mechanical Transfer Drive Components from the People's Republic of China:

Powermach Final Analysis Memorandum," dated October 21, 2016 ("Final Analysis Memorandum").



merchandise in the amounts indicated above. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

### ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order (“APO”), without the written consent of the Assistant Secretary for Enforcement and Compliance.

### Return or Destruction of Proprietary Information

In the event the ITC issues a final negative injury determination, this notice serves as the only reminder to parties subject to an APO of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation subject to sanction.

This determination is issued and published pursuant to sections 705(d) and 777(i) of the Act.

Dated: October 21, 2016.

**Ronald K. Lorentzen,**

*Acting Assistant Secretary for Enforcement and Compliance.*

### Appendix I

#### List of Topics Discussed in the Issues and Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the Investigation
- IV. Scope Comments
- V. Application of the Countervailing Duty Law to Imports From the PRC
- VI. Subsidies Valuation Information
- VII. Benchmarks and Discount Rates
- VIII. Use of Facts Otherwise Available and Adverse Inferences
- IX. Analysis of Programs
- X. Analysis of Comments
  - Comment 1: Whether to Apply AFA With Respect to NOK Wuxi
  - Comment 2: Whether to Apply AFA With Respect to the Powermach Companies

Comment 3: Whether to Apply AFA or FA to Purchases of Pig Iron and Ferrous Scrap

Comment 4: Whether to Apply AFA With Respect to the Program titled “VAT and Import Tariff Exemptions for Imported Equipment”

Comment 5: Whether To Revise the Total AFA Rate Calculated in the Preliminary Determination

Comment 6: Whether To Recalculate the Neutral Facts Available Rate Applied to Cenfit

Comment 7: Whether To Revise the Benchmark for Pig Iron and Ferrous Scrap

Comment 8: Whether To Exclude VAT From the LTAR Benchmark Prices

Comment 9: Whether To Revise the Calculation of Benefits From the Land for LTAR Program

Comment 10: Whether To Revise the Inland Freight Costs Included in Input Benchmarks

Comment 11: Whether To Correct Ministerial Errors

Comment 12: Whether Producers of Pig Iron and Ferrous Scrap Are “Authorities”

Comment 13: Whether Inputs for LTAR Are Specific

Comment 14: Whether to Use a Tier One Benchmark for LTAR Programs

Comment 15: Whether the Provision of Electricity for LTAR is Countervailable

Comment 16: Whether the GOC Provided Policy Loans During the POI

Comment 17: Whether the Department Properly Investigated Uninitiated Programs

Comment 18: Whether the Department Should Find That the Program Titled “Income Tax Credits for Domestically-Owned Companies Purchasing Domestically Produced Equipment” Has Been Terminated

Comment 19: Whether Baldor Electric Company (Canada) Should Receive the All-Others Rate

### XI. Recommendation

[FR Doc. 2016–26105 Filed 10–27–16; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A–122–856]

#### Certain Iron Mechanical Transfer Drive Components From Canada: Final Affirmative Determination of Sales at Less Than Fair Value

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the “Department”) determines that certain iron mechanical transfer drive components (“IMTDCs”) from Canada are being, or likely to be, sold in the United States at less than fair value (“LTFV”). Baldor Electric Company

Canada (“Baldor”) is the sole mandatory respondent in this investigation. The period of investigation (“POI”) is October 1, 2014, through September 30, 2015. The final estimated dumping margins of sales at LTFV are shown in the “Final Determination” section of this notice.

**DATES:** Effective October 28, 2016.

**FOR FURTHER INFORMATION CONTACT:** Stephen Bailey or Robert Bolling, 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) 482–0193 or (202) 482–3434, respectively.

### SUPPLEMENTARY INFORMATION:

#### Background

On June 8, 2016, the Department published its preliminary affirmative determination of sales at LTFV in the investigation of IMTDCs from Canada.<sup>1</sup> We invited interested parties to comment on our preliminary determination. We received comments from TB Wood’s Inc. (“Petitioner”) and did not receive rebuttal comments or a request for a hearing. Additionally, we received scope comments for this investigation (*see* Scope Comments below).

A full discussion of the issues raised by parties for this final determination may be found in the Issues and Decision Memorandum.<sup>2</sup> 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 <http://access.trade.gov> and is available to all parties in the Central Records Unit, room B8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <http://enforcement.trade.gov>. The signed and electronic versions of the Issues and

<sup>1</sup> *See Certain Iron Mechanical Transfer Drive Components from Canada: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 81 FR 36887 (June 8, 2016) (“*Preliminary Determination*”).

<sup>2</sup> *See* Memorandum from Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Enforcement and Compliance, regarding “Certain Iron Mechanical Transfer Drive Components from Canada: Issues and Decision Memorandum for the Final Determination of Sales at Less-Than-Fair-Value,” dated concurrently with this notice (“*Issues and Decision Memorandum*”).

Decision Memorandum are identical in content.

### Scope of the Investigation

The merchandise covered by this investigation are iron mechanical transfer drive components. For a complete description of the scope of the investigation, see Appendix I to this notice.

### Scope Comments

Since the *Preliminary Determination*, Petitioner, as well as interested parties Caterpillar Inc., Carrier Corporation, Dahua Machine Manufacturing Co. Ltd., General Motors Corporation, Kohler Co., Mercury Marine, Otis Elevator Company, Speed Solutions International Inc., ZF Services, LLC, and Vibracoustic North America LP, commented on the scope of this investigation, as well as the companion IMTDCs LTFV investigation from the People's Republic of China (the "PRC") and IMTDCs countervailing duty investigation from the PRC. The Department reviewed these comments and has accepted and incorporated into the scope of these investigations Petitioner's exclusion for certain flywheels with a permanently attached outer ring gear and for certain parts of torsional vibration dampers. For further discussion, see the "Final Scope Decision Memorandum."<sup>3</sup> The scope in Appendix I reflects the final modified scope language.

### Analysis of Comments Received

All issues raised in the case brief that was submitted by Petitioner in this investigation are addressed in the Issues and Decision Memorandum accompanying this notice, and which is hereby adopted by this notice. A list of the issues addressed in the Issues and Decision Memorandum is attached to this notice at Appendix II.

### Final Determination

As discussed in the Issues and Decision Memorandum, we made no changes to our preliminary affirmative LTFV determination. Therefore, for the final determination, we continue to determine that the following estimated

<sup>3</sup> See Memorandum from Abdelali Elouaradia, Director, Office IV, Antidumping and Countervailing Duty Operations, to Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, regarding "Antidumping Duty Investigations of Certain Iron Mechanical Transfer Drive Components from Canada and the People's Republic of China and Countervailing Duty Investigation of Certain Iron Mechanical Transfer Drive Components from the People's Republic of China: Scope Decision Memorandum for the Final Determinations," ("Final Scope Decision Memorandum") dated concurrently with this final determination.

dumping margins exist for the following producers or exporters for the period October 1, 2014, through September 30, 2015.

Exporter/producer	Dumping margin (percent)
Baldor Electric Company	
Canada .....	191.34
All-Others .....	100.47

### All-Others Rate

Section 735(c)(5)(A) of the Tariff Act of 1930, as amended ("the Act"), provides that the estimated "all-others" rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely under section 776 of the Act. In cases in which no weighted-average dumping margins besides zero, *de minimis*, or those determined entirely under section 776 of the Act have been established for individually investigated entities, in accordance with section 735(c)(5)(B) of the Act, the Department may use "any reasonable method" to determine the "all-others" rate. Because the margin for Baldor, the sole mandatory respondent, is calculated entirely under section 776 of the Act, we continue to rely on a simple average of the margins in the Petition, upon which the Department initiated this investigation, in determining the "all-others" rate.

### Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we will instruct U.S. Customs and Border Protection ("CBP") to continue the suspension of liquidation of all entries of IMTDCs from Canada, as described in the "Scope of the Investigation" section, which were entered, or withdrawn from warehouse, for consumption on or after June 8, 2016, the date of publication of the *Preliminary Determination*. CBP shall require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price as shown above. These instructions suspending liquidation will remain in effect until further notice.

### Disclosure

We described the calculations used to determine the estimated dumping margins based on adverse facts available, in the *Preliminary Determination*. We made no changes to our calculations since the *Preliminary*

*Determination*. Thus, no additional disclosure of calculations is necessary for this final determination.

### International Trade Commission Notification

In accordance with section 735(d) of the Act, we will notify the International Trade Commission ("ITC") of our final affirmative determination of sales at LTFV. Because the final determination in the proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of IMTDCs from Canada no later than 45 days after our final determination. If the ITC determines that such injury does not exist, this proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess, upon further instruction by the Department, antidumping duties on appropriate imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

### Notification Regarding Administrative Protective Orders

This notice serves as a reminder to the parties subject to administrative protective order ("APO") of their responsibility concerning the disposition of proprietary information disclosed under APOs in accordance with 19 CFR 351.305. Timely written notification of 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 APOs is a sanctionable violation.

We are issuing and publishing this determination in accordance with sections 735(d) and 777(i)(1) of the Act and 19 CFR 351.210(c).

Dated: October 21, 2016.

**Ronald K. Lorentzen,**

*Acting Assistant Secretary for Enforcement and Compliance.*

### Appendix I

#### Scope of the Investigation

The products covered by this investigation are iron mechanical transfer drive components, whether finished or unfinished (*i.e.*, blanks or castings). Subject iron mechanical transfer drive components are in the form of wheels or cylinders with a center bore hole that may have one or more grooves or teeth in their outer circumference that

guide or mesh with a flat or ribbed belt or like device and are often referred to as sheaves, pulleys, flywheels, flat pulleys, idlers, conveyer pulleys, synchronous sheaves, and timing pulleys. The products covered by this investigation also include bushings, which are iron mechanical transfer drive components in the form of a cylinder and which fit into the bore holes of other mechanical transfer drive components to lock them into drive shafts by means of elements such as teeth, bolts, or screws.

Iron mechanical transfer drive components subject to this investigation are those not less than 4.00 inches (101 mm) in the maximum nominal outer diameter.

Unfinished iron mechanical transfer drive components (*i.e.*, blanks or castings) possess the approximate shape of the finished iron mechanical transfer drive component and have not yet been machined to final specification after the initial casting, forging or like operations. These machining processes may include cutting, punching, notching, boring, threading, mitering, or chamfering.

Subject merchandise includes iron mechanical transfer drive components as defined above that have been finished or machined in a third country, including but not limited to finishing/machining processes such as cutting, punching, notching, boring, threading, mitering, or chamfering, or any other processing that would not otherwise remove the merchandise from the scope of this investigation if performed in the country of manufacture of the iron mechanical transfer drive components.

Subject iron mechanical transfer drive components are covered by the scope of this investigation regardless of width, design, or iron type (*e.g.*, gray, white, or ductile iron). Subject iron mechanical transfer drive components are covered by the scope of this investigation regardless of whether they have non-iron attachments or parts and regardless of whether they are entered with other mechanical transfer drive components or as part of a mechanical transfer drive assembly (which typically includes one or more of the iron mechanical transfer drive components identified above, and which may also include other parts such as a belt, coupling and/or

shaft). When entered as a mechanical transfer drive assembly, only the iron components that meet the physical description of covered merchandise are covered merchandise, not the other components in the mechanical transfer drive assembly (*e.g.*, belt, coupling, shaft). However, the scope excludes flywheels with a ring gear permanently attached onto the outer diameter. A ring gear is a steel ring with convex external teeth cut or machined into the outer diameter, and where the diameter of the ring exceeds 200 mm and does not exceed 2,244.3 mm.

For purposes of this investigation, a covered product is of "iron" where the article has a carbon content of 1.7 percent by weight or above, regardless of the presence and amount of additional alloying elements.

Excluded from the scope are finished torsional vibration dampers (TVDs). A finished TVD is an engine component composed of three separate components: An inner ring, a rubber ring and an outer ring. The inner ring is an iron wheel or cylinder with a bore hole to fit a crank shaft which forms a seal to prevent leakage of oil from the engine. The rubber ring is a dampening medium between the inner and outer rings that effectively reduces the torsional vibration. The outer ring, which may be made of materials other than iron, may or may not have grooves in its outer circumference. To constitute a finished excluded TVD, the product must be composed of each of the three parts identified above and the three parts must be permanently affixed to one another such that both the inner ring and the outer ring are permanently affixed to the rubber ring. A finished TVD is excluded only if it meets the physical description provided above; merchandise that otherwise meets the description of the scope and does not satisfy the physical description of excluded finished TVDs above is still covered by the scope of this investigation regardless of end use or identification as a TVD.

Also excluded from the scope are certain TVD inner rings. To constitute an excluded TVD inner ring, the product must have each of the following characteristics: (1) A single continuous curve forming a protrusion or indentation on outer surface, also known as

a sine lock, with a height or depth not less than 1.5 millimeters and not exceeding 4.0 millimeters and with a width of at least 10 millimeters as measured across the sine lock from one edge of the curve to the other;<sup>4</sup> (2) a face width of the outer diameter of greater than or equal to 20 millimeters but less than or equal to 80 millimeters; (3) an outside diameter greater than or equal to 101 millimeters but less than or equal to 300 millimeters; and (4) a weight not exceeding 7 kilograms. A TVD inner ring is excluded only if it meets the physical description provided above; merchandise that otherwise meets the description of the scope and does not satisfy the physical description of excluded TVD inner rings is still covered by the scope of this investigation regardless of end use or identification as a TVD inner ring.

The scope also excludes light-duty, fixed-pitch, non-synchronous sheaves ("excludable LDFPN sheaves") with each of the following characteristics: Made from grey iron designated as ASTM (North American specification) Grade 30 or lower, GB/T (Chinese specification) Grade HT200 or lower, DIN (German specification) GG 20 or lower, or EN (European specification) EN-GJL 200 or lower; having no more than two grooves; having a maximum face width of no more than 1.75 inches, where the face width is the width of the part at its outside diameter; having a maximum outside diameter of not more than 18.75 inches; and having no teeth on the outside or datum diameter. Excludable LDFPN sheaves must also either have a maximum straight bore size of 1.6875 inches with a maximum hub diameter of 2.875 inches; or else have a tapered bore measuring 1.625 inches at the large end, a maximum hub diameter of 3.50 inches, a length through tapered bore of 1.0 inches, exactly two tapped holes that are 180 degrees apart, and a 2.0-inch bolt circle on the face of the hub. Excludable LDFPN sheaves more than 6.75 inches in outside diameter must also have an arm or spoke construction.<sup>5</sup> Further, excludable LDFPN sheaves must have a groove profile as indicated in the table below:

Size (belt profile)	Outside diameter	Top width range of each groove (inches)	Maximum height (inches)	Angle (°)
MA/AK (A, 3L, 4L) .....	≤5.45 in .....	0.484–0.499	0.531	34
MA/AK (A, 3L, 4L) .....	>5.45 in. but ≤18.75 in .....	0.499–0.509	0.531	38
MB/BK (A, B, 4L, 5L) .....	≤7.40 in .....	0.607–0.618	0.632	34
MB/BK (A, B, 4L, 5L) .....	>7.40 in. but ≤18.75 in .....	0.620–0.631	0.635	38

In addition to the above characteristics, excludable LDFPN sheaves must also have a maximum weight (pounds-per-piece) as follows: For excludable LDFPN sheaves with one groove and an outside diameter of greater

than 4.0 inches but less than or equal to 8.0 inches, the maximum weight is 4.7 pounds; for excludable LDFPN sheaves with two grooves and an outside diameter of greater than 4.0 inches but less than or equal to 8.0

inches, the maximum weight is 8.5 pounds; for excludable LDFPN sheaves with one groove and an outside diameter of greater than 8.0 inches but less than or equal to 12.0 inches, the maximum weight is 8.5 pounds;

<sup>4</sup> The edges of the sine lock curve are defined as the points where the surface of the inner ring is no longer parallel to the plane formed by the inner surface of the bore hole that attaches the ring to the crankshaft.

<sup>5</sup> An arm or spoke construction is where arms or spokes (typically 3 to 6) connect the outside diameter of the sheave with the hub of the sheave. This is in contrast to a block construction (in which the material between the hub and the outside

diameter is solid with a uniform thickness that is the same thickness as the hub of the sheave) or a web construction (in which the material between the hub and the outside diameter is solid but is thinner than at the hub of the sheave).

for excludable LDFPN sheaves with two grooves and an outside diameter of greater than 8.0 inches but less than or equal to 12.0 inches, the maximum weight is 15.0 pounds; for excludable LDFPN sheaves with one groove and an outside diameter of greater than 12.0 inches but less than or equal to 15.0 inches, the maximum weight is 13.3 pounds; for excludable LDFPN sheaves with two grooves and an outside diameter of greater than 12.0 inches but less than or equal to 15.0 inches, the maximum weight is 17.5 pounds; for excludable LDFPN sheaves with one groove and an outside diameter of greater than 15.0 inches but less than or equal to 18.75 inches, the maximum weight is 16.5 pounds; and for excludable LDFPN sheaves with two grooves and an outside diameter of greater than 15.0 inches but less than or equal to 18.75 inches, the maximum weight is 26.5 pounds.

The scope also excludes light-duty, variable-pitch, non-synchronous sheaves with each of the following characteristics: Made from grey iron designated as ASTM (North American specification) Grade 30 or lower, GB/T (Chinese specification) Grade HT200 or lower, DIN (German specification) GG 20 or lower, or EN (European specification) EN-GJL 200 or lower; having no more than 2 grooves; having a maximum overall width of less than 2.25 inches with a single groove, or of 3.25 inches or less with two grooves; having a maximum outside diameter of not more than 7.5 inches; having a maximum bore size of 1.625 inches; having either one or two identical, internally-threaded (*i.e.*, with threads on the inside diameter), adjustable (rotating) flange(s) on an externally-threaded hub (*i.e.*, with threads on the outside diameter) that enable(s) the width (opening) of the groove to be changed; and having no teeth on the outside or datum diameter.

The scope also excludes certain IMTDC bushings. An IMTDC bushing is excluded only if it has a tapered angle of greater than or equal to 10 degrees, where the angle is measured between one outside tapered surface and the directly opposing outside tapered surface.

The merchandise covered by this investigation is currently classifiable under Harmonized Tariff Schedule of the United States ("HTSUS") subheadings 8483.30.8090, 8483.50.6000, 8483.50.9040, 8483.50.9080, 8483.90.3000, 8483.90.8080. Covered merchandise may also enter under the following HTSUS subheadings: 7325.10.0080, 7325.99.1000, 7326.19.0010, 7326.19.0080, 8431.31.0040, 8431.31.0060, 8431.39.0010, 8431.39.0050, 8431.39.0070, 8431.39.0080, and 8483.50.4000. These HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of this investigation is dispositive.

## Appendix II

### List of Topics in the Issues and Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the Investigation
- IV. Discussion of the Issues:

Comment 1: Adverse Facts Available

Comment 2: All-Others Rate  
V. Recommendation

[FR Doc. 2016-26106 Filed 10-27-16; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-552-820]

#### Circular Welded Carbon-Quality Steel Pipe From the Socialist Republic of Vietnam: Final Determination of Sales at Less Than Fair Value

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) determines that imports of circular welded carbon-quality steel pipe (CWP) from the Socialist Republic of Vietnam (Vietnam) are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is April 1, 2015, through September 30, 2015. The final dumping margins of sales at LTFV are listed below in the "Final Determination" section of this notice.

**DATES:** Effective October 28, 2016.

**FOR FURTHER INFORMATION CONTACT:** Andrew Huston or Nancy Decker, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482-4261 or (202) 482-0196, respectively.

#### SUPPLEMENTARY INFORMATION:

##### Background

On June 8, 2016, the Department published the *Preliminary Determination* of this antidumping duty (AD) investigation.<sup>1</sup> On July 15, 2016, the Department published an *Amended Preliminary Determination* in this investigation.<sup>2</sup> A summary of the events that occurred since the Department published the *Amended Preliminary Determination*, as well as a full discussion of the issues raised by parties for this final determination, may be

<sup>1</sup> See *Circular Welded Carbon-Quality Steel Pipe From the Socialist Republic of Vietnam: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 81 FR 36884 (June 8, 2016) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum.

<sup>2</sup> See *Antidumping Duty Investigation of Circular Welded Carbon-Quality Steel Pipe From the Socialist Republic of Vietnam: Amended Affirmative Preliminary Determination*, 81 FR 46048 (July 15, 2016) (*Amended Preliminary Determination*).

found in the Final Issues and Decision Memorandum.<sup>3</sup> The Final 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> and it is available to all parties in the Central Records Unit, room B-8024 of the main Department of Commerce building. In addition, a complete version of the Final Issues and Decision Memorandum can be accessed directly at <http://enforcement.trade.gov/frn/index.html>. The signed and electronic versions of the Final Issues and Decision Memorandum are identical in content.

##### Scope of the Investigation

The products covered by this investigation are CWP from Vietnam. For a full description of the scope of this investigation, see the "Scope of the Investigation," in Appendix I of this notice.

##### Scope Comments

In the *Preliminary Determination*, the Department set aside a period of time for parties to address scope issues in case briefs or other written comments on scope issues.

No interested parties submitted scope comments in case or rebuttal briefs; therefore, for this final determination, the scope of this investigation remains unchanged from that published in the *Preliminary Determination*.

##### Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties in this investigation are addressed in the Final Issues and Decision Memorandum. A list of the issues raised is attached to this notice as Appendix II.

##### Verification

As provided in section 782(i) of the Tariff Act of 1930, as amended (the Act), in June and July 2016, the Department verified the sales and factors of production data reported by the mandatory respondents SeAH Steel VINA Corporation (SeAH) and Vietnam

<sup>3</sup> See Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Enforcement and Compliance, "Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Circular Welded Carbon-Quality Steel Pipe from the Socialist Republic of Vietnam," (Final Issues and Decision Memorandum), dated concurrently with this determination and hereby adopted by this notice.

Haiphong Hongyuan Machinery Manufactory Co., Ltd. (Hongyuan). We used standard verification procedures, including an examination of relevant accounting and production records, and original source documents provided by respondents.<sup>4</sup>

**Changes Since the Preliminary Determination and Amended Preliminary Determination**

Based on the Department’s analysis of the comments received and our findings at verification, we made certain changes to our margin calculations. For a discussion of these changes, see the Final Issues and Decision Memorandum.

**Combination Rates**

As stated in the *Initiation Notice*,<sup>5</sup> the Department calculates combination rates for the respondents that are eligible for a separate rate in this investigation. Policy Bulletin 05.1 describes this practice.<sup>6</sup>

**Separate Rate**

Under section 735(c)(5)(A) of the Act, the rate for all other companies that have not been individually examined is normally an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers

individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely on the basis of facts available. In this final determination, we calculated a weighted-average dumping margin for Hongyuan which is not zero, *de minimis*, or based entirely on facts available. We calculated a zero margin for SeAH. Accordingly, we determine to use Hongyuan’s weighted-average dumping margin as the margin for the separate rate company.

**Vietnam-Wide Rate**

In our *Preliminary Determination*, we found that the Vietnam-wide entity, which includes one Vietnam exporter and/or producer that did not respond to the Department’s requests for information, failed to provide necessary information, withheld information requested by the Department, failed to provide information in a timely manner, and significantly impeded this proceeding by not submitting the requested information, pursuant to sections 776(a)(1) and (a)(2)(A)–(C) of the Act. We also concluded that the Vietnam-wide entity failed to cooperate to the best of its ability, pursuant to section 776(b) of the Act. As a result, we preliminarily determined to calculate the Vietnam-wide rate on the basis of adverse facts available (AFA). We first

examined whether the highest petition margin was less than or equal to the highest calculated margin, and determined that the highest petition margin of 113.18 percent was the higher of the two. Next, in order to corroborate 113.18 percent as the potential Vietnam-wide rate, we first compared it to the highest product matching control number (CONNUM)-specific margin calculated for the mandatory respondents.<sup>7</sup> Neither respondent had a CONNUM-specific margin higher than the petition rate. We next compared the normal values (NVs) and U.S. prices in the petition with the NVs and U.S. prices calculated for the respondents. We determined the petition values were within the range of the values calculated for the respondents. Therefore, we determine that the petition rate is corroborated by the actual experience of the mandatory respondents. The changes made to the calculations since the *Preliminary Determination* do not change this analysis. Therefore, we continue to assign the petition rate to the Vietnam-wide entity for this final determination.

**Final Determination**

The Department determines that the final weighted-average dumping margins are as follows:

Exporter	Producer	Weighted-average dumping margin (percent)
Vietnam Haiphong Hongyuan Machinery Manufactory Co., Ltd	Vietnam Haiphong Hongyuan Machinery Manufactory Co., Ltd	6.27
Hoa Phat Steel Pipe Co .....	Hoa Phat Steel Pipe Co .....	6.27
SeAH Steel VINA Corporation .....	SeAH Steel VINA Corporation .....	0.00
Vietnam-Wide Entity .....	.....	113.18

**Disclosure**

We intend to disclose the calculations performed to interested parties within five days of the public announcement of this final determination in accordance with 19 CFR 351.224(b).

**Continuation of Suspension of Liquidation**

Pursuant to section 735(c)(1)(B) of the Act, the Department will instruct U.S.

Customs and Border Protection (CBP) to continue to suspend liquidation of all entries of CWP from Vietnam, except for those produced and exported by SeAH, the rate for which is zero, which were entered, or withdrawn from warehouse, for consumption on or after: (1) June 8, 2016 (the date of publication of the *Preliminary Determination* of this investigation in the **Federal Register**) for the Vietnam-wide entity; and (2) July

15, 2016 (the date of publication of the *Amended Preliminary Determination*) for Hongyuan and Hoa Phat Steel Pipe Co. Further, pursuant to section 735(c)(1)(B)(ii) of the Act, the Department will instruct CBP to require

<sup>4</sup> See Memorandum to the File, “Verification of the Questionnaire Responses of SeAH Steel VINA Corp.” (August 31, 2016); Memorandum to the File, “Verification of the Questionnaire Responses of SeAH Steel America” (August 31, 2016); Memorandum to the File, “Verification of the Questionnaire Responses of State Pipe & Supply Co.” (August 31, 2016); Memorandum to the File, “Verification of the Questionnaire Responses of Vietnam Haiphong Hongyuan Machinery Manufactory Co., Ltd.” (August 30, 2016); and Memorandum to the File, “Verification of the

Questionnaire Responses of Midwest Air Technologies” (August 30, 2016).  
<sup>5</sup> See *Certain Corrosion-Resistant Steel Products From Italy, India, the People’s Republic of China, the Republic of Korea, and Taiwan: Initiation of Less-Than-Fair-Value Investigations*, 80 FR 37228 (June 30, 2015) (*Initiation Notice*).  
<sup>6</sup> See Enforcement and Compliance’s Policy Bulletin No. 05.1, regarding, “Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries,” (April 5, 2005) (Policy

Bulletin 05.1), available on the Department’s Web site at <http://enforcement.trade.gov/policy/bull05-1.pdf>.  
<sup>7</sup> See Memorandum to the File, “Preliminary Analysis of SeAH Steel VINA Corp. (SeAH),” (SeAH Preliminary Analysis Memorandum) dated May 31, 2016, and Memorandum to Mark Hoadley “Vietnam Haiphong Hongyuan Machinery Manufactory Co., Ltd. Preliminary Analysis Memorandum” (Hongyuan Preliminary Analysis Memorandum), dated May 31, 2016.

a cash deposit,<sup>8</sup> as detailed below, on all imports of the subject merchandise from Vietnam, other than those produced and exported by SeAH, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. The cash deposit will be equal to the weighted-average amount by which the normal value exceeds U.S. price as follows: (1) For the exporter/producer combinations listed in the table above, the cash deposit rate will be equal to the dumping margin which the Department determined in this final determination; (2) for all combinations of Vietnamese exporters/producers of merchandise under consideration which have not received their own separate rate above, the cash deposit rate will be equal to the dumping margin established for the Vietnam-wide entity; and (3) for all non-Vietnamese exporters of merchandise under consideration which have not received their own separate rate above, the cash deposit rate will be equal to the cash deposit rate applicable to the Vietnam exporter/producer combination that supplied that non-Vietnamese exporter. The suspension of liquidation instructions will remain in effect until further notice.

**U.S. International Trade Commission Notification**

In accordance with section 735(d) of the Act, we will notify the U.S. International Trade Commission (ITC) of the final affirmative determination of sales at LTFV. Because the final determination in this proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of CWP from Vietnam no later than 45 days after our final determination. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all cash deposits will be refunded. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess, upon further instruction by the Department, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation as discussed in the “Continuation of Suspension of Liquidation” section.

<sup>8</sup> See *Modification of Regulations Regarding the Practice of Accepting Bonds During the Provisional Measures Period in Antidumping and Countervailing Duty Investigations*, 76 FR 61042 (October 3, 2011).

**Notification Regarding Record Keeping**

In the event we issue a final antidumping duty order, in future proceedings we expect Hongyuan’s U.S. affiliate Midwest Air Technologies to modify its recordkeeping system to be able to track the country of origin of U.S. sales of subject merchandise.<sup>9</sup>

**Notification Regarding Administrative Protective Orders**

This notice serves as a reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a violation subject to sanction.

This determination and this notice are issued and published pursuant to sections 735(d) and 777(i)(1) of the Act.

Dated: October 21, 2016.

**Ronald K. Lorentzen,**

*Acting Assistant Secretary for Enforcement and Compliance.*

**Appendix I**

**Scope of the Investigation**

This investigation covers welded carbon-quality steel pipes and tube, of circular cross-section, with an outside diameter (O.D.) not more than nominal 16 inches (406.4 mm), regardless of wall thickness, surface finish (e.g., black, galvanized, or painted), end finish (plain end, beveled end, grooved, threaded, or threaded and coupled), or industry specification (e.g., American Society for Testing and Materials International (ASTM), proprietary, or other), generally known as standard pipe, fence pipe and tube, sprinkler pipe, and structural pipe (although subject product may also be referred to as mechanical tubing). Specifically, the term “carbon quality” includes products in which:

- (a) Iron predominates, by weight, over each of the other contained elements;
- (b) the carbon content is 2 percent or less, by weight; and
- (c) none of the elements listed below exceeds the quantity, by weight, as indicated:
  - (i) 1.80 percent of manganese;
  - (ii) 2.25 percent of silicon;
  - (iii) 1.00 percent of copper;
  - (iv) 0.50 percent of aluminum;
  - (v) 1.25 percent of chromium;
  - (vi) 0.30 percent of cobalt;
  - (vii) 0.40 percent of lead;
  - (viii) 1.25 percent of nickel;
  - (ix) 0.30 percent of tungsten;
  - (x) 0.15 percent of molybdenum;
  - (xi) 0.10 percent of niobium;
  - (xii) 0.41 percent of titanium;

<sup>9</sup> See Final Issues and Decision Memorandum at Comment 15.

- (xiii) 0.15 percent of vanadium; or
- (xiv) 0.15 percent of zirconium.

Covered products are generally made to standard O.D. and wall thickness combinations. Pipe multi-stenciled to a standard and/or structural specification and to other specifications, such as American Petroleum Institute (API) API-5L specification, may also be covered by the scope of these investigations. In particular, such multi-stenciled merchandise is covered when it meets the physical description set forth above, and also has one or more of the following characteristics: Is 32 feet in length or less; is less than 2.0 inches (50 mm) in outside diameter; has a galvanized and/or painted (e.g., polyester coated) surface finish; or has a threaded and/or coupled end finish.

Standard pipe is ordinarily made to ASTM specifications A53, A135, and A795, but can also be made to other specifications. Structural pipe is made primarily to ASTM specifications A252 and A500. Standard and structural pipe may also be produced to proprietary specifications rather than to industry specifications.

Sprinkler pipe is designed for sprinkler fire suppression systems and may be made to industry specifications such as ASTM A53 or to proprietary specifications.

Fence tubing is included in the scope regardless of certification to a specification listed in the exclusions below, and can also be made to the ASTM A513 specification. Products that meet the physical description set forth above but are made to the following nominal outside diameter and wall thickness combinations, which are recognized by the industry as typical for fence tubing, are included despite being certified to ASTM mechanical tubing specifications:

O.D. in inches (nominal)	Wall thickness in inches (nominal)	Gage
1.315	0.035	20
1.315	0.047	18
1.315	0.055	17
1.315	0.065	16
1.315	0.072	15
1.315	0.083	14
1.315	0.095	13
1.660	0.055	17
1.660	0.065	16
1.660	0.083	14
1.660	0.095	13
1.660	0.109	12
1.900	0.047	18
1.900	0.055	17
1.900	0.065	16
1.900	0.072	15
1.900	0.095	13
1.900	0.109	12
2.375	0.047	18
2.375	0.055	17
2.375	0.065	16
2.375	0.072	15
2.375	0.095	13
2.375	0.109	12
2.375	0.120	11
2.875	0.109	12
2.875	0.165	8
3.500	0.109	12
3.500	0.165	8
4.000	0.148	9

O.D. in inches (nominal)	Wall thickness in inches (nominal)	Gage
4.000 .....	0.165	8
4.500 .....	0.203	7

The scope of this investigation does not include:

(a) Pipe suitable for use in boilers, superheaters, heat exchangers, refining furnaces and feedwater heaters, whether or not cold drawn, which are defined by standards such as ASTM A178 or ASTM A192;

(b) finished electrical conduit, *i.e.*, Electrical Rigid Steel Conduit (also known as Electrical Rigid Metal Conduit and Electrical Rigid Metal Steel Conduit), Finished Electrical Metallic Tubing, and Electrical Intermediate Metal Conduit, which are defined by specifications such as American National Standard (ANSI) C80.1–2005, ANSI C80.3–2005, or ANSI C80.6–2005, and Underwriters Laboratories Inc. (UL) UL–6, UL–797, or UL–1242;

(c) finished scaffolding, *i.e.*, component parts of final, finished scaffolding that enter the United States unassembled as a “kit.” A kit is understood to mean a packaged combination of component parts that contains, at the time of importation, all of the necessary component parts to fully assemble final, finished scaffolding;

(d) tube and pipe hollows for redrawing;

(e) oil country tubular goods produced to API specifications;

(f) line pipe produced to only API specifications, such as API 5L, and not multi-stenciled; and

(g) mechanical tubing, whether or not cold-drawn, other than what is included in the above paragraphs.

The products subject to this investigation are currently classifiable in Harmonized Tariff Schedule of the United States (HTSUS) statistical reporting numbers 7306.19.1010, 7306.19.1050, 7306.19.5110, 7306.19.5150, 7306.30.1000, 7306.30.5015, 7306.30.5020, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085, 7306.30.5090, 7306.50.1000, 7306.50.5030, 7306.50.5050, and 7306.50.5070. The HTSUS subheadings above are provided for convenience and U.S. Customs purposes only. The written description of the scope of the investigation is dispositive.

## Appendix II

### List of Topics Discussed in the Final Issues and Decision Memorandum

I. Summary

II. Background

III. Changes Since the Preliminary Determination

IV. Use of Adverse Facts Available

V. Discussion of the Issues

#### General Issues

Comment 1: Financial Statements to Use for Financial Ratios

Comment 2: Water Surrogate Value

Comment 3: Verification Findings

#### Company-Specific Issues

*SeAH Issues*

Comment 4: Misreported U.S. Sales Destinations

Comment 5: SeAH's Sodium Hydroxide and UniCoat Surrogate Values

Comment 6: Brokerage and Handling Related to Hot-Rolled Coil Surrogate Values

Comment 7: Cap on Freight Revenue

Comment 8: Surrogate Value for SeAH's Hot-Rolled Coils

Comment 9: Conversion of Surrogate Value for Vietnamese Inland Freight

Comment 10: U.S. Credit Expenses

Comment 11: Differential Pricing Analysis *Hongyuan Issues*

Comment 12: Hongyuan's Hot-Rolled Strip Value

Comment 13: U.S. Indirect Selling Expenses

Comment 14: Treatment of Strengthening Tubes Used For Packing

Comment 15: Record-keeping of Hongyuan's U.S. Affiliate

## VI. Recommendation

[FR Doc. 2016–26112 Filed 10–27–16; 8:45 am]

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## DEPARTMENT OF COMMERCE

### International Trade Administration

[C–535–904]

### Circular Welded Carbon-Quality Steel Pipe From Pakistan: Final Affirmative Countervailing Duty Determination

**AGENCY:** Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce.

**SUMMARY:** The U.S. Department of Commerce (the Department) determines that countervailable subsidies are being provided to exporters and producers of circular welded carbon-quality steel pipe (circular welded pipe) from Pakistan. For information on the estimated subsidy rates, see the “Suspension of Liquidation” section of this notice.

**DATES:** Effective October 28, 2016.

#### FOR FURTHER INFORMATION CONTACT:

Kaitlin Wojnar, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3857.

#### SUPPLEMENTARY INFORMATION:

### Background

The petitioners in this investigation are Bull Moose Tube Company, EXLTUBE, Wheatland Tube Company, and Western Tube and Conduit (collectively, Petitioners). In addition to the Government of Pakistan (GOP), the mandatory respondent in this investigation is International Industries

Limited (IIL). The period of investigation (POI) is July 1, 2014, through June 30, 2015.

The Department published its *Preliminary Determination* on April 8, 2016.<sup>1</sup> A complete summary of the events that occurred since the *Preliminary Determination*, as well as a full discussion of the issues raised by parties for this final determination, may be found in the “Issues and Decision Memorandum for the Final Affirmative Determination in the Countervailing Duty Investigation of Circular Welded Carbon-Quality Steel Pipe from Pakistan,” which is dated concurrently with and hereby adopted by this notice.<sup>2</sup> The Issues and Decision Memorandum is a public document and is available electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). Access to ACCESS is available to registered users at <https://access.trade.gov> and to all parties in the Central Records Unit, room B8024 of the Department's main building. In addition, a complete version of the Issues and Decision Memorandum can be viewed at <http://enforcement.trade.gov/frn>. The signed Issues and Decision Memorandum and the electronic version are identical in content.

### Methodology

The Department conducted this countervailing duty (CVD) investigation in accordance with section 701 of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, we determine that there is a subsidy (*i.e.*, a financial contribution by an “authority” that gives rise to a benefit to the recipient) and that the subsidy is specific.<sup>3</sup> For a full description of the methodology underlying our conclusions, see the Issues and Decision Memorandum.

### Scope of the Investigation

The product covered by this investigation is circular welded pipe from Pakistan. For a complete

<sup>1</sup> See *Circular Welded Carbon-Quality Steel Pipe from Pakistan: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 81 FR 20619 (April 8, 2016) (*Preliminary Determination*).

<sup>2</sup> See Department Memorandum, “Issues and Decision Memorandum for the Final Affirmative Determination in the Countervailing Duty Investigation of Circular Welded Carbon-Quality Steel Pipe from Pakistan,” October 21, 2016 (Issues and Decision Memorandum).

<sup>3</sup> See section 771(5)(B) and (D) of the Act regarding financial contribution, section 771(5)(E) of the Act regarding benefit, and the section 771(5A) of the Act regarding specificity.



description of the scope, see Appendix I to this notice.

### Analysis of Subsidy Programs and Comments Received

All issues raised in the comments filed by interested parties to this proceeding are discussed in the Issues and Decision Memorandum. A list of the issues raised by IIL and responded to by the Department in the Issues and Decision Memorandum is attached at Appendix II to this notice.

### Use of Adverse Facts Available

For purposes of this final determination, we have continued to rely on facts available with adverse inferences, in accordance with section 776(a)–(d) of the Act, to calculate the subsidy rate for the mandatory respondent. For this final determination, we continue to find all programs in this proceeding countervailable. A full discussion of our decision to rely on adverse facts available is presented in the “Use of Facts Otherwise Available and Adverse Inferences” section of the Issues and Decision Memorandum.

### Final Determination

In accordance with section 705(c)(1)(B)(i)(I) of the Act, we have calculated a subsidy rate for IIL, the only individually investigated exporter/producer of the subject merchandise. Section 705(c)(5)(A)(ii) of the Act provides that, if the countervailable subsidy rates for all individually investigated exporters and producers are determined entirely in accordance with section 776 of the Act, the Department may use any reasonable method to establish an “all-others” rate for exporters and producers that were not individually investigated. As described above, IIL’s subsidy rate was calculated entirely under section 776 of the Act. Therefore, consistent with section 705(c)(5)(A)(ii) of the Act, we have resorted to “any reasonable method” to derive the all-others rate and are basing the all-others rate on the rate calculated for IIL. This method is consistent with the Department’s past practice.<sup>4</sup>

<sup>4</sup> See *Preliminary Determination*, 81 FR at 20620; see also *Grain-Oriented Electrical Steel from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 79 FR 59221, 59222 (October 1, 2014) (assigning the sole mandatory respondent’s rate, which was based on AFA, as the all-others rate); *Circular Welded Carbon-Quality Steel Pipe from India: Final Affirmative Countervailing Duty Determination*, 77 FR 64468, 64470 (October 22, 2012) (averaging two total AFA respondents’ rates to determine the all-others rate).

We determine the total estimated countervailable subsidy rates to be as follows:

Exporter/producer	Net subsidy rate
International Industries Limited.	64.81 percent.
All-Others .....	64.81 percent.

### Suspension of Liquidation

Pursuant to section 703(d) of the Act, we instructed U.S. Customs and Border Protection (CBP) to suspend liquidation of all entries of circular welded pipe from Pakistan, as described in the “Scope of the Investigation,” that were entered or withdrawn from warehouse for consumption on or after April 8, 2016, the date of publication of the *Preliminary Determination* in the **Federal Register**, and to require a cash deposit for such entries of merchandise.<sup>5</sup> In accordance with section 703(d) of the Act, we issued instructions to CBP to discontinue the suspension of liquidation for CVD purposes in regard to subject merchandise entered or withdrawn from warehouse on or after August 6, 2016, but to continue the suspension of liquidation of all entries from April 8, 2016, through August 5, 2016.

If the U.S. International Trade Commission (ITC) issues a final affirmative injury determination, we will reinstate the suspension of liquidation under section 706(a) of the Act, require a cash deposit of the estimated CVD duties for such entries in the amounts indicated above and issue a CVD order. If the ITC determines that material injury or threat of material injury does not exist, this proceeding will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

### ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making all non-privileged and non-proprietary information related to this investigation available to the ITC. We will also allow the ITC to access all privileged and business proprietary information in our files, provided that the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order (APO), without the written consent of the Assistant Secretary for Enforcement and Compliance.

<sup>5</sup> See *Preliminary Determination*, 81 FR at 20621.

### Return or Destruction of Proprietary Information

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties such as an APO of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or, alternatively, conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation that is subject to sanction.

This determination is published pursuant to section 705(d) and 777(i) of the Act.

Dated: October 21, 2016.

**Ronald K. Lorentzen,**

*Acting Assistant Secretary for Enforcement and Compliance.*

### Appendix I

#### Scope of the Investigation

This investigation covers welded carbon-quality steel pipes and tube, of circular cross-section, with an outside diameter (O.D.) not more than nominal 16 inches (406.4 mm), regardless of wall thickness, surface finish (e.g., black, galvanized, or painted), end finish (plain end, beveled end, grooved, threaded, or threaded and coupled), or industry specification (e.g., American Society for Testing and Materials International (ASTM), proprietary, or other), generally known as standard pipe, fence pipe and tube, sprinkler pipe, and structural pipe (although subject product may also be referred to as mechanical tubing). Specifically, the term “carbon quality” includes products in which:

- (a) Iron predominates, by weight, over each of the other contained elements;
- (b) the carbon content is 2 percent or less, by weight; and
- (c) none of the elements listed below exceeds the quantity, by weight, as indicated:
  - (i) 1.80 percent of manganese;
  - (ii) 2.25 percent of silicon;
  - (iii) 1.00 percent of copper;
  - (iv) 0.50 percent of aluminum;
  - (v) 1.25 percent of chromium;
  - (vi) 0.30 percent of cobalt;
  - (vii) 0.40 percent of lead;
  - (viii) 1.25 percent of nickel;
  - (ix) 0.30 percent of tungsten;
  - (x) 0.15 percent of molybdenum;
  - (xi) 0.10 percent of niobium;
  - (xii) 0.41 percent of titanium;
  - (xiii) 0.15 percent of vanadium; or
  - (xiv) 0.15 percent of zirconium.

Covered products are generally made to standard O.D. and wall thickness combinations. Pipe multi-stenciled to a standard and/or structural specification and to other specifications, such as American Petroleum Institute (API) API-5L specification, may also be covered by the scope of this investigation. In particular, such multi-stenciled merchandise is covered when

it meets the physical description set forth above, and also has one or more of the following characteristics: Is 32 feet in length or less; is less than 2.0 inches (50 mm) in outside diameter; has a galvanized and/or painted (e.g., polyester coated) surface finish; or has a threaded and/or coupled end finish.

Standard pipe is ordinarily made to ASTM specifications A53, A135, and A795, but can also be made to other specifications.

Structural pipe is made primarily to ASTM specifications A252 and A500. Standard and structural pipe may also be produced to proprietary specifications rather than to industry specifications.

Sprinkler pipe is designed for sprinkler fire suppression systems and may be made to industry specifications such as ASTM A53 or to proprietary specifications.

Fence tubing is included in the scope regardless of certification to a specification listed in the exclusions below, and can also be made to the ASTM A513 specification. Products that meet the physical description set forth above but are made to the following nominal outside diameter and wall thickness combinations, which are recognized by the industry as typical for fence tubing, are included despite being certified to ASTM mechanical tubing specifications:

O.D. in inches (nominal)	Wall thickness in inches (nominal)	Gage
1.315 .....	0.035	20
1.315 .....	0.047	18
1.315 .....	0.055	17
1.315 .....	0.065	16
1.315 .....	0.072	15
1.315 .....	0.083	14
1.315 .....	0.095	13
1.660 .....	0.055	17
1.660 .....	0.065	16
1.660 .....	0.083	14
1.660 .....	0.095	13
1.660 .....	0.109	12
1.900 .....	0.047	18
1.900 .....	0.055	17
1.900 .....	0.065	16
1.900 .....	0.072	15
1.900 .....	0.095	13
1.900 .....	0.109	12
2.375 .....	0.047	18
2.375 .....	0.055	17
2.375 .....	0.065	16
2.375 .....	0.072	15
2.375 .....	0.095	13
2.375 .....	0.109	12
2.375 .....	0.120	11
2.875 .....	0.109	12
2.875 .....	0.165	8
3.500 .....	0.109	12
3.500 .....	0.165	8
4.000 .....	0.148	9
4.000 .....	0.165	8
4.500 .....	0.203	7

The scope of this investigation does not include:

(a) Pipe suitable for use in boilers, superheaters, heat exchangers, refining furnaces and feedwater heaters, whether or not cold drawn, which are defined by standards such as ASTM A178 or ASTM A192;

(b) finished electrical conduit, *i.e.*, Electrical Rigid Steel Conduit (also known as Electrical Rigid Metal Conduit and Electrical Rigid Metal Steel Conduit), Finished Electrical Metallic Tubing, and Electrical Intermediate Metal Conduit, which are defined by specifications such as American National Standard (ANSI) C80.1–2005, ANSI C80.3–2005, or ANSI C80.6–2005, and Underwriters Laboratories Inc. (UL) UL–6, UL–797, or UL–1242;

(c) finished scaffolding, *i.e.*, component parts of final, finished scaffolding that enter the United States unassembled as a “kit.” A kit is understood to mean a packaged combination of component parts that contains, at the time of importation, all of the necessary component parts to fully assemble final, finished scaffolding;

(d) tube and pipe hollows for redrawing;

(e) oil country tubular goods produced to API specifications;

(f) line pipe produced to only API specifications, such as API 5L, and not multi-stenciled; and

(g) mechanical tubing, whether or not cold-drawn, other than what is included in the above paragraphs.

The products subject to this investigation are currently classifiable in Harmonized Tariff Schedule of the United States (HTSUS) statistical reporting numbers 7306.19.1010, 7306.19.1050, 7306.19.5110, 7306.19.5150, 7306.30.1000, 7306.30.5015, 7306.30.5020, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085, 7306.30.5090, 7306.50.1000, 7306.50.5030, 7306.50.5050, and 7306.50.5070. The HTSUS subheadings above are provided for convenience and U.S. Customs purposes only. The written description of the scope of the investigation is dispositive.

**Appendix II**

**Topics Discussed in the Issues and Decision Memorandum**

- I. Summary
- II. Background
- III. Scope Comments
- IV. Scope of the Investigation
- V. Use of Facts Otherwise Available and Adverse Inferences
- VI. Discussion of the Issues
  - Issue 1: Non-Cooperation of IIL
  - Issue 2: Corroboration of Secondary Information
- VII. Conclusion

[FR Doc. 2016–26114 Filed 10–27–16; 8:45 am]

**BILLING CODE 3510–DS–P**

**DEPARTMENT OF COMMERCE**

**National Institute of Standards and Technology**

**Board of Overseers of the Malcolm Baldrige National Quality Award**

**AGENCY:** National Institute of Standards and Technology, Department of Commerce.

**ACTION:** Notice of open meeting.

**SUMMARY:** The Board of Overseers of the Malcolm Baldrige National Quality Award (Board) will meet in open session on Tuesday, December 6, 2016. The purpose of this meeting is to review and discuss the work of the private sector contractor, which assists the Director of the National Institute of Standards and Technology (NIST) in administering the Malcolm Baldrige National Quality Award (Award), and information received from NIST and from the Chair of the Judges’ Panel of the Malcolm Baldrige National Quality Award in order to make such suggestions for the improvement of the Award process as the Board deems necessary. Details on the agenda are noted in the **SUPPLEMENTARY INFORMATION** section of this notice.

**DATES:** The meeting will be held on Tuesday, December 6, 2016, from 8:30 a.m. Eastern time until 3:00 p.m. Eastern time. The meeting will be open to the public.

**ADDRESSES:** The meeting will be held at the National Institute of Standards and Technology, 100 Bureau Drive, Building 101, Lecture Room A, Gaithersburg, Maryland 20899. Please note admittance instructions under the **SUPPLEMENTARY INFORMATION** section of this notice.

**FOR FURTHER INFORMATION CONTACT:** Robert Fangmeyer, Director, Baldrige Performance Excellence Program, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 1020, Gaithersburg, Maryland 20899–1020, telephone number (301) 975–2360, or by email at [robert.fangmeyer@nist.gov](mailto:robert.fangmeyer@nist.gov).

**SUPPLEMENTARY INFORMATION:**

**Authority:** 15 U.S.C. 3711a(d)(2)(B) and the Federal Advisory Committee Act, as amended, 5 U.S.C. App.

Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. App., notice is hereby given that the Board will meet in open session on Tuesday, December 6, 2016, from 8:30 a.m. Eastern time until 3:00 p.m. Eastern time. The Board is composed of eleven members selected for their preeminence in the field of organizational performance excellence and appointed by the Secretary of Commerce. The Board consists of a balanced representation from U.S. service, manufacturing, nonprofit, education, and health care industries. The Board includes members familiar with the quality improvement operations and competitiveness issues of manufacturing companies, service companies, small businesses, health care providers, and educational institutions. Members are also chosen who have broad experience

in for-profit and nonprofit areas. The purpose of this meeting is to review and discuss the work of the private sector contractor, which assists the Director of the National Institute of Standards and Technology (NIST) in administering the Award, and information received from NIST and from the Chair of the Judges' Panel of the Malcolm Baldrige National Quality Award in order to make such suggestions for the improvement of the Award process as the Board deems necessary. The Board shall make an annual report on the results of Award activities to the Director of NIST, along with its recommendations for the improvement of the Award process. The agenda will include: Report from the Judges Panel of the Malcolm Baldrige National Quality Award, Baldrige Program Business Plan Status Report, Baldrige Foundation Fundraising Update, Products and Services Update, and Recommendations for the NIST Director. The agenda may change to accommodate Board business. The final agenda will be posted on the NIST Baldrige Performance Excellence Web site at <http://www.nist.gov/baldrige/community/overseers.cfm>. The meeting will be open to the public.

Individuals and representatives of organizations who would like to offer comments and suggestions related to the Board's affairs are invited to request a place on the agenda. On December 6, 2016 approximately one-half hour will be reserved in the afternoon for public comments, and speaking times will be assigned on a first-come, first-served basis. The amount of time per speaker will be determined by the number of requests received, but is likely to be about 3 minutes each. The exact time for public comments will be included in the final agenda that will be posted on the Baldrige Web site at <http://www.nist.gov/baldrige/community/overseers.cfm>. Questions from the public will not be considered during this period. Speakers who wish to expand upon their oral statements, those who had wished to speak, but could not be accommodated on the agenda, and those who were unable to attend in person are invited to submit written statements to the Baldrige Performance Excellence Program, NIST, 100 Bureau Drive, Mail Stop 1020, Gaithersburg, Maryland, 20899-1020, via fax at 301-975-4967 or electronically by email to [nancy.young@nist.gov](mailto:nancy.young@nist.gov).

All visitors to the National Institute of Standards and Technology site must pre-register to be admitted. Please submit your name, time of arrival, email address and phone number to Nancy Young no later than 5:00 p.m. Eastern

Time, Tuesday, November 29, 2015 and she will provide you with instructions for admittance. Non-U.S. citizens must submit additional information and should contact Ms. Young for instructions. Ms. Young's email address is [nancy.young@nist.gov](mailto:nancy.young@nist.gov) and her phone number is (301) 975-2361. For participants attending in person, please note that federal agencies, including NIST, can only accept a state-issued driver's license or identification card for access to federal facilities if such license or identification card is issued by a state that is compliant with the REAL ID Act of 2005 (P.L. 109-13), or by a state that has an extension for REAL ID compliance. NIST currently accepts other forms of federal-issued identification in lieu of a state-issued driver's license. For detailed information please contact Ms. Young or visit: [http://www.nist.gov/public\\_affairs/visitor/](http://www.nist.gov/public_affairs/visitor/).

**Kevin Kimball,**  
NIST Chief of Staff.

[FR Doc. 2016-26081 Filed 10-27-16; 8:45 am]

**BILLING CODE 3510-13-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### Proposed Information Collection; Comment Request; West Coast Swordfish Fishery Survey

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, offers the general public and other Federal agencies this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted on or before 60 days after date of publication of this notice.

**ADDRESSES:** Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at [Jjessup@doc.gov](mailto:Jjessup@doc.gov)).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be

directed to Stephen Stohs, (858) 546-7084 or [stephen.stohs@noaa.gov](mailto:stephen.stohs@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Abstract

This request is for a new collection of information.

The Southwest Fisheries Science Center (SWFSC) is undertaking an economics data collection effort for the West Coast Swordfish Fishery (WCSF) in order to improve the SWFSC's capability to do the following: (1) Describe and monitor economic performance (*e.g.*, profitability, capacity utilization, efficiency, and productivity) and impacts (*e.g.*, sector, community, or region-specific employment and income); (2) determine the quantity and distribution of net benefits derived from living marine resources; (3) understand and predict the ecological, and behavior of participants in Federally managed commercial fisheries; (4) predict the biological, ecological, and economic impacts of existing management measures and alternative proposed management actions; and (5) in general, more effectively conduct the analyses required under the MSA, the Endangered Species Act (ESA), and the Marine Mammal Protection Act (MMPDA), the National Environmental Policy Act (NEPA), and Regulatory Flexibility Act (RFA), Executive Order 12866, and other applicable law.

##### II. Method of Collection

WCSF participants will be contacted and screened to participate in the data collection. A cost and earnings survey will be scheduled and administered to eligible respondents as appropriate. Screener, scheduling and survey modes may include in-person, Internet, phone, or mail.

WCSF participants are defined as current or former participants in the United States (U.S.) west-coast swordfish fisheries—drift gillnet, longline, harpoon and experimental deep-set buoy gear—and suppliers of support services to the fishery, such as processors and spotter-plane pilots.

##### III. Data

*OMB Control Number:* 0648-xxxx.  
*Form Number(s):* None.

*Type of Review:* Regular submission (request for a new information collection).

*Affected Public:* Businesses or other for-profit organizations.

*Estimated Number of Respondents:* 50.

*Estimated Time per Response:* 5 minutes for screener; 5 minutes to schedule survey for qualified and

interested respondents; 60 minutes for survey.

*Estimated Total Annual Burden Hours:* 95.

*Estimated Total Annual Cost to Public:* \$0 in recordkeeping/reporting costs.

#### IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: October 24, 2016.

**Sarah Brabson,**

*NOAA PRA Clearance Officer.*

[FR Doc. 2016-26051 Filed 10-27-16; 8:45 am]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### Marine Protected Areas Federal Advisory Committee; Public Meeting

**AGENCY:** Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

**ACTION:** Notice of open meeting.

**SUMMARY:** Notice is hereby given of a meeting via web conference call of the Marine Protected Areas Federal Advisory Committee (Committee). The web conference call is open to the public; participants can dial in to the call. Participants who choose to use the web conferencing feature in addition to the audio will be able to view the presentations as they are being given.

**DATES:** Members of the public wishing to participate in the meeting should register in advance by Wednesday, November 9, 2016.

The meeting will be held Thursday, November 10, from 2:00 to 4:00 p.m. EDT. These times and the agenda topics described below are subject to change. Refer to the Web page listed below for the most up-to-date meeting agenda.

**ADDRESSES:** The meeting will be held via web conference call. Register by contacting Nicole Capps at [Nicole.Capps@noaa.gov](mailto:Nicole.Capps@noaa.gov) or 831-647-6451.

**FOR FURTHER INFORMATION CONTACT:** Lauren Wenzel, Designated Federal Officer, MPA FAC, National Marine Protected Areas Center, 1305 East West Highway, Silver Spring, Maryland 20910. (Phone: 240-533-0652); email: [lauren.wenzel@noaa.gov](mailto:lauren.wenzel@noaa.gov); or visit the National MPA Center Web site at <http://www.marineprotectedareas.noaa.gov/fac/>.

**SUPPLEMENTARY INFORMATION:** The Committee, composed of external, knowledgeable representatives of stakeholder groups, was established by the Department of Commerce (DOC) to provide advice to the Secretaries of Commerce and the Interior on implementation of Section 4 of Executive Order 13158, on marine protected areas.

*Matters To Be Considered:* The focus of the meeting is a discussion of the Committee's work on MPA connectivity, including voting on draft recommendations. The agenda is subject to change. The latest version will be posted at <http://www.marineprotectedareas.noaa.gov/fac/>.

Dated: October 11, 2016.

**John Armor,**

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

[FR Doc. 2016-26074 Filed 10-27-16; 8:45 am]

**BILLING CODE 3510-NK-P**

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Procurement List; Deletions

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Deletions from the Procurement List.

**SUMMARY:** This action deletes a product and services from the Procurement List previously furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

**DATES:** Effective November 27, 2016.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia 22202-4149.

**FOR FURTHER INFORMATION CONTACT:** Barry S. Lineback, Telephone: (703) 603-7740, Fax: (703) 603-0655, or email [CMTEFedReg@AbilityOne.gov](mailto:CMTEFedReg@AbilityOne.gov).

#### SUPPLEMENTARY INFORMATION:

##### Deletions

On 9/16/2016 (81 FR 63744-63745) and 9/23/2016 (81 FR 65629-65630), the Committee for Purchase From People Who Are Blind or Severely Disabled published notices of proposed deletions from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the product and services listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501-8506 and 41 CFR 51-2.4.

##### Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the product and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501-8506) in connection with the product and services deleted from the Procurement List.

##### End of Certification

Accordingly, the following product and services are deleted from the Procurement List:

##### Product

*NSN(s)—Product Name(s):* 8030-01-347-0979—Compound, Corrosion Preventative, Type I, Class I  
*Mandatory Source(s) of Supply:* The Lighthouse for the Blind, St. Louis, MO  
*Contracting Activity:* General Services Administration, Kansas City, MO

##### Services

*Service Type:* Temp. Admin/General Support Service

*Mandatory for:* National Institute of Health, 31 Center Dr., Bethesda, MD  
*Mandatory Source(s) of Supply:* Columbia Lighthouse for the Blind, Washington, DC

*Contracting Activity:* Dept of Health and Human Services

*Service Type:* Medical Transcription

**Mandatory for:**

Corpus Christi Naval Air Station: Naval Hospital, 10651 E Street, Bldg H-100, Corpus Christi, TX  
U.S. Naval Hospital, 3600 Rivers Ave., North Charleston, SC

**Mandatory Source(s) of Supply:** Lighthouse for the Blind of Houston, Houston, TX

**Contracting Activity:** DOD/Department of the Navy

**Service Type:** Custodial Service

**Mandatory for:** Department of Veterans Affairs, Quad Cities Veterans Center, 1529 46th Avenue, Moline, IL

**Mandatory Source(s) of Supply:** The Arc of the Quad Cities Area, Rock Island, IL

**Contracting Activity:** Dept of Veterans Affairs, 438-Sioux Falls VA Medical Center

**Service Type:** Administrative/General Support Service

**Mandatory for:** GSA, Southwest Supply Center, Fort Worth, TX

**Mandatory Source(s) of Supply:**

Lighthouse for the Blind of Houston, Houston, TX  
West Texas Lighthouse for the Blind, San Angelo, TX  
South Texas Lighthouse for the Blind, Corpus Christi, TX  
The Arkansas Lighthouse for the Blind, Little Rock, AR

**Contracting Activity:** General Services Administration, Ft Worth, TX

**Barry S. Lineback,**

*Director, Business Operations.*

[FR Doc. 2016-26078 Filed 10-27-16; 8:45 am]

**BILLING CODE 6353-01-P**

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Procurement List; Proposed Deletions

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Proposed Deletions from the Procurement List.

**SUMMARY:** The Committee is proposing to delete products and services previously furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

**DATES:** Comments must be received on or before November 27, 2016.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia 22202-4149.

**FOR FURTHER INFORMATION CONTACT:** Barry S. Lineback, Telephone: (703) 603-7740, Fax: (703) 603-0655, or email [CMTEFedReg@AbilityOne.gov](mailto:CMTEFedReg@AbilityOne.gov).

**SUPPLEMENTARY INFORMATION:** This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51-2.3. Its purpose is to provide interested persons

an opportunity to submit comments on the proposed actions.

### Deletions

The following products and services are proposed for deletion from the Procurement List:

#### Products

**NSN(s)—Product Name(s):** 7510-01-565-9539—Tape, Double-Sided

**Mandatory Source(s) of Supply:** Alphapointe, Kansas City, MO

**Contracting Activity:** General Services Administration, New York, NY

**NSN(s)—Product Name(s):** 7530-00-290-0600—Paper, Xerographic, Dual Purpose, White, U.S. Federal Watermarked, 8.5" × 14"

**Mandatory Source(s) of Supply:** Louisiana Association for the Blind, Shreveport, LA

**Contracting Activity:** General Services Administration, New York, NY

#### Services

**Service Type:** Mailing of Initial Tech Orders

**Mandatory for:** Robins Air Force Base, Robins AFB, GA

**Mandatory Source(s) of Supply:** Houston County Association for Exceptional Citizens, Inc., Warner Robins, GA

**Contracting Activity:** Dept. of the Air Force, FA8501 AFSC PZIO

**Service Type:** Janitorial/Custodial Service

**Mandatory for:** Department of the Air Force, Buildings 529 and 575, Randolph AFB, TX

**Mandatory Source(s) of Supply:** Relief Enterprise, Inc., Austin, TX

**Contracting Activity:** Dept. of the Air Force, FA7014 AFDW PK

**Service Type:** Administrative Services

**Mandatory for:** 426 5th Avenue, Sheppard AFB, TX

**Mandatory Source(s) of Supply:** Work Services Corporation, Wichita Falls, TX

**Contracting Activity:** Dept. of the Air Force, FA3020 82 CONS LGC

**Service Type:** Janitorial/Custodial Service

**Mandatory for:** Missouri Air National Guard, 10800 Lambert International Boulevard, Bridgeton, MO

**Mandatory Source(s) of Supply:** MGI Services Corporation, St. Louis, MO

**Contracting Activity:** Dept. of the Air Force, FA7014 AFDW PK

**Service Type:** Custodial Service

**Mandatory for:** Defense Finance and Accounting Service (DFAS)—Denver Center, 6760 E. Irvington Place, Denver, CO

**Mandatory Source(s) of Supply:** North Metro Community Services for Developmentally Disabled, Westminster, CO

**Contracting Activity:** Dept. of the Air Force, FA7014 AFDW PK

**Barry S. Lineback,**

*Director, Business Operations.*

[FR Doc. 2016-26077 Filed 10-27-16; 8:45 am]

**BILLING CODE 6353-01-P**

## COMMODITY FUTURES TRADING COMMISSION

### Sunshine Act Meetings

**TIME AND DATE:** 11:00 a.m., Friday, November 4, 2016.

**PLACE:** Three Lafayette Centre, 1155 21st Street NW., Washington, DC, 9th Floor Commission Conference Room.

**STATUS:** Closed.

**Matters To Be Considered:** Surveillance, enforcement, and examinations matters. In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's Web site at <http://www.cftc.gov>.

**CONTACT PERSON FOR MORE INFORMATION:** Christopher Kirkpatrick, 202-418-5964.

**Natise Allen,**

*Executive Assistant.*

[FR Doc. 2016-26268 Filed 10-26-16; 4:15 pm]

**BILLING CODE 6351-01-P**

## CONSUMER PRODUCT SAFETY COMMISSION

### Sunshine Act Meetings Notice

**TIME AND DATE:** Wednesday, November 2, 2016, 9:30 a.m.—11:30 a.m.

**PLACE:** Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

**STATUS:** Commission Meeting—Open to the Public.

**MATTER TO BE CONSIDERED:** Decisional Matter: Portable Generators—Notice of Proposed Rulemaking

A live webcast of the Meeting can be viewed at [www.cpsc.gov/live](http://www.cpsc.gov/live).

**TIME AND DATE:** Wednesday, November 2, 2016; 1:30 p.m.—3:30 p.m.

**PLACE:** Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

**STATUS:** Commission Meeting—Closed to the Public.

**MATTERS TO BE CONSIDERED:** Compliance Matters: The Commission staff will brief the Commission on the status of various compliance matters.

**CONTACT PERSON FOR INFORMATION:** Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504-7923.

Dated: October 25, 2016.

**Todd A. Stevenson,**  
*Secretary.*

[FR Doc. 2016-26142 Filed 10-26-16; 11:15 am]

**BILLING CODE 6355-01-P**

**DEPARTMENT OF DEFENSE****Office of the Secretary****Defense Science Board; Notice of Federal Advisory Committee Meetings**

**AGENCY:** Department of Defense.

**ACTION:** Notice of Federal Advisory Committee Meetings.

**SUMMARY:** The Defense Science Board (DSB) will meet in closed session on Wednesday, November 2, 2016, from 8:00 a.m. to 11:00 a.m. and 1:00 p.m. to 5:00 p.m. and Thursday, November 3, 2016, from 8:30 a.m. to 11:30 a.m. and 12:30 p.m. to 4:00 p.m. in the Nunn-Lugar conference room 3E863 at the Pentagon, Washington, DC.

**DATES:** November 2, 2016, from 8:00 a.m. to 5:00 p.m.; and November 3, 2016, from 8:30 a.m. to 4:00 p.m.

**ADDRESSES:** Nunn-Lugar conference room 3E863 at the Pentagon, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Ms. Debra Rose, Executive Officer, Defense Science Board, 3140 Defense Pentagon, Room 3B888A, Washington, DC 20301–3140, via email at [debra.a.rose20.civ@mail.mil](mailto:debra.a.rose20.civ@mail.mil), or via phone at (703) 571–0084 or the Defense Science Board Designated Federal Officer (DFO) Karen D.H. Saunders, Executive Director, Defense Science Board, 3140 Defense Pentagon, Room 3B888A, Washington, DC 20301, via email at [karen.d.saunders.civ@mail.mil](mailto:karen.d.saunders.civ@mail.mil), or via phone at (703) 571–0079.

**SUPPLEMENTARY INFORMATION:** Due to difficulties beyond the control of the Department of Defense, the Designated Federal Officer was unable to submit the **Federal Register** notice pertaining to the Defense Science Board meeting for its scheduled meeting for November 2 through 3, that ensured compliance with the requirements of 41 CFR 102–3.150(a). Accordingly the Advisory Committee Management Officer for the Department of Defense waives the 15-calendar day notification requirement pursuant to 41 CFR 102–3.150(b).

This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150.

The mission of the DSB is to provide independent advice and recommendations on matters relating to the Department of Defense's (DoD) scientific and technical enterprise. The objective of the meeting is to obtain, review, and evaluate classified information related to the DSB's

mission. DSB membership will meet with DoD Leadership to discuss current and future national security challenges within the Department. This meeting will focus on providing status and requesting additional input for current studies and proposed study topics on nuclear deterrence; rapid global tactical strike; cyber deterrence; military satellite communication and tactical networking; defense research enterprise assessment; achieving long-range military capabilities; and cyber supply chain. Additionally, it will provide background information on thoughts for study topics to help shape future study plans.

In accordance with section 10(d) of the FACA and 41 CFR 102–3.155, the DoD has determined that the DSB meeting will be closed to the public. Specifically, the Under Secretary of Defense (Acquisition, Technology, and Logistics), in consultation with the DoD Office of General Counsel, has determined in writing that all sessions will be closed to the public because it will consider matters covered by 5 U.S.C. 552b(c)(1). The determination is based on the consideration that it is expected that discussions throughout will involve classified matters of national security concern. To permit the meeting to be open to the public would preclude discussion of such matters and would greatly diminish the ultimate utility of the DSB's findings or recommendations to the Secretary of Defense and to the USD (AT&L).

In accordance with section 10(a)(3) of the FACA and 41 CFR 102–3.105(j) and 102–3.140, interested persons may submit a written statement for consideration by the DSB at any time regarding its mission or in response to the stated agenda of a planned meeting. Individuals submitting a written statement must submit their statement to the Defense Science Board Designated Federal Official (DFO) provided in the **FOR FURTHER INFORMATION CONTACT** section at any point; however, if a written statement is not received at least 3 calendar days prior to the meeting, which is the subject of this notice, then it may not be provided to or considered by the Defense Science Board until a later date.

Dated: October 25, 2016.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2016–26111 Filed 10–27–16; 8:45 am]

**BILLING CODE 5001–06–P**

**DEPARTMENT OF DEFENSE****Office of the Secretary**

[Docket ID: DOD–2015–HA–0049]

**Proposed Collection; Comment Request**

**AGENCY:** Office of the Assistant Secretary of Defense for Health Affairs, DoD.

**ACTION:** Notice.

**SUMMARY:** In compliance with the *Paperwork Reduction Act of 1995*, the Office of the Assistant Secretary of Defense for Health Affairs announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Consideration will be given to all comments received by December 27, 2016.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350–1700.

*Instructions:* All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at <http://www.regulations.gov> for submitting

comments. Please submit comments on any given form identified by docket number, form number, and title.

**FOR FURTHER INFORMATION CONTACT:** To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Health Services Systems (DHSS) Program Executive Office (PEO), ATTN: CDR Patrick Amersbach, Defense Health Headquarters (DHHQ), 7700 Arlington Boulevard, Falls Church VA 22042-2902, or call 703-681-0845.

**SUPPLEMENTARY INFORMATION:**

*Title; Associated Form; and OMB Number:* Centralized Credentials Quality Assurance System (CCQAS); OMB Control Number 0720-TBD.

*Needs and Uses:* CCQAS v2.9.11 is an automated Tri-Service, Web-based database containing credentialing, privileging, risk management, and adverse actions information on direct healthcare providers in the MHS. CCQAS also allows providers to apply for privileges online. This latter capability allows for a privileging workflow for new providers, for transfers (TDY and PCS), for modification of privileges, and for renewal of privileges and staff reappointment within the system. CCQAS was CAC enforced December 2009 and as part of the Federal Health Care Center, North Chicago, VA PIV users gained access in October 2010. In November 2011, CCQAS was PKI/SSO integrated.

*Affected Public:* Individuals or households.

*Annual Burden Hours:* 642,000.

*Number of Respondents:* 53,500.

*Responses per Respondent:* 3.

*Annual Responses:* 160,500.

*Average Burden per Response:* 4 hours.

*Frequency:* On occasion.

Currently, CCQAS provides credentialing, privileging, risk-management and adverse actions capabilities which support medical quality assurance activities in the direct care system. CCQAS is fully deployed world-wide and is used by all Services (Army, Navy, Air Force) and Components (Guard, Reserve). CCQAS serves users functioning at the facility (defined by an individual UIC), Service, and DoD levels. Access to CCQAS modules and capabilities within each module is permissions-based, so that users have access tailored to the functions they perform and sensitive information receives maximal protection. Within each module, access control is available to the screen level.

Dated: October 24, 2016.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2016-26057 Filed 10-27-16; 8:45 am]

**BILLING CODE 5001-06-P**

**DEPARTMENT OF DEFENSE**

**Department of the Navy**

**Notice of Availability of Government-Owned Inventions; Available for Licensing**

**AGENCY:** Department of the Navy; DoD.

**ACTION:** Notice.

**SUMMARY:** The inventions listed below are assigned to the United States Government as represented by the Secretary of the Navy and are available for domestic and foreign licensing by the Department of the Navy.

The following patents are available for licensing: U.S. Patent No. 8,552,282: Propulsion Defeating System//U.S. Patent No. 8,575,929: Magnetic Anomaly Surveillance System Using Spherical Trilateration//U.S. Patent No. 8,577,648: Simulating Fluid Flow at a Moving Boundary//U.S. Patent No. 8,583,573: Nonparametric Mine Line Detection Using Spatial Analysis//U.S. Patent No. 8,594,457: Correlation Image Detection//U.S. Patent No. 8,616,721: Solar Awning and Method//U.S. Patent No. 8,620,082: Sonar Image Texture Segmentation//U.S. Patent No. 8,639,475: System and Method for Spatially Invariant Signal Detection//U.S. Patent No. 8,714,069: Mine Clearance System and Method//U.S. Patent No. 8,743,654: Reflectivity Maps//U.S. Patent No. 8,777,285: Underwater Cable Capture and Pass Through Device//U.S. Patent No. 8,783,202: Subsurface Oscillating Blade Propellor//U.S. Patent No. 8,794,892: Torque Nut Assembly//U.S. Patent No. 8,823,316: Thermal Effluent to Electric Energy Harvesting System//

**ADDRESSES:** Requests for copies of the patents cited should be directed to Office of Counsel, Naval Surface Warfare Center Panama City Division, 110 Vernon Ave., Panama City, FL 32407-7001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Brenda Squires, Patent Administration, Naval Surface Warfare Center Panama City Division, 110 Vernon Ave., Panama City, FL 32407-7001, telephone 850-234-4646.

**Authority:** 35 U.S.C. 207, 37 CFR part 404.

Dated: October 24, 2016.

**C. Mora,**

*Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.*

[FR Doc. 2016-26100 Filed 10-27-16; 8:45 am]

**BILLING CODE 3810-FF-P**

**DEPARTMENT OF DEFENSE**

**Department of the Navy**

**Notice of Performance Review Board Membership**

**AGENCY:** Department of the Navy, DoD.

**ACTION:** Notice.

**SUMMARY:** Pursuant to 5 U.S.C. 4314(c) (4), the Department of Navy (DON) announces the appointment of members to the DON's numerous Senior Executive Service (SES) Performance Review Boards (PRBs). The purpose of the PRBs is to provide fair and impartial review of the annual SES performance appraisal prepared by the senior executive's immediate and second level supervisor; to make recommendations to appointing officials regarding acceptance or modification of the performance rating; and to make recommendations for performance bonuses and basic pay increases. Composition of the specific PRBs will be determined on an ad hoc basis from among the individuals listed below:

CAPT John Bruington  
 CAPT John Gearhart  
 Dr. Edward Franchi  
 Dr. Janine Davidson  
 Dr. John Pazik  
 Dr. Judith Lean  
 Dr. Julie Christodoulou  
 Dr. Lawrence Schuette  
 Dr. Michael Malanoski  
 Dr. Walter Jones  
 LtGen Mark Brilakis  
 LtGen Ronald Bailey  
 Mr. Anthony Cifone  
 Mr. Brian Persons  
 Mr. Bryan Wood  
 Mr. Donald McCormack, Jr.  
 Mr. Elliot Branch  
 Mr. Garry Newton  
 Mr. Gary Kessler  
 Mr. Gary Rensing  
 Mr. James McCarthy  
 Mr. James Meade  
 Mr. Jeff Bearor  
 Mr. Joe Ludovici  
 Mr. Luther Bragg  
 Mr. Mark Andress  
 Mr. Mark Honecker  
 Mr. Marty Simon  
 Mr. Michael Madden  
 Mr. Patrick Sullivan  
 Mr. Paul Lluy  
 Mr. Phillip Chudoba



Mr. Robert Hogue  
 Mr. Ronald Davis, Jr.  
 Mr. Sam Worth  
 Mr. Scott Lutterloh  
 Mr. Stephen Trautman  
 Mr. Steven Iselin  
 Mr. Steven Schulze  
 Mr. Stu Young  
 Mr. Todd Balazs  
 Mr. Todd Schafer  
 Mr. Victor Gavin  
 Mr. William Deligne  
 Ms. Allison Stiller  
 Ms. Ann-Cecile McDermott  
 Ms. Anne Brennan  
 Ms. Anne Davis  
 Ms. Carmela Keeney  
 Ms. Cindy Shaver  
 Ms. Dianne Boyle  
 Ms. Gloria Valdez  
 Ms. Jennifer LaTorre  
 Ms. Joan Johnson  
 Ms. Jodi Greene  
 Ms. Leslie Taylor  
 Ms. Lynn Wright  
 Ms. Mary Tompa  
 Ms. Sharon Smoot  
 RADM Brian Antonio  
 RADM John Neagley  
 RADM Robert Sharp

**FOR FURTHER INFORMATION CONTACT:** Tara Landis, Director, Executive Management Program Office, Office of Civilian Human Resources at 202 685-6186.

Dated: October 24, 2016.

**C. Mora,**

*Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.*

[FR Doc. 2016-26099 Filed 10-27-16; 8:45 am]

**BILLING CODE 3810-FF-P**

**ENVIRONMENTAL PROTECTION AGENCY**

[ER-FRL-9029-8]

**Environmental Impact Statements; Notice of Availability**

*Responsible Agency:* Office of Federal Activities, General Information (202) 564-7146 or <http://www.epa.gov/nepa>. Weekly receipt of Environmental Impact Statements (EISs) Filed 10/17/2016 Through 10/21/2016 Pursuant to 40 CFR 1506.9.

**Notice**

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: <http://www.epa.gov/compliance/nepa/eisdata.html>.

*EIS No. 20160246*, Final, NMFS, FL, Amendment 37 to the Fishery Management Plan for the Snapper-

Grouper Fishery of the South Atlantic Region, Modification to the Hogfish Fishery Management Unit, Fishing Level Specifications for the Two South Atlantic Hogfish Stocks, Rebuilding Plan for the Florida Keys/ East Florida Stock, and Establishment/Revision of Management Measures for Both Stocks, Review Period Ends: 11/28/2016, Contact: Nikhil Mehta 727-551-5098

*EIS No. 20160247*, Final, BLM, NV, 3 Bars Ecosystem and Landscape Restoration Project, Review Period Ends: 11/28/2016, Contact: Todd Erdody 775-635-4000

*EIS No. 20160248*, Draft, VA, KY, Replacement Robley Rex VA Medical Center, Comment Period Ends: 12/12/2016, Contact: Todd Sanders 224-610-3872

*EIS No. 20160249*, Draft, USFS, OR, Government Camp—Cooper Spur Land Exchange, Comment Period Ends: 01/26/2017, Contact: Michelle Lombardo 503-668-1796

*EIS No. 20160250*, Draft, NPS, NY, Fire Island Wilderness Breach Management Plan, Comment Period Ends: 12/12/2016, Contact: Kaetlyn Jackson 631-687-4750

*EIS No. 20160251*, Final, OSM, TN, North Cumberland Wildlife Management Area, Tennessee Lands Unsuitable for Mining Petition Evaluation Document, Review Period Ends: 11/28/2016, Contact: Earl Bandy 865-545-4103

*EIS No. 20160252*, Draft, NSF, PR, Arecibo Observatory, Comment Period Ends: 12/12/2016, Contact: Elizabeth Pentecost 703-292-4907

*EIS No. 20160253*, Draft, USACE, KS, Kansas River Commercial Sand and Gravel Dredging, Comment Period Ends: 12/12/2016, Contact: Brian Donahue 816-389-3703

*EIS No. 20160254*, Final Supplement, USFWS, OH, Ballville Dam Project, Review Period Ends: 11/28/2016, Contact: Jessica Hogrefe 612-713-5102

**Amended Notices**  
*EIS No. 20160197*, Draft, NOAA, HI, Heeia National Estuarine Research Reserve, Comment Period Ends: 10/31/2016, Contact: Jean Tanimoto 808-725-5253

Revision to the FR Notice Published 09/02/2016; Correction to Extended Comment Period from 10/30/2016 to 10/31/2016.  
*EIS No. 20160205*, Draft Supplement, USACE, WV, Bluestone Dam Safety Modification, Comment Period Ends: 11/23/2016, Contact: Rebecca A. Rutherford 304-304-5924

Revision to FR Notice Published 09/09/2016; Extending Comment Period from 10/24/2016 to 11/23/2016.

Dated: October 25, 2016.

**Dawn Roberts,**

*Management Analyst, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. 2016-26109 Filed 10-27-16; 8:45 am]

**BILLING CODE 6560-50-P**

**FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD**

**Notice of Federal Accounting Standards Advisory Board Member Appointment**

**AGENCY:** Federal Accounting Standards Advisory Board.

**ACTION:** Notice.

*Board Action:* Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act (Pub. L. 92-463), as amended, and the FASAB Rules Of Procedure, as amended in October 2010, notice is hereby given that Mr. Patrick McNamee has been appointed to serve a five-year term as a member of the Federal Accounting Standards Advisory Board (FASAB) beginning January 1, 2017. The news release is available on the FASAB Web site at [http://files.fasab.gov/pdffiles/new\\_member\\_mcnamee\\_nr\\_2016.pdf](http://files.fasab.gov/pdffiles/new_member_mcnamee_nr_2016.pdf). Copies can be obtained by contacting FASAB at (202) 512-7350.

**FOR FURTHER INFORMATION CONTACT:** Ms. Wendy M. Payne, Executive Director, 441 G Street NW., Mail Stop 6H19, Washington, DC 20548, or call (202) 512-7350.

**Authority:** Federal Advisory Committee Act, Pub. L. 92-463.

Dated: October 21, 2016.

**Wendy M. Payne,**

*Executive Director.*

[FR Doc. 2016-26048 Filed 10-27-16; 8:45 am]

**BILLING CODE 1610-02-P**

**FEDERAL COMMUNICATIONS COMMISSION**

**Radio Broadcasting Services; AM or FM Proposals To Change the Community of License**

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** The following applicants filed AM or FM proposals to change the community of License: Caldwell County CBC, Inc., Station WAVJ, Facility ID 15527, BPH-20160916ABG, From

Princeton, KY, To Providence, KY; Four R Broadcasting, Inc., Station NEW, Facility ID 191560, BMPH–20160926AAF, From Christoval, TX, To Stanton, TX; Genesee Media Corporation, Station WOKR, Facility ID 15767, BP–20140124AME, From Brockport, NY, To Brighton, NY; Genesis Communications I, Inc., Station WHOO, Facility ID 54573, BP–20140721AAAY, From Kissimmee, FL, To Winter Park, FL; Hopkins-Webster CBC, Inc., Station WWKY, Facility ID 67479, BPH–20160916ABC, From Providence, KY, To Sebree, KY; Radio 7 Media, LLC, Station WLXA, Facility ID 53875, BPH–20161012AAD, From Loretto, TN, To Florence, AL; Rich Broadcasting Idaho LS, LLC, Station KLLP, Facility ID 8413, BPH–20161011AEJ, From Chubbuck, ID, To Blackfoot, ID; Rich Broadcasting Idaho LS, LLC, Station KID–FM, Facility ID 22195, BPH–20161011AFL, From Idaho Falls, ID, To Aberdeen, ID; Shamrock Communications, Inc., Station KNEZ, Facility ID 166018, BPH–20160922ABD, From Fernley, NV, To Hazen, NV; The Montana Radio Company, LLC, Station KZMO, Facility ID 183371, BPH–20161011ABH, From Roundup, MT, To Klein, MT; University Of Wyoming, Station KAIW, Facility ID 93001, BPED–20160825ABH, From Laramie, WY, To Saratoga, WY.

**DATES:** The agency must receive comments on or before December 27, 2016.

**ADDRESSES:** Federal Communications Commission, 445 Twelfth Street SW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Tung Bui, 202–418–2700.

**SUPPLEMENTARY INFORMATION:** The full text of these applications is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 12th Street, SW., Washington, DC 20554 or electronically via the Media Bureau's Consolidated Data Base System, [http://licensing.fcc.gov/prod/cdbs/pubacc/prod/cdbs\\_pa.htm](http://licensing.fcc.gov/prod/cdbs/pubacc/prod/cdbs_pa.htm).

Federal Communications Commission.

**James D. Bradshaw,**  
Deputy Chief, Audio Division, Media Bureau.  
[FR Doc. 2016–26110 Filed 10–27–16; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0149]

### Information Collection Being Reviewed by the Federal Communications Commission

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) 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 December 27, 2016. 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](mailto:PRA@fcc.gov) and to [Nicole.Ongele@fcc.gov](mailto:Nicole.Ongele@fcc.gov).

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection, contact Nicole Ongele at (202) 418–2991.

#### SUPPLEMENTARY INFORMATION:

*OMB Control Number:* 3060–0149.

*Title:* Part 63, Application and Supplemental Information

Requirements; Technology Transitions, GN Docket No. 13–5, et al.

*Form Number(s):* N/A.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit.

*Number of Respondents and Responses:* 65 respondents; 85 responses.

*Estimated Time per Response:* 5.34 hours per response.

*Frequency of Response:* One-time reporting requirement and third party disclosure requirements.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this collection of information is contained in 47 U.S.C. 214 and 402 of the Communications Act of 1934, as amended.

*Total Annual Burden:* 2,075 hours.

*Annual Cost Burden:* \$27,900.

*Privacy Act Impact Assessment:* No impact(s).

*Nature and Extent of Confidentiality:* Information filed in section 214 applications has generally been non-confidential. Requests from parties seeking confidential treatment are considered by Commission staff pursuant to 47 CFR 0.459 of the Commission's rules.

*Needs and Uses:* The Commission is seeking Office of Management and Budget (OMB) approval for a revision of a currently approved collection. The Commission will submit this information collection after this 60 day comment period. Section 214 of the Communications Act of 1934, as amended, requires that a carrier must first obtain FCC authorization either to (1) construct, operate, or engage in transmission over a line of communications; or (2) discontinue, reduce or impair service over a line of communications.

Part 63 of Title 47 of the Code of Federal Regulations (CFR) implements Section 214. Part 63 also implements provisions of the Cable Communications Policy Act of 1984 pertaining to video which was approved under this OMB Control Number 3060–0149. In 2009, the Commission modified Part 63 to extend to providers of interconnected Voice of Internet Protocol (VoIP) service the discontinuance obligations that apply to domestic non-dominant telecommunications carriers under Section 214 of the Communications Act of 1934, as amended. In 2014, the Commission adopted improved administrative filing procedures for domestic transfers of control, domestic discontinuances and notices of network changes, and among other adjustments, modified Part 63 to require electronic

filing for applications for authorization to discontinue, reduce, or impair service under section 214(a) of the Act.

In July 2016, the Commission concluded that applicants seeking to discontinue a legacy time division multiplexing (TDM)-based voice service as part of a transition to a new technology, whether Internet Protocol (IP), wireless, or another type (technology transition discontinuance application) must demonstrate that an adequate replacement for the legacy service exists in order to be eligible for streamlined treatment and revised part 63 accordingly. For any other domestic service for which a discontinuance application is filed, the existing framework governs automatic grant procedures. Unlike traditional applicants, technology transition discontinuance applicants seeking streamlined treatment will be required to submit with their application either a certification or a showing as to whether an “adequate replacement” exists in the service area. The Commission stressed that attempting to satisfy this “adequate replacement” test to establish eligibility for streamlined treatment is entirely voluntary for an applicant. Voice technology transition discontinuance applicants that decline to pursue this path are not eligible for streamlined treatment and will have their applications evaluated on a non-streamlined basis under the traditional five factor test. The Commission concluded that an applicant for a technology transition discontinuance may demonstrate that a service is an adequate replacement for a legacy voice service by certifying or showing that one or more replacement service(s) offers all of the following: (i) Substantially similar levels of network infrastructure and service quality as the applicant service; (ii) compliance with existing federal and/or industry standards required to ensure that critical applications such as 911, network security, and applications for individuals with disabilities remain available; and (iii) interoperability and compatibility with an enumerated list of applications and functionalities determined to be key to consumers and competitors. One replacement service must satisfy all the criteria to retain eligibility for automatic grant. To reduce burdens on carriers, the Commission adopted a more streamlined approach for discontinuances involving services that are substantially similar to those for which a Section 214 discontinuance has previously been approved and allowed Section 214 discontinuance applications to be eligible for automatic grant without any further showing if the

applicant demonstrates that the service has zero customers in the relevant service area and no requests for service in the last six months.

The Commission also concluded that consumer education materials should be required as part of any technology transition discontinuance because customers must be informed of their choices to ensure seamless transitions. The Commission determined that information about the price of the legacy service and the proposed replacement service should be provided as part of the application because any potential increased costs would implicate the Commission’s commitment to ensuring that technology transitions do not unduly impact our most vulnerable citizens. To further reduce burdens on carriers, the Commission also decided to allow carriers to provide notice via email to offer additional options to customers and addressed a gap in the Commission’s rules to make a competitive LEC’s application for discontinuance deemed granted on the effective date of any comer retirement that made the discontinuance unavoidable. The Commission further concluded that applicants must provide notice of discontinuance applications to any federally-recognized Tribal Nations. The Commission estimates that there will be five respondents submitting 25 applications/responses related to these revisions. The Commission also estimates that these revisions will result in a total of 1,775 annual burden hours and a total annual cost of \$27,900. The Commission estimates that the total annual burden and annual cost of the entire collection, as revised, is 2,075 and \$27,900, respectively.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2016–26052 Filed 10–27–16; 8:45 am]

**BILLING CODE 6712-01-P**

## FEDERAL COMMUNICATIONS COMMISSION

[GN Docket No. 12–268; AU Docket No. 14–252; WT Docket No. 12–269; DA 16–1213]

### Clearing Target of 108 Megahertz Set for Stage 3 of the Broadcast Television Spectrum Incentive Auction; Stage 3 Bidding in the Reverse Auction Will Start on November 1, 2016

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** The Incentive Auction Task Force and Wireless

Telecommunications Bureau announce the spectrum clearing target of 108 megahertz and band plan for Stage 3 of the incentive auction, and that bidding in Stage 3 of the reverse auction is scheduled to begin on November 1, 2016. This document also announces details and dates regarding bidding and the availability of educational and informational materials for reverse and forward auction bidders eligible to participate in Stage 3; the availability of Stage 3 bidding and timing information in the Incentive Auction Public Reporting System; and the importance of bidder contingency plans. Finally, this document reminds each reverse and forward auction applicant of its continuing obligations under the FCC’s rules.

#### FOR FURTHER INFORMATION CONTACT:

*Wireless Telecommunications Bureau, Auctions and Spectrum Access Division:* For general auction questions, contact Linda Sanderson at (717) 338–2868. For reverse auction or forward auction legal questions, refer to the contact information listed in the *Incentive Auction Stage 3 Clearing Target Public Notice*.

**SUPPLEMENTARY INFORMATION:** This is a summary of the *Incentive Auction Stage 3 Clearing Target Public Notice*, GN Docket No. 12–268, AU Docket No. 14–252, WT Docket No. 12–269, DA 16–1213, released October 25, 2016. The complete text of the *Incentive Auction Stage 3 Clearing Target Public Notice* is available for public inspection and copying from 8:00 a.m. to 4:30 p.m. Eastern Time (ET) Monday through Thursday or from 8:00 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The complete text is also available on the Commission’s Web site at <http://wireless.fcc.gov>, the Auction 1000 Web site at <http://www.fcc.gov/auctions/1000>, or by using the search function on the ECFS Web page at <http://www.fcc.gov/cgb/ecfs/>. Alternative formats are available to persons with disabilities by sending an email to [FCC504@fcc.gov](mailto:FCC504@fcc.gov) or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

1. The Incentive Auction Task Force (Task Force) and the Wireless Telecommunications Bureau (Bureau) announce the 108 megahertz spectrum clearing target that has been set by the Auction System’s optimization procedure and the associated band plan for Stage 3 of the incentive auction, as well as the number of Category 1 and Category 2 generic license blocks in

each Partial Economic Area (PEA) that will be offered in Stage 3 of the forward auction. The Task Force and Bureau also provide details and specific dates regarding bidding and the continuing availability of educational materials, and remind reverse and forward auction applicants of their continuing obligations.

### **I. Stage 3 Clearing Target and Band Plan**

2. The Auction System's clearing target determination procedure has set a spectrum clearing target of 108 megahertz for Stage 3 of the incentive auction. Under the band plan associated with this spectrum clearing target, 80 megahertz, or 8 paired blocks, of licensed spectrum will be offered in the forward auction on a near-nationwide basis.

3. The generic license blocks offered in Stage 3 of the forward auction under this band plan will consist of a total of 3,301 Category 1 blocks (zero to 15 percent impairment) and a total of two Category 2 blocks (greater than 15 percent and up to 50 percent impairment). Approximately 99.9 percent of the blocks offered will be Category 1 blocks, and 99.9 percent of the Category 1 blocks will be zero percent impaired. Attached to the *Incentive Auction Stage 3 Clearing Target Public Notice* as Appendix A is a list indicating the number of Category 1 and Category 2 blocks available in each PEA.

4. The clearing target for Stage 3 was determined by applying the procedure the Commission adopted in the *Auction 1000 Bidding Procedures Public Notice*, 80 FR 61917, October 14, 2015, using the same objectives as in the initial clearing target optimization and taking into account the additional channel in the TV band and any participating stations that have dropped out of the auction in the previous stage. Based on the new provisional television channel assignment plan, the nationwide impaired weighted-pops were calculated on a 2x2 cell level and the one-block-equivalent nationwide standard for impairments was applied.

### **II. Important Information Concerning the Reverse Auction (Auction 1001)**

5. *Educational Materials.* The Task Force and Bureau remind all reverse auction bidders of the continuing availability of Educational materials regarding bidding in the clock phase of the reverse auction on the Auction 1001 Web site under the Education section. Specifically, such bidders are encouraged to review the Reverse Auction Clock Phase Tutorial and the

Reverse Auction New Stage Tutorial prior to the start of Stage 3 of the reverse auction.

6. *Accessing the Auction System for Stage 3.* Any bidder that had one or more stations with the status "Frozen—Provisionally Winning" at the end of the previous stage will be able to log in to the Reverse Auction Bidding System for Stage 3. Starting at 10:00 a.m. Eastern Time (ET) on October 26, 2016, such a bidder can log in and view the bidding status, and, where applicable, the following information for Round 1 of the new stage for each of the bidder's stations that qualified to participate in the clock rounds of the reverse auction: initial bid option, available bid options, vacancy ranges, and clock price offers.

7. A bidder will need to use the RSA SecurID® tokens (RSA tokens) it used for placing bids in the previous stage to access the Reverse Auction Bidding System for Stage 3. RSA tokens with previously set personal identification numbers (PINs) may be used without setting a new PIN. Any authorized bidder that has not already set a PIN for his or her designated RSA token (*e.g.*, an authorized bidder recently identified on FCC Form 177 or one using a replacement RSA token) must set a PIN as described in the materials sent with the Second Confidential Status Letter. Each bidder will be able to access the Reverse Auction Bidding System at the same web address used during the previous stage. In addition, the FCC Auction Bidder Line phone number for Stage 3 will be the same number used for the previous stage. The Auction Bidder Line will be available from 9:00 a.m. to 5:30 p.m. ET starting on October 31, 2016.

8. *Returning RSA Tokens.* Each bidder that did not have any stations with the status "Frozen—Provisionally Winning" at the end of the previous stage will be sent a pre-addressed, stamped envelope to return its RSA tokens.

9. *Clocks Rounds Start Date and Round Schedule.* Bidding in the clock rounds of Stage 3 of Auction 1001 will begin on Tuesday, November 1, 2016, with the following schedule: Bidding Round (10:00 a.m.—2:00 p.m. ET). From Wednesday, November 2, 2016, through Friday, November 4, 2016, the schedule will be: Bidding Round (10:00 a.m.—12:00 p.m. ET) and Bidding Round (3:00 p.m.—5:00 p.m. ET). Starting on Monday, November 7, 2016, and continuing until further notice, the schedule will be: Bidding Round (10.00 a.m.—11:00 a.m. ET); Bidding Round (1:00 p.m.—2:00 p.m. ET); and Bidding Round (4:00 p.m.—5:00 p.m. ET). There will be no bidding on Friday, November 11, 2016, in observance of the Federal

holiday. Bidding will resume on Monday, November 14, 2016, using the above three-round schedule until further notice. The Bureau may adjust the number and length of bidding rounds based upon its monitoring of the bidding and assessment of the reverse auction's progress. The Bureau will provide notice of any adjustment by announcement in the Reverse Auction Bidding System during the course of the auction.

10. *Reset Base Clock Price and Clock Decrement for Round 1 of Stage 3.* The base clock price has been reset to \$900 per unit of volume for Stage 3 of the reverse auction. The price decrement for Round 1 of Stage 3 of the reverse auction will be five percent of the reset base clock price.

### **III. Important Information Concerning the Forward Auction (Auction 1002)**

11. *Bidding in Stage 3.* On the next business day after Stage 3 of the reverse auction concludes, the Task Force and Bureau will announce the initial bidding schedule for Stage 3 of the forward auction in the Forward Auction Bidding System and in the Incentive Auction Public Reporting System (PRS), including the date and time of the first round of bidding. Bidding in Stage 3 of the forward auction will begin no later than three business days after this announcement. Each bidder is strongly encouraged to regularly monitor the PRS for announcements and other important information related to bidding in Stage 3 of the forward auction. The PRS can be accessed directly at [auctiondata.fcc.gov](http://auctiondata.fcc.gov) and from a link under the Results section of the Auction 1001 Web site ([www.fcc.gov/auctions/1001](http://www.fcc.gov/auctions/1001)) and the Auction 1002 Web site ([www.fcc.gov/auctions/1002](http://www.fcc.gov/auctions/1002)).

12. *Accessing the Forward Auction Bidding System in Stage 3.* Any bidder that is eligible to bid in Stage 3 of the forward auction will be able to access the Forward Auction Bidding System beginning at 10:00 a.m. ET on October 31, 2016. An eligible bidder can log in to the Forward Auction Bidding System using the same RSA tokens, web address, and instructions provided in the bidder registration materials it received prior to the start of Stage 1 of the forward auction. Upon logging in to this system, a bidder can download detailed impairment information for Stage 3 as well as the stage transition files. The detailed impairment information and bidder-specific information, including stage transition files and bidding information from previous stages, are non-public and are provided only to eligible bidders to help guide their bidding in Stage 3 of the

forward auction. This information will not be disclosed publicly until after the auction concludes. Any bidder with zero eligibility by the end of Stage 2 will not be eligible to bid in Stage 3 of the forward auction.

13. *Returning RSA Tokens.* Each bidder that is no longer eligible to participate in the forward auction (*i.e.*, any bidder that has zero eligibility by the end of Stage 2) will be sent a pre-addressed, stamped envelope to return its RSA tokens.

14. *Activity Rule for Round 1 of Stage 3.* Starting in the first round of Stage 3, each bidder must be active on at least 95 percent of its bidding eligibility to maintain its bidding eligibility for the next round. Any changes to the activity requirement in subsequent rounds will be announced via the Forward Auction Bidding System. Prior to the start of Stage 3 of the forward auction, a bidder may view its initial eligibility and required activity for Round 1 by downloading the My Bidder Status file under the Bid/Status tab of the Downloads screen.

15. *Clock Increment for Round 1 of Stage 3.* An increment of five percent will be used to set clock prices for products in Round 1 of Stage 3 of the forward auction. Prior to the announcement of the forward auction bidding schedule for Stage 3, a bidder may view the clock prices for Round 1 by downloading the Sample Bids file in the Forward Auction Bidding System.

#### IV. Public Reporting System

16. As was the case for previous stages of the incentive auction, publicly available bidding and timing information for Stage 3 of the reverse auction and the forward auction will be accessible through the PRS. The PRS will display the same types of bidding and other information for Stage 3 as was available for previous stages. For more information about the types of bidding and other information available in the PRS, please see the *Public Reporting System Public Notice*.

#### V. Bidding Contingency Plan

17. The Task Force and Bureau remind each bidder that it should maintain and continue to refine as necessary a comprehensive contingency plan that can be quickly implemented in case difficulties arise when participating in the incentive auction. While the Commission will correct any problems with Commission-controlled facilities, each bidder is solely responsible for anticipating and overcoming problems such as bidder computer failures or other technical issues, loss of or problems with data connections

(including those used to access and place bids in the Reverse Auction Bidding System or the Forward Auction Bidding System), telephone service interruptions, adverse local weather conditions, unavailability of its authorized bidders, or the loss or breach of confidential security codes.

A bidder should ensure that each of its authorized bidders can access and place bids in the Reverse Auction Bidding System or Forward Auction Bidding System, and it should not rely upon the same computer or data connection to do so. Contingency plans should include arrangements for accessing and placing bids in the Reverse Auction Bidding System or the Forward Auction Bidding System from one or more alternative locations. A bidder's contingency plans might also include, among other arrangements, using the Auction Bidder Line as an alternative method of bidding in the incentive auction.

18. Each reverse auction bidder is further reminded that a failure to submit a bid for a station with the status "Bidding" is considered to be a missing bid and will be interpreted as a bid to drop out of the auction. The Reverse Auction Bidding System will automatically submit a bid to drop out of the auction for all stations with missing bids. The status of a station that bids to drop out of the auction will be "Exited—Voluntarily" once bid processing is complete for the round (unless the station first becomes frozen). Once a station has the status "Exited," a bidder cannot bid for the station in any subsequent round or stage.

19. The Task Force and Bureau remind each forward auction bidder that its failure to submit a bid during a clock round will be considered a "missing" bid and will be treated as a bid for zero blocks, at the lowest price in the price range for the round, for any products in which the bidder had processed demand from the previous round. If there is insufficient excess demand, the "missing" bid may be partially applied or not applied at all and the bidder will continue to have processed demand for the product in the next round. If the "missing" bid is partially or fully applied, that bidder's eligibility may be irrevocably reduced in the next round.

#### VI. Continuing Obligations

20. *Due Diligence.* The Task Force and Bureau remind each reverse and forward auction bidder that it is solely responsible throughout the auction for investigating and evaluating all legal, technical, and marketplace factors and risks that may have a bearing on the bid(s) it submits in the incentive

auction. For more information, each bidder should review the *Auction 1000 Application Procedures Public Notice*, 80 FR 66429, October 29, 2015.

21. *Prohibited Communications Reminder.* The Task Force and Bureau remind all full power and Class A broadcast television licensees, as well as forward auction applicants, that they remain subject to the Commission's rules prohibiting certain communications in connection with Commission auctions. For communications among broadcasters, and between broadcasters and forward auction applicants, the prohibited communication period ends when the results of the incentive auction are announced by public notice. For communications among forward auction applicants, the period ends on the deadline for making down payments on winning bids. A party that is subject to the prohibition remains subject to the prohibition regardless of developments during the auction process.

22. The Task Force and Bureau further remind each full power and Class A broadcast television licensee that even though communicating whether or not a party filed an application to participate in the reverse auction does not violate the rules prohibiting certain communications, communicating that a party "is not bidding" in or has "exited" the reverse auction could constitute an apparent violation that needs to be reported. All forward auction applicants, including those that did not qualify to bid and those that have since lost eligibility to bid in the forward auction, are also reminded that they remain subject to the rules prohibiting certain communications until the deadline for making down payments on winning bids.

23. The Commission's rules require covered parties to report violations of the prohibition of certain communications to Margaret W. Wiener, Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, by the most expeditious means available. Any such report should be submitted by email to Ms. Wiener at the following email address: [auCTION1000@fcc.gov](mailto:auCTION1000@fcc.gov). Any report in hard copy must be delivered only to Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street SW., Washington, DC 20554. Failure to make a timely report under the rule constitutes a continuing violation of the rule, with attendant consequences.

24. For a thorough discussion of the prohibition of certain communications during the incentive auction, please refer to the *Prohibited Communications Public Notice*, 80 FR 63216, October 19, 2015.

25. *Making Modifications to Applications*. The Task Force and Bureau remind each reverse and forward auction applicant that the Commission's rules require an applicant to maintain the accuracy and completeness of information furnished in its application to participate in Auctions 1001 and 1002, respectively. Each applicant should amend its application to furnish additional or corrected information within five days of a significant occurrence, or no more than five days after the applicant becomes aware of the need for an amendment. Any applicant that needs to make changes must do so using the procedures described in the *Auction 1000 Application Procedures Public Notice* and the *Auction 1002 Qualified Bidders Public Notice*.

26. To make changes to its FCC Form 177 or FCC Form 175 while the Auction System is available, the applicant must make those changes electronically using the Auction System and submit a letter briefly summarizing the changes to its FCC Form 177 by email to [auction1001@fcc.gov](mailto:auction1001@fcc.gov), or to its FCC Form 175 by email to [auction1002@fcc.gov](mailto:auction1002@fcc.gov). To make changes at a time when the Auction System is unavailable, the applicant must make those changes using the procedures described in the *Auction 1000 Application Procedures Public Notice*. All changes are subject to review by Commission staff.

Federal Communications Commission.  
**Gary D. Michaels**,  
*Deputy Chief, Auctions and Spectrum Access Division, WTB.*  
 [FR Doc. 2016-26196 Filed 10-27-16; 8:45 am]  
**BILLING CODE 6712-01-P**

**FEDERAL RESERVE SYSTEM**

[Docket No. OP-1552]

**Federal Reserve Bank Services**

**AGENCY:** Board of Governors of the Federal Reserve System.  
**ACTION:** Notice.

**SUMMARY:** The Board of Governors of the Federal Reserve System (Board) has approved the private sector adjustment factor (PSAF) for 2017 of \$16.6 million and the 2017 fee schedules for Federal Reserve priced services and electronic access. These actions were taken in accordance with the Monetary Control Act of 1980, which requires that, over the long run, fees for Federal Reserve priced services be established on the basis of all direct and indirect costs, including the PSAF.

**DATES:** The new fee schedules become effective January 3, 2017.

**FOR FURTHER INFORMATION CONTACT:** For questions regarding the fee schedules: Susan V. Foley, Senior Associate Director, (202) 452-3596; Linda Healey, Senior Financial Services Analyst, (202) 452-5274, Division of Reserve Bank Operations and Payment Systems. For questions regarding the PSAF: Gregory L. Evans, Deputy Associate Director, (202) 452-3945; Lawrence Mize, Deputy Associate Director, (202) 452-5232; Max

Sinthorntham, Senior Financial Analyst, (202) 452-2864, Division of Reserve Bank Operations and Payment Systems. For users of Telecommunications Device for the Deaf (TDD) *only*, please call (202) 263-4869. Copies of the 2017 fee schedules for the check service are available from the Board, the Federal Reserve Banks, or the Reserve Banks' financial services Web site at [www.frb services.org](http://www.frb services.org).

**SUPPLEMENTARY INFORMATION:**

**I. Private Sector Adjustment Factor, Priced Services Cost Recovery, and Overview of 2017 Price Changes**

*A. Overview*—Each year, as required by the Monetary Control Act of 1980, the Reserve Banks set fees for priced services provided to depository institutions. These fees are set to recover, over the long run, all direct and indirect costs and imputed costs, including financing costs, taxes, and certain other expenses, as well as the return on equity (profit) that would have been earned if a private business firm provided the services. The imputed costs and imputed profit are collectively referred to as the PSAF. From 2006 through 2015, the Reserve Banks recovered 102.6 percent of their total expenses (including imputed costs) and targeted after-tax profits or return on equity (ROE) for providing priced services.<sup>1</sup>

Table 1 summarizes 2015 actual, 2016 estimated, and 2017 budgeted cost-recovery rates for all priced services. Cost recovery is estimated to be 103.6 percent in 2016 and budgeted to be 100.0 percent in 2017.

**TABLE 1—AGGREGATE PRICED SERVICES PRO FORMA COST AND REVENUE PERFORMANCE<sup>A</sup>**  
 [Dollars in millions]

Year	1 <sup>b</sup> Revenue	2 <sup>c</sup> Total expense	3 Net income (ROE)  [1-2]	4 <sup>d</sup> Targeted ROE	5 <sup>e</sup> Recovery rate after targeted ROE (%)  [1/(2+4)]
2015 (actual) .....	429.1	397.8	31.3	5.6	106.4
2016 (estimate) .....	432.5	413.3	19.1	4.1	103.6
2017 (budget) .....	439.4	434.8	4.6	4.6	100.0

<sup>a</sup> Calculations in this table and subsequent pro forma cost and revenue tables may be affected by rounding.  
<sup>b</sup> Revenue includes imputed income on investments when equity is imputed at a level that meets minimum capital requirements and, when combined with liabilities, exceeds total assets.  
<sup>c</sup> The calculation of total expense includes operating, imputed, and other expenses. Imputed and other expenses include taxes, Board of Governors' priced services expenses, the cost of float, and interest on imputed debt, if any. Credits or debits related to the accounting for pension plans under FAS 158 [ASC 715] are also included.  
<sup>d</sup> Targeted ROE is the after-tax ROE included in the PSAF.

<sup>1</sup> The 10-year recovery rate is based on the pro forma income statements for Federal Reserve priced services published in the Board's *Annual Report*. Effective December 31, 2006, the Reserve Banks implemented the Financial Accounting Standard Board's (FASB) Statement of Financial Accounting

Standards (SFAS) No. 158, Employers' Accounting for Defined Benefit Pension and Other Postretirement Plans (codified in FASB Accounting Standards Codification (ASC) Topic 715 (ASC 715), Compensation-Retirement Benefits), which resulted in recognizing a cumulative reduction in equity

related to the priced services' benefit plans. Including this cumulative reduction in equity from 2006 to 2015 results in cost recovery of 92.8 percent for the ten-year period. This measure of long-run cost recovery is also published in the Board's *Annual Report*.

<sup>e</sup>The recovery rates in this and subsequent tables do not reflect the unamortized gains or losses that must be recognized in accordance with FAS 158 [ASC 715]. Future gains or losses, and their effect on cost recovery, cannot be projected.

Table 2 provides an overview of cost-recovery budgets, estimates, and performance for the 10-year period from 2006 to 2015, 2015 actual, 2016 budget, 2016 estimate, and 2017 budget by priced service.

TABLE 2—PRICED SERVICES COST RECOVERY  
[Percent]

Priced service	2006–2015	2015 Actual	2016 Budget <sup>a</sup>	2016 Estimate	2017 Budget <sup>b</sup>
All services .....	102.6	106.4	101.4	103.6	100.0
Check .....	103.6	113.0	105.7	109.7	104.5
FedACH .....	99.5	100.7	99.5	98.8	95.5
Fedwire Funds and NSS .....	101.8	103.9	99.4	103.2	101.0
Fedwire Securities .....	102.7	108.2	97.5	97.6	97.5

<sup>a</sup>The 2016 budget figures reflect the final budgets as approved by the Board in December 2015.

<sup>b</sup>The 2017 budget figures reflect preliminary budget information from the Reserve Bank. The Reserve Banks will submit final budget data to the Board in November 2016, for Board consideration in December 2016.

1. *2016 Estimated Performance*—The Reserve Banks estimate that they will recover 103.6 percent of the costs of providing priced services in 2016, including total expense and targeted ROE, compared with a 2016 budgeted recovery rate of 101.4 percent, as shown in table 2. Overall, the Reserve Banks estimate that they will fully recover actual and imputed costs and earn net income of \$19.1 million, compared with the targeted ROE of \$4.1 million. The Reserve Banks estimate that the check service and the Fedwire® Funds and National Settlement Service will achieve full cost recovery; however, the Reserve Banks estimate that the FedACH® Service and the Fedwire Securities Service will not achieve full cost recovery because of investment costs associated with multiyear technology initiatives to modernize their processing platforms.<sup>2</sup> These investments are expected to enhance efficiency, the overall quality of operations, and the Reserve Banks' ability to offer additional services to depository institutions. Greater-than-expected check volume processed by the Reserve Banks has been the single most significant factor influencing priced services cost recovery.

2. *2017 Private-Sector Adjustment Factor*—The 2017 PSAF for Reserve Bank priced services is \$16.6 million.

<sup>2</sup>The Reserve Banks have been engaged in a multiyear technology initiative to modernize the FedACH processing platform by migrating the service from a mainframe system to a distributed computing environment. In 2016, the Reserve Banks chose a commercially available option as their processing solution to modernize the FedACH platform.

The Reserve Banks completed a multiyear technology initiative to modernize the processing platform for the Fedwire Securities Services in 2015. The capitalized software costs of this initiative will be amortized until October 2020 and thus remain a primary factor in the cost recovery calculation for these services in 2016.

This amount represents an increase of \$3.5 million from the 2016 PSAF of \$13.1 million. This increase is primarily the result of an increase in the total cost of capital, which includes cost of debt and targeted return on equity.

3. *2017 Projected Performance*—The Reserve Banks project a priced services cost-recovery rate of 100.0 percent in 2017, with both net income and targeted ROE of \$4.6 million. The Reserve Banks project that the price changes will result in a 3.2 percent average price increase for customers. The Reserve Banks project that the check service and the Fedwire Funds and National Settlement Service will fully recover their costs; however, the Reserve Banks project that the FedACH Service and the Fedwire Securities Service will not achieve full cost recovery. Although FedACH is not budgeted to fully recover its costs in 2017, the Reserve Banks are expected to fully recover FedACH costs following finalization of the FedACH technology modernization project and over the long run. In addition, the Board believes the Reserve Banks' 2017 FedACH fee increases are consistent with a multi-year strategy to minimize pricing volatility and provide long-term price stability for customers while undertaking the ongoing technology upgrade that will result in FedACH incurring higher expenses over the next few years. Although the Fedwire Securities Service is not budgeted to fully recover its costs in 2017, the Board believes the Reserve Banks are expected to fully recover Fedwire Securities Service costs over the long run following a few years of under recovery. As a result of an expected decrease in volume as well as the advancement of new initiatives to improve resiliency and operational functionality, the Reserve Banks plan to increase fees gradually over a multi-year period to

avoid the dramatic impact of a sharp one-year increase.

The primary risks to the Reserve Banks' ability to achieve their targeted cost-recovery rates are unanticipated volume and revenue reductions and the potential for cost overruns with the technology modernization initiatives. In light of these risks, the Reserve Banks will continue refining their business and operational strategies to manage operating costs, to increase product revenue, and to capitalize on efficiencies gained from technology initiatives.

4. *2017 Pricing*—The following summarizes the Reserve Banks' fee schedules for priced services in 2017: Check

- The Reserve Banks announced in July 2016, restructured FedForward®, FedReturn®, and FedReceipt® fee schedules to reflect today's electronic check-processing environment and announced in October 2016 a minor additional modification.<sup>3</sup> These previously announced fees, discussed in attachment II, will be effective in January 2017, consistent with the fee schedules for other priced services. The Reserve Banks announced the restructured fee schedules earlier in the year to provide customers with sufficient notice.

FedACH

- The Reserve Banks will increase the minimum monthly fee for FedACH origination from \$45 to \$50 and the minimum monthly fee for FedACH receipt from \$35 to \$40.

- The Reserve Banks will increase the FedACH Account Servicing fee from

<sup>3</sup> For the July announcement, see [https://www.frb-services.org/files/servicefees/pdf/071116\\_2017\\_check\\_pricing\\_customer\\_letter.pdf](https://www.frb-services.org/files/servicefees/pdf/071116_2017_check_pricing_customer_letter.pdf).

For the October announcement, see <https://frb-services.org/files/communications/pdf/check/100316-check-modification-announcement.pdf>.



\$45 to \$58. The Reserve Banks will also change the name of the FedACH Account Servicing fee to the FedACH Participation fee.

- The Reserve Banks will eliminate the on-us receipt credit of \$0.0032 per item.
- The Reserve Banks will increase the FedACH Information Extract File fee from \$100 to \$150 per file.
- The Reserve Banks will increase the FedPayments Reporter fee approximately 10 percent rounded to the nearest \$5 for each level of the tiered package pricing. The Reserve Banks also will introduce a new top tier, with a \$1,800 monthly fee, for a package that includes more than 10,000 reports.
- The Reserve Banks will introduce a fixed monthly fee and a volume-based tiered pricing structure for the FedGlobal ACH service. The tiered pricing structure will include per-item surcharges that are in addition to the standard FedACH origination fee of \$0.0032 and vary according to the transaction's destination, as seen in table 9. The top tier will cover monthly origination volume of more than 500 items and include a \$185 fixed monthly fee and a per-item surcharge that is \$0.12 lower than current per-item fees. The next tier will cover monthly origination volume between 161 and 500 items and include a \$60 fixed monthly fee and a per-item surcharge that is \$0.13 higher than current per-item fees. The bottom tier will cover monthly origination volume between 0 and 160 items and include a \$20 fixed monthly fee and a per-item surcharge that is \$0.38 higher than current per-item fees.

#### Fedwire Funds

- The Reserve Banks will increase the Tier 1 per-item preincentive fee from \$0.790 to \$0.820 per transaction, increase the Tier 2 per-item preincentive fee from \$0.240 to \$0.245, and increase the Tier 3 per-item preincentive fee from \$0.155 to \$0.170 per transaction.<sup>4</sup>

<sup>4</sup> The per-item preincentive fee is the fee that the Reserve Banks charge for transfers that do not qualify for incentive discounts. The Tier 1 per-item preincentive fee applies to the first 14,000 transfers, the Tier 2 per-item preincentive fee applies to the

- The Reserve Banks will increase the surcharge for offline transactions from \$55 to \$60.

#### National Settlement Services

- The Reserve Banks will keep prices at existing levels for the priced National Settlement Services.

#### Fedwire Securities

- The Reserve Banks will increase the online agency transfer fee from \$0.65 to \$0.77.

- The Reserve Banks will increase the offline origination and receipt surcharge transfer fee from \$66 to \$80.

- The Reserve Banks will increase the monthly agency issues maintenance fee from \$0.65 to \$0.77.

- The Reserve Banks will increase the monthly account maintenance fee from \$48.00 to \$57.50.

- The Reserve Banks will increase the joint custody origination surcharge from \$44 to \$46.

- The Reserve Banks will increase the claims adjustment fees from \$0.75 to \$0.80.

#### FedLine® Access Solutions

- The Reserve Banks will increase five existing monthly fees: (1) The FedLine Web® Plus fee from \$140 to \$160, (2) the FedLine Direct® Premier fee from \$6,500 to \$6,700, (3) the FedComplete® 200 Plus fee from \$1,300 to \$1,350, (4) the FedComplete 200 Premier fee from \$1,375 to \$1,425, and (5) the FedMail® Fax a la carte fee from \$70 to \$100.

- The Reserve Banks will implement a legacy software fee to encourage FedLine Direct customers to migrate to a new messaging solution. The fee will be introduced in July 2017 at \$5,000 per month and will increase in steps to \$20,000 per month by the end of 2017.

- The Reserve Banks will remove the legacy email service from all FedLine Web, Advantage®, Command®, and Direct packages and introduce a \$20-per-month fee to purchase an a la carte subscription to this service.

- The Reserve Banks will modify the E-Payments Routing Directory and make

next 76,000 transfers, and the Tier 3 per-item preincentive fee applies to any additional transfers. The Reserve Banks apply an 80 percent incentive discount to transfers over 60 percent of a customer's historic benchmark volume.

associated changes to FedLine packages and fees. A new automated download directory service will be introduced and available only to subscribers of plus- and premier-level FedLine packages. A la carte fees for additional directory download codes, ranging from \$75 to \$2,000 per month, will also be introduced. In addition, the new lineup of FedLine Exchange packages, discussed below, will allow customers that do not use FedLine for Federal Reserve Financial Services to access the directory.

- The Reserve Banks will introduce a new FedLine Exchange® service, along with two new associated packages: A base-level and premier-level. The base package will be priced at \$40 per month and include the manual download directory service. The premier package will be priced at \$125 per month and include both the manual and automated download directory services.

- The Reserve Banks will introduce a new FedMail package, priced at \$85 per month, which will include the same services as those included in the existing FedLine Exchange package to ensure continuity of this service. All existing FedLine Exchange subscribers will be transitioned to the new FedMail package and experience a fee increase of \$45.

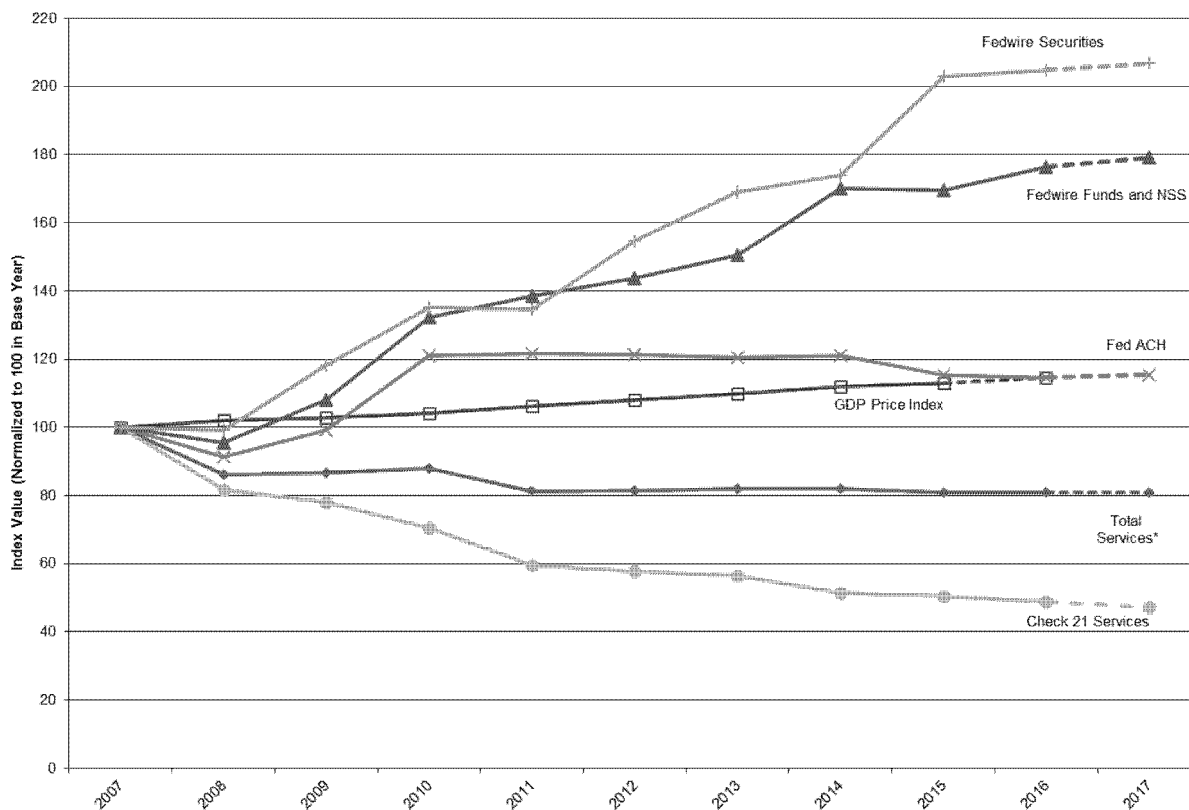
5. *2017 Price Index*—Figure 1 compares indexes of fees for the Reserve Banks' priced services with the GDP price index.<sup>5</sup> The price index for Reserve Bank priced services is projected to decrease less than 1 percent in 2017 from the 2016 level. The price index for Check 21 services is projected to decrease approximately 3 percent. The price index for the FedACH Service is projected to increase nearly 1 percent. The price index for the Fedwire Funds and National Settlement Services is projected to increase approximately 2 percent. The price index for the Fedwire Securities Services is projected to increase nearly 1 percent. For the period 2007 to 2017, the price index for total priced services is expected to decrease approximately 19 percent.

<sup>5</sup> For the period 2007 to 2015, the GDP price index increased 13 percent.

## FIGURE 1

## 2016 PRICE INDEX

## PRICE INDEXES FOR FEDERAL RESERVE PRICED SERVICES



\* Total Services excludes legacy paper services which now have minimal volume and are expected to generate less than \$1 million in revenue in 2017.

### B. Private Sector Adjustment Factor—

The imputed debt financing costs, targeted ROE, and effective tax rate are based on a U.S. publicly traded firm market model.<sup>6</sup> The method for calculating the financing costs in the PSAF requires determining the appropriate imputed levels of debt and equity and then applying the applicable financing rates. In this process, a pro forma balance sheet using estimated assets and liabilities associated with the Reserve Banks' priced services is developed, and the remaining elements that would exist are imputed as if these priced services were provided by a private business firm. The same generally accepted accounting principles that apply to commercial-entity financial statements apply to the relevant elements in the priced services pro forma financial statements.

<sup>6</sup>Data for U.S. publicly traded firms is from the Standard and Poor's Compustat® database. This database contains information on more than 6,000 U.S. publicly traded firms, which approximates the entirety of the U.S. market.

The portion of Federal Reserve assets that will be used to provide priced services during the coming year is determined using information about actual assets and projected disposals and acquisitions. The priced portion of these assets is determined based on the allocation of depreciation and amortization expenses of each asset class. The priced portion of actual Federal Reserve liabilities consists of postemployment and postretirement benefits, accounts payable, and other liabilities. The priced portion of the actual net pension asset or liability is also included on the balance sheet.<sup>7</sup>

The equity financing rate is the targeted ROE produced by the capital asset pricing model (CAPM). In the CAPM, the required rate of return on a firm's equity is equal to the return on a risk-free asset plus a market risk premium. The risk-free rate is based on

<sup>7</sup>The pension assets are netted with the pension liabilities and reported as a net asset or net liability as required by ASC 715 *Compensation—Retirement Benefits*.

the three-month Treasury bill; the beta is assumed to be equal to 1.0, which approximates the risk of the market as a whole; and the market risk premium is based on the monthly returns in excess of the risk-free rate over the most recent 40 years. The resulting ROE reflects the return a shareholder would expect when investing in a private business firm.

For simplicity, given that federal corporate income tax rates are graduated, state income tax rates vary, and various credits and deductions can apply, an actual income tax expense is not explicitly calculated for Reserve Bank priced services. Instead, the Board targets a pretax ROE that would provide sufficient income to fulfill the priced services' imputed income tax obligations. To the extent that performance results are greater or less than the targeted ROE, income taxes are adjusted using the effective tax rate.

**Capital structure.** The capital structure is imputed based on the imputed funding need (assets less

liabilities), subject to minimum equity constraints. Short-term debt is imputed to fund the imputed short-term funding need. Long-term debt and equity are imputed to meet the priced services long-term funding need at a ratio based on the capital structure of the U.S. publicly traded firm market. The level of equity must meet the minimum equity constraints, which follow the FDIC requirements for a well-capitalized institution. The priced services must maintain equity of at least 5 percent of total assets and 10 percent of risk-weighted assets.<sup>8</sup> Any equity imputed that exceeds the amount needed to fund the priced services' assets and meet the minimum equity constraints is offset by a reduction in imputed long-term debt. When imputed equity is larger than what can be offset by imputed debt, the excess is imputed as investments in Treasury securities; income imputed on these investments reduces the PSAF.

*Application of the Payment System Risk (PSR) Policy to the Fedwire Services.* The Board's PSR policy reflects the new international standards for financial market infrastructures (FMIs) developed by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions in the *Principles for Financial Market Infrastructures*. The revised policy retains the expectation that the Fedwire Services meet or exceed the applicable risk-management standards. Principle 15 states that an FMI should identify, monitor, and manage general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that it can continue operations and services as a going concern if those losses materialize. Further, liquid net assets should at all times be sufficient to ensure a recovery or orderly wind-down of critical operations and services. The Fedwire Services do not face the risk that a business shock would cause the service to wind down in a disorderly manner and disrupt the stability of the financial system. In order to foster competition with private-sector FMIs, however, the

Reserve Banks' priced services will hold six months of the Fedwire Funds Service's current operating expenses as liquid financial assets and equity on the pro forma balance sheet.<sup>9</sup> Current operating expenses are defined as normal business operating expenses on the income statement, less depreciation, amortization, taxes, and interest on debt. The Fedwire Funds Service's six months of current operating expenses are computed based on its preliminary 2017 budget at \$53.9 million. In 2017, \$14.1 million of equity was imputed to meet the FDIC capital requirements. No additional imputed equity was necessary to meet the PSR policy requirement.

*Effective tax rate.* Like the imputed capital structure, the effective tax rate is calculated based on data from U.S. publicly traded firms. The tax rate is the mean of the weighted average rates of the U.S. publicly traded firm market over the past 5 years.

*Debt and equity financing.* The imputed short- and long-term debt financing rates are derived from the nonfinancial commercial paper rates from the Federal Reserve Board's H.15 Selected Interest Rates release (AA and A2/P2) and the annual Merrill Lynch Corporate & High Yield Index rate, respectively. The rates for debt and equity financing are applied to the priced services estimated imputed short-term debt, long-term debt, and equity needed to finance short- and long-term assets and meet equity requirements.

The increase in the 2017 PSAF to \$16.6 million from \$13.1 million in 2016 is primarily attributable to a \$2.0 million increase in the cost of debt and a \$1.0 million increase in the return on equity offset by a \$0.3 million decrease in the incremental return on imputed equity necessary for PSR policy compliance, all three of which were driven primarily by increased imputed funding needs arising from higher retail float asset balances.

Projected 2017 Federal Reserve priced-services assets, reflected in table 3, have increased \$143.1 million from 2016. This increase is primarily due to a \$234.0 million increase in the balance of imputed investments in federal funds and a net \$42.8 million increase in long-term assets, inclusive of pension, Bank premises, furniture and equipment, and leasehold improvements and long-term prepayments. The increase was partially

offset by an \$80.0 million decrease in items in process of collection and a \$55.8 million decrease in imputed investments in Treasury securities. The significant increase in the imputed investments in federal funds balance is related to a reduction in debit float due to new deposit deadlines associated with the Endpoint-Culled ICL deposit option deadlines implemented in July 2016, which are intended to reduce float and items in process of collection. These balances had increased significantly as a result of the PSR policy implementation in 2015. The Endpoint-Culled ICL deposit option defers the portion of deposits the Federal Reserve is unable to present after a specific deadline during the processing cycle to limit instances where same-day credit is offered under the PSR policy for items that cannot be collected same day. The resulting balance of 2017 imputed investments in federal funds was sufficient to comply with the PSR policy expectations for Fedwire Funds, and no additional costs were incurred. As shown in table 3, imputed equity for 2017 is \$58.6 million, an increase of \$4.8 million from the equity imputed for 2016. In accordance with ASC 715, this amount includes an accumulated other comprehensive loss of \$635.1 million.

Table 4 reflects the portion of short- and long-term assets that must be financed with actual or imputed liabilities and equity. Debt and equity imputed to fund the 2017 priced services assets within the observed market leverage ratio produced an equity level that did not meet the FDIC minimum equity requirements. As a result, additional equity was imputed to meet the FDIC requirements, and imputed long-term debt was reduced. The ratio of capital to risk-weighted assets meets the required 10 percent of risk-weighted assets, and equity exceeds 5 percent of total assets (table 6). In 2017, long-term debt and equity was imputed to meet the asset funding requirements and reflects the leverage ratio observed in the market; additional equity of \$14.1 million was required (table 5) to meet the market leverage ratio.

Table 5 shows the derivation of the 2017 and 2016 PSAF. Financing costs for 2017 are \$2.7 million higher than in 2016. In addition to the increase in the levels of debt and equity mentioned above, the cost of equity increased in 2017 to 41.6 percent from 41.5 percent in 2016. The increased equity balance and the slightly higher cost of equity result in a pretax ROE that is \$1.0 million higher than the 2016 pretax ROE. Imputed sales taxes increased to

<sup>8</sup> The FDIC rule, which was adopted as final on April 14, 2014, requires that well-capitalized institutions meet or exceed the following standards: (1) Total capital to risk-weighted assets ratio of at least 10 percent, (2) tier 1 capital to risk-weighted assets ratio of at least 8 percent, (3) common equity tier 1 capital to risk-weighted assets ratio of at least 6.5 percent, and (4) a leverage ratio (tier 1 capital to total assets) of at least 5 percent. Because all of the Federal Reserve priced services' equity on the pro forma balance sheet qualifies as tier 1 capital, only requirements 1 and 4 are binding. The FDIC rule can be located at [https://www.fdic.gov/news/board/2014/2014-04-08\\_notice\\_dis\\_c\\_fr.pdf](https://www.fdic.gov/news/board/2014/2014-04-08_notice_dis_c_fr.pdf).

<sup>9</sup> This requirement does not apply to the Fedwire Securities Service. There are no competitors to the Fedwire Securities Service that would face such a requirement, and imposing such a requirement when pricing the securities services could artificially increase the cost of these services.

\$3.2 million in 2017 from \$2.8 million in 2016. The priced services portion of the Board's expenses increased \$0.4

million to \$5.4 million in 2017. The effective income tax rate used in 2017

increased to 22.7 percent from 21.6 percent in 2016.

TABLE 3—COMPARISON OF PRO FORMA BALANCE SHEETS FOR BUDGETED FEDERAL RESERVE PRICED SERVICES  
[Millions of dollars—projected average for year]

	2017	2016	Change
Short-term assets:			
Receivables .....	\$36.6	\$35.6	\$1.1
Materials and supplies .....	0.6	0.5	0.1
Prepaid expenses .....	11.2	10.2	1.0
Items in process of collection <sup>10</sup> .....	241.0	321.0	(80.0)
Total short-term assets .....	289.4	367.2	(77.9)
Imputed investments: <sup>11</sup>			
Imputed investment in Treasury Securities .....		55.8	(55.8)
Imputed investment in Fed Funds .....	245.0	11.0	234.0
Total imputed investments .....	245.0	66.8	178.2
Long-term assets:			
Premises <sup>12</sup> .....	128.7	111.0	17.7
Furniture and equipment .....	39.0	38.5	0.5
Leasehold improvements and long-term prepayments .....	104.8	89.5	15.3
Pension asset .....	10.9	10.9	0.0
Deferred tax asset .....	186.1	187.9	(1.8)
Total long-term assets .....	469.6	426.8	42.8
Total assets .....	1,003.9	860.9	143.1
Short-term liabilities:			
Deferred credit items .....	486.0	332.0	154.0
Short-term debt .....	18.1	19.0	(0.9)
Short-term payables .....	30.2	27.2	3.0
Total short-term liabilities .....	534.4	387.2	156.1
Long-term liabilities:			
Pension liability .....		17.6	(17.6)
Long-term debt .....	48.4	0.0	48.4
Postemployment/postretirement benefits and net pension liabilities <sup>13</sup> .....	362.5	411.3	48.7
Total liabilities .....	945.3	807.1	138.3
Equity <sup>14</sup> .....	58.6	53.8	4.8
Total liabilities and equity .....	1,003.9	860.9	143.1

TABLE 4—IMPUTED FUNDING FOR PRICED-SERVICES ASSETS  
[Millions of dollars]

	2017	2016
A. Short-term asset financing:		
Short-term assets to be financed:		
Receivables .....	\$36.6	\$35.6
Materials and supplies .....	0.6	0.5
Prepaid expenses .....	11.2	10.2
Total short-term assets to be financed .....	48.4	46.2
Short-term payables .....	30.2	27.2
Net short-term assets to be financed .....	18.1	19.0
Imputed short-term debt financing <sup>15</sup> .....	18.1	19.0
B. Long-term asset financing:		
Long-term assets to be financed:		
Premises .....	128.7	111.0

<sup>10</sup> Credit float, which represents the difference between items in process of collection and deferred credit items, occurs when the Reserve Banks debit the paying bank for transactions prior to providing credit to the depositing bank. Float is directly estimated at the service level.

<sup>11</sup> Consistent with the Board's PSR policy, the Reserve Banks; priced services will hold six months of the Fedwire Funds Service's current operating expenses as liquid net financial assets and equity on the pro forma balance sheet. Six months of the

Fedwire Funds Service's projected current operating expenses is \$53.9 million. In 2017, \$58.6 million of equity was imputed to meet the regulatory capital requirements.

<sup>12</sup> Includes the allocation of Board of Governors assets to priced services of \$1.2 million for 2017 and \$1.3 million for 2016.

<sup>13</sup> Includes the allocation of Board of Governors liabilities to priced services of \$0.6 million for 2017 and 2016.

<sup>14</sup> Includes an accumulated other comprehensive loss of \$635.1 million for 2017 and \$666.1 million for 2016, which reflects the ongoing amortization of the accumulated loss in accordance with FAS 158 [ASC 715]. Future gains or losses, and their effects on the pro forma balance sheet, cannot be projected. See table 5 for calculation of required imputed equity amount.

TABLE 4—IMPUTED FUNDING FOR PRICED-SERVICES ASSETS—Continued  
[Millions of dollars]

	2017	2016
Furniture and equipment .....	39.0	38.5
Leasehold improvements and long-term prepayments .....	104.8	89.5
Pension asset .....	10.9	.....
Deferred tax asset .....	186.1	187.9
Total long-term assets to be financed .....	469.6	426.8
Pension liability .....	.....	17.6
Postemployment/postretirement benefits and net pension liabilities .....	362.5	411.3
Net long-term assets to be financed .....	107.0	(2.0)
Imputed long-term debt <sup>15</sup> .....	48.4	.....
Imputed equity <sup>15</sup> .....	58.6	53.8
Total long-term financing .....	107.0	53.8

TABLE 5—DERIVATION OF THE 2017 AND 2016 PSAF  
[Dollars in millions]

	2017		2016	
	Debt	Equity	Debt	Equity
A. Imputed long-term debt and equity:				
Net long-term assets to finance .....	\$107.0	\$107.0	\$(2.0)	\$(2.0)
Capital structure observed in market .....	58.4%	41.6%	58.5%	41.5%
Pre-adjusted long-term debt and equity .....	\$62.5	\$44.5	\$(1.2)	\$(0.8)
Equity adjustments: <sup>16</sup>				
Equity to meet capital requirements .....	.....	58.6	.....	51.1
Adjustment to debt and equity funding given capital requirements <sup>17</sup> .....	(14.1)	14.1	1.2	(1.2)
Adjusted equity balance .....	—	58.6	—	(2.0)
Equity to meet capital requirements <sup>18</sup> .....	—	—	—	53.1
Total imputed long-term debt and equity .....	\$48.4	\$58.6	—	\$51.1
B. Cost of capital:				
Elements of capital costs:				
Short-term debt <sup>19</sup> .....	\$18.1 × 0.6% =	\$0.1	\$19.0 × 0.3% =	\$0.1
Long-term debt <sup>19</sup> .....	48.4 × 4.0% =	1.9	— × 4.2% =	—
Equity <sup>20</sup> .....	58.6 × 10.2% =	6.0	51.1 × 9.8% =	5.0
.....		\$8.0	.....	\$5.1
C. Incremental cost of PSR policy:				
Equity to meet policy .....	\$ — × 10.2% =	\$ —	\$2.7 × 9.8% =	\$0.3
D. Other required PSAF costs:				
Sales taxes .....	\$3.2	.....	\$2.8	.....
Board of Governors expenses .....	5.4	.....	5.0	.....
.....		8.6	.....	7.8
.....		\$16.6	.....	\$13.1
E. Total PSAF:				
As a percent of assets .....	.....	1.7%	.....	1.5%
As a percent of expenses .....	.....	3.9%	.....	3.6%
F. Tax rates: .....	.....	22.7%	.....	21.6%

<sup>15</sup> See table 5 for calculation.

<sup>16</sup> If minimum equity constraints are not met after imputing equity based on the capital structure observed in the market, additional equity is imputed to meet these constraints. The long-term funding need was met by imputing long-term debt and equity based on the capital structure observed in the market (see tables 4 and 6). In 2017, the amount of imputed equity exceeded the minimum equity requirements for risk-weighted assets.

<sup>17</sup> Equity adjustment offsets are due to a shift of long-term debt funding to equity in order to meet FDIC capital requirements for well-capitalized institutions.

<sup>18</sup> Additional equity in excess of that needed to fund priced services assets is offset by an asset balance of imputed investments in treasury securities.

<sup>19</sup> Imputed short-term debt and long-term debt are computed at table 4.

<sup>20</sup> The 2017 ROE is equal to a risk-free rate plus a risk premium (beta \* market risk premium). The 2017 after-tax CAPM ROE is calculated as 0.30% + (1.0 \* 7.59%) = 7.89%. Using a tax rate of 22.7%, the after-tax ROE is converted into a pretax ROE, which results in a pretax ROE of (7.89% / (1 - 22.7%)) = 10.21%. Calculations may be affected by rounding.

TABLE 6—COMPUTATION OF 2017 CAPITAL ADEQUACY FOR FEDERAL RESERVE PRICED SERVICES  
[Dollars in millions]

	Assets	Risk weight	Weighted assets (\$)
Imputed investments:			
1-Year Treasury securities <sup>21</sup> .....	\$ —	—	—
Federal funds <sup>22</sup> .....	245.0	0.2	49.0
Total imputed investments .....	245.0	.....	49.0
Receivables .....	36.6	0.2	7.3
Materials and supplies .....	0.6	1.0	0.6
Prepaid expenses .....	11.2	1.0	11.2
Items in process of collection .....	241.0	0.2	48.2
Premises .....	128.7	1.0	128.7
Furniture and equipment .....	39.0	1.0	39.0
Leasehold improvements and long-term prepayments .....	104.8	1.0	104.8
Pension asset .....	10.9	1.0	10.9
Deferred tax asset .....	186.1	1.0	186.1
Total .....	1,003.9	.....	585.8
Imputed equity:			
Capital to risk-weighted assets .....	10.0%		
Capital to total assets .....	5.8%		

C. Check Service — Table 7 shows the budgeted cost-recovery performance for the commercial check service.

TABLE 7—CHECK SERVICE PRO FORMA COST AND REVENUE PERFORMANCE  
[Dollars in millions]

Year	Revenue	Total expense	Net income (ROE) [1–2]	Targeted ROE	Recovery rate after targeted ROE (%) [1/(2 + 4)]
	1	2	3	4	5
2015 (actual) .....	160.6	140.2	20.4	2.0	113.0
2016 (estimate) .....	152.9	138.1	14.8	1.3	109.7
2017 (budget) .....	141.2	133.7	7.5	1.4	104.5

1. *2016 Estimate*—The Reserve Banks estimate that the check service will recover 109.7 percent of total expenses and targeted ROE, compared with a 2016 budgeted recovery rate of 105.7 percent. Greater-than-expected check volumes processed by the Reserve Banks and lower-than-expected costs have influenced significantly the check service's cost recovery.

The decline in Reserve Bank check volume, which is attributable to the

<sup>21</sup> If minimum equity constraints are not met after imputing equity based on all other financial statement components, additional equity is imputed to meet these constraints. Additional equity imputed to meet minimum equity requirements is invested solely in Treasury securities. The imputed investments are similar to those for which rates are available on the Federal Reserve's H.15 statistical release, which can be located at <http://www.federalreserve.gov/releases/h15/data.htm>.

<sup>22</sup> The investments are imputed based on the amounts arising from the collection of items prior to providing credit according to established availability schedules.

decline in the number of checks written generally, was not as great as anticipated. Through August, total commercial forward check volume is 3.9 percent lower and total commercial return check volume is 3.3 percent lower than for the same period last year. For full-year 2016, the Reserve Banks estimate that their total forward check volume will decline 5.2 percent (compared with a budgeted decline of 6.2 percent) and their total return check volume will decline 6.8 percent (compared with a budgeted decline of 12.7 percent) from 2015 levels.<sup>23</sup>

2. *2017 Pricing*—The Reserve Banks expect the check service to recover 104.5 percent of total expenses and targeted ROE in 2017. The Reserve Banks project revenue to be \$141.2

<sup>23</sup> Total Reserve Bank forward check volumes are expected to drop from 5.5 billion in 2015 to 5.2 billion in 2016. Total Reserve Bank return check volumes are expected to drop from 33.2 million in 2015 to 30.9 million in 2016.

million, a decline of 7.7 percent from the 2016 estimate. This decline is driven largely by the Reserve Banks' restructured FedForward, FedReturn, and FedReceipt fee schedules, discussed below.<sup>24</sup> Total expenses for the check service are projected to decrease to \$133.7 million, a decline of \$4.4 million, or 3.2 percent, from 2016 expenses primarily due to reduced operating costs, including cost savings associated with increased efficiencies of the Reserve Banks' customer support services for the FedACH and check service lines.

<sup>24</sup> This decline is also driven, in part, by anticipated continuing decline in the number of checks written generally. The Reserve Banks estimate that total commercial forward check volumes in 2017 will decline 5.0 percent, to 4.9 billion, and total commercial return check volumes will decline 10.1 percent to 27.8 million in 2017.

In July 2016, the Reserve Banks announced restructured FedForward, FedReturn and FedReceipt fee schedules designed to reflect the efficiencies of electronic check processing and better serve the needs of the marketplace in today's electronic environment.<sup>25</sup> The Reserve Banks announced the restructured fee schedules earlier in the year to provide customers with sufficient notice.<sup>26</sup>

Specifically, the Reserve Banks announced simplified FedForward and FedReturn deposit products. The simplified deposit products will offer two fixed-fee options: a per-image cash letter (ICL) fee and a daily subscription fee.<sup>27</sup> Both options will offer standard and premium variations, with premium variations offering higher fixed and lower per-item fees than the standard variations. Both options will also include per-item fees, based on a modified volume-based tiered pricing structure, with tiers defined by volume of items received by a chartered institution from the Reserve Banks.<sup>28</sup> Tiers for the three premium variations of the daily subscription fee deposit options, FedForward Premium Daily Fee A, B, and C and FedReturn Premium Daily Fee A, will be based only on volume received by a chartered institution from a subset of the Reserve Banks' customers.<sup>29</sup> The volumes used to define all tiers will be evaluated and set annually as part of the Board's approval of annual fee schedules.<sup>30</sup>

The Premium Daily Fee deposit options will include a fifth tier, Tier 0,

comprised of routing numbers for which the Reserve Banks currently receive little to no volume from the specified subset of Reserve Bank customers (and therefore cannot currently be assigned to the other tiers with sufficient certainty). Tier 0 will also be evaluated annually, along with all other tiers, so that if volume migrates to routing numbers in tier 0 (enabling more information on which to assign a tier) those routing numbers will be moved to the appropriate tier.

In October 2016, the Reserve Banks announced minor modifications to the Premium Daily Fee products.<sup>31</sup> To clarify Tier 0's transitional purpose, the Reserve Banks announced that routing numbers cannot be placed in Tier 0 if they have previously been assigned to one of the other tiers. Based on additional review of Tier 0's composition, the Reserve Banks also announced that a routing number will only be assigned to Tier 0 if the chartered institution receives a minimum of 150 items daily.<sup>32</sup> As a result, the Reserve Banks determined that approximately 3,800 routing numbers initially included in Tier 0 could more appropriately be placed in another tier, Tier 4.<sup>33</sup>

The Reserve Banks also announced that most sorted-deposit options will be eliminated, including the Fine Sort ICL, Deferred Fine Sort ICL, and Fixed Mixed ICL deposit options.<sup>34</sup> The Reserve Banks announced that they will not, however, modify the Endpoint-Culled ICL deposit option, the Dollar

Cut Mixed ICL (renamed "Dollar-Culled ICL") option, or the Deferred Mixed ICL (renamed "Deferred ICL") option.<sup>35</sup> The Reserve Banks will continue to allow separately sorted Treasury Check, Postal Money Order, and Savings Bond ICLs.

Finally, the Reserve Banks announced modifications to their FedReceipt product, including reduced FedReceipt fees for forward and return items and elimination of the FedReceipt Plus Deposit Discount for both FedForward and FedReturn deposits.<sup>36</sup> The Reserve Banks also announced that they will modify volume tiers for their Courtesy Delivery service (renamed "Accelerated Delivery Service") and that the Retail Payments Premium Receiver discount will be applied to items deposited by a chartered institution rather than on items received. Both products remain otherwise unchanged.

The Reserve Banks estimate that the price changes will result in a 3.5 percent average price decrease for check customers.

The primary risks to the Reserve Banks' ability to achieve budgeted 2017 cost recovery for the check service include lower-than-expected check volume due to reductions in check writing overall and competition from correspondent banks, aggregators, and direct exchanges, which would result in lower-than-anticipated revenue.

*D. FedACH Service*—Table 8 shows the 2015 actual, 2016 estimate, and 2017 budgeted cost-recovery performance for the commercial FedACH service.

<sup>25</sup> As part of the Board's approval of the Reserve Banks' 2016 check fee schedules, the Board noted that the Reserve Banks would announce changes to the check service to reflect the efficiencies of today's electronic check processing environment. 79 FR 65937, 70785 (Nov. 16, 2015).

<sup>26</sup> A full summary of the modifications was included with Reserve Bank's announcement and is available at [https://frbsservices.org/files/servicefees/pdf/071116\\_2017\\_check\\_pricing\\_summary\\_of\\_changes.pdf](https://frbsservices.org/files/servicefees/pdf/071116_2017_check_pricing_summary_of_changes.pdf). The Reserve Banks' modified fee schedules are available at [https://www.frbsservices.org/servicefees/check\\_services\\_2016.html](https://www.frbsservices.org/servicefees/check_services_2016.html).

<sup>27</sup> The per-ICL fee structure offers a fixed fee for each deposited image cash letter and a per-item fee for each item in the cash letter. The subscription structure offers a daily subscription fee and a per-item fee for each item. Per-item fees are determined by the Reserve Banks' volume-based tiered pricing structure.

<sup>28</sup> Under the tiered pricing structure, depositors pay a variable per-item fee based on the endpoint to which an item is being delivered. Tiers are currently determined at the individual routing number.

<sup>29</sup> The Reserve Banks believe the top 15 customers, which account for approximately 33 percent of the Reserve Banks' deposit volume, represent the most-likely users of the Premium Daily Fee deposit options because of the high daily fixed fees and lower per-item fees.

<sup>30</sup> The tiers for 2017 are available at [https://www.frbsservices.org/servicefees/check21\\_endpoint\\_listing.html](https://www.frbsservices.org/servicefees/check21_endpoint_listing.html).

<sup>31</sup> For the announcement, see <https://frbsservices.org/files/communications/pdf/check/100316-check-modification-announcement.pdf>.

<sup>32</sup> The Reserve Banks determined after further analysis that a floor of 150 items daily was appropriate to avoid placing small institutions in Tier 0 because of limited total volumes (institutions below the floor receive an average of only 47 items daily).

<sup>33</sup> To minimize any customer impact of these changes, the Reserve Banks also reduced the Tier 4 per-item fees and daily fixed fees for two of the Premium Daily Fee deposit options.

<sup>34</sup> In a paper check processing environment, the fine-sort products allowed the Reserve Banks to gain efficiencies because the checks did not require processing on reader-sorters. In today's electronic check processing environment, all ICLs are processed through the Reserve Banks' electronic system in the same manner, and the Reserve Banks do not gain any efficiencies by having the depositing bank fine-sort electronic checks before deposit.

<sup>35</sup> Under the Endpoint-Culled ICL deposit option (offered only at 12:00 p.m. ET), items drawn on routing numbers enrolled in the Reserve Banks' Premium Presentment service and those presented as substitute checks are culled from the cash letter

by the Reserve Banks and placed into a Deferred Imaged Cash Letter, with depositors receiving next-day credit availability on those items. The product allows the Reserve Banks to limit instances where same-day credit is offered for items that cannot be collected same day (the Reserve Banks similarly cull items deposited on the 12:00 p.m. ET deposit deadline offered as part of the Premium Daily Fee deposit options). Under the Deferred ICL deposit option, credit for all items deposited is deferred until the next business day. Under the Dollar-Culled ICL deposit option, items written for less than \$1,000, plus all items for \$1,000 or more that are drawn on a substitute check endpoint, are culled from the cash letter by the Reserve Banks and placed into a Deferred Imaged Cash Letter, with depositors receiving the next-day credit availability of that deposit option. Items of \$1,000 or more (except for those that will be presented as substitute checks) are kept in the original cash letter, with same-day credit availability at the next deadline according to the Federal Reserve Policy on Payment System Risk.

<sup>36</sup> The Reserve Banks implemented the deposit discount structure to encourage banks to transition from paper to electronic items. With the Reserve Banks presenting and returning more than 99 percent of items electronically, the discount is no longer necessary to encourage banks to move away from paper.



TABLE 8—FEDACH SERVICE PRO FORMA COST AND REVENUE PERFORMANCE

[Dollars in millions]

Year	Revenue	Total expense	Net income (ROE) [1–2]	Targeted ROE	Recovery rate after targeted ROE %, [1/(2 + 4)]
	1	2	3	4	5
2015 (actual) .....	125.5	122.8	2.7	1.8	100.7
2016 (estimate) .....	130.7	131.0	–0.3	1.3	98.8
2017 (budget) .....	140.4	145.4	–5.1	1.6	95.5

1. *2016 Estimate*—The Reserve Banks estimate that the FedACH service will recover 98.8 percent of total expenses and targeted ROE, compared with a 2016 budgeted recovery rate of 99.5 percent. Through August, FedACH commercial origination and receipt volume was 5.8 percent higher than it was during the same period last year. For full-year 2016 the Reserve Banks estimate that FedACH commercial origination and receipt volume will increase 4.9 percent, compared with a budgeted increase of 4.5 percent. Although volume is higher than originally projected, the Reserve Banks estimate lower-than-budgeted 2016 cost recovery due to higher than anticipated environmental costs such as an increase in pension expense and refinement in the accounting treatment between capital and expenses for the FedACH technology modernization program.<sup>37</sup>

2. *2017 Pricing*—The Reserve Banks expect the FedACH service to recover 95.5 percent of total expenses and targeted ROE in 2017. FedACH commercial origination and receipt volume is projected to grow 5.7 percent, contributing to an increase of \$9.7

million in total revenue from the 2016 estimate. Total expenses are budgeted to increase \$14.4 million from 2016 expenses, primarily because of costs associated with the development of a new FedACH technology platform.

The Reserve Banks will increase the minimum monthly fee for forward origination from \$45 to \$50 and the minimum monthly fee for receipt from \$35 to \$40.<sup>38</sup> The Reserve Banks also will increase the FedACH Account Servicing Fee from \$45 to \$58 and change the fee name to the “FedACH Participation fee,” to reflect more accurately the intention of the fee, which is to recover fixed costs related to participation in the FedACH network. The Reserve Banks also will eliminate the on-us receipt credit of \$0.0032 per item. All on-us items will be charged the current FedACH receipt per-item fee of \$0.0032 per item.

The Reserve Banks will increase the FedACH Information Extract File fee from \$100 to \$150 per file. The Reserve Banks also will increase the FedPayments Reporter fee approximately 10 percent rounded to the nearest \$5 for each level of the tiered

package pricing. They also will introduce a new top tier, with a \$1,800 monthly fee, for a package that includes more than 10,000 reports.

Further, the Reserve Banks will introduce a fixed monthly fee and a volume-based tiered pricing structure for the FedGlobal ACH service.<sup>39</sup> The tiered pricing structure will include per-item surcharges that are in addition to the standard FedACH origination fee of \$0.0032 and vary according to the transaction’s destination, as seen in table 9. The top tier will cover monthly origination volume over 500 items and include a \$185 fixed monthly fee and a per-item surcharge that is \$0.12 lower than current per-item fees. The next tier will cover monthly origination volume between 161 and 500 items and include a \$60 fixed monthly fee and a per-item surcharge that is \$0.13 higher than current per-item fees. The bottom tier will cover monthly origination volume between 0 and 160 items and include a \$20 fixed monthly fee and a per-item surcharge that is \$0.38 higher than current per-item fees.

TABLE 9—FEDGLOBAL ACH SERVICE VOLUME-BASED ORIGINATION SURCHARGES<sup>40</sup>

Volume (items)	Fixed monthly fee	Canada (per transaction)	Mexico (per transaction)	Panama (per transaction)	Europe (per transaction)
More than 500 .....	\$185	\$0.50	\$0.55	\$0.60	\$1.13
161–500 .....	60	0.75	0.80	0.85	1.38
0–160 .....	20	1.00	1.05	1.10	1.63

The Reserve Banks estimate that the price changes will result in a 5.3 percent

average price increase for FedACH customers.

While the Reserve Banks are not budgeted to fully recover costs in 2017, they are expected to fully recover costs

<sup>37</sup> The Reserve Banks have been engaged in a multiyear technology initiative to modernize the FedACH processing platform by migrating the service from a mainframe system to a distributed computing environment. In 2016, the Reserve Banks chose a commercially available option as their processing solution to modernize the FedACH platform.

<sup>38</sup> Any originating depository financial institution (ODFI) incurring less than \$50 for the following fees will be charged the difference to reach the

minimum: Forward value and nonvalue item origination fees, FedGlobal ACH origination surcharges, and FedACH SameDay forward origination surcharges.

Any receiving depository financial institution (RDFI) that incurs less than \$40 in receipt fees and originates forward value and nonvalue items incurring less than \$50 in origination fees will only be charged the difference in the origination fee to reach the minimum monthly origination fee of \$50. Any RDFI that incurs less than \$40 in receipt fees

and is not originating forward value and nonvalue items will incur the \$40 minimum monthly fee for receipt.

<sup>39</sup> The FedGlobal ACH pricing changes meet the Federal Reserve Board’s guidance on the Reserve Banks’ use of volume-based pricing for electronic payment services and products. 62 FR 14146 (March 25, 1997) (FRB Docket No. R–0967).

<sup>40</sup> These per-item surcharges are in addition to the standard domestic FedACH origination fees.

following finalization of the FedACH technology modernization project. The Reserve Banks' FedACH fee increases balance raising fees dramatically during a temporary period of increased costs associated with a defined technology upgrade that will be expected to result in significant over recovery following this defined period. The approach to moderately increase fees only is consistent with a multi-year strategy to minimize pricing volatility and provide long-term price stability for customers

while undertaking the ongoing technology upgrade that will result in FedACH incurring higher expenses over the next few years.

The primary risks to the Reserve Banks' ability to achieve budgeted 2017 cost recovery for the FedACH service are cost overruns associated with unanticipated problems related to efforts to modernize the FedACH processing platform and higher-than-expected support and overhead costs. Other risks include lower-than-expected

volume and associated revenue due to unanticipated mergers and acquisitions and loss of market share due to direct exchanges and a shift of volume to the private-sector operator.

E. *Fedwire Funds and National Settlement Services*—Table 10 shows the 2015 actual, 2016 estimate, and 2017 budgeted cost-recovery performance for the Fedwire Funds and National Settlement Services.

TABLE 10—FEDWIRE FUNDS AND NATIONAL SETTLEMENT SERVICES PRO FORMA COST AND REVENUE PERFORMANCE  
[Dollars in millions]

Year	Revenue	Total expense	Net income (ROE) [1–2]	Targeted ROE	Recovery rate after targeted ROE (%) [1/(2 + 4)]
	1	2	3	4	5
2015 (actual) .....	116.0	110.1	5.9	1.6	103.9
2016 (estimate) .....	123.1	118.0	5.1	1.3	103.2
2017 (budget) .....	128.8	126.3	2.6	1.3	101.0

1. *2016 Estimate*—The Reserve Banks estimate that the Fedwire Funds and National Settlement Services will recover 103.2 percent of total expenses and targeted ROE, compared with a 2016 budgeted recovery rate of 99.4 percent. Through August, Fedwire Funds Service online volume was 3.6 percent higher than for the same period last year. For full-year 2016, the Reserve Banks estimate Fedwire Funds Service online volume to increase 1.9 percent from 2015 levels, compared with the 0.3 percent volume decrease that had been budgeted. The Reserve Banks do not expect the volume growth in 2015 and early 2016 to continue at that level through year-end. Through August, National Settlement Service settlement file volume was 1.0 percent lower than for the same period last year, and settlement entry volume was 3.0 percent lower. For the full year, the Reserve Banks estimate that settlement file volume will decrease 1.1 percent (compared with a budgeted 5.3 percent increase) and settlement entry volume

will decrease 4.0 percent from 2015 levels (compared with a budgeted 0.8 percent decrease). NSS settlement file and entry volumes are anticipated to be lower than budgeted, as the onboarding of a new arrangement originally expected to occur in the fourth quarter of 2016 has now been delayed until 2017.

2. *2017 Pricing*—The Reserve Banks expect the Fedwire Funds and National Settlement Services to recover 101.0 percent of total expenses and targeted ROE. Revenue is projected to be \$128.8 million, an increase of 4.6 percent from the 2016 estimate. The Reserve Banks project total expenses to be \$8.3 million higher than the 2016 expenses, primarily because of capitalized software costs associated with the Fedwire Funds modernization program that will be amortized until January 2022 and other costs related to new resiliency initiatives.

The Reserve Banks will adjust the incentive pricing fees for the Fedwire Funds Service by increasing the Tier 1

per-item preincentive fee (the fee before volume discounts are applied) from \$0.790 to \$0.820, increasing the Tier 2 per-item preincentive fee from \$0.240 to \$0.245, and increasing the Tier 3 per-item preincentive fee from \$0.155 to \$0.170.<sup>41</sup> The Reserve Banks also will increase the surcharge for offline transactions from \$55 to \$60. The Reserve Banks estimate that the price changes will result in a 3.3 percent average price increase for Fedwire Funds customers.

The Reserve Banks will not change National Settlement Service fees for 2017.

The primary risks to the Reserve Banks' ability to achieve budgeted 2017 cost recovery for these services are cost overruns from new initiatives to improve resiliency and operational functionality.

F. *Fedwire Securities Service*—Table 11 shows the 2015 actual, 2016 estimate, and 2017 budgeted cost recovery performance for the Fedwire Securities Service.<sup>42</sup>

<sup>41</sup> The per-item preincentive fee is the fee that the Reserve Banks charge for transfers that do not qualify for incentive discounts. The Tier 1 per-item preincentive fee applies to the first 14,000 transfers, the Tier 2 per-item preincentive fee applies to the next 76,000 transfers, and the Tier 3 per-item preincentive fee applies to any additional transfers. The Reserve Banks apply an 80 percent incentive

discount to transfers over 60 percent of a customer's historic benchmark volume.

<sup>42</sup> The Reserve Banks provide transfer services for securities issued by the U.S. Treasury, federal government agencies, government-sponsored enterprises, and certain international institutions. The priced component of this service consists of revenues, expenses, and volumes associated with

the transfer of all non-Treasury securities. For Treasury securities, the U.S. Treasury assesses fees for the securities transfer component of the service. The Reserve Banks assess a fee for the funds settlement component of a Treasury securities transfer; this component is not treated as a priced service.

TABLE 11—FEDWIRE SECURITIES SERVICE PRO FORMA COST AND REVENUE PERFORMANCE  
[Dollars in millions]

Year	Revenue	Total expense	Net income (ROE) [1–2]	Targeted ROE	Recovery rate after targeted ROE (%) [1/(2 + 4)]
	1	2	3	4	5
2015 (actual) .....	27.1	24.7	2.4	0.3	108.2
2016 (estimate) .....	25.8	26.2	–0.4	0.3	97.6
2017 (budget) .....	29.0	29.4	–0.4	0.3	97.5

1. *2016 Estimate*—The Reserve Banks estimate that the Fedwire Securities Service will recover 97.6 percent of total expenses and targeted ROE, close to the 2016 budgeted recovery rate of 97.5 percent.

Through August, Fedwire Securities Service online agency transfer volume was 13.1 percent lower than during the same period last year. For full-year 2016, the Reserve Banks estimate Fedwire Securities Service online agency transfer volume will decline 13.5 percent from 2015 levels, compared with a budgeted decline of 5.4 percent. The lower-than-expected online agency transfer volume resulted from lower-than-projected Agency debt issuance, as Fannie Mae and Freddie Mac continue to reduce the overall size of their portfolios in accordance with Federal Housing Finance Agency guidelines. In addition, new mortgage originations and mortgage paydowns from refinancing activity are expected to decline before year-end if interest rates rise in the fourth quarter, which will result in falling levels of issuance and settlement activity for agency mortgage-backed securities over Fedwire Securities. Through August, account maintenance volume was 4.4 percent lower than during the same period last year. For the full year 2016, the Reserve Banks estimate that account maintenance volume will decline 5.0 percent over 2015 levels, compared with a budgeted decline of 8.8 percent. The higher account maintenance volume is the result of conservative estimates for customer account closures that have not materialized.

2. *2017 Pricing*—The Reserve Banks expect the Fedwire Securities Service to recover 97.5 percent of total expenses and targeted ROE in 2017. The Reserve Banks project that online agency transfer activity will decline 7.5 percent in 2017, the number of accounts maintained will decrease 7.4 percent, and the number of agency issues

maintained will decrease 2.4 percent.<sup>43</sup> The projected decline in both online transfer and account maintenance volume in 2017 reflects, in part, an anticipated drop in demand resulting from JP Morgan Chase's exit from the U.S. government securities clearing and settlement business for its broker-dealer services by mid-2018.<sup>44</sup> Moreover, as in 2016, the Reserve Banks continue to project a decrease in online transfers as interest rates may possibly increase, leading to less mortgage refinancing, and, in turn, reducing issuances of mortgage-backed securities. In addition, the reduction in agency debt issuance will continue to reflect a reduction in government-sponsored enterprise portfolios, as required by the U.S. Treasury and the Federal Housing Finance Agency, leading to a reduced funding need for new debt issuance.<sup>45</sup> New settlement logic launched by the Fixed Income Clearing Corporation in January 2016, and further changes in mid-2017 are also expected to reduce the number of agency debt transfers over the Fedwire Securities Service.<sup>46</sup>

Revenue is projected to be \$29.0 million, an increase of 12.4 percent from the 2016 estimate; this projected rise in revenue results from higher fees,

<sup>43</sup> The online transfer fee, monthly account maintenance fee, and monthly issue maintenance fee accounted for approximately 93 percent of total Fedwire Securities Service revenue through June 2016.

<sup>44</sup> JP Morgan Chase announced in July 2016, its intent to exit the government securities clearing and settlement business. It is expected that the exit will result in significant reductions of transfer volume over Fedwire Securities as more transactions shift to in-house activity at the remaining custodian banks.

<sup>45</sup> Government-sponsored enterprises are reducing their retained portfolio by 15 percent annually through 2018, as mandated by the Senior Preferred Stock Purchase Agreements, until each portfolio reaches a target level of \$250 billion. Further information on these agreements can be found at: <http://www.fhfa.gov/Conservatorship/Pages/Senior-Preferred-Stock-Purchase-Agreements.aspx>.

<sup>46</sup> Information on the Fixed Income Clearing Corporation's new settlement logic can be found at <http://www.dtcc.com/-/media/Files/pdf/2015/6/22/GOV045-15.pdf>.

discussed below, that offset the anticipated online transfer and account maintenance volume declines. The Reserve Banks also project that 2017 expenses will increase by \$3.2 million, compared with 2016 expenses, reflecting higher expected operating costs. Higher operating costs in 2017 reflect the amortization of capital software costs from completed modernization initiatives as well as the advancement of new initiatives to improve resiliency and operational functionality.

The Reserve Banks will increase the online agency transfer fee from \$0.65 to \$0.77 and increase the offline origination and receipt surcharge transfer fee from \$66 to \$80. The Reserve Banks also will increase the monthly agency issues maintenance fee from \$0.65 to \$0.77 and will increase the monthly account maintenance fee from \$48 to \$57.50. Moreover, the Reserve Banks will increase the joint custody origination surcharge from \$44 to \$46. Finally, the Reserve Banks will increase the claims adjustment fees from \$0.75 to \$0.80. The Reserve Banks estimate that the price changes will result in an 18.0 percent average price increase for Fedwire Securities customers.

The primary risks to the Reserve Banks' ability to achieve budgeted 2017 cost recovery for these services are lower-than-expected volume resulting from the pace of structural changes in government securities settlement, and cost overruns from new initiatives to improve resiliency and operational functionality.

G. *FedLine Access*—The Reserve Banks charge fees for the electronic connections that depository institutions use to access priced services and allocate the costs and revenue associated with this electronic access to the various priced services. There are currently five FedLine channels through which customers can access the Reserve Banks' priced services: FedMail, FedLine Web, FedLine Advantage, FedLine Command, and FedLine

Direct.<sup>47</sup> The Reserve Banks package these channels into nine FedLine packages, described below, that are supplemented by a number of premium (or a la carte) access and accounting information options. In addition, the Reserve Banks offer FedComplete packages, which are bundled offerings of a FedLine Advantage connection and a fixed number of FedACH, Fedwire Funds, and Check 21-enabled services.

Six attended access packages offer manual access to critical payment and information services via a web-based interface. The FedLine Exchange package provides access to basic information services via email, while two FedLine Web packages offer an email option plus online attended access to a range of services, including cash services, FedACH information services, and check services. Three FedLine Advantage packages expand upon the FedLine Web packages and offer attended access to critical transactional services: FedACH, Fedwire Funds, and Fedwire Securities.

Three unattended access packages are computer-to-computer, IP-based interfaces. The FedLine Command package offers an unattended connection to FedACH, as well as most accounting information services. The two remaining options are FedLine Direct packages, which allow for unattended connections at one of two connection speeds to FedACH, Fedwire Funds, and Fedwire Securities transactional and information services and to most accounting information services.<sup>48</sup>

For the 2017 FedLine fees, the Reserve Banks will increase five existing monthly fees: (1) The FedLine Web Plus fee from \$140 to \$160, (2) the FedLine Direct Premier fee from \$6,500 to \$6,700, (3) the FedComplete 200 Plus fee from \$1,300 to \$1,350, (4) the FedComplete 200 Premier fee from \$1,375 to \$1,425, and (5) the FedMail Fax a la carte fee from \$70 to \$100. As in previous years, the Reserve Banks will introduce new fees on legacy services. In particular, the Reserve Banks will implement a legacy software fee to encourage FedLine Direct customers to migrate to an enhanced

messaging solution.<sup>49</sup> To provide customers sufficient time to migrate, the fee will not become effective until the third quarter of 2017. The fee will be introduced on July 1, 2017, at \$5,000 per month and will increase in steps to \$20,000 per month by the end of 2017.<sup>50</sup> In addition, the Reserve Banks will remove the legacy email service from all FedLine Web, Advantage, Command, and Direct packages and introduce a \$20-per-month fee to purchase an a la carte subscription to this service. Customers in these packages that currently use the email service will have the opportunity to cancel the service to avoid the a la carte fee.

In addition, the Reserve Banks will modify the E-Payments Routing Directory and make several associated changes to FedLine packages and fees.<sup>51</sup> Currently, all FedLine Web, Advantage, Command, and Direct packages include two services to download the directory: manual and automated.<sup>52</sup> The Reserve Banks will introduce a new automated download service that will allow subscribers to provide access to the directory to their customers (that is, non-financial institutions that require access to the directory). Access to the directory will be controlled through the use of download codes, and financial institutions will be responsible for distributing the codes to their respective customers. Additionally, the Reserve Banks will include the automated download service in only plus- and premier-level FedLine packages.<sup>53</sup> Five download codes will be included in these packages, and additional codes will be available to purchase through an a la carte option (codes will be available in bundles ranging in price from \$75 to \$2,000 per month).

To accommodate the enhancements to the E-payments Directory, the Reserve Banks will introduce a new FedLine Exchange service, along with a new set

of associated packages. Currently, the FedLine Exchange service is an email-based interface, and there is only one package available. The new FedLine Exchange service—which will be a web-based interface (that is, accessible via a web browser rather than email)—will allow customers that do not use FedLine for Federal Reserve Financial Services to access the E-Payments Routing Directory.<sup>54</sup> The new service will be available in two packages: A base-level and premier-level. The base package, priced at \$40 per month, will include the manual download directory service. The premier package, priced at \$125 month, will include both the manual and automated download directory services.<sup>55</sup> To ensure continuity of service, the services available in the existing FedLine Exchange package will continue to be available through a new package, FedMail, as discussed below.

The Reserve banks will introduce a new FedMail package, priced at \$85 per month, which will include the same email-based services included in the existing FedLine Exchange package.<sup>56</sup> Subscribers of the existing FedLine Exchange package will be transitioned to the new FedMail package and experience a fee increase of \$45.<sup>57</sup>

The Reserve Banks estimate that the price changes will result in an 8.1 percent average price increase for FedLine customers.

## II. Analysis of Competitive Effect

All operational and legal changes considered by the Board that have a substantial effect on payment system participants are subject to the competitive impact analysis described in the March 1990 policy “The Federal Reserve in the Payments System.”<sup>58</sup> Under this policy, the Board assesses whether proposed changes will have a direct and material adverse effect on the ability of other service providers to compete effectively with the Federal

<sup>49</sup> To avoid the fee, FedLine Direct customers will need to configure their systems to run a supported version of the MQ platform. MQ is a critical messaging component that facilitates the exchange of information between applications, systems, services and files.

<sup>50</sup> The fee will increase to \$10,000 per month on September 1, 2017, and to \$20,000 per month on November 1, 2017.

<sup>51</sup> E-Payments Routing Directory provides basic routing information for Fedwire Funds, Fedwire Securities, and FedACH transactions.

<sup>52</sup> The manual service allows subscribers to download the directory in a manual fashion via a web-based interface. The automated service allows subscribers to schedule daily, weekly, or monthly automated (unattended) downloads of the directory.

<sup>53</sup> Plus- and premier-level packages are FedLine Web Plus, FedLine Advantage Plus and Premier, FedLine Command Plus, and FedLine Direct Plus and Premier. In addition the new FedLine Exchange Premier package will have access to the automated service.

<sup>54</sup> Customers that do not use FedLine to access Federal Reserve Financial Services are generally small financial institutions that partner with a payment processor or other third party for transactional processing.

<sup>55</sup> FedLine Exchange customers will need to request credentials to access the manual directory download service. These credentials will be billed via a FedMail-FedLine Exchange Subscriber 5-pack. The automated download directory service under the FedLine Exchange Premier package includes five download codes so a separate subscriber 5-pack is not required.

<sup>56</sup> The addition of the FedMail package and the FedLine Exchange Premier package will increase the total number of FedLine packages from nine to eleven.

<sup>57</sup> The \$45 increase represents the difference in price between the new FedMail package (\$85) and the existing FedLine Exchange package (\$40).

<sup>58</sup> Federal Reserve Regulatory Service (FRRS) 9–1558.

<sup>47</sup> FedMail, FedLine Web, FedLine Advantage, FedLine Command, and FedLine Direct are registered trademarks of the Federal Reserve Banks.

<sup>48</sup> None of the FedLine packages offer an unattended connection to check services. The Reserve Banks offer an unattended check product, Check 21 Large File Delivery, outside of the FedLine suite that allows a depository institution to upload and download check image cash letters automatically via a direct network connection to the Reserve Banks.

Reserve in providing similar services because of differing legal powers or constraints or because of a dominant market position deriving from such legal differences. If any proposed changes create such an effect, the Board must further evaluate the changes to assess whether the benefits associated with the changes—such as contributions to

payment system efficiency, payment system integrity, or other Board objectives—can be achieved while minimizing the adverse effect on competition.

The 2017 fees, fee structures, and changes in service will not have a direct and material adverse effect on the ability of other service providers to

compete effectively with the Reserve Banks in providing similar services. The changes should permit the Reserve Banks to earn a ROE that is comparable to overall market returns and provide for full cost recovery over the long run.

### **III. 2017 Fee Schedules**

**BILLING CODE 6210-01-P**

**FEDACH SERVICE 2017 FEE SCHEDULE**

EFFECTIVE JANUARY 3, 2017.

**BOLD INDICATES CHANGES FROM 2016 PRICES**

	Fee
FedACH minimum monthly fee	
<b>Originating Depository Financial Institution (ODFI)<sup>59</sup></b>	<b>\$50.00</b>
<b>Receiving Depository Financial Institution (RDFI)<sup>60</sup></b>	<b>\$40.00</b>
Origination (per item or record)	
Forward or return items	\$0.0032
SameDay Service - forward item <sup>61</sup>	\$0.0010 surcharge
Addenda record	\$0.0015
FedLine Web <sup>®</sup> -originated returns and notification of change (NOC) <sup>62</sup>	\$0.35
Facsimile exception returns/NOC <sup>63</sup> .....	\$45.00
Automated NOC .....	\$0.20
Volume-based discounts (based on monthly billed origination volume) per item when origination volume is:	
750,001 to 1,500,000 items per month .....	\$0.0005
discount	
more than 1,500,000 items per month .....	\$0.0007
discount	

Volume-based discounts (based on monthly billed receipt volume) per item when receipt volume is<sup>64</sup>:

<sup>59</sup> Any ODFI incurring less than \$50 in forward value and nonvalue item origination fees will be charged a variable amount to reach the minimum monthly origination fee.

<sup>60</sup> Any RDFI not originating forward value and nonvalue items and incurring less than \$40 in receipt fees will be charged a variable amount to reach the minimum monthly receipt fee. Any RDFI that originates forward value and nonvalue items incurring less than \$50 in forward value and nonvalue item origination fees will only be charged a variable amount to reach the minimum monthly origination fee.

<sup>61</sup> This surcharge is assessed on all forward items that qualify for same-day processing and settlement and is incremental to the standard origination item fee.

<sup>62</sup> The fee includes the item and addenda fees in addition to the conversion fee.

<sup>63</sup> The fee includes the item and addenda fees in addition to the conversion fee. Reserve Banks also assess a \$30 fee for every government paper return/NOC they process.

<sup>64</sup> Origination discounts based on monthly volume apply only to those items received by FedACH receiving points and are available only to Premium Receivers (institutions receiving volume above a specified threshold through FedACH).

10,000,001 to 15,000,000 items per month \$0.0002 discount	
more than 15,000,000 items per month discount	\$0.0003
Receipt (per item or record)	
Forward Item.....	\$0.0032
Return Item.....	\$0.0075
Addenda record.....	\$0.0015
Volume-based discounts	
Non-Premium Receivers—RDFIs receiving less than 90 percent of total network volume through FedACH per item when volume is:	
750,001 to 12,500,000 items per month <sup>65</sup> .....	\$0.0014 discount
more than 12,500,000 items per month <sup>66</sup> .....	\$0.0016 discount
Premium Receivers, Level One—RDFIs receiving at least 90 percent of FedACH- originated volume through FedACH per item when volume is:	
750,001 to 1,500,000 items per month <sup>65</sup> .....	\$0.0014 discount
1,500,001 to 2,500,000 items per month <sup>66</sup> .....	\$0.0014 discount
2,500,001 to 12,500,000 items per month <sup>66</sup> .....	\$0.0015 discount
more than 12,500,000 items per month <sup>66</sup> .....	\$0.0017 discount
Premium Receivers, level two—RDFIs receiving at least 90 percent of ACH volume originated through FedACH or EPN per item when volume is	
750,001 to 1,500,000 items per month <sup>65</sup> .....	\$0.0014 discount
1,500,001 to 2,500,000 items per month <sup>66</sup> .....	\$0.0014 discount
2,500,001 to 12,500,000 items per month <sup>66</sup> .....	\$0.0016 discount
more than 12,500,000 items per month <sup>66</sup> .....	\$0.0018 discount
FedACH Bundled Service Discount	
Monthly Bundled Service Package Discount <sup>67</sup> .....	\$20.00 discount
Monthly FedACH Risk <sup>®</sup> Management fees <sup>68</sup>	

<sup>65</sup> This per-item discount is a reduction to the standard receipt fees listed in this fee schedule.

<sup>66</sup> Receipt volumes at these levels qualify for the waterfall discount, which includes all FedACH receipt items.

<sup>67</sup> This monthly billing discount is available for any customer that (1) pays the FedACH minimum monthly fee; (2) purchases a FedLine Web Plus or higher package; and (3) subscribes to either FedACH RDFI Alert, FedACH Risk Origination Monitoring, or FedPayments Reporter.

<sup>68</sup> Criteria may be set for both the origination monitoring service and the RDFI alert service. Subscribers with no criteria set up will be assessed the \$35 monthly package fee.



Risk Origination Monitoring Service/RDFI Alert Service package pricing.....	
For up to 5 criteria sets.....	\$35.00
For 6 through 11 criteria sets .....	\$70.00
For 12 through 23 criteria sets .....	\$125.00
For 24 through 47 criteria sets .....	\$150.00
For 48 through 95 criteria sets .....	\$250.00
For 96 through 191 criteria sets .....	\$425.00
For 192 through 383 criteria sets .....	\$675.00
For 384 through 584 criteria sets .....	\$850.00
For more than 585 criteria sets.....	\$1,100.00
Risk origination monitoring batch (based on total monthly volume)	
For 1 through 100,000 batches (per batch).....	\$0.007
For more than 100,000 batches (per batch) .....	\$0.0035
Monthly FedPayments Reporter Service	
Receiver setup report <sup>69</sup>	
FedPayments Reporter Service package pricing includes	
Standard reports <sup>70</sup>	
ACH received entries detail – customer and depository financial institution	
ACH volume summary by SEC code report - customer	
On Demand Surcharge <sup>71</sup> .....	1.00
<b>Report delivery via FedLine file access solution (monthly fee)</b>	
<b>For up to 50 reports .....</b>	<b>\$40.00</b>
<b>For 51 through 150 reports .....</b>	<b>\$60.00</b>
<b>For 151 through 500 reports .....</b>	<b>\$110.00</b>
<b>For 501 through 1,000 reports .....</b>	<b>\$200.00</b>
<b>For 1,001 through 1,500 reports .....</b>	<b>\$285.00</b>
<b>For 1,501 through 2,500 reports .....</b>	<b>\$460.00</b>

<sup>69</sup> The Receiver Setup Report is provided as part of the FedPayments Reporter service and is free of charge to customers that subscribe to FedLine Web Plus, FedLine Advantage Plus, FedLine Advantage Premier, FedLine Command Plus, FedLine Direct Plus, or FedLine Direct Premier. Customers who receive the Receiver Setup Report only are not charged FedPayments Reporter package fees and are instead only charged FedLine access fees (see Attachment VI: FedLine Access Solutions).

<sup>70</sup> Standard reports include Customer Transaction Activity, Death Notification, International (IAT), Notification of Change, Payment Data Information File, Remittance Advice Detail, Remittance Advice Summary, Return Item, Return Ratio, Social Security Beneficiary, Originator Setup Reports, and Report Delivery via FedLine Access Solution.

<sup>71</sup> The on demand surcharge applies to standard reports (as defined in the previous footnote), ACH received entries detail reports, and ACH volume summary by SEC code reports.

<b>For 2,501 through 3,500 reports .....</b>	<b>\$640.00</b>
<b>For 3,501 through 4,500 reports .....</b>	<b>\$820.00</b>
<b>For 4,501 through 5,500 reports .....</b>	<b>\$995.00</b>
<b>For 5,501 through 7,000 reports .....</b>	<b>\$1,225.00</b>
<b>For 7,001 through 8,500 reports .....</b>	<b>\$1,440.00</b>
<b>For 8,501 through 10,000 reports .....</b>	<b>\$1,650.00</b>
<b>For more than 10,000 reports .....</b>	<b>\$1,800.00</b>
Premier reports (per report generated) <sup>72</sup>	
ACH volume summary by SEC code report - depository financial institution	
For 1 through 5 reports .....	\$10.00
For 6 through 10 reports .....	\$6.00
For 11 or more reports .....	\$1.00
On Demand Surcharge .....	\$1.00
ACH volume summary by SEC code report – customer	
On Demand Surcharge .....	\$1.00
Monthly ACH routing number activity report	
For 1 through 5 reports .....	\$10.00
For 6 through 10 reports .....	\$6.00
For 11 or more reports .....	\$1.00
On Demand Surcharge .....	\$1.00
Same Day Originated Batch Report (FedPayments Reporter Subscribers)....	\$10.00
Same Day Originated Batch Report (non-FedPayments Reporter Subscribers)	\$30.00
On-us inclusion	
Participation (monthly fee per RTN) .....	\$10.00
Per-item .....	\$0.0030
Per-addenda .....	\$0.0015
Report delivery via encrypted email (per email) .....	\$0.20
Other fees	
Monthly fee (per routing number)	
<b>Participation fee</b> <sup>73</sup> .....	<b>\$58.00</b>
SameDay service origination participation fee <sup>74</sup> .....	\$10.00 surcharge
FedACH settlement <sup>75</sup> .....	\$55.00

<sup>72</sup> Premier reports generated on demand are subject to the package/tiered fees plus a surcharge.

<sup>73</sup> The Participation fee applies to routing numbers that have received or originated FedACH transactions. Institutions that receive only U.S. government transactions through the Reserve Banks or that elect to use a private-sector operator exclusively are not assessed this fee.

<sup>74</sup> This surcharge is assessed to any routing number that originates at least one item meeting the criteria for same-day processing and settlement in a given month and is incremental to the standard Participation fee.

<sup>75</sup> The FedACH settlement fee is applied to any routing number with activity during a month, including routing numbers of institutions that elect to use a private-sector operator exclusively but also have items routed to or from customers that access the ACH network through FedACH.

<b>FedACH information extract file .....</b>	<b>\$150.00</b>
IAT Output File Sort.....	\$75.00
Automated NOC participation fee <sup>76</sup> .....	\$5.00
Non-electronic input/output fee <sup>77</sup>	
CD/DVD (CD or DVD).....	\$50.00
Paper (file or report).....	\$50.00
Fees established by NACHA <sup>78</sup>	
NACHA Same Day Entry fee (per item) .....	\$0.052
NACHA Same Day Entry credit (per item).....	\$0.052 (credit)
NACHA Unauthorized Entry fee (per item).....	\$4.50
NACHA Unauthorized Entry credit (per item).....	\$4.50 (credit)
NACHA Admin Network fee (monthly fee per RTN) .....	\$18.00
NACHA Admin Network fee (per entry) .....	\$0.000162
FedGlobal ACH Payments <sup>79</sup>	
<b>Fixed Monthly Fee<sup>80</sup></b>	
<b>Monthly origination volume more than 500 items.....</b>	<b>\$185.00</b>
<b>Monthly origination volume between 161 and 500 items.....</b>	<b>\$60.00</b>
<b>Monthly origination volume less than 161 items.....</b>	<b>\$20.00</b>
<b>Per-item Origination Fee for Monthly Volume more than 500 Items (surcharge)<sup>81</sup></b>	
<b>Canada service .....</b>	<b>\$0.50</b>
<b>Mexico service .....</b>	<b>\$0.55</b>
<b>Panama service.....</b>	<b>\$0.60</b>
<b>Europe service.....</b>	<b>\$1.13</b>
<b>Per-item Origination Fee for Monthly Volume between 161 and 500 items (surcharge)<sup>81</sup></b>	
<b>Canada service .....</b>	<b>\$0.75</b>

This fee does not apply to routing numbers that use the Reserve Banks for only U.S. government transactions.

<sup>76</sup> The notification-of-change fee will be assessed only when automated NOCs are generated.

<sup>77</sup> Limited services are offered in contingency situations.

<sup>78</sup> The fees listed are collected from the ODFI and credited to NACHA (admin network fees) or to the RDFI (same-day entry fee and unauthorized entry fee) in accordance with the ACH Rules.

<sup>79</sup> The international fees and surcharges vary from country to country because these are negotiated with each international gateway operator.

<sup>80</sup> The fixed monthly fee is a single monthly fee based on total FedGlobal ACH Payments origination volume.

<sup>81</sup> This per-item surcharge is in addition to the standard domestic origination fees.

<b>Mexico service .....</b>	<b>\$0.80</b>
<b>Panama service.....</b>	<b>\$0.85</b>
<b>Europe service .....</b>	<b>\$1.38</b>
<b>Per-item Origination Fee for Monthly Volume Less than 160 items (surcharge)<sup>81</sup></b>	
<b>Canada service .....</b>	<b>\$1.00</b>
<b>Mexico service .....</b>	<b>\$1.05</b>
<b>Panama service.....</b>	<b>\$1.10</b>
<b>Europe service .....</b>	<b>\$1.63</b>
<b>Other FedGlobal ACH Payments Fees</b>	
Canada service	
Return received from Canada <sup>82</sup> .....	\$0.99
Item trace at receiving gateway .....	\$5.50
Item trace not at receiving gateway .....	\$7.00
Mexico service fee	
Return received from Mexico <sup>82</sup> .....	\$0.91
Foreign currency to foreign currency (F3X) item originated to Mexico <sup>81</sup> ..	\$0.67
Item trace .....	\$13.50
Panama service fee	
Return received from Panama <sup>82</sup> .....	\$1.00
NOC .....	\$0.72
Item trace .....	\$7.00
Europe service fee	
F3X item originated to Europe <sup>81</sup> .....	\$1.25
Return received from Europe <sup>82</sup> .....	\$1.35
Item trace .....	\$7.00

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<sup>82</sup> This per-item surcharge is in addition to the standard domestic receipt fees.

**FEDWIRE FUNDS AND NATIONAL SETTLEMENT SERVICES 2017 FEE SCHEDULE**

EFFECTIVE JANUARY 3, 2017.  
**BOLD INDICATES CHANGES FROM 2016 PRICES.**

**Fedwire Funds Service**

	Fee
Monthly Participation Fee.....	\$95.00
Basic volume-based preincentive transfer fee (originations and receipts) – per transfer for:	
<b>the first 14,000 transfers per month.....</b>	<b>\$0.820</b>
<b>additional transfers up to 90,000 per month.....</b>	<b>\$0.245</b>
<b>every transfer over 90,000 per month.....</b>	<b>\$0.170</b>
Volume-based transfer fee with the incentive discount (originations and receipts) – per eligible transfer for: <sup>83</sup>	
<b>the first 14,000 transfers per month.....</b>	<b>\$0.164</b>
<b>additional transfers up to 90,000 per month.....</b>	<b>\$0.049</b>
<b>every transfer over 90,000 per month.....</b>	<b>\$0.034</b>
<b>Surcharge for Off-line Transfers (Originations and Receipts).....</b>	<b>\$60.00</b>
Surcharge for End-of-Day Transfer Originations <sup>84</sup> .....	\$0.26
Monthly FedPayments Manager import/export fee <sup>85</sup> .....	\$50.00
Surcharge for high-value payments:	
> \$10 million.....	\$0.14

<sup>83</sup> The incentive discounts apply to the volume that exceeds 60 percent of a customer's historic benchmark volume. Historic benchmark volume is based on a customer's average daily activity over the previous five calendar years. If a customer has fewer than five full calendar years of previous activity, its historic benchmark volume is based on its daily activity for as many full calendar years of data as are available. If a customer has less than one year of past activity, then the customer qualifies automatically for incentive discounts for the year. The applicable incentive discounts are as follows:

\$0.656 for transfers up to 14,000; \$0.196 for transfers 14,001 to 90,000; and \$0.136 for transfers over 90,000.

<sup>84</sup> This surcharge applies to originators of transfers that are processed by the Reserve Banks after 5:00 p.m. eastern time.

<sup>85</sup> This fee is charged to any Fedwire Funds participant that originates a transfer message via the FedPayments Manager (FPM) Funds tool and has the import/export processing option setting active at any point during the month.

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> \$100 million.....	\$0.36
Surcharge for Payment Notification:	
Origination Surcharge <sup>86</sup> .....	\$0.20

### National Settlement Service

Basic	
Settlement Entry Fee.....	\$1.50
Settlement File Fee .....	\$30.00
Surcharge for Off-line File Origination <sup>87</sup> .....	\$45.00
Minimum Monthly Fee (account maintenance) <sup>88</sup> .....	\$60.00
Special Settlement Arrangements (fee per day) <sup>89</sup> .....	\$150.00

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<sup>86</sup> Payment Notification and End-of-Day Origination surcharges apply to each Fedwire funds transfer message.

<sup>87</sup> Offline files will be accepted only on an exception basis when a settlement agent's primary and backup means of transmitting settlement files are both unavailable.

<sup>88</sup> Any customer account with total settlement charges less than \$60 during a calendar month will be assessed a variable amount to reach the minimum monthly account maintenance fee.

<sup>89</sup> Special settlement arrangements use Fedwire Funds transfers to effect settlement. Participants in arrangements and settlement agents are also charged the applicable Fedwire Funds transfer fee for each transfer into and out of the settlement account.

**FEDWIRE SECURITIES SERVICE 2017 FEE SCHEDULE  
(NON-TREASURY SECURITIES)**

EFFECTIVE JANUARY 3, 2017.  
**BOLD INDICATES CHANGES FROM 2016 PRICES.**

	Fee
Basic Transfer Fee	
<b>Transfer or reversal originated or received .....</b>	<b>\$0.77</b>
Surcharge	
<b>Offline origination &amp; receipt surcharge .....</b>	<b>\$80.00</b>
Monthly Maintenance Fees	
<b>Account maintenance (per account).....</b>	<b>\$57.50</b>
<b>Issues maintained (per issue/per account).....</b>	<b>\$0.77</b>
<b>Claim Adjustment Fee.....</b>	<b>\$0.80</b>
GNMA Serial Note Stripping or Reconstitution Fee <sup>90</sup> .....	\$9.00
<b>Joint Custody Origination Surcharge<sup>91</sup> .....</b>	<b>\$46.00</b>
Delivery of Reports – Hard Copy Reports to On-Line Customers.....	\$50.00

<sup>90</sup> This service was formerly called the GNMA Serial Note CUSIP Fee.

<sup>91</sup> Fedwire Securities Service charges customers the Joint Custody Origination Surcharge for both Agency and Treasury securities.

**FEDLINE 2017 FEE SCHEDULE**

EFFECTIVE JANUARY 3, 2017.  
**BOLD INDICATES CHANGES FROM 2016 PRICES.**

	Fee
<u>FedComplete Packages (monthly)</u> <sup>92</sup>	
FedComplete 100 Plus .....	\$775.00
includes FedLine Advantage Plus package	
FedLine subscriber 5-pack	
FedMail-FedLine Exchange subscriber 5-pack <sup>93</sup>	
7,500 FedForward transactions	
70 FedReturn transactions	
14,000 FedReceipt <sup>®</sup> transactions	
35 Fedwire funds origination transfers	
35 Fedwire funds receipt transfers	
Fedwire participation fee	
1,000 FedACH origination items	
FedACH minimum fee	
7,500 FedACH receipt items	
FedACH receipt minimum fee	
10 FedACH web return/NOC	
500 FedACH addenda originated	
1,000 FedACH addenda received	
FedACH account servicing	
FedACH settlement	
FedComplete 100 Premier .....	\$850.00
includes FedLine Advantage Premier package	
Volumes included in the FedComplete 100 Plus package	

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<sup>92</sup> FedComplete packages are all-electronic service options that bundle payment services with an access solution for one monthly fee.

<sup>93</sup> FedComplete customers that use the email service will be charged the FedMail Email a la carte fee.



<b>FedComplete 200 Plus</b> .....	<b>\$1,350.00</b>
includes FedLine Advantage Plus package	
FedLine subscriber 5-pack	
FedMail-FedLine Exchange subscriber 5-pack <sup>94</sup>	
25,000 FedForward transactions	
225 FedReturn transactions	
25,000 FedReceipt transactions	
100 Fedwire funds origination transfers	
100 Fedwire funds receipt transfers	
Fedwire participation fee	
2,000 FedACH origination items	
FedACH minimum fee	
25,000 FedACH receipt items	
FedACH receipt minimum fee	
20 FedACH web return/NOC	
750 FedACH addenda originated	
1,500 FedACH addenda received	
FedACH account servicing	
FedACH settlement	

<b>FedComplete 200 Premier</b> .....	<b>\$1,425.00</b>
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includes FedLine Advantage Premier package  
 Volumes included in the FedComplete 200 Plus package

FedComplete Excess Volume Surcharge<sup>95</sup>

FedForward .....	\$0.01/item
FedReturn .....	\$0.7500/item
Fedwire Funds Origination.....	\$0.7000/item
FedACH Origination .....	\$0.0025/item

<sup>94</sup> FedComplete customers that use the email service will be charged the FedMail Email a la carte fee.

<sup>95</sup> Per-item surcharges are in addition to the standard fees listed in the applicable priced services fee schedules.

FedComplete package credit incentive <sup>96</sup> .....	(\$1,500.00)
FedComplete credit adjustment .....	various
FedComplete debit adjustment .....	various

*FedLine Customer Access Solutions (monthly)*<sup>97</sup>

**FedMail**<sup>98</sup> .....\$85.00

includes **FedMail access channel**  
**FedACH Advice and Settlement Information**  
**Fedwire Funds Offline Advices**  
**Check 21 Services**  
**Check 21 Duplicate Notification Service**  
**Check Adjustments**  
**Accounting Statements**  
**Daylight Overdraft Reports**  
**Billing Statement**

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<sup>96</sup> New FedComplete package customers with a new FedLine Advantage connection are eligible for a one-time \$1,500 credit applied to their Federal Reserve service charges. Customers receiving credit must continue using the FedComplete package for a minimum of six months or forfeit the \$1,500 credit.

<sup>97</sup> VPN hardware for FedLine Advantage and FedLine Command is billed directly by the vendor. A current list of fees can be found at [http://www.frbservices.org/files/servicefees/pdf/access/vendor\\_fees.pdf](http://www.frbservices.org/files/servicefees/pdf/access/vendor_fees.pdf).

<sup>98</sup> FedMail and FedLine Exchange packages do not include user credentials, which are required to access priced services and certain informational services. Credentials are sold separately in packs of five via the FedMail-FedLine Exchange Subscriber 5-pack.

**FedLine Exchange<sup>98</sup> .....\$40.00**

includes **E-Payments Routing Directory (manual download)**

**FedLine Exchange Premier<sup>98</sup> .....\$125.00**

includes **FedLine Exchange package**  
**E-Payments Routing Directory (auto download)**

FedLine Web<sup>99</sup> .....\$110.00

includes FedLine Web access channel  
Services included in the FedLine Exchange package  
Check FedForward, FedReturn and FedReceipt services  
Check Adjustments  
FedACH Information Services & Derived Returns/NOCs  
FedACH Risk Services (includes RDFI Alert and Returns Reporting)  
FedCash Services  
Service Charge Information

**FedLine Web Plus<sup>99</sup> .....\$160.00**

includes FedLine Web package  
FedACH Risk Origination Monitoring Service  
FedACH FedPayments Reporter Service  
Check Large Dollar Return  
Check FedImage Services  
Account Management Information  
Various accounting and inquiry services (ABMS inquiry, IAS/PSR inquiry, IAS detailed inquiries, notifications and advices, end-of-day accounting file (PDF))  
**E-Payments Routing Directory (auto download)**

FedLine Advantage<sup>99</sup> .....\$380.00

includes: FedLine Advantage access channel  
Services included in the FedLine Web package  
FedACH transactions

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<sup>99</sup> FedLine Web and Advantage packages do not include user credentials, which are required to access priced services and certain informational services. Credentials are sold separately in packs of five via the FedLine Subscriber 5-pack.

Fedwire Funds transactions  
 Fedwire Securities transactions  
 National Settlement Service transactions  
 Check Large Dollar Return  
 Check FedImage Services  
 Account Management Information with Intra-Day Download Search File  
 Various accounting and inquiry services (ABMS inquiry, IAS/PSR inquiry, IAS  
 detailed inquiries, notifications and advices, end-of-day accounting file (PDF))

FedLine Advantage Plus<sup>99</sup> .....\$425.00

includes FedLine Advantage package  
 FedACH Risk Origination Monitoring Service  
 FedACH FedPayments Reporter Service  
 Fedwire Funds FedPayments Manager Import/Export (less than 250 Fedwire  
 transactions and one routing number per month)  
 FedTransaction Analyzer<sup>®</sup> (less than 250 Fedwire transactions and one routing number  
 per month)  
**E-Payments Routing Directory (auto download)**

FedLine Advantage Premier<sup>99</sup> .....\$500.00

includes FedLine Advantage Plus package  
 Secondary VPN device  
 Fedwire Funds FedPayments Manager Import/Export (more than 250 Fedwire  
 transactions or more than one routing number in a given month)  
 FedTransaction Analyzer (more than 250 Fedwire transactions or more than one  
 routing number per month)

FedLine Command Plus .....\$1,000.00

includes FedLine Command access channel  
 Services included in the FedLine Advantage Plus package  
 Two FedLine Command server certificates  
 Fedwire Statement Services  
 Fedwire Funds FedPayments Manager Import/Export (more than 250 Fedwire  
 transactions or more than one routing number in a given month)  
 FedTransaction Analyzer (more than 250 Fedwire transactions or more than one  
 routing number per month)  
 Intra-Day File (I-Day CI File)  
 Statement of Account Spreadsheet File (SASF)

Financial Institution Reconciliation Data File (FIRD)  
Billing Data Format File (Bdff)

FedLine Direct Plus .....\$3,600.00  
includes FedLine Direct access channel  
256K Dedicated WAN Connection  
Services included in the FedLine Command Plus package  
Two FedLine Direct server certificates  
Treasury Check Information System (TCIS)

**FedLine Direct Premier** .....**\$6,700.00**  
includes FedLine Direct Plus package  
T1 dedicated WAN connection  
Secondary VPN device  
Cash Management Services Plus Own Report (No Respondent/Subaccount activity)

A la carte options (monthly)<sup>100</sup>

Electronic Access

**FedMail - FedLine Exchange Subscriber 5-pack** .....\$15.00  
FedLine Subscriber 5-pack (access to Web and Advantage) .....\$80.00  
Additional FedLine Command Certificate<sup>101</sup> .....\$100.00  
Additional FedLine Direct Certificate<sup>102</sup> .....\$100.00  
Additional VPNs - Maintenance Fee<sup>103</sup> .....\$60.00  
Additional dedicated connections  
    256K .....\$2,500.00  
    T1 .....\$3,200.00  
FedLine International Setup (one-time fee).....\$5,000.00  
FedLine Custom Implementation Fee<sup>104</sup> .....various

<sup>100</sup> These add-on services can be purchased only with a FedLine Customer Access Service option.

<sup>101</sup> Additional FedLine Command Certificates available for FedLine Command and Direct packages only.

<sup>102</sup> Additional FedLine Direct Certificates available for FedLine Direct packages only.

<sup>103</sup> Additional VPNs are available for FedLine Advantage, FedLine Command, and FedLine Direct packages only.

FedLine Direct Contingency Solution .....	\$1,000.00
Check 21 Large File Delivery <sup>105</sup> .....	various
<b>FedMail Email (for FedLine customers) .....</b>	<b>\$20.00</b>
<b>FedMail Fax .....</b>	<b>\$100.00</b>
VPN Device Modification .....	\$200.00
VPN Device Missed Activation Appointment.....	\$175.00
VPN Device Expedited Hardware Surcharge.....	\$100.00
VPN Device Replacement or Move.....	\$300.00
<b>E-Payments Automated Download (1-5 Add'l Codes).....</b>	<b>\$75</b>
<b>E-Payments Automated Download (6-20 Add'l Codes).....</b>	<b>\$150</b>
<b>E-Payments Automated Download (21-50 Add'l Codes).....</b>	<b>\$300</b>
<b>E-Payments Automated Download (51-100 Add'l Codes).....</b>	<b>\$500</b>
<b>E-Payments Automated Download (101-250 Add'l Codes).....</b>	<b>\$1,000</b>
<b>E-Payments Automated Download (&gt;250 Add'l Codes).....</b>	<b>\$2,000</b>

#### Electronic Access Training

Learning Center	complimentary
Certificate Retrieval Download Tutorial	complimentary

#### Accounting Information Services

Cash Management System (CMS) Plus – Own report – up to six files with: <sup>106</sup>	
no respondent/sub-account activity.....	\$60.00
less than 10 respondent and/or sub-accounts .....	\$125.00
10-50 respondent and/or sub-accounts.....	\$250.00
51-100 respondents and/or sub-accounts .....	\$500.00
101-500 respondents and/or sub-accounts .....	\$750.00
>500 respondents and/or sub-accounts .....	\$1,000.00
End-of-Day Financial Institution Reconciliation Data File <sup>107</sup> .....	\$150.00

<sup>104</sup> The FedLine Custom Implementation Fee is \$2,500 or \$5,000 based on the complexity of the setup.

<sup>105</sup> The fee ranges from \$1,400 to \$20,725 depending on the size, speed, and location of the connection.

<sup>106</sup> Cash Management Service options are limited to plus and premier packages.

<sup>107</sup> The End of Day Reconciliation File option is available for FedLine Web Plus, FedLine Advantage Plus, and Premier packages. It is available for no extra fee in FedLine Command Plus and Direct packages.

Statement of Account Spreadsheet File <sup>108</sup> .....	\$150.00
Intra-day Download Search File (with AMI) <sup>109</sup> .....	\$150.00
ACTS Report <sup>110</sup>	
<= 20 sub-accounts .....	\$500.00
21-40 sub-accounts .....	\$1,000.00
41-60 sub-accounts .....	\$1,500.00
>60 sub-accounts .....	\$2,000.00
Other	
Software Certification .....	\$0.00 to \$8,000.00
Vendor Pass-Through Fee .....	various
Electronic Access Credit Adjustment .....	various
Electronic Access Debit Adjustment .....	various
Legacy Connection Service Fee .....	\$20,000.00
<b>Legacy Software Fee (effective July 1, 2017).....</b>	<b>\$5,000.00</b>
<b>(effective September 1, 2017).....</b>	<b>\$10,000.00</b>
<b>(effective November 1, 2017).....</b>	<b>\$20,000.00</b>

<sup>108</sup> The Statement of Account Spreadsheet File option is available for FedLine Web Plus, FedLine Advantage Plus, and Premier packages. It is available for no extra fee in FedLine Command Plus and Direct packages.

<sup>109</sup> The Intra-day Download Search File option is available for the FedLine Web Plus package. It is available for no extra fee in FedLine Advantage and higher packages.

<sup>110</sup> ACT Report options are limited to FedLine Command Plus, FedLine Direct Plus, and Premier packages.

By order of the Board of Governors of the Federal Reserve System, October 25, 2016.

**Robert deV. Frierson,**

*Secretary of the Board.*

[FR Doc. 2016-26068 Filed 10-27-16; 8:45 am]

BILLING CODE 6210-01-C

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

[CMS-1667-FN]

#### Medicare Program; Approval of Request for an Exception to the Prohibition on Expansion of Facility Capacity Under the Hospital Ownership and Rural Provider Exceptions to the Physician Self-Referral Prohibition

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

**ACTION:** Final notice.

**SUMMARY:** This final notice announces our decision to approve the request of Deaconess Women's Hospital of Southern Indiana doing business as (d/b/a) The Women's Hospital (The Women's Hospital) for an exception to the prohibition on expansion of facility capacity.

**DATES:** *Effective Date:* This notice is effective on October 28, 2016.

**FOR FURTHER INFORMATION CONTACT:**

*POH-ExceptionRequests@cms.hhs.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Section 1877 of the Social Security Act (the Act), also known as the physician self-referral law—(1) prohibits a physician from making referrals for certain “designated health services” (DHS) payable by Medicare to an entity with which he or she (or an immediate

family member) has a financial relationship (ownership or compensation), unless the requirements of an applicable exception are satisfied; and (2) prohibits the entity from filing claims with Medicare (or billing another individual, entity, or third party payer) for those DHS furnished as a result of a prohibited referral.

Section 1877(d)(2) of the Act provides an exception, known as the rural provider exception, for physician ownership or investment interests in rural providers. In order for an entity to qualify for the rural provider exception, the DHS must be furnished in a rural area (as defined in section 1886(d)(2)(D) of the Act) and substantially all the DHS furnished by the entity must be furnished to individuals residing in a rural area.

Section 1877(d)(3) of the Act provides an exception, known as the hospital ownership exception, for physician ownership or investment interests held

in a hospital located outside of Puerto Rico, provided that the referring physician is authorized to perform services at the hospital and the ownership or investment interest is in the hospital itself (and not merely in a subdivision of the hospital).

Section 6001(a)(3) of the Patient Protection and Affordable Care Act (Pub. L. 111–148) as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) (hereafter referred to together as “the Affordable Care Act”) amended the rural provider and hospital ownership exceptions to the physician self-referral prohibition to impose additional restrictions on physician ownership and investment in hospitals. Since March 23, 2010, a physician-owned hospital that seeks to avail itself of either exception is prohibited from expanding facility capacity unless it qualifies as an “applicable hospital” or “high Medicaid facility” (as defined in sections 1877(i)(3)(E), (F) of the Act and 42 CFR 411.362(c)(2), (3) of our regulations) and has been granted an exception to the facility expansion prohibition by the Secretary of the Department of Health and Human Services (the Secretary). Section 1877(i)(3)(A)(ii) of the Act provides that individuals and entities in the community in which the provider requesting the exception is located must have an opportunity to provide input with respect to the provider’s request for the exception. Section 1877(i)(3)(H) of the Act states that the Secretary shall publish in the **Federal Register** the final decision with respect to the request for an exception to the prohibition against facility expansion not later than 60 days after receiving a complete application.

## II. Exception Approval Process

On November 30, 2011, we published a final rule in the **Federal Register** (76 FR 74122, 74517 through 74525) that, among other things, finalized § 411.362(c), which specified the process for submitting, commenting on, and reviewing a request for an exception to the prohibition on expansion of facility capacity. We published a subsequent final rule in the **Federal Register** on November 10, 2014 (79 FR 66770) that made certain revisions. These revisions include, among other things, permitting the use of data from an external data source or data from the Hospital Cost Report Information System (HCRIS) for specific eligibility criteria.

As stated in regulations at § 411.362(c)(5), we will solicit community input on the request for an exception by publishing a notice of the request in the **Federal Register**.

Individuals and entities in the hospital’s community will have 30 days to submit comments on the request. Community input must take the form of written comments and may include documentation demonstrating that the physician-owned hospital requesting the exception does or does not qualify as an applicable hospital or high Medicaid facility, as such terms are defined in § 411.362(c)(2) and (3). In the November 30, 2011 final rule (76 FR 74522), we gave examples of community input, such as documentation demonstrating that the hospital does not satisfy one or more of the data criteria or that the hospital discriminates against beneficiaries of Federal health programs; however, we noted that these were examples only and that we will not restrict the type of community input that may be submitted. If we receive timely comments from the community, we will notify the hospital, and the hospital will have 30 days after such notice to submit a rebuttal statement (§ 411.362(c)(5)(ii)).

A request for an exception to the facility expansion prohibition is considered complete as follows:

- If the request, any written comments, and any rebuttal statement include only HCRIS data: (1) The end of the 30-day comment period if the Centers for Medicare & Medicaid Services (CMS) receives no written comments from the community; or (2) the end of the 30-day rebuttal period if CMS receives written comments from the community, regardless of whether the physician-owned hospital submitting the request submits a rebuttal statement (§ 411.362(c)(5)(i)).
- If the request, any written comments, or any rebuttal statement include data from an external data source, no later than: (1) 180 days after the end of the 30-day comment period if CMS receives no written comments from the community; and (2) 180 days after the end of the 30-day rebuttal period if CMS receives written comments from the community, regardless of whether the physician-owned hospital submitting the request submits a rebuttal statement (§ 411.362(c)(5)(ii)).

If we grant the request for an exception to the prohibition on expansion of facility capacity, the expansion may occur only in facilities on the hospital’s main campus and may not result in the number of operating rooms, procedure rooms, and beds for which the hospital is licensed to exceed 200 percent of the hospital’s baseline number of operating rooms, procedure rooms, and beds (§ 411.362(c)(6)). The CMS decision to grant or deny a

hospital’s request for an exception to the prohibition on expansion of facility capacity must be published in the **Federal Register** in accordance with our regulations at § 411.362(c)(7).

## III. Public Response to Notice With Comment Period

On July 28, 2016, we published a notice in the **Federal Register** (81 FR 49662) entitled “Request for an Exception to the Prohibition on Expansion of Facility Capacity under the Hospital Ownership and Rural Provider Exceptions to the Physician Self-Referral Prohibition”. In the notice, we stated that, as permitted by section 1877(i)(3) of the Act and our regulations at § 411.362(c), the following physician-owned hospital requested an exception to the prohibition on expansion of facility capacity:

*Name of Facility:* Deaconess Women’s Hospital of Southern Indiana d/b/a The Women’s Hospital.

*Address:* 4199 Gateway Blvd., Newburgh, IN 47630.

*County:* Warrick County, Indiana.

*Basis for Exception Request:* High Medicaid Facility.

In the notice, we solicited comments from individuals and entities in the community in which The Women’s Hospital is located. During the 30-day public comment period, we received no public comments.

## IV. Decision

This final notice announces our decision to approve The Women’s Hospital’s request for an exception to the prohibition against expansion of facility capacity. As required by the November 30, 2011 final rule (76 FR 74122) and our public guidance documents, The Women’s Hospital submitted the data and certifications necessary to demonstrate that it satisfies the criteria to qualify as a high Medicaid facility. Therefore in accordance with section 1877(i)(3) of the Act, we are granting The Women’s Hospital’s request for an exception to the expansion of facility capacity prohibition based on the following criteria:

- The Women’s Hospital is not the sole hospital in the county in which the hospital is located;
- With respect to each of the 3 most recent 12-month periods for which data are available as of the date the hospital submitted its request, The Women’s Hospital had an annual percent of total inpatient admissions under Medicaid that is estimated to be greater than such percent with respect to such admissions for any other hospital located in the



county in which the hospital is located; and

- The Women's Hospital certified that it does not discriminate against beneficiaries of Federal health care programs and does not permit physicians practicing at the hospital to discriminate against such beneficiaries.

Our decision grants The Women's Hospital's request to add a total of 75 operating rooms, procedure rooms, and beds. Pursuant to § 411.362(c)(6), the expansion may occur only in facilities on the hospital's main campus and may not result in the number of operating rooms, procedure rooms, and beds for which The Women's Hospital is licensed to exceed 200 percent of its baseline number of operating rooms, procedure rooms, and beds. The Women's Hospital certified that its baseline number of operating rooms, procedure rooms, and beds is 81. Accordingly, we find that granting an additional 75 operating rooms, procedure rooms, and beds will not exceed the limitation on a permitted expansion.

#### V. 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.*).

Dated: October 3, 2016.

**Andrew M. Slavitt**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

[FR Doc. 2016-26117 Filed 10-27-16; 8:45 am]

BILLING CODE 4120-01-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

[CMS-1661-FN]

#### Medicare Program; Approval of Request for an Exception to the Prohibition on Expansion of Facility Capacity Under the Hospital Ownership and Rural Provider Exceptions to the Physician Self-Referral Prohibition for Rockwall Regional Hospital, Limited Liability Company Doing Business as (d/b/a) Texas Health Presbyterian Hospital Rockwall

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

**ACTION:** Final notice.

**SUMMARY:** This final notice announces our decision to approve the request of Rockwall Regional Hospital, Limited Liability Company (LLC) doing business as (d/b/a) Texas Health Presbyterian Hospital Rockwall (Texas Health Rockwall) for an exception to the prohibition on expansion of facility capacity.

**DATES:** Effective Date: This notice is effective on October 28, 2016.

**FOR FURTHER INFORMATION CONTACT:** *POH-ExceptionRequests@cms.hhs.gov.*

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Section 1877 of the Social Security Act (the Act), also known as the physician self-referral law—(1) prohibits a physician from making referrals for certain “designated health services” (DHS) payable by Medicare to an entity with which he or she (or an immediate family member) has a financial relationship (ownership or compensation), unless the requirements of an applicable exception are satisfied; and (2) prohibits the entity from filing claims with Medicare (or billing another individual, entity, or third party payer) for those DHS furnished as a result of a prohibited referral.

Section 1877(d)(2) of the Act provides an exception, known as the rural provider exception, for physician ownership or investment interests in rural providers. In order for an entity to qualify for the rural provider exception, the DHS must be furnished in a rural area (as defined in section 1886(d)(2)(D) of the Act) and substantially all the DHS furnished by the entity must be furnished to individuals residing in a rural area.

Section 1877(d)(3) of the Act provides an exception, known as the hospital ownership exception, for physician ownership or investment interests held in a hospital located outside of Puerto Rico, provided that the referring physician is authorized to perform services at the hospital and the ownership or investment interest is in the hospital itself (and not merely in a subdivision of the hospital).

Section 6001(a)(3) of the Patient Protection and Affordable Care Act (Pub. L. 111-148) as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111-152) (hereafter referred to together as “the Affordable Care Act”) amended the rural provider and hospital ownership exceptions to the physician self-referral prohibition to impose additional restrictions on physician ownership and

investment in hospitals. Since March 23, 2010, a physician-owned hospital that seeks to avail itself of either exception is prohibited from expanding facility capacity unless it qualifies as an “applicable hospital” or “high Medicaid facility” (as defined in sections 1877(i)(3)(E), (F) of the Act and 42 CFR 411.362(c)(2), (3) of our regulations) and has been granted an exception to the facility expansion prohibition by the Secretary of the Department of Health and Human Services (the Secretary). Section 1877(i)(3)(A)(ii) of the Act provides that individuals and entities in the community in which the provider requesting the exception is located must have an opportunity to provide input with respect to the provider's request for the exception. Section 1877(i)(3)(H) of the Act states that the Secretary shall publish in the **Federal Register** the final decision with respect to the request for an exception to the prohibition against facility expansion not later than 60 days after receiving a complete application.

##### II. Exception Approval Process

On November 30, 2011, we published a final rule in the **Federal Register** (76 FR 74122, 74517 through 74525) that, among other things, finalized § 411.362(c), which specified the process for submitting, commenting on, and reviewing a request for an exception to the prohibition on expansion of facility capacity. We published a subsequent final rule in the **Federal Register** on November 10, 2014 (79 FR 66770) that made certain revisions. These revisions include, among other things, permitting the use of data from an external data source or data from the Hospital Cost Report Information System (HCRIS) for specific eligibility criteria.

As stated in regulations at § 411.362(c)(5), we will solicit community input on the request for an exception by publishing a notice of the request in the **Federal Register**. Individuals and entities in the hospital's community will have 30 days to submit comments on the request. Community input must take the form of written comments and may include documentation demonstrating that the physician-owned hospital requesting the exception does or does not qualify as an applicable hospital or high Medicaid facility, as such terms are defined in § 411.362(c)(2) and (3). In the November 30, 2011 final rule (76 FR 74522), we gave examples of community input, such as documentation demonstrating that the hospital does not satisfy one or more of the data criteria or that the hospital discriminates against beneficiaries of Federal health

programs; however, we noted that these were examples only and that we will not restrict the type of community input that may be submitted. If we receive timely comments from the community, we will notify the hospital, and the hospital will have 30 days after such notice to submit a rebuttal statement (§ 411.362(c)(5)(ii)).

A request for an exception to the facility expansion prohibition is considered complete as follows:

- If the request, any written comments, and any rebuttal statement include only HCRIS data: (1) The end of the 30-day comment period if the Centers for Medicare & Medicaid Services (CMS) receives no written comments from the community; or (2) the end of the 30-day rebuttal period if CMS receives written comments from the community, regardless of whether the physician-owned hospital submitting the request submits a rebuttal statement (§ 411.362(c)(5)(i)).

- If the request, any written comments, or any rebuttal statement include data from an external data source, no later than: (1) 180 days after the end of the 30-day comment period if CMS receives no written comments from the community; and (2) 180 days after the end of the 30-day rebuttal period if CMS receives written comments from the community, regardless of whether the physician-owned hospital submitting the request submits a rebuttal statement (§ 411.362(c)(5)(ii)).

If we grant the request for an exception to the prohibition on expansion of facility capacity, the expansion may occur only in facilities on the hospital's main campus and may not result in the number of operating rooms, procedure rooms, and beds for which the hospital is licensed to exceed 200 percent of the hospital's baseline number of operating rooms, procedure rooms, and beds (§ 411.362(c)(6)). The CMS decision to grant or deny a hospital's request for an exception to the prohibition on expansion of facility capacity must be published in the **Federal Register** in accordance with our regulations at § 411.362(c)(7).

### III. Public Response to Notice With Comment Period

On February 2, 2016, we published a notice in the **Federal Register** (81 FR 5463) entitled "Request for an Exception to the Prohibition on Expansion of Facility Capacity under the Hospital Ownership and Rural Provider Exceptions to the Physician Self-Referral Prohibition." In the notice, we stated that, as permitted by section 1877(i)(3) of the Act and our regulations

at § 411.362(c), the following physician-owned hospital requested an exception to the prohibition on expansion of facility capacity:

*Name of Facility:* Rockwall Regional Hospital, LLC, d/b/a Texas Health Presbyterian Hospital Rockwall.

*Address:* 3150 Horizon Road, Rockwall County, Texas 75032-7805.

*County:* Rockwall County, Texas

*Basis for Exception Request:*

Applicable Hospital.

In the notice, we solicited comments from individuals and entities in the community in which Texas Health Rockwall is located. We received 43 comments during the 30-day public comment period. Forty-two comments were in favor of the request and one was in opposition.

The commenter that opposed the expansion request asserted that Texas Health Rockwall did not meet the inpatient Medicaid admissions criterion at § 411.362(c)(2)(ii). The commenter expressed concern that the HCRIS, the data source used by Texas Health Rockwall to demonstrate satisfaction of the inpatient Medicaid admissions criterion, does not accurately reflect all Medicaid admissions and discharges. The commenter expressed its belief that information from a different source, the Texas Health Care Information Collection (THCIC), does not indicate that Texas Health Rockwall's satisfied the inpatient Medicaid admissions criterion.

On April 13, 2016, Texas Health Rockwall submitted a rebuttal statement in response to the comment opposing its request. The statement satisfactorily rebutted the commenters' assertions regarding the inpatient Medicaid admissions criterion and addressed the concerns expressed by the commenter regarding HCRIS and THCIC data.

### IV. Decision

This final notice announces our decision to approve Texas Health Rockwall's request for an exception to the prohibition against expansion of facility capacity. As required by the November 30, 2011 final rule (76 FR 74122) and our public guidance documents, Texas Health Rockwall submitted the data and certifications necessary to demonstrate that it satisfies the criteria to qualify as an applicable hospital. In accordance with section 1877(i)(3) of the Act, we are granting Texas Health Rockwall's request for an exception to the expansion of facility capacity prohibition based on the following criteria:

- Texas Health Rockwall is located in a county that had a percentage increase in population that is at least 150 percent

of the percentage increase in population of the State in which the hospital is located during the most recent 5-year period for which data are available as of the date that the hospital submitted its request;

- Texas Health Rockwall had an annual percent of total inpatient admissions under Medicaid that is equal to or greater than the average percent with respect to such admissions for all hospitals located in the county in which the hospital is located during the most recent fiscal year for which data are available as of the date that the hospital submitted its request;

- Texas Health Rockwall certified that it does not discriminate against beneficiaries of Federal health care programs and does not permit physicians practicing at the hospital to discriminate against such beneficiaries;

- Texas Health Rockwall is located in a State in which the average bed capacity in the State was less than the national average bed capacity during the most recent fiscal year for which data are available as of the date that the hospital submitted its request; and

- Texas Health Rockwall had an average bed occupancy rate that was greater than the average bed occupancy rate in the State in which the hospital is located during the most recent fiscal year for which data are available as of the date that the hospital submitted its request.

Our decision grants Texas Health Rockwall's request to add a total of 60 operating rooms, procedure rooms, and beds. Pursuant to § 411.362(c)(6), the expansion may occur only in facilities on the hospital's main campus and may not result in the number of operating rooms, procedure rooms, and beds for which Texas Health Rockwall is licensed to exceed 200 percent of its baseline number of operating rooms, procedure rooms, and beds. Texas Health Rockwall certified that its baseline number of operating rooms, procedure rooms, and beds is 60. Accordingly, we find that granting an additional 60 operating rooms, procedure rooms, and beds will not exceed the limitation on a permitted expansion.

### V. 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.*).

Dated: October 3, 2016.

**Andrew M. Slavitt,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

[FR Doc. 2016-26119 Filed 10-27-16; 8:45 am]

**BILLING CODE 4120-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2016-N-3330]

#### Authorizations of Emergency Use of In Vitro Diagnostic Devices for Detection and/or Diagnosis of Zika Virus; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the issuance of four Emergency Use Authorizations (EUAs) (the Authorizations) for four in vitro diagnostic devices for detection and/or diagnosis of Zika virus in response to the Zika virus outbreak in the Americas. FDA issued these Authorizations under the Federal Food, Drug, and Cosmetic Act (the FD&C Act), as requested by Siemens Healthcare Diagnostics, Inc., Luminex Corporation, InBios International, Inc., and Roche Molecular Systems, Inc. The Authorizations contain, among other things, conditions on the emergency use of the authorized in vitro diagnostic devices. The Authorizations follow the February 26, 2016, determination by the Secretary of Health and Human Services (HHS) that there is a significant potential for a public health emergency that has a significant potential to affect national security or the health and security of U.S. citizens living abroad and that involves Zika virus. On the basis of such determination, the Secretary of HHS declared on February 26, 2016, that circumstances exist justifying the authorization of emergency use of in vitro diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection, subject to the terms of any authorization issued under the FD&C Act. The Authorizations, which include an explanation of the reasons for issuance, are reprinted in this document.

**DATES:** The Authorization for Siemens Healthcare Diagnostics, Inc., is effective as of July 29, 2016; the Authorization for Luminex Corporation is effective as of August 4, 2016; the Authorization for InBios International, Inc., is effective as of August 17, 2016; and the

Authorization for Roche Molecular Systems, Inc., is effective as of August 26, 2016.

**ADDRESSES:** Submit written requests for single copies of the EUAs to the Office of Counterterrorism and Emerging Threats, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 4338, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your request or include a fax number to which the Authorizations may be sent. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the Authorizations.

**FOR FURTHER INFORMATION CONTACT:** Michael Mair, Office of Counterterrorism and Emerging Threats, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 4336, Silver Spring, MD 20993-0002, 301-796-8510 (this is not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Section 564 of the FD&C Act (21 U.S.C. 360bbb-3) as amended by the Project BioShield Act of 2004 (Pub L. 108-276) and the Pandemic and All-Hazards Preparedness Reauthorization Act of 2013 (Pub L. 113-5) allows FDA to strengthen the public health protections against biological, chemical, nuclear, and radiological agents. Among other things, section 564 of the FD&C Act allows FDA to authorize the use of an unapproved medical product or an unapproved use of an approved medical product in certain situations. With this EUA authority, FDA can help assure that medical countermeasures may be used in emergencies to diagnose, treat, or prevent serious or life-threatening diseases or conditions caused by biological, chemical, nuclear, or radiological agents when there are no adequate, approved, and available alternatives.

Section 564(b)(1) of the FD&C Act provides that, before an EUA may be issued, the Secretary of HHS must declare that circumstances exist justifying the authorization based on one of the following grounds: (1) A determination by the Secretary of Homeland Security that there is a domestic emergency, or a significant potential for a domestic emergency, involving a heightened risk of attack with a biological, chemical, radiological, or nuclear agent or agents; (2) a determination by the Secretary of Defense that there is a military emergency, or a significant potential for a military emergency, involving a heightened risk to U.S. military forces of

attack with a biological, chemical, radiological, or nuclear agent or agents; (3) a determination by the Secretary of HHS that there is a public health emergency, or a significant potential for a public health emergency, that affects, or has a significant potential to affect, national security or the health and security of U.S. citizens living abroad, and that involves a biological, chemical, radiological, or nuclear agent or agents, or a disease or condition that may be attributable to such agent or agents; or (4) the identification of a material threat by the Secretary of Homeland Security under section 319F-2 of the Public Health Service (PHS) Act (42 U.S.C. 247d-6b) sufficient to affect national security or the health and security of U.S. citizens living abroad.

Once the Secretary of HHS has declared that circumstances exist justifying an authorization under section 564 of the FD&C Act, FDA may authorize the emergency use of a drug, device, or biological product if the Agency concludes that the statutory criteria are satisfied. Under section 564(h)(1) of the FD&C Act, FDA is required to publish in the **Federal Register** a notice of each authorization, and each termination or revocation of an authorization, and an explanation of the reasons for the action. Section 564 of the FD&C Act permits FDA to authorize the introduction into interstate commerce of a drug, device, or biological product intended for use when the Secretary of HHS has declared that circumstances exist justifying the authorization of emergency use. Products appropriate for emergency use may include products and uses that are not approved, cleared, or licensed under sections 505, 510(k), or 515 of the FD&C Act (21 U.S.C. 355, 360(k), and 360e) or section 351 of the PHS Act (42 U.S.C. 262). FDA may issue an EUA only if, after consultation with the HHS Assistant Secretary for Preparedness and Response, the Director of the National Institutes of Health, and the Director of the Centers for Disease Control and Prevention (to the extent feasible and appropriate given the applicable circumstances), FDA<sup>1</sup> concludes: (1) That an agent referred to in a declaration of emergency or threat can cause a serious or life-threatening disease or condition; (2) that, based on the totality of scientific evidence available to FDA, including data from adequate and well-controlled clinical trials, if available, it is reasonable to believe that: (A) The product may be effective in diagnosing,

<sup>1</sup> The Secretary of HHS has delegated the authority to issue an EUA under section 564 of the FD&C Act to the Commissioner of Food and Drugs.

treating, or preventing (i) such disease or condition; or (ii) a serious or life-threatening disease or condition caused by a product authorized under section 564, approved or cleared under the FD&C Act, or licensed under section 351 of the PHS Act, for diagnosing, treating, or preventing such a disease or condition caused by such an agent; and (B) the known and potential benefits of the product, when used to diagnose, prevent, or treat such disease or condition, outweigh the known and potential risks of the product, taking into consideration the material threat posed by the agent or agents identified in a declaration under section 564(b)(1)(D) of the FD&C Act, if applicable; (3) that there is no adequate, approved, and available alternative to the product for diagnosing, preventing, or treating such disease or condition; and (4) that such other criteria as may be prescribed by regulation are satisfied.

No other criteria for issuance have been prescribed by regulation under section 564(c)(4) of the FD&C Act. Because the statute is self-executing, regulations or guidance are not required for FDA to implement the EUA authority.

## II. EUA Requests for In Vitro Diagnostic Devices for Detection and/or Diagnosis of Zika Virus

On February 26, 2016, the Secretary of HHS determined that there is a significant potential for a public health emergency that has a significant potential to affect national security or the health and security of U.S. citizens living abroad and that involves Zika virus. On February 26, 2016, under section 564(b)(1) of the FD&C Act, and on the basis of such determination, the Secretary of HHS declared that circumstances exist justifying the authorization of emergency use of in vitro diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection, subject to the terms of any authorization issued under section 564 of the FD&C Act. Notice of the determination and declaration of the Secretary was published in the **Federal Register** on March 2, 2016 (81 FR 10878). On July 21, 2016, Siemens Healthcare Diagnostics, Inc., requested, and on July 29, 2016, FDA issued, an EUA for the VERSANT® Zika RNA 1.0 Assay (kPCR) Kit, subject to the terms of the Authorization. On August 1, 2016, Luminex Corporation requested, and on August 4, 2016, FDA issued, an EUA for the xMAP® MultiFLEX™ Zika RNA Assay, subject to the terms of the

Authorization. On July 21, 2016, InBios International, Inc., requested, and on August 17, 2016, FDA issued, an EUA for the ZIKV *Detect*™ IgM Capture ELISA, subject to the terms of the Authorization. On August 18, 2016, Roche Molecular Systems, Inc., requested, and on August 26, 2016, FDA issued, an EUA for the *LightMix*® Zika *rRT-PCR Test*, subject to the terms of the Authorization.

## III. Electronic Access

An electronic version of this document and the full text of the Authorizations are available on the Internet at <http://www.regulations.gov>.

## IV. The Authorizations

Having concluded that the criteria for issuance of the Authorizations under section 564(c) of the FD&C Act are met, FDA has authorized the emergency use of four in vitro diagnostic devices for detection and/or diagnosis of Zika virus subject to the terms of the Authorizations. The Authorizations in their entirety (not including the authorized versions of the fact sheets and other written materials) follow and provide an explanation of the reasons for their issuance, as required by section 564(h)(1) of the FD&C Act:

**BILLING CODE 4164-01-P**



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration  
Silver Spring, MD 20993

July 29, 2016

Ingrid Mehlhorn  
Regulatory Affairs  
Siemens Healthcare Diagnostics Inc.  
725 Potter St.  
Berkeley, CA 94710

Dear Dr. Mehlhorn:

This letter is in response to your request that the Food and Drug Administration (FDA) issue an Emergency Use Authorization (EUA) for emergency use of Siemens Healthcare Diagnostics Inc.'s ("Siemens") VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit for the qualitative detection of RNA from Zika virus in human serum, EDTA plasma, and urine (collected alongside a patient-matched serum or plasma specimen) from individuals meeting Centers for Disease Control and Prevention (CDC) Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiologic criteria for which Zika virus testing may be indicated), by laboratories in the United States (U.S.) that are certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 42 U.S.C. § 263a, to perform high complexity tests, or by similarly qualified non-U.S. laboratories, pursuant to section 564 of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. § 360bbb-3).<sup>1</sup> Assay results are for the identification of Zika virus RNA. Zika virus RNA is generally detectable in these specimens during the acute phase of infection (approximately 7 days in serum, possibly longer in urine, following onset of symptoms, if present). Positive results are indicative of current infection.

On February 26, 2016, pursuant to section 564(b)(1)(C) of the Act (21 U.S.C. § 360bbb-3(b)(1)(C)), the Secretary of Health and Human Services (HHS) determined that there is a significant potential for a public health emergency that has a significant potential to affect national security or the health and security of United States citizens living abroad and that involves Zika virus.<sup>2</sup> Pursuant to section 564(b)(1) of the Act (21 U.S.C. § 360bbb-3(b)(1)), and on the basis of such determination, the Secretary of HHS then declared that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection

<sup>1</sup> For ease of reference, this letter will refer to "laboratories in the United States (U.S.) that are certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 42 U.S.C. § 263a, to perform high complexity tests, or by similarly qualified non-U.S. laboratories" as "authorized laboratories."

<sup>2</sup> As amended by the Pandemic and All Hazards Preparedness Reauthorization Act, Pub. L. No. 113-5, under section 564(b)(1)(C) of the Act, the Secretary may make a determination of a public health emergency, or of a significant potential for a public health emergency.

Page 2 – Mrs. Mehlhorn, Siemens Healthcare Diagnostics Inc.

of Zika virus and/or diagnosis of Zika virus infection, subject to the terms of any authorization issued under 21 U.S.C. § 360bbb-3(a).<sup>3</sup>

Having concluded that the criteria for issuance of this authorization under section 564(c) of the Act (21 U.S.C. § 360bbb-3(c)) are met, I am authorizing the emergency use of the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit (as described in the Scope of Authorization section of this letter (Section II)) in individuals meeting CDC Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiologic criteria for which Zika virus testing may be indicated) (as described in the Scope of Authorization section of this letter (Section II)) for the detection of Zika virus infection by authorized laboratories, subject to the terms of this authorization.

#### **I. Criteria for Issuance of Authorization**

I have concluded that the emergency use of the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit for the detection of Zika virus and diagnosis of Zika virus infection in the specified population meets the criteria for issuance of an authorization under section 564(c) of the Act, because I have concluded that:

1. The Zika virus can cause Zika virus infection, a serious or life-threatening disease or condition to humans infected with the virus;
2. Based on the totality of scientific evidence available to FDA, it is reasonable to believe that the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit, when used with the specified instrument and in accordance with the Scope of Authorization, may be effective in detecting Zika virus and diagnosing Zika virus infection, and that the known and potential benefits of the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit for detecting Zika virus and diagnosing Zika virus infection outweigh the known and potential risks of such product; and
3. There is no adequate, approved, and available alternative to the emergency use of the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit for detecting Zika virus and diagnosing Zika virus infection.<sup>4</sup>

#### **II. Scope of Authorization**

I have concluded, pursuant to section 564(d)(1) of the Act, that the scope of this authorization is limited to the use of the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit by authorized laboratories for the detection of RNA from Zika virus and diagnosis of Zika virus infection in individuals meeting CDC Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g.,

<sup>3</sup> HHS. *Determination and Declaration Regarding Emergency Use of in Vitro Diagnostic Tests for Detection of Zika Virus and/or Diagnosis of Zika Virus Infection*. 81 Fed. Reg. 10878 (March 2, 2016).

<sup>4</sup> No other criteria of issuance have been prescribed by regulation under section 564(c)(4) of the Act.

Page 3 – Mrs. Mehlhorn, Siemens Healthcare Diagnostics Inc.

history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiologic criteria for which Zika virus testing may be indicated).

#### **The Authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit**

The VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit is a real-time PCR (RT-PCR) assay for the qualitative detection of RNA from Zika virus in serum, EDTA plasma, and urine (collected alongside a patient-matched serum or plasma specimen) and other authorized specimen types.

To perform the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR), samples are first extracted to isolate the Zika virus RNA. Nucleic acids are isolated and purified from the sample using either the Siemens' automated VERSANT<sup>®</sup> kPCR Sample Preparation (SP) system (also referred to as VERSANT<sup>®</sup> kPCR Molecular System SP) with the VERSANT<sup>®</sup> MiPLX Software Solution and the VERSANT<sup>®</sup> Sample Preparation 1.0 Reagents or with the QIAamp viral RNA Mini Kit with manual extraction, or with other authorized extraction methods. An Internal Control sequence is added to the sample prior to extraction and is used as a control for the sample extraction and the amplification reaction.

Purified RNA is then added to a PCR plate containing Zika Enzyme Mix and Zika Primer/Probe Mix, and the wells are sealed. The purified nucleic acids are first reverse transcribed into cDNAs. In the process, the probes anneal to the specific target sequences located between the respective forward and reverse primers. The assay targets two regions of the Zika virus genome. The dual-labeled probes include fluorescent dyes and quenchers and specifically detect the presence of Zika virus and Internal Control amplicons during amplification. During the extension phase of the PCR cycle, the 5' nuclease activity of Taq polymerase degrades the probes, causing the reporter dyes to separate from the quencher dyes, generating fluorescent signals. With each cycle, additional reporter dye molecules are cleaved from their respective probes, increasing the fluorescence intensity.

The RT-PCR is performed on the QuantStudio<sup>™</sup> 5 Real-Time PCR System (Thermo Fisher Scientific), the CFX96 Touch<sup>™</sup> Real-Time PCR Detection System (Bio-Rad), the Applied Biosystems<sup>®</sup> 7500 Fast Dx Real-Time PCR Instrument (Thermo Fisher Scientific) or other authorized instruments.

The VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit includes the following materials, or other authorized materials or ancillary products:

- Zika Enzyme Mix
- Zika Primer/Probe Mix
- Zika Internal Control
- Zika Negative Control
- Zika Positive Control
- Water (nuclease free)

The VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit requires the following control materials, or other authorized control materials, to be included in each run; all assay controls listed below must generate expected results in order for a test to be considered valid:

- VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit Internal Control

Page 4 – Mrs. Mehlhorn, Siemens Healthcare Diagnostics Inc.

- The internal control consists of a non-Zika virus RNA that is added and co-purified with each specimen, Positive Control, and Negative Control, and that is amplified by a specific primers and probe set.
- The internal control RNA controls for sample extraction, reverse transcription, amplification and detection, and also ensures the absence of non-specific PCR inhibition of a sample.
- VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit Negative Control
  - PCR grade water.
  - A negative control should be included in each run of specimen extractions to monitor Zika virus contamination.
- VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit Positive Control
  - Inactivated Cultured Zika Virus Strain MR766.
  - A positive control is included in each run of specimen extractions to monitor nucleic acid isolation and detection of Zika virus RNA.

To produce a valid run, the test controls must meet the performance specifications outlined in the Instructions for Use.

The above described VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit, when labeled consistently with the labeling authorized by FDA entitled “VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit Instructions for Use” (available at <http://www.fda.gov/MedicalDevices/Safety/EmergencySituations/ucm161496.htm>), which may be revised by Siemens in consultation with the Division of Microbiology Devices (DMD)/Office of In Vitro Diagnostics and Radiological Health (OIR)/Center for Devices and Radiological Health (CDRH), is authorized to be distributed to and used by authorized laboratories under this EUA, despite the fact that it does not meet certain requirements otherwise required by federal law.

The above described VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit is authorized to be accompanied by the following information pertaining to the emergency use, which is authorized to be made available to health care providers, pregnant women, and other patients:

- Fact Sheet for Health Care Providers: Interpreting VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit Test Results
- Fact Sheet for Pregnant Women: Understanding Results from the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit
- Fact Sheet for Patients: Understanding Results from the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit

As described in Section IV below, Siemens is also authorized to make available additional information relating to the emergency use of the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit that is consistent with, and does not exceed, the terms of this letter of authorization.

I have concluded, pursuant to section 564(d)(2) of the Act, that it is reasonable to believe that the known and potential benefits of the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit in the specified population, when used for detection of Zika virus and to diagnose Zika virus infection and used consistently with the Scope of Authorization of this letter (Section II),



Page 5 – Mrs. Mehlhorn, Siemens Healthcare Diagnostics Inc.

outweigh the known and potential risks of such a product.

I have concluded, pursuant to section 564(d)(3) of the Act, based on the totality of scientific evidence available to FDA, that it is reasonable to believe that the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit may be effective in the detection of Zika virus and diagnosis of Zika virus infection, when used consistently with the Scope of Authorization of this letter (Section II), pursuant to section 564(c)(2)(A) of the Act.

FDA has reviewed the scientific information available to FDA, including the information supporting the conclusions described in Section I above, and concludes that the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit, when used for detection of Zika virus and to diagnose Zika virus infection in the specified population (as described in the Scope of Authorization of this letter (Section II)), meets the criteria set forth in section 564(c) of the Act concerning safety and potential effectiveness.

The emergency use of the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit under this EUA must be consistent with, and may not exceed, the terms of this letter, including the Scope of Authorization (Section II) and the Conditions of Authorization (Section IV). Subject to the terms of this EUA and under the circumstances set forth in the Secretary of HHS's determination described above and the Secretary of HHS's corresponding declaration under section 564(b)(1), the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit described above is authorized to detect Zika virus and diagnose Zika virus infection in individuals meeting CDC Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to geographic regions during a period of active Zika virus transmissions at the time of travel, or other epidemiologic criteria for which Zika virus testing may be indicated).

This EUA will cease to be effective when the HHS declaration that circumstances exist to justify the EUA is terminated under section 564(b)(2) of the Act or when the EUA is revoked under section 564(g) of the Act.

### III. Waiver of Certain Requirements

I am waiving the following requirements for the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit during the duration of this EUA:

- Current good manufacturing practice requirements, including the quality system requirements under 21 CFR Part 820 with respect to the design, manufacture, packaging, labeling, storage, and distribution of the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit.
- Labeling requirements for cleared, approved, or investigational devices, including labeling requirements under 21 CFR 809.10 and 21 CFR 809.30, except for the intended use statement (21 CFR 809.10(a)(2), (b)(2)), adequate directions for use (21 U.S.C. 352(f)), (21 CFR 809.10(b)(5), (7), and (8)), any appropriate limitations on the use of the device including information required under 21 CFR 809.10(a)(4), and any available information regarding performance of the device, including requirements under 21 CFR 809.10(b)(12).

Page 6 – Mrs. Mehlhorn, Siemens Healthcare Diagnostics Inc.

#### IV. Conditions of Authorization

Pursuant to section 564 of the Act, I am establishing the following conditions on this authorization:

##### Siemens Healthcare Diagnostics Inc. and Its Authorized Distributor(s)

- A. Siemens and its authorized distributor(s) will distribute the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit with the authorized labeling, as may be revised by Siemens in consultation with DMD/OIR/CDRH, only to authorized laboratories.
- B. Siemens and its authorized distributor(s) will provide to authorized laboratories the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit Fact Sheet for Health Care Providers, the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit Fact Sheet for Pregnant Women, and the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit Fact Sheet for Patients.
- C. Siemens and its authorized distributor(s) will make available on their websites the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit Fact Sheet for Health Care Providers, the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit Fact Sheet for Pregnant Women, and the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit Fact Sheet for Patients.
- D. Siemens and its authorized distributor(s) will inform authorized laboratories and relevant public health authority(ies) of this EUA, including the terms and conditions herein.
- E. Siemens and its authorized distributor(s) will ensure that authorized laboratories using the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit have a process in place for reporting test results to health care providers and relevant public health authorities, as appropriate.<sup>5</sup>
- F. Through a process of inventory control, Siemens and its authorized distributor(s) will maintain records of device usage.
- G. Siemens and its authorized distributor(s) will collect information on the performance of the test. Siemens will report to FDA any suspected occurrence of false positive and false negative results and significant deviations from the established performance characteristics of the test of which Siemens becomes aware.
- H. Siemens and its authorized distributor(s) are authorized to make available additional information relating to the emergency use of the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit that is consistent with, and does not exceed, the terms of this letter of authorization.

<sup>5</sup> For questions related to reporting Zika test results to relevant public health authorities, it is recommended that Siemens and authorized laboratories consult with the applicable country, state or territory health department(s). According to CDC, Zika is a nationally notifiable condition (see <http://www.cdc.gov/zika/>).

Page 7 – Mrs. Mehilhorn, Siemens Healthcare Diagnostics Inc.

**Siemens Healthcare Diagnostics Inc.**

- I. Siemens will notify FDA of any authorized distributor(s) of the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit, including the name, address, and phone number of any authorized distributor(s).
- J. Siemens will provide its authorized distributor(s) with a copy of this EUA, and communicate to its authorized distributor(s) any subsequent amendments that might be made to this EUA and its authorized accompanying materials (e.g., fact sheets, instructions for use).
- K. Siemens may request changes to the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit Fact Sheet for Health Care Providers, the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit Fact Sheet for Pregnant Women, and the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit Fact Sheet for Patients. Such requests will be made by Siemens in consultation with, and require concurrence of, DMD/OIR/CDRH.
- L. Siemens may request the addition of other instruments for use with the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit. Such requests will be made by Siemens in consultation with, and require concurrence of, DMD/OIR/CDRH.
- M. Siemens may request the addition of other extraction methods for use with the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit. Such requests will be made by Siemens in consultation with, and require concurrence of, DMD/OIR/CDRH.
- N. Siemens may request the addition of other specimen types for use with the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit. Such requests will be made by Siemens in consultation with, and require concurrence of, DMD/OIR/CDRH.
- O. Siemens may request the addition of other control materials for use with the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit. Such requests will be made by Siemens in consultation with, and require concurrence of, DMD/OIR/CDRH.
- P. Siemens may request the addition of other materials and ancillary reagents for use with the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit. Such requests will be made by Siemens in consultation with, and require concurrence of, DMD/OIR/CDRH.
- Q. Siemens will assess traceability<sup>6</sup> of the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit with FDA-recommended reference material(s). After submission to FDA and DMD/OIR/CDRH's review of and concurrence with the data, Siemens will update its labeling to reflect the additional testing.
- R. Siemens will track adverse events and report to FDA under 21 CFR Part 803.

<sup>6</sup> Traceability refers to tracing analytical sensitivity/reactivity back to a FDA recommended reference material.

Page 8 – Mrs. Mehlhorn, Siemens Healthcare Diagnostics Inc.

#### Authorized Laboratories

- S. Authorized laboratories will include with reports of the results of the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit the authorized Fact Sheet for Health Care Providers, the authorized Fact Sheet for Pregnant Women, and the authorized Fact Sheet for Patients. Under exigent circumstances, other appropriate methods for disseminating these Fact Sheets may be used, which may include mass media.
- T. Authorized laboratories will perform the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit on the QuantStudio<sup>™</sup> 5 Real-Time PCR System, the CFX96 Touch<sup>™</sup> Real-Time PCR Detection System, the Applied Biosystems<sup>®</sup> 7500 Fast Dx Real-Time PCR Instrument or other authorized instruments.
- U. Authorized laboratories will perform the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit using either the VERSANT<sup>®</sup> kPCR Sample Preparation (SP) system (also referred to as VERSANT<sup>®</sup> kPCR Molecular System SP) with the VERSANT<sup>®</sup> MiPLX Software Solution and the VERSANT<sup>®</sup> Sample Preparation 1.0 Reagents or with the QIAamp viral RNA Mini Kit with manual extraction, or with other authorized extraction methods.
- V. Authorized laboratories will perform the VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit on serum, EDTA plasma, or urine (collected alongside a patient-matched serum or plasma specimen) or with other authorized specimen types.
- W. Authorized laboratories will have a process in place for reporting test results to health care providers and relevant public health authorities, as appropriate.<sup>7</sup>
- X. Authorized laboratories will collect information on the performance of the test and report to Siemens, any suspected occurrence of false positive or false negative results of which they become aware.
- Y. All laboratory personnel using the test should be appropriately trained in RT-PCR techniques and use appropriate laboratory and personal protective equipment when handling this kit, and use the test in accordance with the authorized labeling.

#### Siemens Healthcare Diagnostics Inc., its Authorized Distributor(s) and Authorized Laboratories

- Z. Siemens, its authorized distributor(s) and authorized laboratories, will ensure that any records associated with this EUA are maintained until notified by FDA. Such records will be made available to FDA for inspection upon request.

#### Conditions Related to Advertising and Promotion

- AA. All advertising and promotional descriptive printed matter relating to the use of the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit shall be consistent with the

<sup>7</sup> For questions related to reporting Zika test results to relevant public health authorities, it is recommended that Siemens and authorized laboratories consult with the applicable country, state or territory health department(s). According to CDC, Zika is a nationally notifiable condition. <http://www.cdc.gov/zika/>.

Page 9 -- Mrs. Mehlhorn, Siemens Healthcare Diagnostics Inc.

Fact Sheets and authorized labeling, as well as the terms set forth in this EUA and the applicable requirements set forth in the Act and FDA regulations.

BB. All advertising and promotional descriptive printed matter relating to the use of the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit shall clearly and conspicuously state that:

- This test has not been FDA cleared or approved;
- This test has been authorized by FDA under an EUA for use by authorized laboratories;
- This test has been authorized only for the detection of RNA from Zika virus and diagnosis of Zika virus infection, not for any other viruses or pathogens; and
- This test is only authorized for the duration of the declaration that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection under section 564(b)(1) of the Act, 21 U.S.C. § 360bbb-3(b)(1), unless the authorization is terminated or revoked sooner.

No advertising or promotional descriptive printed matter relating to the use of the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit may represent or suggest that this test is safe or effective for the diagnosis of Zika virus infection.

The emergency use of the authorized VERSANT<sup>®</sup> Zika RNA 1.0 Assay (kPCR) Kit as described in this letter of authorization must comply with the conditions and all other terms of this authorization.

#### V. Duration of Authorization

This EUA will be effective until the declaration that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection is terminated under section 564(b)(2) of the Act or the EUA is revoked under section 564(g) of the Act.

Sincerely,



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Luciana Borio, M.D.  
Acting Chief Scientist  
Food and Drug Administration

Enclosures



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration  
Silver Spring, MD 20993

August 4, 2016

Mr. Roy Johnson  
Manager, Regulatory Affairs  
Luminex Corporation  
12212 Technology Blvd.  
Austin, TX 78727

Dear Mr. Johnson:

This letter is in response to your request that the Food and Drug Administration (FDA) issue an Emergency Use Authorization (EUA) for emergency use of Luminex Corporation's ("Luminex") xMAP<sup>®</sup> MultiFLEX<sup>™</sup> Zika RNA Assay for the qualitative detection of RNA from Zika virus in human serum, plasma, and urine (collected alongside a patient-matched serum or plasma specimen) from individuals meeting Centers for Disease Control and Prevention (CDC) Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated), by laboratories in the United States that are certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 42 U.S.C. § 263a, to perform high complexity tests, or by similarly qualified non-U.S. laboratories, pursuant to section 564 of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. § 360bbb-3).<sup>1</sup> Assay results are for the identification of Zika virus RNA. Zika virus RNA is generally detectable in these specimens during the acute phase of infection and, according to the updated CDC Guidance for U.S. Laboratories Testing for Zika Virus Infection<sup>2</sup>, up to 14 days in serum and urine (possibly longer in urine), following onset of symptoms, if present. Positive results are indicative of current infection.

On February 26, 2016, pursuant to section 564(b)(1)(C) of the Act (21 U.S.C. § 360bbb-3(b)(1)(C)), the Secretary of Health and Human Services (HHS) determined that there is a significant potential for a public health emergency that has a significant potential to affect national security or the health and security of U.S. citizens living abroad and that involves Zika virus.<sup>3</sup> Pursuant to section 564(b)(1) of the Act (21 U.S.C. § 360bbb-3(b)(1)), and on the basis of such determination, the Secretary of HHS then declared that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus

<sup>1</sup> For ease of reference, this letter will refer to "laboratories in the United States (U.S.) that are certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 42 U.S.C. § 263a, to perform high complexity tests, or by similarly qualified non-U.S. laboratories" as "authorized laboratories."

<sup>2</sup> Available at <http://www.cdc.gov/zika/laboratories/lab-guidance.html> (last updated on July 26, 2016).

<sup>3</sup> As amended by the Pandemic and All Hazards Preparedness Reauthorization Act, Pub. L. No. 113-5, under section 564(b)(1)(C) of the Act, the Secretary may make a determination of a public health emergency, or of a significant potential for a public health emergency.

Page 2 – Mr. Johnson, Luminex Corporation

and/or diagnosis of Zika virus infection, subject to the terms of any authorization issued under 21 U.S.C. § 360bbb-3(a).<sup>4</sup>

Having concluded that the criteria for issuance of this authorization under section 564(c) of the Act (21 U.S.C. § 360bbb-3(c)) are met, I am authorizing the emergency use of the xMAP<sup>®</sup> MultiFLEX<sup>™</sup> Zika RNA Assay (as described in the Scope of Authorization section of this letter (Section II)) in individuals meeting CDC Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated) (as described in the Scope of Authorization section of this letter (Section II)) for the detection of Zika virus infection by authorized laboratories, subject to the terms of this authorization.

### **I. Criteria for Issuance of Authorization**

I have concluded that the emergency use of the xMAP<sup>®</sup> MultiFLEX<sup>™</sup> Zika RNA Assay for the detection of Zika virus and diagnosis of Zika virus infection in the specified population meets the criteria for issuance of an authorization under section 564(c) of the Act, because I have concluded that:

1. The Zika virus can cause Zika virus infection, a serious or life-threatening disease or condition to humans infected with the virus;
2. Based on the totality of scientific evidence available to FDA, it is reasonable to believe that the xMAP<sup>®</sup> MultiFLEX<sup>™</sup> Zika RNA Assay, when used with the specified instrument and in accordance with the Scope of Authorization, may be effective in detecting Zika virus and diagnosing Zika virus infection, and that the known and potential benefits of the xMAP<sup>®</sup> MultiFLEX<sup>™</sup> Zika RNA Assay for detecting Zika virus and diagnosing Zika virus infection outweigh the known and potential risks of such product; and
3. There is no adequate, approved, and available alternative to the emergency use of the xMAP<sup>®</sup> MultiFLEX<sup>™</sup> Zika RNA Assay for detecting Zika virus and diagnosing Zika virus infection.<sup>5</sup>

### **II. Scope of Authorization**

I have concluded, pursuant to section 564(d)(1) of the Act, that the scope of this authorization is limited to the use of the authorized xMAP<sup>®</sup> MultiFLEX<sup>™</sup> Zika RNA Assay by authorized laboratories for the detection of RNA from Zika virus and diagnosis of Zika virus infection in individuals meeting CDC Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated).

<sup>4</sup> HHS. *Determination and Declaration Regarding Emergency Use of in Vitro Diagnostic Tests for Detection of Zika Virus and/or Diagnosis of Zika Virus Infection*. 81 Fed. Reg. 10878 (March 2, 2016).

<sup>5</sup> No other criteria of issuance have been prescribed by regulation under section 564(c)(4) of the Act.

**The Authorized xMAP® MultiFLEX™ Zika RNA Assay**

The xMAP® MultiFLEX™ Zika RNA Assay is a real-time PCR (RT-PCR) assay for the qualitative detection of RNA from Zika virus in serum, plasma, and urine (collected alongside a patient-matched serum or plasma specimen) and other authorized specimen types.

To perform the xMAP® MultiFLEX™ Zika RNA Assay, samples are first extracted to isolate the Zika virus RNA. Nucleic acids are isolated and purified from the sample using the BioMerieux's NucliSENS easyMag nucleic acid extraction system, or other authorized extraction methods. An Internal Control sequence is added to the sample prior to extraction and is used as a control for the sample extraction and the amplification reaction.

Extracted total nucleic acid is then simultaneously amplified using target specific primers and probes for RT-PCR followed by amplicon hybridization to probe-coupled microspheres. Streptavidin-conjugated R-Phycoerythrin (SAPE) is added, and detection of the targets of interest is performed on a Luminex IVD xMAP instrument (MAGPIX or Luminex 100/200) or other authorized instruments.

The xMAP® MultiFLEX™ Zika RNA Assay includes the following materials, or other authorized materials or ancillary products:

- Primer Mix
- Streptavidin-Phycoerythrin (SAPE)
- Microsphere mix
- Buffer A
- Buffer B
- MS2 bacteriophage RNA extraction control

The xMAP® MultiFLEX™ Zika RNA Assay requires the following control materials, or other authorized control materials; all assay controls listed below must generate expected results in order for a test to be considered valid:

- Internal Control (Bacteriophage MS2)

This internal positive control is added to each test sample as well as to each external control prior to extraction. The internal control allows the user to ascertain whether the extraction and reverse-transcription/ amplification steps of the assay are functioning correctly.

- No Template Control (NTC)

No Template Controls (NTCs) for the amplification/ detection steps are DNase- and RNase-free distilled water in place of specimen nucleic acids and must be included in each assay run. The NTC is a control for contamination or improper function of the assay reagents which could result in false positive results.

- External Positive Control

An External Positive Control may be used with the xMAP® MultiFLEX™ Zika RNA Assay based on local guidelines or laboratory standard operating procedures (SOPs). The External



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Positive Control should be processed with the same workflow as clinical specimens. A positive result for the Zika virus specific RNA confirms the assay is performing as expected.

To produce a valid run, the test controls must meet the performance specifications outlined in the Instructions for Use.

The above described xMAP® MultiFLEX™ Zika RNA Assay, when labeled consistently with the labeling authorized by FDA entitled “xMAP® MultiFLEX™ Zika RNA Assay Instructions for Use” (available at <http://www.fda.gov/MedicalDevices/Safety/EmergencySituations/ucm161496.htm>), which may be revised by Luminex in consultation with the Division of Microbiology Devices (DMD)/Office of In Vitro Diagnostics and Radiological Health (OIR)/Center for Devices and Radiological Health (CDRH), is authorized to be distributed to and used by authorized laboratories under this EUA, despite the fact that it does not meet certain requirements otherwise required by federal law.

The above described xMAP® MultiFLEX™ Zika RNA Assay is authorized to be accompanied by the following information pertaining to the emergency use, which is authorized to be made available to health care providers, pregnant women, and other patients:

- Fact Sheet for Health Care Providers: Interpreting xMAP® MultiFLEX™ Zika RNA Assay Results
- Fact Sheet for Pregnant Women: Understanding Results from the xMAP® MultiFLEX™ Zika RNA Assay
- Fact Sheet for Patients: Understanding Results from the xMAP® MultiFLEX™ Zika RNA Assay

As described in Section IV below, Luminex is also authorized to make available additional information relating to the emergency use of the authorized xMAP® MultiFLEX™ Zika RNA Assay that is consistent with, and does not exceed, the terms of this letter of authorization.

I have concluded, pursuant to section 564(d)(2) of the Act, that it is reasonable to believe that the known and potential benefits of the authorized xMAP® MultiFLEX™ Zika RNA Assay in the specified population, when used for detection of Zika virus and to diagnose Zika virus infection and used consistently with the Scope of Authorization of this letter (Section II), outweigh the known and potential risks of such a product.

I have concluded, pursuant to section 564(d)(3) of the Act, based on the totality of scientific evidence available to FDA, that it is reasonable to believe that the authorized xMAP® MultiFLEX™ Zika RNA Assay may be effective in the detection of Zika virus and diagnosis of Zika virus infection, when used consistently with the Scope of Authorization of this letter (Section II), pursuant to section 564(c)(2)(A) of the Act.

FDA has reviewed the scientific information available to FDA, including the information supporting the conclusions described in Section I above, and concludes that the authorized xMAP® MultiFLEX™ Zika RNA Assay, when used for detection of Zika virus and to diagnose Zika virus infection in the specified population (as described in the Scope of Authorization of this letter (Section II)), meets the criteria set forth in section 564(c) of the Act concerning safety and potential effectiveness.

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The emergency use of the authorized xMAP® MultiFLEX™ Zika RNA Assay under this EUA must be consistent with, and may not exceed, the terms of this letter, including the Scope of Authorization (Section II) and the Conditions of Authorization (Section IV). Subject to the terms of this EUA and under the circumstances set forth in the Secretary of HHS's determination described above and the Secretary of HHS's corresponding declaration under section 564(b)(1), the xMAP® MultiFLEX™ Zika RNA Assay described above is authorized to detect Zika virus and diagnose Zika virus infection in individuals meeting CDC Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to geographic regions during a period of active Zika virus transmissions at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated).

This EUA will cease to be effective when the HHS declaration that circumstances exist to justify the EUA is terminated under section 564(b)(2) of the Act or when the EUA is revoked under section 564(g) of the Act.

### III. Waiver of Certain Requirements

I am waiving the following requirements for the xMAP® MultiFLEX™ Zika RNA Assay during the duration of this EUA:

- Current good manufacturing practice requirements, including the quality system requirements under 21 CFR Part 820 with respect to the design, manufacture, packaging, labeling, storage, and distribution of the xMAP® MultiFLEX™ Zika RNA Assay.
- Labeling requirements for cleared, approved, or investigational devices, including labeling requirements under 21 CFR 809.10 and 21 CFR 809.30, except for the intended use statement (21 CFR 809.10(a)(2), (b)(2)), adequate directions for use (21 U.S.C. 352(f)), (21 CFR 809.10(b)(5), (7), and (8)), any appropriate limitations on the use of the device including information required under 21 CFR 809.10(a)(4), and any available information regarding performance of the device, including requirements under 21 CFR 809.10(b)(12).

### IV. Conditions of Authorization

Pursuant to section 564 of the Act, I am establishing the following conditions on this authorization:

#### Luminex Corporation and Its Authorized Distributor(s)

- A. Luminex and its authorized distributor(s) will distribute the authorized xMAP® MultiFLEX™ Zika RNA Assay with the authorized labeling, as may be revised by Luminex in consultation with DMD/OIR/CDRH, only to authorized laboratories.
- B. Luminex and its authorized distributor(s) will provide to authorized laboratories the authorized xMAP® MultiFLEX™ Zika RNA Assay Fact Sheet for Health Care Providers, the authorized xMAP® MultiFLEX™ Zika RNA Assay for Pregnant

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Women, and the authorized xMAP® MultiFLEX™ Zika RNA Assay Fact Sheet for Patients.

- C. Luminex and its authorized distributor(s) will make available on their websites the authorized xMAP® MultiFLEX™ Zika RNA Assay Fact Sheet for Health Care Providers, the authorized xMAP® MultiFLEX™ Zika RNA Assay Fact Sheet for Pregnant Women, and the authorized xMAP® MultiFLEX™ Zika RNA Assay Fact Sheet for Patients.
- D. Luminex and its authorized distributor(s) will inform authorized laboratories and relevant public health authority(ies) of this EUA, including the terms and conditions herein.
- E. Luminex and its authorized distributor(s) will ensure that authorized laboratories using the authorized xMAP® MultiFLEX™ Zika RNA Assay have a process in place for reporting test results to health care providers and relevant public health authorities, as appropriate.<sup>6</sup>
- F. Through a process of inventory control, Luminex and its authorized distributor(s) will maintain records of device usage.
- G. Luminex and its authorized distributor(s) will collect information on the performance of the test. Luminex will report to FDA any suspected occurrence of false positive and false negative results and significant deviations from the established performance characteristics of the test of which Luminex becomes aware.
- H. Luminex and its authorized distributor(s) are authorized to make available additional information relating to the emergency use of the authorized xMAP® MultiFLEX™ Zika RNA Assay that is consistent with, and does not exceed, the terms of this letter of authorization.

#### Luminex Corporation

- I. Luminex will notify FDA of any authorized distributor(s) of the xMAP® MultiFLEX™ Zika RNA Assay, including the name, address, and phone number of any authorized distributor(s).
- J. Luminex will provide its authorized distributor(s) with a copy of this EUA, and communicate to its authorized distributor(s) any subsequent amendments that might be made to this EUA and its authorized accompanying materials (e.g., fact sheets, instructions for use).
- K. Luminex may request changes to the authorized xMAP® MultiFLEX™ Zika RNA Assay for Health Care Providers, the authorized xMAP® MultiFLEX™ Zika RNA Assay Fact Sheet for Pregnant Women, and the authorized xMAP® MultiFLEX™

<sup>6</sup> For questions related to reporting Zika test results to relevant public health authorities, it is recommended that Luminex and authorized laboratories consult with the applicable country, state or territory health department(s). According to CDC, Zika virus disease is a nationally notifiable condition (see <http://www.cdc.gov/zika/>).

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- Zika RNA Assay Fact Sheet for Patients. Such requests will be made by Luminex in consultation with, and require concurrence of, DMD/OIR/CDRH.
- L. Luminex may request the addition of other instruments for use with the authorized xMAP® MultiFLEX™ Zika RNA Assay. Such requests will be made by Luminex in consultation with, and require concurrence of, DMD/OIR/CDRH.
  - M. Luminex may request the addition of other extraction methods for use with the authorized xMAP® MultiFLEX™ Zika RNA Assay. Such requests will be made by Luminex in consultation with, and require concurrence of, DMD/OIR/CDRH.
  - N. Luminex may request the addition of other specimen types for use with the authorized xMAP® MultiFLEX™ Zika RNA Assay. Such requests will be made by Luminex in consultation with, and require concurrence of, DMD/OIR/CDRH.
  - O. Luminex may request the addition of other control materials for use with the authorized xMAP® MultiFLEX™ Zika RNA Assay. Such requests will be made by Luminex in consultation with, and require concurrence of, DMD/OIR/CDRH.
  - P. Luminex may request the addition of other materials and ancillary reagents for use with the authorized xMAP® MultiFLEX™ Zika RNA Assay. Such requests will be made by Luminex in consultation with, and require concurrence of, DMD/OIR/CDRH.
  - Q. Luminex will assess traceability<sup>7</sup> of the xMAP® MultiFLEX™ Zika RNA Assay with FDA-recommended reference material(s). After submission to FDA and DMD/OIR/CDRH's review of and concurrence with the data, Luminex will update its labeling to reflect the additional testing.
  - R. Luminex will track adverse events and report to FDA under 21 CFR Part 803.

#### Authorized Laboratories

- S. Authorized laboratories will include with reports of the results of the xMAP® MultiFLEX™ Zika RNA Assay the authorized Fact Sheet for Health Care Providers, the authorized Fact Sheet for Pregnant Women, and the authorized Fact Sheet for Patients. Under exigent circumstances, other appropriate methods for disseminating these Fact Sheets may be used, which may include mass media.
- T. Authorized laboratories will perform the xMAP® MultiFLEX™ Zika RNA Assay on a Luminex IVD xMAP instrument (MAGPIX or Luminex 100/200) or other authorized instruments.
- U. Authorized laboratories will perform the xMAP® MultiFLEX™ Zika RNA Assay using the BioMerieux's NucliSENS easyMag nucleic acid extraction system or other authorized extraction methods.

<sup>7</sup> Traceability refers to tracing analytical sensitivity/reactivity back to a FDA recommended reference material.

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- V. Authorized laboratories will perform the xMAP® MultiFLEX™ Zika RNA Assay on serum, plasma, or urine (collected alongside a patient-matched serum or plasma specimen) or with other authorized specimen types.
- W. Authorized laboratories will have a process in place for reporting test results to health care providers and relevant public health authorities, as appropriate.<sup>8</sup>
- X. Authorized laboratories will collect information on the performance of the test and report to Luminex, any suspected occurrence of false positive or false negative results of which they become aware.
- Y. All laboratory personnel using the test should be appropriately trained in RT-PCR techniques and use appropriate laboratory and personal protective equipment when handling this kit, and use the test in accordance with the authorized labeling.

**Luminex Corporation, its Authorized Distributor(s) and Authorized Laboratories**

- Z. Luminex, its authorized distributor(s) and authorized laboratories, will ensure that any records associated with this EUA are maintained until notified by FDA. Such records will be made available to FDA for inspection upon request.

**Conditions Related to Advertising and Promotion**

- AA. All advertising and promotional descriptive printed matter relating to the use of the authorized xMAP® MultiFLEX™ Zika RNA Assay shall be consistent with the Fact Sheets and authorized labeling, as well as the terms set forth in this EUA and the applicable requirements set forth in the Act and FDA regulations.
- BB. All advertising and promotional descriptive printed matter relating to the use of the authorized xMAP® MultiFLEX™ Zika RNA Assay shall clearly and conspicuously state that:
  - This test has not been FDA cleared or approved;
  - This test has been authorized by FDA under an EUA for use by authorized laboratories;
  - This test has been authorized only for the detection of RNA from Zika virus and diagnosis of Zika virus infection, not for any other viruses or pathogens; and
  - This test is only authorized for the duration of the declaration that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection under section 564(b)(1) of the Act, 21 U.S.C. § 360bbb-3(b)(1), unless the authorization is terminated or revoked sooner.

<sup>8</sup> For questions related to reporting Zika test results to relevant public health authorities, it is recommended that Luminex and authorized laboratories consult with the applicable country, state or territory health department(s). According to CDC, Zika virus disease is a nationally notifiable condition (see <http://www.cdc.gov/zika/>).

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No advertising or promotional descriptive printed matter relating to the use of the authorized xMAP® MultiFLEX™ Zika RNA Assay may represent or suggest that this test is safe or effective for the diagnosis of Zika virus infection.

The emergency use of the authorized xMAP® MultiFLEX™ Zika RNA Assay as described in this letter of authorization must comply with the conditions and all other terms of this authorization.

**V. Duration of Authorization**

This EUA will be effective until the declaration that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection is terminated under section 564(b)(2) of the Act or the EUA is revoked under section 564(g) of the Act.

Sincerely,



Robert M. Califf, M.D.  
Commissioner of Food and Drugs

Enclosures



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration  
Silver Spring, MD 20993

August 17, 2016

Estela Raychaudhuri  
President  
InBios International, Inc.  
562 1<sup>st</sup> Avenue S., Suite 600  
Seattle, WA 98104

Dear Ms. Raychaudhuri:

This letter is in response to your request that the Food and Drug Administration (FDA) issue an Emergency Use Authorization (EUA) for emergency use of InBios International, Inc.'s ("InBios"), ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA for the presumptive detection of Zika virus IgM antibodies in human sera collected from individuals meeting the Centers for Disease Control and Prevention (CDC) Zika virus clinical criteria (e.g., a history of clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated), by laboratories in the United States that are certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 42 U.S.C. § 263a, to perform high complexity tests, or by similarly qualified non-U.S. laboratories,<sup>1</sup> pursuant to section 564 of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. § 360bbb-3). Where there are presumptive Zika positive, possible Zika positive, or presumptive other flavivirus positive results from the ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA, confirmation of the presence of anti-Zika IgM antibodies or other flavivirus IgM antibodies requires additional testing, as described in the Scope of Authorization of this letter (Section II) and in the authorized Instructions for Use document, and/or consideration alongside test results for other patient-matched specimens using the latest CDC guideline for the diagnosis of Zika virus infection.

On February 26, 2016, pursuant to section 564(b)(1)(C) of the Act (21 U.S.C. § 360bbb-3(b)(1)(C)), the Secretary of Health and Human Services (HHS) determined that there is a significant potential for a public health emergency that has a significant potential to affect national security or the health and security of United States citizens living abroad and that involves Zika virus.<sup>2</sup> Pursuant to section 564(b)(1) of the Act (21 U.S.C. § 360bbb-3(b)(1)), and on the basis of such determination, the Secretary of HHS then declared that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or

<sup>1</sup> For ease of reference, this letter will refer to "laboratories in the United States that are certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 42 U.S.C. § 263a, to perform high complexity tests, or by similarly qualified non-U.S. laboratories" as "authorized laboratories."

<sup>2</sup> As amended by the Pandemic and All-Hazards Preparedness Reauthorization Act, Pub. L. No. 113-5, under section 564(b)(1)(C) of the Act, the Secretary may make a determination of a public health emergency, or of a significant potential for a public health emergency.

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diagnosis of Zika virus infection, subject to the terms of any authorization issued under 21 U.S.C. § 360bbb-3(a).<sup>3</sup>

Having concluded that the criteria for issuance of this authorization under section 564(c) of the Act (21 U.S.C. § 360bbb-3(c)) are met, I am authorizing the emergency use of the ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA (as described in the Scope of Authorization section of this letter (Section II)) in individuals meeting CDC Zika virus clinical criteria (e.g., a history of clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated) (as described in the Scope of Authorization section of this letter (Section II)) for the presumptive detection of Zika virus infection by authorized laboratories, subject to the terms of this authorization.

#### **I. Criteria for Issuance of Authorization**

I have concluded that the emergency use of the ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA for the presumptive detection of Zika virus-specific IgM antibodies in the specified population meets the criteria for issuance of an authorization under section 564(c) of the Act, because I have concluded that:

1. The Zika virus can cause Zika virus infection, a serious or life-threatening disease or condition to humans infected with the virus;
2. Based on the totality of scientific evidence available to FDA, it is reasonable to believe that the ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA may be effective in diagnosing Zika virus infection, and that the known and potential benefits of the ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA for diagnosing Zika virus infection outweigh the known and potential risks of such product, when, for presumptive Zika positive, possible Zika positive, and presumptive other flavivirus positive results, additional testing (as described in the Instructions for Use document) is performed and/or test results for other patient-matched specimens (using the latest CDC guideline for the diagnosis of Zika virus infection) are considered; and
3. There is no adequate, approved, and available alternative to the emergency use of the ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA for diagnosing Zika virus infection.<sup>4</sup>

#### **II. Scope of Authorization**

I have concluded, pursuant to section 564(d)(1) of the Act, that the scope of this authorization is limited to the use of the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA by authorized laboratories for the presumptive detection of Zika virus-specific IgM antibodies in individuals meeting CDC Zika virus clinical criteria (e.g., a history of clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological

<sup>3</sup> HHS. *Determination and Declaration Regarding Emergency Use of In Vitro Diagnostic Tests for Detection of Zika Virus and/or Diagnosis of Zika Virus Infection*. 81 Fed. Reg. 10878 (March 2, 2016).

<sup>4</sup> No other criteria of issuance have been prescribed by regulation under section 564(c)(4) of the Act.



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criteria for which Zika virus testing may be indicated) when, for presumptive Zika positive, possible Zika positive, and presumptive other flavivirus positive results, additional testing (as described in the Instructions for Use document) is performed<sup>5</sup> and/or test results for other patient-matched specimens (using the latest CDC guideline for the diagnosis of Zika virus infection) are considered.

#### **The Authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA**

The ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA is an IgM antibody capture enzyme-linked immunosorbent assay for the *in vitro* presumptive detection of Zika virus-specific IgM antibodies in human sera and other authorized specimen types from individuals meeting CDC Zika virus clinical criteria (e.g., a history of clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated). The test procedure is based on capturing human IgM antibodies from the patient specimen on a microtiter plate using anti-human-IgM antibody followed by the addition of Zika virus specific antigen and detector conjugate.

One of the limitations of this test is the possibility of false positive results in patients with a history of infection with other flaviviruses. For presumptive Zika positive, possible Zika positive, and presumptive other flavivirus positive specimens, additional testing (as described in the Instructions for Use document) and/or consideration of test results for other patient-matched specimens, using the latest CDC guideline for the diagnosis of Zika virus infection, is therefore required to confirm Zika virus infection.

The assay uses a purified antibody specific for human IgM that is immobilized on a test plate to capture IgM antibodies from a human specimen. A serum specimen from a patient and positive and negative controls are added to the test plate, and incubated to allow the IgM antibodies from the specimen to bind to the immobilized antibody. After washing, Ready-To-Use Zika virus antigen (Zika Ag), a Cross-reactive Control Antigen (CCA), and a Normal Cell Antigen (NCA) are added separately to appropriate locations on the ELISA plate and allowed to incubate. During incubation the Zika Ag binds to any Zika virus-specific IgM antibodies captured on the plate. Following a washing step, a flavivirus specific monoclonal antibody conjugated to horseradish peroxidase is then added which binds to any immobilized Zika Ag and generates a colorimetric optical signal upon addition of a chromogenic substrate that can be measured by a spectrophotometer or other instruments that may be authorized. Any signals generated in the wells exposed to CCA and NCA are analyzed as part of the test procedure and used to aid in the interpretation of the ELISA results.

The ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA includes the following materials, or other authorized materials:

- **Coated Microtiter Test Strips for IgM:** ELISA plate strip holder with 96 (12x8 strips) polystyrene microtiter wells pre-coated with capture antibodies specific for human IgM.

<sup>5</sup> As discussed in the Instructions for Use document, the additional testing for presumptive Zika positive and possible Zika positive results is to be performed using the latest CDC guideline for the diagnosis of Zika virus infection, and the additional testing for presumptive other flavivirus positive results is to be performed with FDA-cleared Dengue and West Nile virus IgM devices.

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- **ZIKV Sample Dilution Buffer:** The buffer solution is used to dilute all serum specimens and controls prior to testing in the ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA.
- **Ready-To-Use ZIKV Recombinant Antigen for IgM (Zika Ag):** The Zika Ag comprises the Zika envelope glycoproteins and is used in the ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA.
- **Cross-reactive Control Antigen for ZIKV IgM (CCA):** The CCA cocktail is used to aid in the interpretation of the ELISA results.
- **Normal Cell Antigen for ZIKV IgM (NCA):** The NCA is used to aid in the interpretation of the ELISA results.
- **100X Conjugate for ZIKV IgM:** This is horseradish peroxidase-labeled monoclonal anti-Flavivirus antibody used to generate the optical signal measured by the ELISA spectrophotometer.
- **Conjugate Diluent for ZIKV:** This solution is used to dilute the 100X Conjugate for ZIKV IgM solution during the ELISA procedure.
- **10X Wash Buffer:** Concentrated wash buffer used during the ELISA procedure.
- **Liquid Tetramethylbenzidine Substrate:** Chromogenic substrate that reacts with the horseradish peroxidase conjugate to generate the optical signal measured by the ELISA spectrophotometer.
- **Stop Solution:** Used to terminate the reaction between the chromogenic substrate and the horseradish peroxidase conjugate.

The ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA requires the following control materials or other authorized control materials provided with the kit:

- **ZIKV IgM Positive Control:** The positive control aids in verifying the validity of the kit.
- **ZIKV IgM Negative Control:** The negative control aids in verifying the validity of the kit.

Controls listed above must be included on each 96-well plate. Controls must generate expected results in order for a plate to be considered valid.

The ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA also requires the use of additional materials and ancillary reagents commonly used in clinical laboratories and that are described in the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA Instructions for Use.

The above described ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA, when labeled consistently with the labeling authorized by FDA entitled “ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA Instructions for Use”

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(available at

<http://www.fda.gov/MedicalDevices/%20Safety/EmergencySituations/ucm161496.htm>), is authorized to be distributed to and used by authorized laboratories under this EUA, despite the fact that it does not meet certain requirements otherwise required by federal law. This labeling may be revised by InBios in consultation with, and with concurrence of, the Division of Microbiology Devices (DMD)/Office of In Vitro Diagnostics and Radiological Health (OIR)/Center for Devices and Radiological Health (CDRH).

The above described ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA is authorized to be accompanied by the following information pertaining to the emergency use, which is authorized to be made available to health care providers, pregnant women, and other patients:

- Fact Sheet for Health Care Providers: Interpreting ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA Results
- Fact Sheet for Pregnant Women: Understanding Results from the ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA
- Fact Sheet for Patients: Understanding Results from the ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA

Other Fact Sheets developed by InBios in consultation with, and with concurrence of, the Office of Counterterrorism and Emerging Threats (OCET)/Office of the Chief Scientist (OCS)/Office of the Commissioner (OC) and DMD/OIR/CDRH may be authorized to accompany the above described ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA and to be made available to health care providers, pregnant women, and other patients.

As described in Section IV below, InBios is also authorized to make available additional information relating to the emergency use of the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA that is consistent with, and does not exceed, the terms of this letter of authorization.

I have concluded, pursuant to section 564(d)(2) of the Act, that it is reasonable to believe that the known and potential benefits of the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA in the specified population, when used for presumptive detection of Zika virus-specific IgM antibodies and used consistently with the Scope of Authorization of this letter (Section II), outweigh the known and potential risks of such a product.

I have concluded, pursuant to section 564(d)(3) of the Act, based on the totality of scientific evidence available to FDA, that it is reasonable to believe that the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA may be effective in the diagnosis of Zika virus infection, when used consistently with the Scope of Authorization of this letter (Section II), pursuant to section 564(c)(2)(A) of the Act.

FDA has reviewed the scientific information available to FDA, including the information supporting the conclusions described in Section I above, and concludes that the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA, when used to diagnose Zika virus infection in the specified population (as described in the Scope of Authorization of this letter (Section II)), meets the criteria set forth in section 564(c) of the Act concerning safety and potential effectiveness.

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The emergency use of the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA under this EUA must be consistent with, and may not exceed, the terms of this letter, including the Scope of Authorization (Section II) and the Conditions of Authorization (Section IV). Subject to the terms of this EUA and under the circumstances set forth in the Secretary of HHS's determination described above and the Secretary of HHS's corresponding declaration under section 564(b)(1), the ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA described above is authorized to diagnose Zika virus infection in individuals meeting CDC Zika virus clinical criteria (e.g., a history of clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated).

This EUA will cease to be effective when the HHS declaration that circumstances exist to justify the EUA is terminated under section 564(b)(2) of the Act or when the EUA is revoked under section 564(g) of the Act.

### III. Waiver of Certain Requirements

I am waiving the following requirements for the ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA during the duration of this EUA:

- Current good manufacturing practice requirements, including the quality system requirements under 21 CFR Part 820 with respect to the design, manufacture, packaging, labeling, storage, and distribution of the ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA.
- Labeling requirements for cleared, approved, or investigational devices, including labeling requirements under 21 CFR 809.10 and 21 CFR 809.30, except for the intended use statement (21 CFR 809.10(a)(2), (b)(2)), adequate directions for use (21 U.S.C. 352(f)), (21 CFR 809.10(b)(5), (7), and (8)), any appropriate limitations on the use of the device including information required under 21 CFR 809.10(a)(4), and any available information regarding performance of the device, including requirements under 21 CFR 809.10(b)(12).

### IV. Conditions of Authorization

Pursuant to section 564 of the Act, I am establishing the following conditions on this authorization:

#### InBios and Its Authorized Distributor(s)

- A. InBios and its authorized distributor(s) will distribute the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA with the authorized labeling only to authorized laboratories. InBios may request changes to the authorized labeling. Such requests will be made by InBios in consultation with, and require concurrence of, DMD/OIR/CDRH.
- B. InBios and its authorized distributor(s) will provide to authorized laboratories the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA Fact Sheet for Health Care Providers, the

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authorized ZIKV *Detect*<sup>™</sup> IgM Capture ELISA Fact Sheet for Pregnant Women, and the authorized ZIKV *Detect*<sup>™</sup> IgM Capture ELISA Fact Sheet for Patients, and any additional ZIKV *Detect*<sup>™</sup> IgM Capture ELISA Fact Sheets for Health Care Providers, Pregnant Women, and Patients that OCET/OCS/OC and DMD/OIR/CDRH may authorize.

- C. InBios and its authorized distributor(s) will make available on their websites the authorized ZIKV *Detect*<sup>™</sup> IgM Capture ELISA Fact Sheet for Health Care Providers, the authorized ZIKV *Detect*<sup>™</sup> IgM Capture ELISA Fact Sheet for Pregnant Women, and the authorized ZIKV *Detect*<sup>™</sup> IgM Capture ELISA Fact Sheet for Patients, and any additional ZIKV *Detect*<sup>™</sup> IgM Capture ELISA Fact Sheets for Health Care Providers, Pregnant Women, and Patients that OCET/OCS/OC and DMD/OIR/CDRH may authorize.
- D. InBios and its authorized distributor(s) will inform authorized laboratories and relevant public health authority(ies) of this EUA, including the terms and conditions herein.
- E. InBios and its authorized distributor(s) will ensure that authorized laboratories using the authorized ZIKV *Detect*<sup>™</sup> IgM Capture ELISA have a process in place for reporting test results to health care providers and relevant public health authorities, as appropriate.<sup>6</sup>
- F. Through a process of inventory control, InBios and its authorized distributor(s) will maintain records of device usage.
- G. InBios and its authorized distributor(s) will collect information on the performance of the assay. InBios will report to FDA any suspected occurrence of false negative results and significant deviations from the established performance characteristics of the assay of which InBios becomes aware.
- H. InBios and its authorized distributor(s) are authorized to make available additional information relating to the emergency use of the authorized ZIKV *Detect*<sup>™</sup> IgM Capture ELISA that is consistent with, and does not exceed, the terms of this letter of authorization.

#### **InBios**

- I. InBios will notify FDA of any authorized distributor(s) of the ZIKV *Detect*<sup>™</sup> IgM Capture ELISA, including the name, address, and phone number of any authorized distributor(s).
- J. InBios will provide its authorized distributor(s) with a copy of this EUA, and communicate to its authorized distributor(s) any subsequent amendments that might be made to this EUA and its authorized accompanying materials (e.g., fact sheets, instructions for use).

<sup>6</sup> For questions related to reporting Zika test results to relevant public health authorities, it is recommended that InBios and authorized laboratories consult with the applicable country, state, or territory health department(s). According to CDC, Zika is a nationally notifiable condition (see <http://www.cdc.gov/zika/>).

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- K. InBios may request changes to the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA Fact Sheet for Health Care Providers, the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA Fact Sheet for Pregnant Women, and the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA Fact Sheet for Patients. InBios may also request that InBios develop new ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA Fact Sheets for Health Care Providers, Pregnant Women, and Patients, if appropriate, and may request changes to such Fact Sheets. All such requests listed in this condition of authorization will be made by InBios in consultation with, and require concurrence of, OCET/OCS/OC and DMD/OIR/CDRH.
- L. InBios may request the addition of other instruments for use with the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA. Such requests will be made by InBios in consultation with, and require concurrence of, DMD/OIR/CDRH.
- M. InBios may request the addition of other ancillary reagents for use with the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA. Such requests will be made by InBios in consultation with, and require concurrence of, DMD/OIR/CDRH.
- N. InBios may request the addition of other specimen types for use with the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA. Such requests will be made by InBios in consultation with, and require concurrence of, DMD/OIR/CDRH.
- O. InBios may request the addition of other control materials for use with the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA. Such requests will be made by InBios in consultation with, and require concurrence of, DMD/OIR/CDRH.
- P. InBios may request substitution for or changes to the authorized materials used in the detection process of the human anti-Zika IgM in the specimen. Such requests will be made by InBios in consultation with, and require concurrence of, DMD/OIR/CDRH.
- Q. InBios will track adverse events and report to FDA under 21 CFR Part 803.
- R. InBios will evaluate the performance of the ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA with a FDA-recommended or established panel(s) of characterized clinical specimens, and will submit that performance data to FDA. After DMD/OIR/CDRH's review of and concurrence with the data, InBios will update its labeling, in consultation with, and with concurrence of, DMD/OIR/CDRH, to reflect the additional testing.

#### Authorized Laboratories

- S. Authorized laboratories will include with reports of the results of the ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA the authorized Fact Sheet for Health Care Providers, the authorized Fact Sheet for Pregnant Women, and the authorized Fact Sheet for Patients, and any additional ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA Fact Sheets for Health Care Providers, Pregnant Women, and Patients that OCET/OCS/OC and DMD/OIR/CDRH may authorize. Under exigent circumstances, other appropriate methods for disseminating these Fact Sheets may be used, which may include mass media.

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- T. Authorized laboratories will perform the ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA on serum or with other authorized specimen types.
- U. Within the United States and its territories, authorized laboratories will report all presumptive Zika positive, possible Zika positive, and presumptive other flavivirus positive results to InBios.
- V. Authorized laboratories will have a process in place to assure that, for presumptive Zika positive, possible Zika positive, and presumptive other flavivirus positive results, additional testing (as described in the Instructions for Use document) is performed and/or test results for other patient-matched specimens, using the latest CDC guideline for the diagnosis of Zika virus infection, are considered.
- W. Authorized laboratories will have a process in place for reporting test results to health care providers and relevant public health authorities, as appropriate.<sup>7</sup>
- X. Authorized laboratories will collect information on the performance of the assay and report to InBios any suspected occurrence of false negative results and significant deviations from the established performance characteristics of which they become aware.
- Y. All laboratory personnel using the assay should be appropriately trained in performing and interpreting immunoassays techniques, use appropriate laboratory and personal protective equipment when handling this kit, and use the test in accordance with the authorized labeling.

**InBios, Its Authorized Distributor(s), and Authorized Laboratories**

- Z. InBios, its authorized distributor(s), and authorized laboratories will ensure that any records associated with this EUA are maintained until notified by FDA. Such records will be made available to FDA for inspection upon request.

**Conditions Related to Advertising and Promotion**

- AA. All advertising and promotional descriptive printed matter relating to the use of the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA shall be consistent with the authorized Fact Sheets and authorized labeling, as well as the terms set forth in this EUA and the applicable requirements set forth in the Act and FDA regulations.
- BB. All advertising and promotional descriptive printed matter relating to the use of the authorized ZIKV *Detect*<sup>TM</sup> IgM Capture ELISA shall clearly and conspicuously state that:
  - This test has not been FDA cleared or approved;
  - This test has been authorized by FDA under an EUA for use by authorized laboratories;

<sup>7</sup> For questions related to reporting Zika test results to relevant public health authorities, it is recommended that InBios and authorized laboratories consult with the applicable country, state, or territory health department(s). According to CDC, Zika is a nationally notifiable condition (see <http://www.cdc.gov/zika/>).

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- This test has been authorized only for the diagnosis of Zika virus infection and not for any other viruses or pathogens; and
- This test is only authorized for the duration of the declaration that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection under section 564(b)(1) of the Act, 21 U.S.C. § 360bbb-3(b)(1), unless the authorization is terminated or revoked sooner.

No advertising or promotional descriptive printed matter relating to the use of the authorized ZIKV Detect™ IgM Capture ELISA may represent or suggest that this test is safe or effective for the diagnosis of Zika virus infection.

The emergency use of the authorized ZIKV Detect™ IgM Capture ELISA as described in this letter of authorization must comply with the conditions and all other terms of this authorization.

#### V. Duration of Authorization

This EUA will be effective until the declaration that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection is terminated under section 564(b)(2) of the Act or the EUA is revoked under section 564(g) of the Act.

Sincerely,



Robert M. Califf, M.D.  
Commissioner of Food and Drugs

Enclosures





DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration  
Silver Spring, MD 20993

August 26, 2016

Jintao Chen, Ph.D.  
Director, Regulatory Affairs  
Roche Molecular Systems, Inc.  
4300 Hacienda Drive  
Pleasanton, CA 94588

Dear Dr. Chen:

This letter is in response to your request that the Food and Drug Administration (FDA) issue an Emergency Use Authorization (EUA) for emergency use of Roche Molecular Systems, Inc.'s *LightMix*<sup>®</sup> *Zika rRT-PCR Test* for the qualitative detection of RNA from Zika virus in human serum and EDTA plasma from individuals meeting Centers for Disease Control and Prevention (CDC) Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated), by laboratories in the United States (U.S.) that are certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 42 U.S.C. § 263a, to perform high complexity tests, or by similarly qualified non-U.S. laboratories, pursuant to section 564 of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. § 360bbb-3).<sup>1</sup> Test results are for the identification of Zika virus RNA. Zika virus RNA is generally detectable in these specimens during the acute phase of infection and, according to the updated CDC Guidance for U.S. Laboratories Testing for Zika Virus Infection,<sup>2</sup> approximately 7 days following onset of symptoms, if present. Positive results are indicative of current infection.

On February 26, 2016, pursuant to section 564(b)(1)(C) of the Act (21 U.S.C. § 360bbb-3(b)(1)(C)), the Secretary of Health and Human Services (HHS) determined that there is a significant potential for a public health emergency that has a significant potential to affect national security or the health and security of U.S. citizens living abroad and that involves Zika virus.<sup>3</sup> Pursuant to section 564(b)(1) of the Act (21 U.S.C. § 360bbb-3(b)(1)), and on the basis of such determination, the Secretary of HHS then declared that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus

<sup>1</sup> For ease of reference, this letter will refer to "laboratories in the United States (U.S.) that are certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 42 U.S.C. § 263a, to perform high complexity tests, or by similarly qualified non-U.S. laboratories" as "authorized laboratories."

<sup>2</sup> Available at <http://www.cdc.gov/zika/laboratories/lab-guidance.html> (last updated on August 24, 2016).

<sup>3</sup> As amended by the Pandemic and All Hazards Preparedness Reauthorization Act, Pub. L. No. 113-5, under section 564(b)(1)(C) of the Act, the Secretary may make a determination of a public health emergency, or of a significant potential for a public health emergency.

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and/or diagnosis of Zika virus infection, subject to the terms of any authorization issued under 21 U.S.C. § 360bbb-3(a).<sup>4</sup>

Having concluded that the criteria for issuance of this authorization under section 564(c) of the Act (21 U.S.C. § 360bbb-3(c)) are met, I am authorizing the emergency use of the *LightMix*<sup>®</sup> *Zika rRT-PCR Test* (as described in the Scope of Authorization section of this letter (Section II)) in individuals meeting CDC Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated) (as described in the Scope of Authorization section of this letter (Section II)) for the detection of Zika virus infection by authorized laboratories, subject to the terms of this authorization.

#### I. Criteria for Issuance of Authorization

I have concluded that the emergency use of the *LightMix*<sup>®</sup> *Zika rRT-PCR Test* for the detection of Zika virus and diagnosis of Zika virus infection in the specified population meets the criteria for issuance of an authorization under section 564(c) of the Act, because I have concluded that:

1. The Zika virus can cause Zika virus infection, a serious or life-threatening disease or condition to humans infected with the virus;
2. Based on the totality of scientific evidence available to FDA, it is reasonable to believe that the *LightMix*<sup>®</sup> *Zika rRT-PCR Test*, when used with the specified instrument(s) and in accordance with the Scope of Authorization, may be effective in detecting Zika virus and diagnosing Zika virus infection, and that the known and potential benefits of the *LightMix*<sup>®</sup> *Zika rRT-PCR Test* for detecting Zika virus and diagnosing Zika virus infection outweigh the known and potential risks of such product; and
3. There is no adequate, approved, and available alternative to the emergency use of the *LightMix*<sup>®</sup> *Zika rRT-PCR Test* for detecting Zika virus and diagnosing Zika virus infection.<sup>5</sup>

#### II. Scope of Authorization

I have concluded, pursuant to section 564(d)(1) of the Act, that the scope of this authorization is limited to the use of the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test* by authorized laboratories for the detection of RNA from Zika virus and diagnosis of Zika virus infection in individuals meeting CDC Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to a geographic region with active Zika transmission at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated).

<sup>4</sup> HHS, *Determination and Declaration Regarding Emergency Use of in Vitro Diagnostic Tests for Detection of Zika Virus and/or Diagnosis of Zika Virus Infection*. 81 Fed. Reg. 10878 (March 2, 2016).

<sup>5</sup> No other criteria of issuance have been prescribed by regulation under section 564(c)(4) of the Act.

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**The Authorized *LightMix*<sup>®</sup> *Zika* rRT-PCR Test**

The *LightMix*<sup>®</sup> *Zika* rRT-PCR Test is a real-time reverse transcription polymerase chain reaction (rRT-PCR) assay for the qualitative detection of RNA from Zika virus in human serum, EDTA plasma, and other authorized specimen types.

To perform the *LightMix*<sup>®</sup> *Zika* rRT-PCR Test, specimens are first extracted to isolate the Zika virus RNA. Nucleic acids are isolated and purified from the sample using either the automated Roche MagNA Pure 96 System together with the Roche MagNA Pure 96 DNA and Viral NA Large Volume reagent kit or the MagNA Pure Compact Instrument and MagNA Pure Compact Nucleic Acid Isolation Kit I - Large Volume, or other authorized extraction methods.

The purified RNA is reverse transcribed into cDNA, which is then amplified. The Roche LightCycler<sup>®</sup> Multiplex RNA Virus Master reagent, which contains reagents and enzymes for reverse transcription and specific amplification of the Zika virus targeted region, is added. The rRT-PCR is performed on the Roche LightCycler<sup>®</sup> 480 Instrument II, Roche cobas z 480 Analyzer (open channel) or other authorized instruments.

The *LightMix*<sup>®</sup> *Zika* rRT-PCR Test includes the following materials, or other authorized materials:

- **LightMix<sup>®</sup> Zika rRT-PCR Test PSR (1 Vial):** Contains pathogen-specific reagent (PSR), i.e., lyophilized primers and FAM-labeled probe that specifically detect Zika viral RNA.
- **LightMix<sup>®</sup> Zika rRT-PCR Test ivRNA Positive Control (1 Vial):** Contains lyophilized synthetic RNA, designed to react with the LightMix<sup>®</sup> Zika rRT-PCR Test PSR to indicate whether the *LightMix*<sup>®</sup> *Zika* rRT-PCR Test has worked properly.

The *LightMix*<sup>®</sup> *Zika* rRT-PCR Test requires the following control materials, or other authorized control materials, to be included in each run; all controls listed below must generate expected results in order for a test to be considered valid, as outlined in the *LightMix*<sup>®</sup> *Zika* rRT-PCR Test Instructions for Use:

- **Negative Process Control:** PCR-grade water is used in place of clinical samples from the beginning of the sample extraction process. The Negative Process Control is run in parallel with clinical specimens in each specimen extraction run.
- **Negative rRT-PCR Control:** PCR-grade water is used at the rRT-PCR step to test for absence of cross-contamination.
- **Positive Control:** Contains a synthetic RNA transcript containing the virus region targeted by the *LightMix*<sup>®</sup> *Zika* rRT-PCR Test. The Positive Control is used starting at the rRT-PCR step, then run in parallel with clinical specimens and the negative controls in each assay run.
- **Extraction Control:** The Extraction Control is the Roche RNA Process Control LSR (RPC). The Extraction Control is run together with every clinical specimen from the

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beginning of the extraction process and is detected by rRT-PCR using a primer pair and a Cy5-labeled probe that are different from the Zika virus specific primer pair and probe.

The *LightMix*<sup>®</sup> *Zika rRT-PCR Test* also requires the use of additional materials and ancillary reagents commonly used in clinical laboratories and that are described in the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test* Instructions for Use.

The above described *LightMix*<sup>®</sup> *Zika rRT-PCR Test*, when labeled consistently with the labeling authorized by FDA entitled “Instructions for Use: *LightMix*<sup>®</sup> *Zika rRT-PCR Test*” (available at <http://www.fda.gov/MedicalDevices/Safety/EmergencySituations/ucm161496.htm>), which may be revised by Roche Molecular Systems, Inc. in consultation with the Division of Microbiology Devices (DMD)/Office of In Vitro Diagnostics and Radiological Health (OIR)/Center for Devices and Radiological Health (CDRH), is authorized to be distributed to and used by authorized laboratories under this EUA, despite the fact that it does not meet certain requirements otherwise required by federal law.

The above described *LightMix*<sup>®</sup> *Zika rRT-PCR Test* is authorized to be accompanied by the following information pertaining to the emergency use, which is authorized to be made available to health care providers, pregnant women, and other patients:

- Fact Sheet for Health Care Providers: Interpreting *LightMix*<sup>®</sup> *Zika rRT-PCR Test* Results
- Fact Sheet for Pregnant Women: Understanding Results from the *LightMix*<sup>®</sup> *Zika rRT-PCR Test*
- Fact Sheet for Patients: Understanding Results from the *LightMix*<sup>®</sup> *Zika rRT-PCR Test*

As described in Section IV below, Roche Molecular Systems, Inc., Roche Diagnostics, and other authorized distributor(s) are also authorized to make available additional information relating to the emergency use of the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test* that is consistent with, and does not exceed, the terms of this letter of authorization.

I have concluded, pursuant to section 564(d)(2) of the Act, that it is reasonable to believe that the known and potential benefits of the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test* in the specified population, when used for detection of Zika virus and to diagnose Zika virus infection and used consistently with the Scope of Authorization of this letter (Section II), outweigh the known and potential risks of such a product.

I have concluded, pursuant to section 564(d)(3) of the Act, based on the totality of scientific evidence available to FDA, that it is reasonable to believe that the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test* may be effective in the detection of Zika virus and diagnosis of Zika virus infection, when used consistently with the Scope of Authorization of this letter (Section II), pursuant to section 564(e)(2)(A) of the Act.

FDA has reviewed the scientific information available to FDA, including the information supporting the conclusions described in Section I above, and concludes that the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test*, when used for detection of Zika virus and to diagnose Zika virus infection in the specified population (as described in the Scope of Authorization of this letter

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(Section II)), meets the criteria set forth in section 564(c) of the Act concerning safety and potential effectiveness.

The emergency use of the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test* under this EUA must be consistent with, and may not exceed, the terms of this letter, including the Scope of Authorization (Section II) and the Conditions of Authorization (Section IV). Subject to the terms of this EUA and under the circumstances set forth in the Secretary of HHS's determination described above and the Secretary of HHS's corresponding declaration under section 564(b)(1), the *LightMix*<sup>®</sup> *Zika rRT-PCR Test* described above is authorized to detect Zika virus and diagnose Zika virus infection in individuals meeting CDC Zika virus clinical criteria (e.g., clinical signs and symptoms associated with Zika virus infection) and/or CDC Zika virus epidemiological criteria (e.g., history of residence in or travel to geographic regions with active Zika virus transmissions at the time of travel, or other epidemiological criteria for which Zika virus testing may be indicated).

This EUA will cease to be effective when the HHS declaration that circumstances exist to justify the EUA is terminated under section 564(b)(2) of the Act or when the EUA is revoked under section 564(g) of the Act.

### III. Waiver of Certain Requirements

I am waiving the following requirements for the *LightMix*<sup>®</sup> *Zika rRT-PCR Test* during the duration of this EUA:

- Current good manufacturing practice requirements, including the quality system requirements under 21 CFR Part 820 with respect to the design, manufacture, packaging, labeling, storage, and distribution of the *LightMix*<sup>®</sup> *Zika rRT-PCR Test*.
- Labeling requirements for cleared, approved, or investigational devices, including labeling requirements under 21 CFR 809.10 and 21 CFR 809.30, except for the intended use statement (21 CFR 809.10(a)(2), (b)(2)), adequate directions for use (21 U.S.C. 352(f)), (21 CFR 809.10(b)(5), (7), and (8)), any appropriate limitations on the use of the device including information required under 21 CFR 809.10(a)(4), and any available information regarding performance of the device, including requirements under 21 CFR 809.10(b)(12).

### IV. Conditions of Authorization<sup>6</sup>

Pursuant to section 564 of the Act, I am establishing the following conditions on this authorization:

#### **Roche Molecular Systems, Inc., Roche Diagnostics, and/or Other Authorized Distributor(s)<sup>7</sup>**

<sup>6</sup> Unless otherwise specified, Roche Molecular Systems, Inc. and Roche Diagnostics are the responsible parties for satisfying the Conditions of Authorization.

<sup>7</sup> At the time of authorization, Roche Diagnostics is the sole authorized distributor of the *LightMix*<sup>®</sup> *Zika rRT-PCR Test*, manufactured by TIB MOLBIOL GmbH.

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- A. Roche Diagnostics and other authorized distributor(s) will distribute the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test* with the authorized labeling only to authorized laboratories. Changes to the authorized labeling may be made by Roche Molecular Systems, Inc. in consultation with, and require concurrence of, DMD/OIR/CDRH.
- B. Roche Diagnostics and other authorized distributor(s) will provide to authorized laboratories the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test* Fact Sheet for Health Care Providers, the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test* Fact Sheet for Pregnant Women, and the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test* Fact Sheet for Patients.
- C. Roche Diagnostics and other authorized distributor(s) will make available on their websites the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test* Fact Sheet for Health Care Providers, the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test* Fact Sheet for Pregnant Women, and the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test* Fact Sheet for Patients.
- D. Roche Diagnostics and other authorized distributor(s) will inform authorized laboratories and relevant public health authority(ies) of this EUA, including the terms and conditions herein.
- E. Roche Diagnostics and other authorized distributor(s) will ensure that the authorized laboratories using the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test* have a process in place for reporting test results to health care providers and relevant public health authorities, as appropriate.<sup>8</sup>
- F. Through a process of inventory control, Roche Diagnostics and other authorized distributor(s) will maintain records of device usage.
- G. Roche Diagnostics and other authorized distributor(s) will collect information on the performance of the test and provide this information to Roche Molecular Systems, Inc. Roche Molecular Systems, Inc. will report to FDA any suspected occurrence of false positive and false negative results and significant deviations from the established performance characteristics of the test of which Roche Molecular Systems, Inc. becomes aware.
- H. Roche Molecular Systems, Inc., Roche Diagnostics, and other authorized distributor(s) are authorized to make available additional information relating to the emergency use of the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test* that is consistent with, and does not exceed, the terms of this letter of authorization.

**Roche Molecular Systems, Inc.**

- I. Roche Molecular Systems, Inc. will notify FDA of any additional authorized distributor(s) of the *LightMix*<sup>®</sup> *Zika rRT-PCR Test*, including the name, address, and phone number of any additional, authorized distributor(s).

<sup>8</sup> For questions related to reporting Zika test results to relevant public health authorities, it is recommended that Roche Molecular Systems, Inc., Roche Diagnostics, other authorized distributor(s), and authorized laboratories consult with the applicable country, state or territory health department(s). According to CDC, Zika virus disease is a nationally notifiable condition (see <http://www.cdc.gov/zika/>).

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- J. Roche Molecular Systems, Inc. will provide Roche Diagnostics, other authorized distributor(s), and TIB MOLBIOL GmbH with a copy of this EUA, and communicate to Roche Diagnostics, other authorized distributor(s), and TIB MOLBIOL GmbH any subsequent amendments that might be made to this EUA and its authorized accompanying materials (e.g., Fact Sheets, Instructions for Use).
- K. Roche Molecular Systems, Inc. may request changes to the authorized *LightMix<sup>®</sup> Zika rRT-PCR Test* Fact Sheet for Health Care Providers, the authorized *LightMix<sup>®</sup> Zika rRT-PCR Test* Fact Sheet for Pregnant Women, and the authorized *LightMix<sup>®</sup> Zika rRT-PCR Test* Fact Sheet for Patients. Such requests will be made by Roche Molecular Systems, Inc. in consultation with, and require concurrence of, DMD/OIR/CDRH.
- L. Roche Molecular Systems, Inc. may request the addition of other instruments for use with the authorized *LightMix<sup>®</sup> Zika rRT-PCR Test*. Such requests will be made by Roche Molecular Systems, Inc. in consultation with, and require concurrence of, DMD/OIR/CDRH.
- M. Roche Molecular Systems, Inc. may request the addition of other extraction methods for use with the authorized *LightMix<sup>®</sup> Zika rRT-PCR Test*. Such requests will be made by Roche Molecular Systems, Inc. in consultation with, and require concurrence of, DMD/OIR/CDRH.
- N. Roche Molecular Systems, Inc. may request the addition of other specimen types for use with the authorized *LightMix<sup>®</sup> Zika rRT-PCR Test*. Such requests will be made by Roche Molecular Systems, Inc. in consultation with, and require concurrence of, DMD/OIR/CDRH.
- O. Roche Molecular Systems, Inc. may request the addition of other control materials for use with the authorized *LightMix<sup>®</sup> Zika rRT-PCR Test*. Such requests will be made by Roche Molecular Systems, Inc. in consultation with, and require concurrence of, DMD/OIR/CDRH.
- P. Roche Molecular Systems, Inc. may request the addition and/or substitution of other ancillary reagents and materials for use with the authorized *LightMix<sup>®</sup> Zika rRT-PCR Test*. Such requests will be made by Roche Molecular Systems, Inc. in consultation with, and require concurrence of, DMD/OIR/CDRH.
- Q. Roche Molecular Systems, Inc. will assess traceability<sup>9</sup> of the *LightMix<sup>®</sup> Zika rRT-PCR Test* with FDA-recommended reference material(s). After submission to FDA and DMD/OIR/CDRH's review of and concurrence with the data, Roche Molecular Systems, Inc. will update its labeling to reflect the additional testing.
- R. Roche Molecular Systems, Inc., assuming the medical device reporting responsibilities of the manufacturer of the *LightMix<sup>®</sup> Zika rRT-PCR Test*, will track adverse events and report to FDA under 21 CFR Part 803.

<sup>9</sup> Traceability refers to tracing analytical sensitivity/reactivity back to a FDA recommended reference material.

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#### Authorized Laboratories

- S. Authorized laboratories will include with reports of the results of the *LightMix*<sup>®</sup> *Zika rRT-PCR Test* the authorized Fact Sheet for Health Care Providers, the authorized Fact Sheet for Pregnant Women, and the authorized Fact Sheet for Patients. Under exigent circumstances, other appropriate methods for disseminating these Fact Sheets may be used, which may include mass media.
- T. Authorized laboratories will perform the *LightMix*<sup>®</sup> *Zika rRT-PCR Test* on the Roche LightCycler<sup>®</sup> 480 Instrument II, Roche cobas z 480 Analyzer (open channel), or other authorized instruments.
- U. Authorized laboratories will perform the *LightMix*<sup>®</sup> *Zika rRT-PCR Test* using the automated Roche MagNA Pure 96 System together with the Roche MagNA Pure 96 DNA and Viral NA Large Volume reagent kit, the MagNA Pure Compact Instrument and MagNA Pure Compact Nucleic Acid Isolation Kit I - Large Volume, or other authorized extraction methods.
- V. Authorized laboratories will perform the *LightMix*<sup>®</sup> *Zika rRT-PCR Test* on human serum, EDTA plasma, or with other authorized specimen types.
- W. Authorized laboratories will have a process in place for reporting test results to health care providers and relevant public health authorities, as appropriate.<sup>10</sup>
- X. Authorized laboratories will collect information on the performance of the test and report to Roche Diagnostics any suspected occurrence of false positive or false negative results of which they become aware.
- Y. All laboratory personnel using the test should be appropriately trained in rRT-PCR techniques and use appropriate laboratory and personal protective equipment when handling this kit, and use the test in accordance with the authorized labeling.

#### Roche Molecular Systems, Inc., Roche Diagnostics, Other Authorized Distributor(s), and Authorized Laboratories

- Z. Roche Molecular Systems, Inc., Roche Diagnostics, other authorized distributor(s), and authorized laboratories will ensure that any records associated with this EUA are maintained until notified by FDA. Such records will be made available to FDA for inspection upon request.

#### Conditions Related to Advertising and Promotion

- AA. All advertising and promotional descriptive printed matter relating to the use of the authorized *LightMix*<sup>®</sup> *Zika rRT-PCR Test* shall be consistent with the Fact Sheets and authorized labeling, as well as the terms set forth in this EUA and the applicable

<sup>10</sup> For questions related to reporting Zika test results to relevant public health authorities, it is recommended that Roche Molecular Systems, Inc., Roche Diagnostics, other authorized distributor(s), and authorized laboratories consult with the applicable country, state or territory health department(s). According to CDC, Zika virus disease is a nationally notifiable condition (see <http://www.cdc.gov/zika/>).



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requirements set forth in the Act and FDA regulations.

BB. All advertising and promotional descriptive printed matter relating to the use of the authorized *LightMix<sup>®</sup> Zika rRT-PCR Test* shall clearly and conspicuously state that:

- This test has not been FDA cleared or approved;
- This test has been authorized by FDA under an EUA for use by authorized laboratories;
- This test has been authorized only for the detection of RNA from Zika virus and diagnosis of Zika virus infection, not for any other viruses or pathogens; and
- This test is only authorized for the duration of the declaration that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection under section 564(b)(1) of the Act, 21 U.S.C. § 360bbb-3(b)(1), unless the authorization is terminated or revoked sooner.

No advertising or promotional descriptive printed matter relating to the use of the authorized *LightMix<sup>®</sup> Zika rRT-PCR Test* may represent or suggest that this test is safe or effective for the diagnosis of Zika virus infection.

The emergency use of the authorized *LightMix<sup>®</sup> Zika rRT-PCR Test* as described in this letter of authorization must comply with the conditions and all other terms of this authorization.

#### V. Duration of Authorization

This EUA will be effective until the declaration that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostic tests for detection of Zika virus and/or diagnosis of Zika virus infection is terminated under section 564(b)(2) of the Act or the EUA is revoked under section 564(g) of the Act.

Sincerely,



Robert M. Califf, M.D.  
Commissioner of Food and Drugs

Enclosures

Dated: October 24, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016-26066 Filed 10-27-16; 8:45 am]

BILLING CODE 4164-01-C

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2013-N-0578]

#### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; General Licensing Provisions: Biologics License Application, Changes to an Approved Application, Labeling, Revocation and Suspension, and Postmarketing Studies Status Reports

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or we) is

announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Fax written comments on the collection of information by November 28, 2016.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202-395-7285, or emailed to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov). All comments should be identified with the OMB control number 0910-0338. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** FDA PRA Staff, Office of Operations, Food and Drug Administration, Three White Flint North, 10A63, 11601 Landsdown St., North Bethesda, MD 20852, [PRAStaff@fda.hhs.gov](mailto:PRAStaff@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

*General Licensing Provisions:*

Biologics License Application, Changes to an Approved Application, Labeling, Revocation and Suspension, Postmarketing Studies Status Reports, and Form FDA 356h OMB Control Number 0910-0338—Extension

Under Section 351 of the Public Health Services Act (42 U.S.C. 262), manufacturers of biological products must submit a license application for FDA review and approval before marketing a biological product in interstate commerce. Licenses may be issued only upon showing that the establishment and the products for which a license is desired meets standards prescribed in regulations designed to ensure the continued safety, purity, and potency of such products. All such licenses are issued, suspended, and revoked as prescribed by regulations in part 601 (21 CFR part 601).

Section 130(a) of the Food and Drug Administration Modernization Act (Pub. L. 105-115) amended the Federal Food, Drug, and Cosmetic Act (the FD&C Act) by adding a new provision (section 506B of the FD&C Act (21 U.S.C. 356b)) requiring reports of postmarketing studies for approved human drugs and licensed biological products. Section 506B of the FD&C Act provides FDA with additional authority to monitor the progress of postmarketing studies that applicants have made a commitment to conduct and requires the Agency to make publicly available information that pertains to the status of these studies. Under section 506B(a) of the FD&C Act, applicants that have committed to conduct a postmarketing study for an approved human drug or licensed biological product must submit to FDA a status report of the progress of the study or the reasons for the failure of the applicant to conduct the study. This report must be submitted within 1 year after the U.S. approval of the application and then annually until the study is completed or terminated.

A summary of the collection of information requirements follows:

Section 601.2(a) requires a manufacturer of a biological product to submit an application on forms

prescribed for such purposes with accompanying data and information, including certain labeling information, to FDA for approval to market a product in interstate commerce. The container and package labeling requirements are provided under §§ 610.60 through 610.65 (21 CFR 610.60 through 610.65). The estimate for these regulations is included in the estimate under § 601.2(a) in table 1.

Section 601.5(a) requires a manufacturer to submit to FDA notice of its intention to discontinue manufacture of a product or all products. Section 601.6(a) requires the manufacturer to notify selling agents and distributors upon suspension of its license, and provide FDA of such notification.

Section 601.12(a)(2) requires, generally, that the holder of an approved Biologics License Application (BLA) must assess the effects of a manufacturing change before distributing a biological product made with the change. Section 601.12(a)(4) requires, generally, that the applicant must promptly revise all promotional labeling and advertising to make it consistent with any labeling changes implemented. Section 601.12(a)(5) requires the applicant to include a list of all changes contained in the supplement or annual report; for supplements, this list must be provided in the cover letter. The burden estimates for § 601.12(a)(2) are included in the estimates for supplements (§§ 601.12(b) and (c)) and annual reports (§ 601.12(d)). The burden estimates for § 601.12(a)(4) are included in the estimates under 601.12(f)(4) in table 1.

Sections 601.12(b)(1), (b)(3), (c)(1), (c)(3), (c)(5), (d)(1) and (d)(3) require applicants to follow specific procedures to submit information to FDA of any changes, in the product, production process, quality controls, equipment, facilities, or responsible personnel established in an approved license application. The appropriate procedure depends on the potential for the change to have a substantial, moderate, or minimal adverse effect on the identity, strength, quality, purity, or potency of the products as they may relate to the safety or effectiveness of the product. Under § 601.12(b)(4), an applicant may ask FDA to expedite its review of a supplement for public health reasons or if a delay in making the change described in it would impose an extraordinary hardship of the applicant. The burden estimate for § 601.12(b)(4) is minimal and included in the estimate under § 601.12(b)(1) and (b)(3) in table 1.

Section 601.12(e) requires applicants to submit a protocol, or change to a

protocol, as a supplement requiring FDA approval before distributing the product. Section 601.12(f)(1), (2), and (3) requires applicants to follow specific procedures to report certain labeling changes to FDA. Section 601.12(f)(4) requires applicants to report to FDA advertising and promotional labeling and any changes.

Under § 601.14, the content of labeling required in 21 CFR 201.100(d)(3) must be in electronic format and in a form that FDA can process, review, and archive. This requirement is in addition to the provisions of §§ 601.2(a) and 601.12(f). The burden estimate for § 601.14 is minimal and included in the estimate under §§ 601.2(a) (BLAs) and 601.12(f)(1), (2), and (3) (labeling supplements and annual reports) in table 1.

Section 601.45 requires applicants of biological products for serious or life-threatening illnesses to submit to the Agency for consideration, during the pre-approval review period, copies of all promotional materials, including promotional labeling as well as advertisements.

In addition to §§ 601.2 and 601.12, there are other regulations in 21 CFR parts 640, 660, and 680 that relate to information to be submitted in a license application or supplement for certain blood or allergenic products as follows: §§ 640.6; 640.17; 640.21(c); 640.22(c); 640.25(c); 640.56(c); 640.64(c); 640.74(a) and (b)(2); 660.51(a)(4); and 680.1(b)(2)(iii) and (d).

In table 1, the burden associated with the information collection requirements in the applicable regulations is included in the burden estimate for §§ 601.2 and/or 601.12. A regulation may be listed under more than one subsection of § 601.12 due to the type of category under which a change to an approved application may be submitted.

There are also additional container and/or package labeling requirements for certain licensed biological products including: § 640.74(b)(3) and (4) for Source Plasma Liquid; § 640.84(a) and (c) for Albumin; § 640.94(a) for Plasma Protein Fraction; § 660.2(c) for Antibody to Hepatitis B Surface Antigen; § 660.28(a), (b), and (c) for Blood Grouping Reagent; § 660.35(a), (c through g), and (i through m) for Reagent Red Blood Cells; § 660.45 for Hepatitis B Surface Antigen; and § 660.55(a) and (b) for Anti-Human Globulin. The burden associated with the additional labeling requirements for submission of a license application for these certain biological products is minimal because the majority of the burden is associated with the

requirements under §§ 610.60 through 610.65 or 21 CFR 809.10. Therefore, the burden estimates for these regulations are included in the estimate under §§ 610.60 through 610.65 in table 1. The burden estimates associated with § 809.10 are approved under OMB control number 0910-0485.

Section 601.27(a) requires that applications for new biological products contain data that are adequate to assess the safety and effectiveness of the biological product for the claimed indications in pediatric subpopulations, and to support dosing and administration information. Section 601.27(b) provides that an applicant may request a deferred submission of some or all assessments of safety and effectiveness required under § 601.27(a) until after licensing the product for use in adults. Section 601.27(c) provides that an applicant may request a full or partial waiver of the requirements under § 601.27(a) with adequate justification. The burden estimates for § 601.27(a) are included in the burden estimate under § 601.2(a) in table 1 since these regulations deal with information to be provided in an application.

Section 601.28 requires sponsors of licensed biological products to submit the information in § 601.28(a), (b), and (c) to the Center for Biologics Evaluation and Research (CBER) or to the Center for Drug Evaluation and Research (CDER) each year, within 60 days of the anniversary date of approval of the license. Section 601.28(a) requires sponsors to submit to FDA a brief summary stating whether labeling supplements for pediatric use have been submitted and whether new studies in the pediatric population to support appropriate labeling for the pediatric population have been initiated. Section 601.28(b) requires sponsors to submit to FDA an analysis of available safety and efficacy data in the pediatric population and changes proposed in the labeling based on this information. Section 601.28(c) requires sponsors to submit to FDA a statement on the current status of any postmarketing studies in the pediatric population performed by, on or behalf of, the applicant. If the postmarketing studies were required or agreed to, the status of these studies is to be reported under § 601.70 rather than under this section.

Sections 601.33 through 601.35 clarify the information to be submitted in an application to FDA to evaluate the safety and effectiveness of radiopharmaceuticals intended for in vivo administration for diagnostic and monitoring use. The burden estimates for §§ 601.33 through 601.35 are included in the burden estimate under

§ 601.2(a) in table 1 since these regulations deal with information to be provided in an application.

Section 601.70 (b) requires each applicant of a licensed biological product to submit annually a report to FDA on the status of postmarketing studies for each approved product application. Each annual postmarketing status report must be accompanied by a completed transmittal Form FDA 2252 (Form FDA 2252 approved under OMB control number 0910-0001). Under § 601.70(d), two copies of the annual report shall be submitted to FDA.

Sections 601.91 through 601.94 concern biological products for which human efficacy studies are not ethical or feasible. Section 601.91(b)(2) requires, in certain circumstances, such postmarketing restrictions as are needed to ensure the safe use of the biological product. Section 601.91(b)(3) requires applicants to prepare and provide labeling with relevant information to patients or potential patients for biological products approved under part 601, subpart H, when human efficacy studies are not ethical or feasible (or based on evidence of effectiveness from studies in animals). Section 601.93 provides that biological products approved under subpart H are subject to the postmarketing recordkeeping and safety reporting applicable to all approved biological products. Section 601.94 requires applicants under subpart H to submit to the Agency for consideration during preapproval review period copies of all promotional materials including promotional labeling as well as advertisements. Under § 601.91(b)(2) and § 601.93, any potential postmarketing reports and/or recordkeeping burdens would be included under the adverse experience reporting (AER) requirements under 21 CFR part 600 (OMB control number 0910-0308). Therefore, any burdens associated with these requirements would be reported under the AER information collection requirements (OMB control number 0910-0308). The burden estimate for § 601.91(b)(3) is included in the estimate under §§ 610.60 through 610.65.

Section 610.9(a) requires the applicant to present certain information, in the form of a license application or supplement to the application, for a modification of any particular test method or manufacturing process or the conditions which it is conducted under the biologics regulations. The burden estimate for § 610.9(a) is included in the estimate under §§ 601.2(a) and 601.12(b) and (c) in table 1.

Under § 610.15(d), the Director of CBER or the Director of CDER may

approve, as appropriate, a manufacturer's request for exceptions or alternatives to the regulation for constituent materials. Manufacturers seeking approval of an exception or alternative must submit a request in writing with a brief statement describing the basis for the request and the supporting data.

Section 640.120 requires licensed establishments to submit a request for an exception or alternative to any requirement in the biologics regulations regarding blood, blood components, or blood products. For licensed establishments, a request for an exception or alternative must be submitted in accordance with § 601.12; therefore, the burden estimate for § 640.120 is included in the estimate under § 601.12(b) in table 1.

Section 680.1(c) requires manufacturers to update annually their license file with the list of source materials and the suppliers of the materials. Section 680.1(b)(3)(iv) requires manufacturers to notify FDA when certain diseases are detected in source materials.

Sections 600.15(b) and 610.53(d) (21 CFR 610.53(d)) require the submission of a request for an exemption or modification regarding the temperature requirements during shipment and from dating periods, respectively, for certain biological products. Section 606.110(b) (21 CFR 606.110(b)) requires the submission of a request for approval to perform plasmapheresis of donors who do not meet certain donor requirements for the collection of plasma containing rare antibodies. Under §§ 600.15(b), 610.53(d), and 606.110(b), a request for an exemption or modification to the requirements would be submitted as a supplement. Therefore, the burden hours for any submissions under §§ 600.15(b), 610.53(d), and 606.110(b) are included in the estimates under § 601.12(b) in table 1.

In July 1997, FDA revised Form FDA 356h "Application to Market a New Drug, Biologic, or an Antibiotic Drug for Human Use" to harmonize application procedures between CBER and CDER. The application form serves primarily as a checklist for firms to gather and submit certain information to FDA. As such, the form, now entitled "Application to Market a New or Abbreviated New Drug or Biologic for Human Use" helps to ensure that the application is complete and contains all the necessary information, so that delays due to lack of information may be eliminated. In addition, the form provides key information to FDA for efficient handling and distribution to the appropriate staff for review. The

estimated burden hours for nonbiological product submissions to CDER using FDA Form 356h are approved under OMB control number 0910-0001 (an estimated 3,200 submissions × 24 hours = 76,800 hours).

For advertisements and promotional labeling (e. g., circulars, package labels, container labels, etc.) and labeling changes, manufacturers of licensed biological products may submit to CBER or CDER Form FDA 2253. In August of 1998, FDA revised and harmonized Form FDA 2253 so the form may be used to transmit specimens of promotional labeling and advertisements for biological products as well as for prescription drugs and antibiotics. The revised, harmonized form updates the information about the types of promotional materials and the codes that are used to clarify the type of advertisement or labeling submitted, clarifies the intended audience for the advertisements or promotional labeling (e.g., consumers, professionals, news services), and helps ensure that the submission is complete. Form FDA 2253 can also be submitted electronically. Form FDA 2253 is approved under OMB control number 0910-0001.

Respondents to this collection of information are manufacturers of biological products. Under tables 1 and 2, the numbers of respondents are based on the estimated annual number of manufacturers that submitted the required information to FDA or the number of submissions FDA received in fiscal year (FY) 2015. Based on information obtained from FDA's database systems, there are an estimated 391 licensed biologics manufacturers.

The total annual responses are based on the estimated number of submissions (i.e., license applications, labeling and other supplements, protocols, advertising and promotional labeling, notifications) for a particular product received annually by FDA. The hours per response are based on information provided by industry and past FDA experience with the various submissions or notifications. The hours per response include the time estimated to prepare the various submissions or notifications to FDA, and, as applicable, the time required to fill out the appropriate form and collate the documentation. Additional information regarding these estimates is provided as necessary.

Under §§ 601.2 and 601.12, the estimated hours per response are based on the average number of hours to submit the various submissions. The estimated average number of hours is based on the range of hours to complete a very basic application or supplement and a complex application or supplement.

Under section 601.6(a), the total annual responses are based on FDA estimates that establishments may notify an average of 20 selling agents and distributors of such suspension, and provide FDA of such notification. The number of respondents is based on the estimated annual number of suspensions of a biologic license. In table 1, FDA is estimating 1 in case a suspension occurs.

Under §§ 601.12(f)(4) and 601.45, manufacturers of biological products may use Form FDA 2253 to submit advertising and promotional labeling (which can include multiple pieces).

Based on information obtained from FDA's database system, there were an estimated 11,676 submissions using Form FDA 2253 of advertising and promotional labeling from 114 respondents.

Under §§ 601.28 and 601.70(b), FDA estimates that it takes an applicant approximately 24 hours (8 hours per study × 3 studies) annually to gather, complete, and submit the appropriate information for each postmarketing status report (approximately two to four studies per report) and the accompanied transmittal Form FDA 2252. Included in these 24 hours is the time necessary to prepare and submit two copies of the annual progress report of postmarketing studies to FDA under § 601.70(d). For FY 2015, there were 139 reports from 82 respondents.

Under § 610.15(d), FDA has received no submissions since the implementation of the final rule in April 2011. Therefore, FDA is estimating one respondent and one annual request to account for a possible submission to CBER or CDER of a request for an exception or alternative for constituent materials under § 610.15(d).

There were a total of 2,777 amendments to an unapproved application or supplement and resubmissions submitted using Form FDA 356h.

In the **Federal Register** of July 11, 2016 (81 FR 44868), we published a 60-day notice requesting public comment on the proposed extension of this collection of information. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN <sup>1</sup>

21 CFR Section	Form FDA No.	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours <sup>10</sup>
601.2(a) <sup>2</sup> , 610.60 through 610.65 <sup>3</sup> ...	356h	28	1.36	38	860 .....	32,680
601.5(a) .....	NA	12	0.75	9	0.33 (20 minutes)	3
601.6(a) .....	NA	1	1	1	0.33 (20 minutes)	1
601.12(a)(5) .....	NA	537	24.41	13,106	1 .....	13,106
601.12(b)(1)/(b)(3)/(e) <sup>4</sup> .....	<sup>2</sup> 356h	164	3.66	600	80 .....	48,000
601.12(c)(1)/(c)(3) <sup>5</sup> .....	<sup>2</sup> 356h	120	4.78	574	50 .....	28,700
601.12(c)(5) .....	<sup>2</sup> 356h	7	1.14	8	50 .....	400
601.12(d)(1)/(d)(3) <sup>6</sup> /(f)(3) <sup>8</sup> .....	<sup>2</sup> 356h	246	3.34	822	24 .....	19,728
601.12(f)(1) <sup>7</sup> .....	2253	72	1.93	139	40 .....	5,560
601.12(f)(2) <sup>7</sup> .....	2253	60	1.82	109	20 .....	2,180
601.12(f)(4)/601.45 <sup>9</sup> .....	2253	114	102.42	11,676	10 .....	116,670
601.27(b) .....	NA	20	16.50	330	24 .....	7,920
601.27(c) .....	NA	12	1.08	13	8 .....	104
601.70(b) and (d)/601.28 .....	2252	82	1.70	139	24 .....	3,336
610.15(d) .....	NA	1	1	1	1 .....	1
680.1(c) .....	NA	9	1	9	2 .....	18
680.1(b)(3)(iv) .....	NA	1	1	1	2 .....	2
Amendments/Resubmissions .....	356h	125	22.22	2,777	20 .....	55,540

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN <sup>1</sup>—Continued

21 CFR Section	Form FDA No.	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours <sup>10</sup>
Total .....	.....	.....	.....	.....	.....	333,949

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.  
<sup>2</sup> The reporting requirements under §§ 601.14, 601.27(a), 601.33, 601.34, 601.35, 610.9(a), 640.17, 640.25(c), 640.56(c), 640.74(b)(2), 660.51(a)(4), and 680.1(b)(2)(iii) are included in the estimate under § 601.2(a).  
<sup>3</sup> The reporting requirements under §§ 601.93(b)(3), 640.74(b)(3) and (4), 640.84(a) and (c), 640.94(a), 660.2(c), 660.28(a), (b), and (c), 660.35(a), (c through g), and (i through m), 660.45, and 660.55(a) and (b) are included under §§ 610.60 through 610.65.  
<sup>4</sup> The reporting requirements under §§ 601.12(a)(2) and (b)(4), 600.15(b), 610.9(a), 610.53(d), 606.110(b), 640.6, 640.17, 640.21(c), 640.22(c), 640.25(c), 640.56(c), 640.64(c), 640.74(a) and (b)(2), 640.120, and 680.1(d) are included in the estimate under § 601.12(b).  
<sup>5</sup> The reporting requirements under §§ 601.12(a)(2), 610.9(a), 640.17, 640.25(c), 640.56(c), and 640.74(b)(2) are included in the estimate under § 601.12(c).  
<sup>6</sup> The reporting requirement under § 601.12(a)(2) is included in the estimate under § 601.12(d).  
<sup>7</sup> The reporting requirement under § 601.14 is included in the estimate under § 601.12(f)(1) and (f)(2).  
<sup>8</sup> The reporting requirement under §§ 601.12(a)(4) and 601.14 is included in the estimate under § 601.12(f)(3).  
<sup>9</sup> The reporting requirement under § 601.94 is included in the estimate under § 601.45.  
<sup>10</sup> The numbers in this column have been rounded to the nearest whole number.

Under table 2, the estimated recordkeeping requirements associated with the AER system. recordkeeping requirements associated with the AER system. recordkeeping burden of 1 hour is based on previous estimates for the

TABLE 2—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN <sup>1</sup>

21 CFR Section	Number of respondents	Annual disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours <sup>2</sup>
601.6(a) .....	1	20	20	0.33	7

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.  
<sup>2</sup> The numbers in this column have been rounded to the nearest whole number.

Dated: October 25, 2016.  
**Leslie Kux**,  
 Associate Commissioner for Policy.  
 [FR Doc. 2016-26064 Filed 10-27-16; 8:45 am]  
**BILLING CODE 4164-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**  
 [Docket No. FDA-2013-N-0796]

**Agency Information Collection Activities; Proposed Collection; Comment Request; Testing Communications on Medical Devices and Radiation-Emitting Products**

**AGENCY:** Food and Drug Administration, HHS.  
**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for

public comment in response to the notice. This notice solicits comments on communication studies involving medical devices and radiation-emitting products regulated by FDA. This information will be used to explore concepts of interest and assist in the development and modification of communication messages and campaigns to fulfill the Agency’s mission to protect the public health.

**DATES:** Submit either electronic or written comments on the collection of information by December 27, 2016.

**ADDRESSES:** You may submit comments as follows:

*Electronic Submissions*

Submit electronic comments in the following way:  
 • *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <http://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or

confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <http://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

*Written/Paper Submissions*

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

*Instructions:* All submissions received must include the Docket No. FDA-2013-N-0796 for “Agency Information Collection Activities; Proposed

Collection; Comment Request; Testing Communications on Medical Devices and Radiation-Emitting Products.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <http://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <http://www.regulations.gov>. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

**Docket:** For access to the docket to read background documents or the electronic and written/paper comments received, go to <http://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** FDA PRA Staff, Office of Operations, Food and Drug Administration, Three White Flint North, 10A63, 11601 Landsdown

St., North Bethesda, MD 20852, [PRAStaff@fda.hhs.gov](mailto:PRAStaff@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. “Collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes 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 (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA’s functions, including whether the information will have practical utility; (2) the accuracy of FDA’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**Testing Communications on Medical Devices and Radiation-Emitting Products—OMB Control Number 0910–0678—Extension**

FDA is authorized by section 1003(d)(2)(D) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 393(d)(2)(D)) to conduct educational and public information programs relating to the safety of regulated medical devices and radiation-emitting products. FDA must conduct needed research to ensure that such programs have the highest likelihood of being effective. Improving communications about medical devices and radiation

emitting products will involve many research methods, including individual in-depth interviews, mall-intercept interviews, focus groups, self-administered surveys, gatekeeper reviews, and omnibus telephone surveys.

The information collected will serve three major purposes. First, as formative research it will provide critical knowledge needed about target audiences to develop messages and campaigns about medical device and radiation-emitting product use. Knowledge of consumer and health care professional decision making processes will provide the better understanding of target audiences that FDA needs to design effective communication strategies, messages, and labels. These communications will aim to improve public understanding of the risks and benefits of using medical devices and radiation-emitting products by providing users with a better context in which to place risk information more completely.

Second, as initial testing, it will allow FDA to assess the potential effectiveness of messages and materials in reaching and successfully communicating with their intended audiences. Testing messages with a sample of the target audience will allow FDA to refine messages while still in the developmental stage. Respondents will be asked to give their reaction to the messages in either individual or group settings.

Third, as evaluative research, it will allow FDA to ascertain the effectiveness of the messages and the distribution method of these messages in achieving the objectives of the message campaign. Evaluation of campaigns is a vital link in continuous improvement of communications at FDA.

Annually, FDA projects about 30 studies using a variety of research methods and lasting an average of 0.17 hours each (varying from 0.08 to 1.5 hours). FDA estimates the burden of this collection of information based on prior recent experience with the various types of data collection methods described earlier. FDA is requesting this burden so as not to restrict the Agency’s ability to gather information on public sentiment for its proposals in its regulatory and communications programs.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN <sup>1</sup>

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Individual in-depth interviews .....	360	1	360	.75 (45 minutes) .....	270
General public focus group interviews .....	144	1	144	1.5 hours .....	216
Intercept interviews: Central location .....	200	1	200	.25 (15 minutes) .....	50
Intercept interviews: Telephone .....	4,000	1	4,000	.08 (5 minutes) .....	320
Self-administered surveys .....	2,400	1	2,400	.25 (15 minutes) .....	600
Gatekeeper reviews .....	400	1	400	.5 (30 minutes) .....	200
Omnibus surveys .....	1,200	1	1,200	.17 (10 minutes) .....	204
<b>Total (general public) .....</b>	<b>8,704</b> .....	.....	.....	.....	<b>1,860</b>
Physician focus group interviews .....	144	1	144	1.5 hours .....	216
<b>Total (physician) .....</b>	<b>144</b> .....	.....	.....	.....	<b>216</b>
<b>Total (overall) .....</b>	<b>8,848</b> .....	.....	.....	.....	<b>2,076</b>

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: October 21, 2016.  
**Leslie Kux**,  
*Associate Commissioner for Policy.*  
 [FR Doc. 2016-26044 Filed 10-27-16; 8:45 am]  
**BILLING CODE 4164-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

[Docket No. FDA-2009-D-0524]

**Listing of Ingredients in Tobacco Products; Revised Draft Guidance for Industry; Availability**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA or we) is announcing the availability of a revised draft guidance for industry entitled “Listing of Ingredients in Tobacco Products.” The revised draft guidance document is intended to assist persons making tobacco product ingredient submissions to FDA as required by the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act).

**DATES:** Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this revised draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the revised draft guidance by November 28, 2016.

**ADDRESSES:** You may submit comments as follows:

**Electronic Submissions**

Submit electronic comments in the following way:  
 • *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <http://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <http://www.regulations.gov>.

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

**Written/Paper Submissions**

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential,

if submitted as detailed in “Instructions.”

*Instructions:* All submissions received must include the Docket No. FDA-2009-D-0524 for “Listing of Ingredients in Tobacco Products.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <http://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <http://www.regulations.gov>. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR

56469, September 18, 2015, or access the information at: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

**Docket:** For access to the docket to read background documents or the electronic and written/paper comments received, go to <http://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the revised draft guidance to the Center for Tobacco Products, Food and Drug Administration, Document Control Center, 10903 New Hampshire Ave., Bldg. 71, Rm. G335, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your request or include a fax number to which the revised draft guidance may be sent. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the draft guidance.

**FOR FURTHER INFORMATION CONTACT:**

Katherine Collins, Center for Tobacco Products, Food and Drug Administration, Document Control Center, 10903 New Hampshire Ave., Bldg. 71, Rm. G335, Silver Spring, MD 20993-0002, 1-877-287-1373, email: [AskCTP@fda.hhs.gov](mailto:AskCTP@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

We are announcing the availability of a revised draft guidance for industry entitled "Listing of Ingredients in Tobacco Products." We are issuing this draft guidance consistent with our good guidance practices regulation (21 CFR 10.115).

The revised draft guidance document, when finalized, is intended to assist persons making tobacco product ingredient submissions to FDA as required by the Tobacco Control Act.

The Tobacco Control Act (Pub. L. 111-31), enacted on June 22, 2009, amends the Federal Food, Drug, and Cosmetic Act (the FD&C Act) and provides FDA with the authority to regulate the manufacture, marketing, and distribution of tobacco products to protect the public health. Among its many provisions, the Tobacco Control Act added section 904 to the FD&C Act (21 U.S.C. 387d), establishing requirements for tobacco product ingredient submissions.

The revised draft guidance discusses tobacco products that are newly deemed subject to chapter IX of the FD&C Act.

Cigarettes, cigarette tobacco, roll-your-own tobacco (RYO), and smokeless tobacco were immediately covered by FDA's tobacco product authorities in chapter IX of the FD&C Act, including section 904, when the Tobacco Control Act went into effect. As for other types of tobacco products, section 901(b) of the FD&C Act (21 U.S.C. 387a(b)) grants FDA authority to deem those products subject to chapter IX of the FD&C Act. Under that authority, FDA issued a final rule deeming all other products that meet the statutory definition of "tobacco product," set forth in section 201(rr) of the FD&C Act (21 U.S.C. 321(rr)), except for accessories of those products, as subject to chapter IX of the FD&C Act (81 FR 28974, May 10, 2016). The final rule became effective on August 8, 2016. As a result, manufacturers or importers (or their agents) of tobacco products subject to the deeming rule are now required to comply with chapter IX of the FD&C Act, including the ingredient listing requirements in section 904(a)(1).

Section 904(a)(1) of the FD&C Act requires each tobacco product manufacturer or importer, or agent thereof, to submit a listing of all ingredients, including tobacco, substances, compounds, and additives that are added by the manufacturer to the tobacco, paper, filter, or other part of each tobacco product by brand and by quantity in each brand and subbrand. For cigarettes, cigarette tobacco, RYO, and smokeless tobacco products on the market as of June 22, 2009, the list of ingredients had to be submitted by December 22, 2009. For cigarettes, cigarette tobacco, RYO, and smokeless tobacco products not on the market as of June 22, 2009, section 904(c)(1) requires that the list of ingredients be submitted at least 90 days prior to delivery for introduction into interstate commerce. Section 904(c) of the FD&C Act also requires submission of information whenever any additive, or the quantity of any additive, is changed.

As described in the preamble to the final deeming rule, for products other than cigarettes, cigarette tobacco, RYO, and smokeless tobacco that are on the market as of August 8, 2016, FDA does not intend to enforce the section 904(a)(1) ingredient listing submission requirement until 6 months from the effective date of the rule or 12 months from the effective date for small-scale tobacco product manufacturers. Under this policy, FDA will not enforce the ingredient listing submission requirement until February 8, 2017, for businesses that are not considered small-scale tobacco product manufacturers, and August 8, 2017, for small-scale tobacco product

manufacturers. Manufacturers of tobacco products introduced into interstate commerce after August 8, 2016, must submit the ingredient information required by section 904(a)(1) at least 90 days before the product is delivered for introduction into interstate commerce, as with cigarettes, cigarette tobacco, RYO, and smokeless tobacco first marketed after June 22, 2009 (section 904(c)(1)).

**II. Significance of Guidance**

FDA is issuing this revised draft guidance consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ingredient listing. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

**III. Paperwork Reduction Act of 1995**

This revised draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). The revised draft guidance includes information and recommendations for how to provide ingredient listing submissions. The collections of information in section 904(a)(1) of the FD&C Act have been approved under OMB control number 0910-0650.

**IV. Electronic Access**

Persons with access to the Internet may obtain an electronic version of the draft guidance at either <http://www.regulations.gov> or <http://www.fda.gov/TobaccoProducts/Labeling/RulesRegulationsGuidance/default.htm>.

Dated: October 24, 2016.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2016-26065 Filed 10-27-16; 8:45 am]

**BILLING CODE 4164-01-P**



## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

#### National Vaccine Injury Compensation Program: Revised Amount of the Average Cost of a Health Insurance Policy

The Health Resources and Services Administration is publishing an updated monetary amount of the average cost of a health insurance policy as it relates to the National Vaccine Injury Compensation Program (VICP).

Section 100.2 of the VICP's implementing regulation (42 CFR part 100) states that the revised amount of the average cost of a health insurance policy, as determined by the Secretary, is effective upon its delivery by the Secretary to the United States Court of Federal Claims (the Court), and will be published periodically in a notice in the **Federal Register**. This figure is calculated using the most recent Medical Expenditure Panel Survey-Insurance Component (MEPS-IC) data available as the baseline for the average monthly cost of a health insurance policy. This baseline is adjusted by the annual percentage increase/decrease obtained from the most recent annual Kaiser Family Foundation and Health Research and Educational Trust (KFF/HRET) Employer Health Benefits Survey or other authoritative source that may be more accurate or appropriate.

In 2016, MEPS-IC, available at [www.meps.hhrq.gov](http://www.meps.hhrq.gov), published the annual 2015 average total single premium per enrolled employee at private-sector establishments that provide health insurance. The figure published was \$5,963. This figure is divided by 12 months to determine the cost per month of \$496.92. The \$496.92 is increased or decreased by the percentage change reported by the most recent KFF/HRET Employer Health Benefits Survey, available at [www.kff.org](http://www.kff.org). The percentage increase from 2015 to 2016 was 2.9 percent. By adding this percentage increase, the calculated average monthly cost of a health insurance policy for a 12-month period is \$511.33.

Therefore, the Secretary announces that the revised average cost of a health insurance policy under the VICP is \$511.33 per month. In accordance with § 100.2, the revised amount was effective upon its delivery by the Secretary to the Court. Such notice was delivered to the Court on October 24, 2016.

Dated: October 24, 2016.

James Macrae,

Acting Administrator.

[FR Doc. 2016-26098 Filed 10-27-16; 8:45 am]

BILLING CODE 4165-15-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

#### Privacy Act of 1974; System of Records Notice

**AGENCY:** Assistant Secretary for Administration, Office of the Secretary (OS), Department of Health and Human Services (HHS).

**ACTION:** Notice of deletion of multiple systems of records.

**SUMMARY:** The Office of the Assistant Secretary for Administration (ASA) within the Department of Health and Human Services (HHS) is deleting eighteen (18) systems of records established pursuant to the Privacy Act of 1974, as amended (5 U.S.C. 552a), because HHS has determined that they duplicate other systems of records or are obsolete.

**DATES: Effective Dates:** The deletions are effective upon publication.

**ADDRESSES:** The public should address written comments to: Director for Workforce Management and Vitality, Office of Human Resources, 200 Independence Avenue SW., Suite 801, Washington, DC 20201. Comments will be available for public viewing at the same location. To review comments in person, please contact the Director for Workforce Management and Vitality.

**FOR FURTHER INFORMATION CONTACT:** Director for Workforce Management and Vitality, Office of Human Resources, 200 Independence Avenue SW., Suite 801, Washington, DC 20201.

#### SUPPLEMENTARY INFORMATION:

##### I. The Eighteen (18) Deleted Systems of Records

The agency is deleting the following eighteen systems of records for the reasons indicated:

- A. *Duplicative of OPM/GOV'T-1:*
  1. 09-90-0018 Personnel Records in Operating Offices
- B. *Duplicative of OPM/GOV'T-1 with respect to civilian personnel, and duplicative of 09-40-0001 with respect to Public Health Service (PHS) Commissioned Corps personnel:*
  2. 09-90-0012 Executive Development Records
  3. 09-90-0016 HHS Motor Vehicle Operator Records

4. 09-90-0019 Special Employment Program Records
  5. 09-90-0021 Training Management Information System
  6. 09-90-0022 Volunteer EEO Support Personnel Records
  7. 09-90-0028 Biographies and Photographs of HHS Officials
  8. 09-90-0036 Employee Suggestion Program Records
  9. 09-90-0200 Child Care Subsidy Program Records
- C. *Duplicative of the SORN(s) indicated:*
10. 09-15-0004 Federal Employees Occupational Health Data System (*duplicates OPM/GOV'T-10, 09-40-0002, and 09-40-0005*)
  11. 09-40-0013 PSC Parking Program, PSC Transshare Program Records, PSC Security Services, and PSC Employee and Contractors Identification Badge Issuances (*duplicates OPM/GOV'T-1, 09-40-0001, and 09-90-0777 as to parking; duplicates OPM/GOV'T-1 and 09-40-0001 as to Transshare; duplicates 09-90-0777 as to security and badging*)
  12. 09-90-0006 Applicants for Employment Records (*duplicates OPM/GOV'T-5*)
  13. 09-90-0011 Employee Appraisal Program Records (*duplicates OPM/GOV'T-2*)
  14. 09-90-0013 Federal Employees Occupational Health Program Records (*duplicates OPM/GOV'T-10, 09-40-0002, and 09-40-0005*)
  15. 09-90-0023 Departmental Parking Control Policy and Records System (*duplicates OPM/GOV'T-1, 09-40-0001, and 09-90-0777*)
- D. *Obsolete; the systems no longer exist, and all records have been destroyed:*
16. 09-90-0075 MBTA Prepaid Pass Program Participants (*an obsolete transit subsidy system*)
  17. 09-90-0095 Management Information System Efficiency Reporter (MISER) (*there is no longer any record of this system apart from System of Records Notices published from January 19, 1982 (47 FR 2791) to November 9, 1994 (59 FR 55845)*)
  18. 09-90-1101 Optional Form 55 Cards Issuance Log (*an obsolete access control system*)

##### II. The Privacy Act

The Privacy Act (5 U.S.C. 552a) governs the means by which the U.S. Government collects, maintains, and uses information about individuals in a system of records. A "system of records" is a group of any records under the control of a Federal agency from which information about an individual

is retrieved by the individual's name or other personal identifier. The Privacy Act requires each agency to publish in the **Federal Register** a system of records notice (SORN) identifying and describing each system of records the agency maintains, including the purposes for which the agency uses information about individuals in the system, the routine uses for which the agency discloses such information outside the agency, and how individual record subjects can exercise their rights under the Privacy Act (e.g., to determine if the system contains information about them).

Dated: October 21, 2016.

**Christine M. Major,**

*Acting Deputy Assistant Secretary for Human Resources, U.S. Department of Health and Human Services.*

**NOTICE OF DELETION:**

The following systems of records are now deleted:

1. 09-15-0004 Federal Employees Occupational Health Data System
2. 09-40-0013 PSC Parking Program, PSC Transshare Program Records, PSC Security Services, and PSC Employee and Contractors Identification Badge Issuances
3. 09-90-0006 Applicants for Employment Records
4. 09-90-0011 Employee Appraisal Program Records
5. 09-90-0012 Executive Development Records
6. 09-90-0013 Federal Employees Occupational Health Program Records
7. 09-90-0016 HHS Motor Vehicle Operator Records
8. 09-90-0018 Personnel Records in Operating Offices
9. 09-90-0019 Special Employment Program Records
10. 09-90-0021 Training Management Information System
11. 09-90-0022 Volunteer EEO Support Personnel Records
12. 09-90-0023 Departmental Parking Control Policy and Records System
13. 09-90-0028 Biographies and Photographs of HHS Officials
14. 09-90-0036 Employee Suggestion Program Records
15. 09-90-0075 MBTA Prepaid Pass Program Participants

16. 09-90-0095 Management Information System Efficiency Reporter (MISER)

17. 09-90-0200 Child Care Subsidy Program Records

18. 09-90-1101 Optional Form 55 Cards Issuance Log

[FR Doc. 2016-26116 Filed 10-27-16; 8:45 am]

**BILLING CODE 4151-17-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Office of the Secretary**

[Document Identifier HHS-OS-0990-New-60D]

**Agency Information Collection Activities; Proposed Collection; Public Comment Request**

**AGENCY:** Office of the Secretary, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, announces plans to submit a new Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, OS seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

**DATES:** Comments on the ICR must be received on or before December 27, 2016.

**ADDRESSES:** Submit your comments to [Sherrette.Funn@hhs.gov](mailto:Sherrette.Funn@hhs.gov) or by calling (202) 690-5683.

**FOR FURTHER INFORMATION CONTACT:** Information Collection Clearance staff, [Information.CollectionClearance@hhs.gov](mailto:Information.CollectionClearance@hhs.gov) or (202) 690-5683.

**SUPPLEMENTARY INFORMATION:** When submitting comments or requesting information, please include the document identifier HHS-OS-0990-New-60D for reference.  
*Information Collection Request Title:* Evaluating Supporting Nursing Moms at Work.

*Abstract:* The HHS Office on Women's Health (OWH) is seeking approval by OMB on a new Information Collection Request. A Section of the Affordable Care Act (ACA) requires

employers to provide basic breastfeeding accommodations for nursing mothers at work. These include a functional space, other than a bathroom, that is shielded from view and intrusion from coworkers and reasonable break time for women to express milk. OWH implemented outreach to businesses and industries across the nation to determine perceived barriers to compliance to this requirement, and became acutely aware of the sparse amount of information and resources that target worksite lactation needs and challenges of these employers.

Based upon these finding, in June, 2014, the HHS Office on Women's Health (OWH) launched a national initiative to provide information, education and resources to employers on how to best support the needs of their nursing employees upon their return to the workplace. OWH particularly targeted challenging work environments. *Supporting Nursing Moms at Work: Employer Solutions* was developed as an on-line, searchable, solutions-oriented resource, housed on the OWH Web site, ([www.womenshealth.gov](http://www.womenshealth.gov)). This resource features over 200 individual business profiles from companies in more than 34 U.S. States and demonstrates use of innovative methods and strategies to overcome time and space challenges.

OWH has contracted with LTG Associates to conduct formative research to evaluate the effectiveness, utility and impact of this on-line lactation worksite resource and to heighten visibility and identify opportunities for effective dissemination.

*Need and Proposed Use of the Information:* Information from the data collection will be used to update, integrate current issues and expand the on-line resource, "Supporting Nursing Mothers at Work: Employer Solutions," housed on [www.womenshealth.gov](http://www.womenshealth.gov). Content to this on-line resource will be adjusted as necessary.

*Likely Respondents:* There are three primary audiences: Human resources managers, employers/supervisors of women who expressed breast milk at work; and employees—women who currently express or previously expressed milk at work.

TOTAL ESTIMATED ANNUALIZED BURDEN  
[Hours]

Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Women who Expressed Milk at Work Interview Form .....	60	1	1	60
HR Interview Form .....	60	1	1	60
Employer/Supervisor Interview Form .....	60	1	1	60
Total .....	180	.....	.....	180

OS specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**Terry S. Clark,**

*Asst Information Collection Clearance Officer.*

[FR Doc. 2016-26058 Filed 10-27-16; 8:45 am]

**BILLING CODE 4150-33-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**National Institutes of Health**

**National Institute of General Medical Sciences; Amended Notice of Meeting**

Notice is hereby given of a change in the meeting of the National Institute of General Medical Sciences Special Emphasis Panel, December 01, 2016, 8:00 a.m. to December 01, 2016, 6:00 PM, Cambria Suites Rockville, 1 Helen Heneghan Way, Rockville, MD, 20850 which was published in the **Federal Register** on October 13, 2016, 81 FR 70688.

The meeting notice is amended to change the date to the meeting from December 1, 2016 to December 2, 2016. The meeting is closed to the public.

Dated: October 24, 2016.

**Melanie J. Gray,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-26050 Filed 10-27-16; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**National Institutes of Health**

**Center for Scientific Review; Notice of Closed Meetings**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Drug Discovery and Probes for the Nervous System.

*Date:* November 16, 2016.

*Time:* 1:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Geoffrey G Schofield, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040-A, MSC 7850, Bethesda, MD 20892, 301-435-1235, [geoffreys@csr.nih.gov](mailto:geoffreys@csr.nih.gov).

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Musculoskeletal Rehabilitation Small Business.

*Date:* November 21, 2016.

*Time:* 10:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

*Contact Person:* Maria Nurminskaya, Ph.D., Scientific Review Officer, Center for

Scientific Review, National Institutes of Health, Bethesda, MD 20892, (301) 435-1222, [nurminskayam@csr.nih.gov](mailto:nurminskayam@csr.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393-93.396, 93.837-93.844, 93.846-93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: October 24, 2016.

**Sylvia Neal,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-26049 Filed 10-27-16; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**[Docket No. FR-5907-N-44]**

**Federal Property Suitable as Facilities To Assist the Homeless**

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Notice.

**SUMMARY:** This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for use to assist the homeless.

**FOR FURTHER INFORMATION CONTACT:** Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 402-3970; TTY number for the hearing- and speech-impaired (202) 708-2565 (these telephone numbers are not toll-free), call the toll-free Title V information line at 800-927-7588 or send an email to [title5@hud.gov](mailto:title5@hud.gov).

**SUPPLEMENTARY INFORMATION:** In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were

reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless v. Veterans Administration*, No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, and suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for "off-site use only" recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to: Ms. Theresa M. Ritta, Chief Real Property Branch, the Department of Health and Human Services, Room 12–07, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–2265 (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 or send an email to [title5@hud.gov](mailto:title5@hud.gov) for detailed instructions, or write a letter to Ann Marie Oliva at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (e.g., acreage, floor plan, condition of property, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: AGRICULTURE: Ms. Debra Kerr, Department of Agriculture, OPDM, Property Management Division, Agriculture South Building, 300 7th Street SW., Washington, DC 20024, (202) 720–8873; AIR FORCE: Mr. Robert E. Moriarty, P.E., AFCEC/CI, 2261 Hughes Avenue, Ste. 155, JBSA Lackland TX 78236–9853, (315) 225–7384; COE: Ms. Brenda Johnson-Turner, HQUSACE/CEMP–CR, 441 G Street NW., Washington, DC 20314, (202) 761–7238; ENERGY: Mr. David Steinau, Department of Energy, Office of Asset Management (MA–50), 1000 Independence Ave. SW., Washington, DC 20585, (202) 287–1503; GSA: Mr. Flavio Peres, General Services Administration, Office of Real Property Utilization and Disposal, 1800 F Street NW., Room 7040 Washington, DC 20405, (202) 501–0084; NAVY: Ms. Nikki Hunt, Department of the Navy, Asset Management Division, Naval Facilities Engineering Command, Washington Navy Yard, 1330 Patterson Ave. SW., Suite 1000, Washington, DC 20374; (202) 685–9426; (These are not toll-free numbers).

Dated: October 20, 2016.

**Brian P. Fitzmaurice**,  
Director, Division of Community Assistance,  
Office of Special Needs Assistance;  
Assistance Programs.

**TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM FEDERAL REGISTER REPORT FOR 10/28/2016**

**Suitable/Available Properties**

*Building*

Florida

3745C Naval Air Station  
Pensacola 198 Navy Exchange Rd. Corry  
Station

Annex—NASP

Pensacola FL 32508

Landholding Agency: Navy

Property Number: 77201640002

Status: Unutilized

Comments: Off-site removal only; 216 sq. ft.; retail; roof leaks; rusted support members; mold; 12+ months vacant; significant repairs needed; contact Navy for more information about condition of property

Mississippi

ARS Farm Storage Building

CPAIS ID 640200B064; RPUID: 03.837

Jamie Whitten Delta States Research Center

Washington County MS

Landholding Agency: Agriculture

Property Number: 15201640001

Status: Excess

Directions: Leased Land: Section 1, Township 18N, Range 7W; contact Agriculture for accessibility/removal requirements & other conditions on property

Comments: Off-site removal only; 200 sq. ft.; 1+ month vacant; extremely poor conditions; interior ceiling stained; plywood flooring;

ARS Storage Building

CPAIS ID 640200B062; RPUID: 03.825

Jamie Whitten Delta States Research Center

Washington County MS

Landholding Agency: Agriculture

Property Number: 15201640003

Status: Excess

Directions: Leased Land: NW Quarter of Section 1 Township 18, Range 7W; contact Agriculture for accessibility/removal requirements and more information about the conditions of the property

Comments: Off-site removal only; 840 sq. ft., 1+ month vacant; fair/poor conditions; modular trailer;

Texas

Former Tyler Naval Reserve Center; 1818  
North Confederate Street Tyler TX 75701

Landholding Agency: GSA

Property Number: 54201640001

Status: Surplus

GSA Number: 7–G–TX–0984–AD

Directions: Office Building 1 (8,401 sf); Office Building 2 (3,000 sf); 2 Storage Sheds (300 sf each)

Comments: Office use; 12+ months vacant; good/fair conditions; contact GSA for more details on a specific property listed above

**Unsuitable Properties***Building*

California

Shop/Storage/Maintenance Facility Lake  
Isabella Lake Isabella CA  
Landholding Agency: COE  
Property Number: 31201640003  
Status: Unutilized  
Comments: Public access denied and no  
alternative method to gain access without  
compromising national security  
Reasons: Secured Area

Administration Building

Lake Isabella

Lake Isabella CA

Landholding Agency: COE

Property Number: 31201640004

Status: Unutilized

Comments: Public access denied and no  
alternative method to gain access without  
compromising national security  
Reasons: Secured Area

Florida

1523; Naval Air Station Pensacola 362 Jordan  
Rd.

Pensacola FL 32508

Landholding Agency: Navy

Property Number: 77201640001

Status: Unutilized

Comments: Public access denied and no  
alternative method to gain access without  
compromising national security  
Reasons: Secured Area

New York

Building 904, Electrician Work Area;  
Brookhaven National Lab

Upton NY 11973

Landholding Agency: Energy

Property Number: 41201640001

Status: Excess

Comments: Research facilities on site where  
public access denied and no alternative  
method to gain access without  
compromising national security  
Reasons: Secured Area

Reasons: Secured Area

North Dakota

Sentinel Butle Radio Building

Sentinel Butle

Sentinel Butle ND 58654

Landholding Agency: Agriculture

Property Number: 15201640004

Status: Unutilized

Comments: Documented deficiencies:  
significant roof damage; clear threat to  
physical safety

Reasons: Extensive deterioration

Oklahoma

SWT-Keystone Lake

23115 West Wekiwa Rd.

Sand Springs OK 74063

Landholding Agency: COE

Property Number: 31201640001

Status: Unutilized

Comments: Documented deficiencies: severe  
water damage; numerous holes in interior  
walls, cracks, & vandalism; severely  
infested by pest; clear threat to physical  
safety

Reasons: Extensive deterioration

Arcadia Lake

Edmond Park

Edmond OK 73034

Landholding Agency: COE

Property Number: 31201640006

Status: Unutilized

Comments: Documented deficiencies: high  
concentrations of mold; severe mold  
damage throughout entire property due to  
consistent water leakage; friable asbestos  
present as well; clear threat to physical  
safety

Reasons: Extensive deterioration;  
Contamination

Oregon

Wildlife Area Vault Toilet

Ferry Rd.

Umatilla OR 97882

Landholding Agency: COE

Property Number: 31201640005

Status: Underutilized

Comments: Documented deficiencies: old  
dilapidated floor, wall, roof; clear threat to  
physical safety

Reasons: Extensive deterioration

Texas

Laughlin Air Force,

2.66 acres of improved land

78843 Mitchell Blvd.

Del Rio TX 78843

Landholding Agency: Air Force

Property Number: 18201640001

Status: Unutilized

Comments: Public access denied and no  
alternative method to gain access without  
compromising national security

Reasons: Secured Area

Sam Rayburn Lake

18981 FM 1751

Pineland TX 75930

Landholding Agency: COE

Property Number: 31201640002

Status: Unutilized

Comments: Documented deficiencies:  
structurally unsound; masonry exterior  
separated from wooden substructure;  
wooden sill plates & base of studs in wall  
deteriorated; clear threat to physical safety

Reasons: Extensive deterioration

Virginia

Structure R22 on JEBLC-FS

Special Area

JEBLCFS

Wallops Island VA

Landholding Agency: Navy

Property Number: 77201640003

Status: Unutilized

Comments: Public access denied and no  
alternative method to gain access without  
compromising national security

Reasons: Secured Area

[FR Doc. 2016-25773 Filed 10-27-16; 8:45 am]

**BILLING CODE 4210-67-P****DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service**

[FWS-R3-FHC-2016-N108;  
FXFR13340300000-145-FF03F00000]

**Fisheries and Habitat Conservation;  
Final Supplemental Environmental  
Impact Statement for the Ballville Dam  
Project on the Sandusky River,  
Sandusky County, Ohio**

**AGENCY:** Fish and Wildlife Service,  
Interior.

**ACTION:** Notice of availability; request  
for comments.

**SUMMARY:** We, the U.S. Fish and  
Wildlife Service (Service), announce the  
availability of a final supplemental  
environmental impact statement (SEIS)  
that has been prepared to evaluate the  
Ballville Dam Project, in Sandusky  
County, Ohio, in accordance with the  
requirements of the National  
Environmental Policy Act (NEPA). We  
are also requesting public comments.

**DATES:** *Submitting Comments:* We will  
consider all comments regarding the  
final SEIS received or postmarked by  
November 28, 2016 and respond to them  
as appropriate.

**ADDRESSES:** *Submitting Comments:* A  
hard copy of the draft SEIS and  
associated documents will be available  
for review at the Birchard Public  
Library, 423 Croghan Street, Fremont,  
Ohio 43420, as well as online at [http://  
www.fws.gov/midwest/fisheries/  
ballville-dam.html](http://www.fws.gov/midwest/fisheries/ballville-dam.html).

You may submit comments on the  
final SEIS by any one of the following  
methods:

- *U.S. mail or hand-delivery:* Jessica  
Hogrefe, U.S. Fish and Wildlife Service,  
Fisheries, 5600 American Boulevard  
West, Suite 990, Bloomington, MN  
55437-1458.
- *Email:* [Ballvilledam@fws.gov](mailto:Ballvilledam@fws.gov).
- *Fax:* (612) 713-5289 (Attention:  
Jessica Hogrefe).

**FOR FURTHER INFORMATION CONTACT:**

Jessica Hogrefe, (612) 713-5102.

Individuals who are hearing impaired or  
speech impaired may call the Federal  
Relay Service at (800) 877-8337 for TTY  
assistance.

**SUPPLEMENTARY INFORMATION:** We  
announce the availability of a final  
supplemental environmental impact  
statement (SEIS) that has been prepared  
to evaluate the Ballville Dam Project, in  
Sandusky County, Ohio, in accordance  
with the requirements of the National  
Environmental Policy Act (NEPA). We  
are also requesting public comments.

## Background

Ballville Dam was built in 1913 for hydroelectric power generation. The City of Fremont purchased the dam in 1959 from the Ohio Power Company for the purpose of supplying water to the city. With the construction of a raw water reservoir, the dam is no longer required for this purpose. Moreover, in 2007, the Ohio Department of Natural Resources issued a Notice of Violation to the City, stating that the dam was being operated in violation of the law as a result of its deteriorated condition.

Ballville Dam is currently a complete barrier to upstream fish passage and impedes hydrologic processes. The purpose for the issuance of Federal funds and preparation of this final SEIS is to remove Ballville Dam and restore natural hydrological processes over a 40-mile stretch of the Sandusky River, reopen fish passage to 22 miles of additional habitat, restore flow conditions for fish access to habitat above the impoundment, and improve overall conditions for native fish communities in the Sandusky River system, restoring self-sustaining fish resources.

We published a final EIS in the **Federal Register** on August 1, 2014 (79 FR 44856), for the Ballville Dam Project that addressed the environmental, economic, cultural and historical, and safety issues associated with the proposed removal of the dam and a suite of alternatives. The final EIS analyzed four alternatives for the removal: (1) Proposed Action—Incremental Dam Removal with Ice Control Structure; (2) No Federal Action; (3) Fish Elevator Structure; and (4) Dam Removal with Ice Control Structure. The final EIS considered the direct, indirect, and cumulative effects of the alternatives, including any measures under the Proposed Action alternative intended to minimize and mitigate such impacts. The final EIS also identified additional alternatives that were considered, but were eliminated from consideration as detailed in Section 2.3 of the final EIS.

We further published a draft SEIS in the **Federal Register** on February 26, 2016 (81 FR 9877), that provided further discussion of the potential significant impacts of the proposed action and an analysis of reasonable alternatives to the proposed action, specifically within the context of additional information made available since completion of final EIS for this project. This additional information addressed estimates of total quantity of sediment impounded by Ballville Dam, the potential impacts of the proposed alternative on harmful

algal blooms (HABs) in the Sandusky River and Lake Erie due to the proposed sediment release, the potential impacts of the proposed alternative on downstream habitats due to sediment release, the accuracy of cost estimates of sediment removal within the EIS, and evaluation of a bypass and excavation alternative provided in comments on the final EIS. Although we concluded that these topics were sufficiently addressed in the final EIS, we provided additional review and assessment in the draft SEIS to help further clarify the issues. To complete this aspect of the draft SEIS, we consulted subject matter experts to help review final EIS materials and clearly articulate our understanding of them. The resulting additional information and explanation was incorporated within the draft SEIS.

This final SEIS further incorporates information received during the public comment period for the draft SEIS, and finalizes the analyses and conclusions in the document.

## Public Comments

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies, and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties.

We request data, comments, new information, or suggestions from the public, concerned governmental agencies, the scientific community, tribes, industry, or any other interested party on this notice. We specifically request comments regarding the additional information and analyses presented in the final SEIS.

You may submit your comments and materials considering this notice by one of the methods listed in the **ADDRESSES** section.

### Public Availability of Comments

All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment

to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

## Authority

This notice is being furnished as provided for by NEPA and its implementing Regulations (40 CFR 1501.7 and 1508.22). The intent of the notice is to obtain suggestions and additional information from other agencies and the public on the final SEIS. Comments and participation in this process are solicited.

### Todd Turner,

*Assistant Regional Director, Fisheries, Midwest Region.*

[FR Doc. 2016-26101 Filed 10-27-16; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[LLNVB00000.LF310000.DD0000.  
LFHFJF500000; 13-08807; MO#  
4500079713]

### Notice of Availability of the Final Environmental Impact Statement for the 3 Bars Ecosystem and Landscape Restoration Project in Eureka County, NV

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** In accordance with the National Environmental Policy Act of 1969, as amended, the Bureau of Land Management (BLM) has prepared a Final Environmental Impact Statement (EIS) for the 3 Bars Ecosystem and Landscape Restoration Project (3 Bars Project) and by this notice is announcing its availability.

**DATES:** The BLM will not issue a final decision on the proposal for a minimum of 30 days from the date that the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**.

**ADDRESSES:** Copies of the 3 Bars Project Final EIS are available for public inspection at the Bureau of Land Management, Mount Lewis Field Office, 50 Bastian Road, Battle Mountain, Nevada, during regular business hours of 7:30 a.m. to 4:30 p.m., Monday through Friday, except holidays. Interested persons may also view the Final EIS at: <http://on.doi.gov/1N1Y62v>.

**FOR FURTHER INFORMATION CONTACT:** Todd Erdody, Fire Ecologist 775-635-4109, Bureau of Land Management, Mount Lewis Field Office, 50 Bastian

Road, Battle Mountain, NV 89820; or email: [3Bars\\_Project@blm.gov](mailto:3Bars_Project@blm.gov). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The 3 Bars Project area in central Eureka County, Nevada, spans approximately 749,810 acres and includes all or portions of three major mountain ranges (Roberts Mountain, Simpson Park Range, and Sulphur Spring Range). Monitoring has indicated that resource conditions within the project area have deteriorated due to past land use activities, causing the BLM to target this area for restoration.

The BLM is proposing a comprehensive treatment program for improving the health of the ecosystem in the 3 Bars Project area. The proposed project focuses on restoration at the landscape level. The proposed treatments range from several acres to several thousand acres, depending on specific treatment and management goals and desired objectives for each resource. Possible treatment methods include manual, mechanical, and biological control treatments, prescribed fire, or wildland fire for resource benefit, and other management actions. The surface landownership consists of about 97 percent public lands administered by the BLM and three percent privately owned lands.

The BLM initiated the scoping period for the Project by publication of a Notice of Intent (75 FR 3916–3917) to prepare an Environmental Impact Statement (EIS) on January 25, 2010. The scoping period ended on March 10, 2010. Public scoping meetings were held in Battle Mountain, Nevada, on February 22, 2010, and in Eureka, Nevada, on February 23, 2010. The BLM received 24 scoping comment letters on the proposed 3 Bars Project. During the scoping period, 637 catalogued individual comments were recorded for the 3 Bars Project EIS. All comments that were received have been incorporated in a Scoping Summary Report and were considered in the subsequent preparation of the Draft EIS.

Based on the public comments received during the scoping period for the 3 Bars Project, the BLM developed and analyzed four alternatives in the Draft EIS; specifically, the All Treatment Method Alternative; No Fire Use

Alternative; Minimal Land Disturbance Alternative; and No Action Alternative.

The BLM has identified site-specific treatment projects that it proposes to implement to restore and manage the 3 Bars Project area. Treatment projects were identified through an iterative process involving the BLM and other Federal, state and local agencies. Treatments would focus on four priority vegetation management concerns:

- Riparian—Treatments in riparian habitats would focus on restoring riparian functionality in areas where structural integrity (incised channel, headcuts, knickpoints, developments, and diversions) and/or appropriate species composition are compromised.
  - Aspen—Treatments in quaking aspen habitats would focus on improving the health of aspen stands by stimulating aspen regeneration.
  - Pinyon-juniper—Treatments in singleleaf pinyon pine and Utah juniper habitats would focus on thinning pinyon-juniper communities to promote woodland health and removing pinyon-juniper where it encroaches into riparian areas and upland habitats, including sagebrush habitat.
  - Sagebrush—Treatments in sagebrush habitats would focus on restoring the sagebrush community by removing encroaching pinyon-juniper, promoting the reestablishment of native forbs and grasses in sagebrush communities, and promoting the development of sagebrush in areas where it occurred historically.
- In addition to the All Available Methods Alternative, three other alternatives are analyzed in the Final EIS. The No Fire Use Alternative would target the same treatment areas, but the methods of treatment would not include prescribed fire or wildland fire for resource benefit. The Minimal Land Disturbance Alternative targets the same areas for treatment, but further limits the methods of treatment to exclude fire use, mechanical treatments, and non-classical biological controls. A No Action Alternative has also been included to provide a baseline against which all other alternatives can be measured. Three additional alternatives were considered, but eliminated from detailed analysis.

The BLM has prepared the Final EIS in coordination with its three Cooperating Agencies: the Nevada Department of Wildlife, Eureka County Board of Commissioners, and the National Park Service—National Trails Intermountain Region.

On September 27, 2013, a Notice of Availability of the Draft EIS was published in the **Federal Register** (78 FR 59712), providing a 45-day public

comment period. One public comment meeting was held on November 7, 2013, in Eureka, Nevada. A second Notice was published in the **Federal Register** (78 FR 67392) entitled “New Dates for Close of Public Comment and Protest Periods Due to Federal Government Shutdown extending the comment period to November 29, 2013.” No preferred alternative for this Project was chosen in the Draft EIS.

More than 6,800 comments were received, of which 6,530 were form letters containing identical or similar comments. The BLM identified 23 substantive issues as a result of the review process. Comments primarily pertained to potential impacts to wild horses, preservation of old growth woodlands, and protection of habitat for wildlife and special status species, including Greater Sage-Grouse. Substantive comments were considered by the BLM and changes to the Final EIS made accordingly.

The Final EIS has identified the All Available Methods Alternative as the preferred alternative, with treatments and treatment objectives that meet previously identified resource management goals. These goals are consistent with the 1986 Shoshone-Eureka Resource Management Plan, as amended by the BLM Nevada and Northeastern California Greater Sage-Grouse Approved Resource Management Plan Amendment and Record of Decision, which currently guides land management activities within the 3 Bars Project area. These goals focus primarily on wildlife and habitat enhancement, fire and fuels management, woodland and rangeland values, wetland and riparian restoration, wild horse management, and protection of traditional edible and medicinal plants and cultural resources.

The 3 Bars ecosystem provides habitat for Greater Sage-Grouse, a BLM special status species. The proposed 3 Bars Project is fully in conformance with the September 2015 BLM Nevada and Northeastern California Greater Sage-Grouse Approved Resource Management Plan Amendment and Record of Decision (ARMPA).

To ensure that treatments benefit Greater Sage-Grouse, sagebrush restoration treatments would adhere to ARMPA Required Design Features (RDFs). These include avoiding treatments near Greater Sage-Grouse leks and avoiding treatments in breeding, brood-rearing, and wintering habitats during those times of the year when Greater Sage-Grouse are using these habitats. The BLM will ensure proper livestock management is in place prior to treatments when necessary in



order to meet project goals and objectives, which would benefit Greater Sage-Grouse habitat.

**Authority:** 40 CFR 1506.6, 40 CFR 1506.10

**Jon D. Sherve,**

*Field Manager, Mount Lewis Field Office.*

[FR Doc. 2016-25978 Filed 10-27-16; 8:45 am]

**BILLING CODE 4310-HC-P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[LLMT929000/L14400000.BJ0000;  
17X1109AF; MO#4500100894]

#### Notice of Filing of Plats of Survey; Montana

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of filing of plats of survey.

**SUMMARY:** The Bureau of Land Management (BLM) will file the plat of survey of the lands described below in the BLM Montana State Office, Billings, Montana, on November 28, 2016.

**DATES:** A notice of protest of the survey must be filed before November 28, 2016 to be considered. A statement of reasons for a protest may be filed with the notice of protest and must be filed within thirty days after the notice of protest is filed.

**ADDRESSES:** Protests of the survey should be sent to the Branch of Cadastral Survey, Bureau of Land Management, 5001 Southgate Drive, Billings, Montana 59101-4669.

**FOR FURTHER INFORMATION CONTACT:** Blaise Lodermeier, Cadastral Surveyor, Branch of Cadastral Survey, Bureau of Land Management, 5001 Southgate Drive, Billings, Montana 59101-4669, telephone (406) 896-5128 or (406) 896-5003, [bloderme@blm.gov](mailto:bloderme@blm.gov). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** This survey was executed at the request of the Chief, Branch of Realty, Lands and Renewable Energy, Bureau of Land Management, Billings, Montana, and was necessary to create Tracts of land to be transferred to the State of Montana through the indemnity selection process.

The lands we surveyed are:

#### Principal Meridian, Montana

Tps. 7 and 8 N., R. 47 E.

The plat, in two sheets, representing the dependent resurvey of Tract O, Tract Z, and a portion of Tract N (Tps. 7 and 8 N., R. 47 E.), and the subdivision of Tract O and Tract Z into Tract CC, Tract DD, Tract EE, and Tract FF, Township 7 North, Range 47 East, Principal Meridian, Montana, was accepted March 17, 2016.

We will place a copy of the plat, in two sheets, in the open files. They will be available to the public as a matter of information. If the BLM receives a protest against this survey, as shown on this plat, in two sheets, prior to the date of the official filing, we will stay the filing pending our consideration of the protest. We will not officially file this plat, in two sheets, until the day after we have accepted or dismissed all protests and they have become final, including decisions or appeals. Before including your address, phone number, email address, or other personally identifying information in your comment, you should be aware that your entire comment—including your personally identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personally identifying information from public review, we cannot guarantee that we will be able to do so.

**Authority:** 43 U.S.C. Chap. 3.

**Joshua F. Alexander,**

*Chief, Branch of Cadastral Survey, Division of Energy, Minerals, and Realty.*

[FR Doc. 2016-26102 Filed 10-27-16; 8:45 am]

**BILLING CODE 4310-DN-P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

[NPS-WASO-NRNHL-22126;  
PPWOCRADIO, PCU00RP14.R50000]

#### National Register of Historic Places; Notification of Pending Nominations and Related Actions

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** The National Park Service is soliciting comments on the significance of properties nominated before October 1, 2016, for listing or related actions in the National Register of Historic Places.

**DATES:** Comments should be submitted by November 14, 2016.

**ADDRESSES:** Comments may be sent via U.S. Postal Service to the National Register of Historic Places, National

Park Service, 1849 C St. NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St. NW., 8th floor, Washington, DC 20005; or by fax, 202-371-6447.

**SUPPLEMENTARY INFORMATION:** The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before October 1, 2016. Pursuant to section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

## GEORGIA

### Fulton County

Sears, Roebuck and Co. Mail-Order Warehouse and Retail Store, 675 Ponce de Leon Ave. NE., Atlanta, 16000769

## MASSACHUSETTS

### Middlesex County

Reeves Tavern, 126 Old Connecticut Path, Wayland, 16000770

## MISSOURI

### Jackson County

West Bottoms—North Historic District, (Railroad Related Historic Commercial and Industrial Resources in Kansas City, Missouri MPS), W. 9th St., St. Louis Ave., Union Ave. from Wyoming to W. of Mulberry Sts., Kansas City, 16000771

## MONTANA

### Glacier County

Rising Wolf, (Glacier National Park MPS), Glacier National Park, St. Mary, 16000772

## NEBRASKA

### Douglas County

Hanscom Apartments, (Apartments, Flats and Tenements in Omaha, Nebraska from 1880-1962 MPS), 1029 Park Ave., Omaha, 16000773

Holy Sepulchre Cemetery, 4912 Leavenworth St., Omaha, 16000774

Scott—Omaha Tent and Awning Company, 1501 Howard St., Omaha, 16000775

### Keith County

Alkali Station, (Conflict & Warfare in the North & South Platte Valleys of Nebraska,



1864–1865 MPS), Address Restricted,  
Roscoe, 16000776

#### NEW JERSEY

##### Sussex County

Evans—Waters Cottage, 11 Grandview Rd.,  
Lake Wallkill, Vernon Township,  
16000777

#### NEW YORK

##### Dutchess County

Poughkeepsie and Connecticut Stanfordville  
Station, 5–15 Old Depot Way,  
Stanfordville, 16000778

##### Monroe County

Maplewood Historic District (Boundary  
Increase), 21–267 Alameda, 26–284  
Albemarle, 21–148 Augustine, 36–68 Birr  
Sts., 1–9, Burke Terrace, 1136–1212 Dewey  
Ave., Rochester, 16000779

##### New York County

Hudson Theatre, 139–141 W. 44th St., New  
York, 16000780

#### WYOMING

##### Washakie County

Saban, James T., Lookout,  
Approx. .9 mi. SW. of US 16 & FS Rd. 429,  
Ten Sleep, 16000781

A request for removal has been received for  
the following resource:

#### NEBRASKA

##### Cedar County

Bow Valley Mills, N. of Wynot, Wynot,  
78003402

**Authority:** 60.13 of 36 CFR part 60.

Dated: October 7, 2016.

##### Christopher Hetzel,

*Acting Chief, National Register of Historic  
Places/National Historic Landmarks Program.*

[FR Doc. 2016–26056 Filed 10–27–16; 8:45 am]

**BILLING CODE 4312–52–P**

#### DEPARTMENT OF THE INTERIOR

##### Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX064A000  
178S180110; S2D2S SS08011000  
SX064A000 17XS501520]

##### North Cumberland Wildlife Management Area, Tennessee Lands Unsuitable for Mining Final Petition Evaluation Document and Environmental Impact Statement OSM– EIS–37

**AGENCY:** Office of Surface Mining  
Reclamation and Enforcement.

**ACTION:** Notice of availability; final  
environmental impact statement.

**SUMMARY:** The Office of Surface Mining  
Reclamation and Enforcement (OSMRE)  
announces that the final Petition  
Evaluation Document and

Environmental Impact Statement (PED/  
EIS) for the North Cumberland Wildlife  
Management Area Petition to Find  
Certain Lands Unsuitable for Surface  
Coal Mining Operations is available for  
public review and comment.

**DATES:** The OSMRE will not issue a final  
decision of the proposal for a minimum  
of 30 days after the date that the  
Environmental Protection Agency  
publishes the Notice of Availability in  
the **Federal Register**.

**ADDRESSES:** Copies of the Final PED/EIS  
for the Project may be viewed online at  
[http://www.osmre.gov/programs/rcm/  
TNLUM.shtm](http://www.osmre.gov/programs/rcm/TNLUM.shtm). In addition, a limited  
number of CD copies of the Final PED/  
EIS are available upon request. You may  
obtain a CD by contacting the person  
identified in **FOR FURTHER INFORMATION  
CONTACT**.

**FOR FURTHER INFORMATION CONTACT:** Earl  
D. Bandy Jr., Director-Knoxville Field  
Office, Office of Surface Mining  
Reclamation and Enforcement, John J.  
Duncan Federal Building, 710 Locust  
Street, 2nd Floor, Knoxville, Tennessee  
37902. Telephone: 865–545–4103 ext.  
186. Email: [TNLUM@osmre.gov](mailto:TNLUM@osmre.gov).

##### SUPPLEMENTARY INFORMATION:

##### Background

On September 30, 2010, pursuant to  
the Surface Mining Control and  
Reclamation Act, 30 U.S.C. 1272 (c)  
(SMCRA), the State of Tennessee filed a  
petition with the Office of Surface  
Mining and Reclamation and  
Enforcement (OSMRE) to designate  
certain lands in the state as unsuitable  
for surface coal mining operations.  
These lands include the area within 600  
feet of all ridge lines (a 1,200 foot  
corridor) lying within the North  
Cumberland Wildlife Management Area  
(NCWMA)—comprised of the Royal  
Blue Wildlife Management Area, the  
Sundquist Wildlife Management Area,  
and the New River Wildlife  
Management Area (also known as the  
Brimstone Tract Conservation  
Easement)—and the Emory River Tracts  
Conservation Easement (ERTCE),  
encompassing approximately 67,326  
acres and 505 miles of ridgelines. In  
Tennessee, OSMRE has operated a  
Federal regulatory program as the  
primary regulator under SMCRA since  
October 1984, when the state repealed  
its surface mining law; therefore, in  
accordance with its responsibility in  
administering the Federal program in  
Tennessee, the OSMRE must process  
and make decisions on all petitions  
submitted to designate areas in the state  
as unsuitable for surface coal mining  
operations.

The petition includes two primary  
allegations with numerous allegations of  
fact and supporting statements. In  
primary allegation 1, the petitioner  
contends that the petition area should  
be designated unsuitable for surface coal  
mining operations because mining in  
the area would be incompatible with  
existing state or local land use plans or  
programs. SMCRA 522(a)(3)(A), 30  
U.S.C. 1272(a)(3)(A). In primary  
allegation 2, the petitioner contends that  
the OSMRE should designate the  
petition area as unsuitable for surface  
coal mining operations because such  
operations would affect fragile or  
historic lands, resulting in significant  
damage to important historic, cultural,  
scientific, and aesthetic values and  
natural systems. SMCRA 522(a)(3)(B),  
30 U.S.C. 1272(a)(3)(B).

The Director, OSMRE, is required to  
make a decision on the petition. The  
Final PED/EIS considers in detail the  
following alternatives for action by the  
Director:

- Alternative 1—do not designate any  
of the petition area as unsuitable for  
surface coal mining operations (no-  
action). There would be no change in  
types of permit applications accepted  
for evaluation.
- Alternative 2—designate the entire  
petition area (67,326 acres) as  
unsuitable for all surface coal mining  
operations (state's proposed action). No  
types of surface mining permit  
applications would be accepted for this  
area.
- Alternative 3—designate the state  
petition area (67,326 acres) as  
unsuitable for surface coal mining  
operations that are not remaining. Under  
this alternative, remaining could  
continue to be permitted on a case-by-  
case basis. The only acceptable types of  
permits would be permits for remaining.
- Alternative 4—grant an expanded  
corridor designation of independently  
identified ridgelines within the petition  
area (76,133 acres) as unsuitable for  
surface coal mining operations that are  
not remaining (agency's preferred  
alternative). Under this alternative,  
remaining could continue to be permitted  
on a case-by-case basis. The only  
acceptable types of permits would be  
permits for remaining.
- Alternative 5—designate lands as  
unsuitable for surface coal mining based  
on the presence of certain sensitive  
resources (12,331 acres). No types of  
surface mining permits would be  
accepted for this area.
- Alternative 6—designate a reduced  
corridor of 600 feet (39,106 acres). No  
types of surface mining permits would  
be accepted for this area.

In accordance with the applicable regulations under 30 CFR parts 762 and 764 and the requirements of the National Environmental Policy Act of 1969 (NEPA), as amended, OSMRE evaluated the merits of the unsuitability petition and analyzed the impacts of these alternatives. This analysis is reflected in the Final PED/EIS, which notes the potential impacts of the project and alternatives on earth resources (geology, topography and physiography), air quality and greenhouse gases, groundwater, surface water, wetlands, vegetation, fish and wildlife including special status species, land use, aesthetics including visual resources and soundscapes, socioeconomic and environmental justice, cultural resources including archaeological, historic and ethnographic resources, and public health and safety. Mitigation measures to be included as part of project implementation will be noted in the final decision.

In accordance with Department of the Interior regulations (43 CFR 46.425), OSMRE identified Alternative 3 as the preferred alternative in the Draft EIS. However, based on public and agency comments, as well as the state's input, OSMRE has now identified alternative 4 as the preferred alternative because it is the most consistent with the state's request. OSMRE reached that decision based on its analysis and conclusion that the "agency's preferred alternative" is the alternative the agency believes would best accomplish the purpose of and need for action, and fulfill its statutory mission and responsibilities, while still giving consideration to economic, environmental, technical, and other factors. Alternative 4 is also the environmentally preferred alternative because of its long-term environmental benefits.

The OSMRE will prepare a Record of Decision (ROD) for the proposed petition after a 30-day period following publication of the NOA.

**Authority:** 40 CFR 1506.6, 40 CFR 1506.1.

Dated: October 7, 2016.

**Thomas D. Shope,**

*Regional Director, Appalachian Region.*

[FR Doc. 2016-25868 Filed 10-27-16; 8:45 am]

**BILLING CODE 4310-05-P**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### Exemptions From Certain Prohibited Transaction Restrictions

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Grant of individual exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following: 2016–10, Royal Bank of Canada, D–11868; 2016–11, Northern Trust Corporation, D–11875; and, 2016–12, Extension of PTE 2015–15 involving Deutsche Bank AG, D–11879.

**SUPPLEMENTARY INFORMATION:** A notice was published in the *Federal Register* of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

#### Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637,

66644, October 27, 2011)<sup>1</sup> and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

#### Royal Bank of Canada (Together With Its Current and Future Affiliates, RBC or the Applicant), Located in Toronto, Ontario, Canada

[Prohibited Transaction Exemption 2016–10; Exemption Application No. D–11868]

##### Temporary Exemption

##### Section I—Covered Transactions

Certain entities with specified relationships to Royal Bank of Canada Trust Company (Bahamas) Limited (RBCTC Bahamas) (hereinafter, the RBC QPAMs, as further defined in Section II(b)) will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Exemption (PTE) 84–14,<sup>2</sup> notwithstanding a judgment of conviction against RBCTC Bahamas for aiding and abetting tax fraud, to be entered in France in the District Court of Paris (the Conviction, as further defined in Section II(a)),<sup>3</sup> for a period of up to twelve months beginning on the date of the Conviction (the Conviction Date), provided that the following conditions are satisfied:

(a) The RBC QPAMs (including their officers, directors, agents other than RBC, and employees of such RBC QPAMs) did not know of, have reason to know of, or participate in the criminal conduct of RBCTC Bahamas that is the subject of the Conviction (for purposes of this paragraph (a), "participate in" includes the knowing or tacit approval of the misconduct underlying the Conviction);

(b) The RBC QPAMs (including their officers, directors, agents other than RBC, and employees of such RBC

<sup>1</sup> The Department has considered exemption applications received prior to December 27, 2011 under the exemption procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

<sup>2</sup> 49 FR 9494 (March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985), as amended at 70 FR 49305 (August 23, 2005), and as amended at 75 FR 38837 (July 6, 2010).

<sup>3</sup> Section I(g) of PTE 84–14 generally provides that "[n]either the QPAM nor any affiliate thereof . . . nor any owner . . . of a 5 percent or more interest in the QPAM is a person who within the 10 years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of" certain felonies including income tax evasion, and aiding and abetting tax evasion.

QPAMs) did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct that is the subject of the Conviction;

(c) The RBC QPAMs will not employ or knowingly engage any of the individuals that participated in the criminal conduct that is the subject of the Conviction (for purposes of this paragraph (c), "participated in" includes the knowing or tacit approval of the misconduct underlying the Conviction);

(d) An RBC QPAM will not use its authority or influence to direct an "investment fund," (as defined in Section VI(b) of PTE 84-14) that is subject to ERISA or the Code and managed by such RBC QPAM, to enter into any transaction with RBCTC Bahamas or engage RBCTC Bahamas to provide any service to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption;

(e) Any failure of the RBC QPAMs to satisfy Section I(g) of PTE 84-14 arose solely from the Conviction;

(f) The criminal conduct that is the subject of the Conviction did not directly or indirectly involve the assets of any plan subject to Part 4 of Title I of ERISA (an ERISA-covered plan) or section 4975 of the Code (an IRA);

(g) RBCTC Bahamas has not provided nor will provide discretionary asset management services to ERISA-covered plans or IRAs, nor will it otherwise act as a fiduciary with respect to ERISA-covered plan and IRA assets;

(h)(1) Within four months of the date of the Conviction, each RBC QPAM must develop, implement, maintain, and follow written policies (the Policies) requiring and reasonably designed to ensure that:

(i) The asset management decisions of the RBC QPAM are conducted independently of the management and business activities of RBCTC Bahamas;

(ii) The RBC QPAM fully complies with ERISA's fiduciary duties and with ERISA and the Code's prohibited transaction provisions, and does not knowingly participate in any violations of these duties and provisions with respect to ERISA-covered plans and IRAs;

(iii) The RBC QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to ERISA-covered plans and IRAs;

(iv) Any filings or statements made by the RBC QPAM to regulators, including

but not limited to, the Department of Labor, the Department of the Treasury, the Department of Justice, and the Pension Benefit Guaranty Corporation, on behalf of ERISA-covered plans or IRAs are materially accurate and complete, to the best of such QPAM's knowledge at that time;

(v) The RBC QPAM does not make material misrepresentations or omit material information in its communications with such regulators with respect to ERISA-covered plans or IRAs, or make material misrepresentations or omit material information in its communications with ERISA-covered plan and IRA clients;

(vi) The RBC QPAM complies with the terms of this temporary exemption; and

(vii) Any violation of, or failure to comply with, an item in subparagraph (ii) through (vi), is corrected promptly upon discovery, and any such violation or compliance failure not promptly corrected is reported, upon discovering the failure to promptly correct, in writing, to appropriate corporate officers, the head of compliance and the General Counsel (or their functional equivalent) of the relevant RBC QPAM, and an appropriate fiduciary of any affected ERISA-covered plan or IRA where such fiduciary is independent of RBC; however, with respect to any ERISA-covered plan or IRA sponsored by an "affiliate" (as defined in Section VI(d) of PTE 84-14) of RBC or beneficially owned by an employee of RBC or its affiliates, such fiduciary does not need to be independent of RBC. An RBC QPAM will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided that it corrects any instance of noncompliance promptly when discovered or when it reasonably should have known of the noncompliance (whichever is earlier), and provided that it adheres to the reporting requirements set forth in this subparagraph (vii);

(2) Within four months of the date of the Conviction, each RBC QPAM must develop and implement a program of training (the Training), conducted at least annually, for all relevant RBC QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. The Training must be set forth in the Policies and at a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions), ethical conduct, the consequences for not complying with the conditions of this temporary exemption (including any loss of exemptive relief provided

herein), and prompt reporting of wrongdoing;

(i) Effective as of the effective date of this temporary exemption, with respect to any arrangement, agreement, or contract between an RBC QPAM and an ERISA-covered plan or IRA for which an RBC QPAM provides asset management or other discretionary fiduciary services, each RBC QPAM agrees:

(1) To comply with ERISA and the Code, as applicable with respect to such ERISA-covered plan or IRA; to refrain from engaging in prohibited transactions that are not otherwise exempt (and to promptly correct any inadvertent prohibited transactions); and to comply with the standards of prudence and loyalty set forth in section 404 of ERISA with respect to each such ERISA-covered plan and IRA;

(2) Not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the RBC QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(3) Not to require the ERISA-covered plan or IRA (or sponsor of such ERISA-covered plan or beneficial owner of such IRA) to indemnify the RBC QPAM for violating ERISA or engaging in prohibited transactions, except for violations or prohibited transactions caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of RBC;

(4) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the RBC QPAM (including any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM), with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors as a result of an actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors;

(5) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other

investors, provided that such fees are applied consistently and in like manner to all such investors;

(6) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the RBC QPAM for a violation of such agreement's terms, except for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of RBC; and

(7) To indemnify and hold harmless the ERISA-covered plan or IRA for any damages resulting from a violation of applicable laws, a breach of contract, or any claim arising out of the failure of such RBC QPAM to qualify for the exemptive relief provided by PTE 84-14 as a result of a violation of Section I(g) of PTE 84-14 other than the Conviction.

Within six (6) months of the date of the Conviction, each RBC QPAM will: Provide a notice of its obligations under this Section I(i) to each ERISA-covered plan and IRA for which an RBC QPAM provides asset management or other discretionary fiduciary services;

(j) The RBC QPAMs comply with each condition of PTE 84-14, as amended, with the sole exceptions of the violations of Section I(g) of PTE 84-14 that are attributable to the Conviction;

(k) Each RBC QPAM will maintain records necessary to demonstrate that the conditions of this temporary exemption have been met, for six (6) years following the date of any transaction for which such RBC QPAM relies upon the relief in the temporary exemption;

(l) During the effective period of this temporary exemption, RBC: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) that RBC or an affiliate enters into with the U.S. Department of Justice, to the extent such DPA or NPA involves conduct described in Section I(g) of PTE 84-14 or section 411 of ERISA; and (2) immediately provides the Department any information requested by the Department, as permitted by law, regarding the agreement and/or the conduct and allegations that led to the agreements; and

(m) An RBC QPAM will not fail to meet the terms of this temporary exemption, solely because a different RBC QPAM fails to satisfy a condition for relief under this temporary exemption, described in Sections I(c), (d), (h), (i), (j), and (k).

#### Section II—Definitions

(a) The term “Conviction” means the potential judgment of conviction against

RBCTC Bahamas for aiding and abetting tax fraud to be entered in France in the District Court of Paris, French Special Prosecutor No. 1120392066, French Investigative Judge No. JIRSIF/11/12;

(b) The term “RBC QPAM” means a “qualified professional asset manager” (as defined in section VI(a) <sup>4</sup> of PTE 84-14) that relies on the relief provided by PTE 84-14 and with respect to which RBCTC Bahamas is a current or future “affiliate” (as defined in section VI(d) of PTE 84-14);

(c) The term “RBCTC Bahamas” means Royal Bank of Canada Trust Company (Bahamas) Limited, a Bahamian “affiliate” of RBC (as defined in section VI(c) of PTE 84-14);

(d) The terms “ERISA-covered plan” and “IRA” mean, respectively, a plan subject to Part 4 of Title I of ERISA and a plan subject to section 4975 of the Code; and

(e) The term “RBC” means Royal Bank of Canada, together with its current and future affiliates.

*Effective Date:* This temporary exemption is effective for the period beginning on the Conviction Date until the earlier of: The date that is twelve months following the Conviction Date; or the effective date of a final agency action made by the Department in connection with an application for long-term exemptive relief for the covered transactions described herein.

#### Supplementary Information

On October 12, 2016, the Department of Labor (the Department) published a notice of proposed temporary exemption in the **Federal Register** at 81 FR 70562, proposing that certain entities with specified relationships to RBCTC Bahamas could continue to rely upon the relief provided by PTE 84-14 (49 FR 9494 (March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985), as amended at 70 FR 49305 (August 23, 2005), and as amended at 75 FR 38837 (July 6, 2010)), notwithstanding a judgment of conviction against RBCTC Bahamas for aiding and abetting tax fraud, to be entered in France in the District Court of Paris (the Conviction, as further defined in Section II(a)),<sup>5</sup> for

<sup>4</sup> In general terms, a QPAM is an independent fiduciary that is a bank, savings and loan association, insurance company, or investment adviser that meets certain equity or net worth requirements and other licensure requirements and that has acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM.

<sup>5</sup> Section I(g) of PTE 84-14 generally provides that “[n]either the QPAM nor any affiliate thereof . . . nor any owner . . . of a 5 percent or more interest in the QPAM is a person who within the 10 years immediately preceding the transaction has been either convicted or released from

a period of up to twelve months beginning on the date of the Conviction.

The Department is today granting this temporary exemption in order to protect ERISA-covered plans and IRAs from certain costs and/or investment losses that may arise to the extent entities with a corporate relationship to RBCTC Bahamas lose their ability to rely on PTE 84-14 as of the Conviction Date, as described in the proposed temporary exemption. The Department is considering proposing longer-term relief for RBC QPAMs to rely on PTE 84-14 notwithstanding the Conviction, in Application No. D-11912. The relief in this temporary exemption provides the Department more time to consider whether longer-term relief is warranted.

No relief from a violation of any other law is provided by this temporary exemption, including any criminal conviction described in the proposed temporary exemption. Furthermore, the Department cautions that the relief in this temporary exemption will terminate immediately if, among other things, an entity within the RBC corporate structure is convicted of a crime described in Section I(g) of PTE 84-14 (other than the Conviction) during the effective period of the temporary exemption. While such an entity could apply for a new exemption in that circumstance, the Department would not be obligated to grant the exemption. The terms of this temporary exemption have been specifically designed to permit plans to terminate their relationships in an orderly and cost effective fashion in the event of an additional conviction or a determination that it is otherwise prudent for a plan to terminate its relationship with an entity covered by the temporary exemption.

#### Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed temporary exemption, published on October 12, 2016. All comments and requests for hearing were due by October 19, 2016. During the comment period, the Department received written comments from RBC and from The Clearing House. Although the Department has, for the most part, revised the proposed temporary exemption in the manner requested by RBC, the Department cautions that it may decline to include those revisions in any decision to grant more permanent relief.

imprisonment, whichever is later, as a result of certain felonies including income tax evasion, and aiding and abetting tax evasion.

## RBC's Comment

RBC seeks several revisions to the conditions set forth in the proposed temporary exemption. First, RBC states that Section I(f) of the proposed temporary exemption may be unintentionally broad. As proposed, that condition states: "No entities holding assets that constitute the assets of any plan subject to Part 4 of Title I of ERISA (an ERISA-covered plan) or section 4975 of the Code (an IRA) were involved in the criminal conduct that is the subject of the Conviction." RBC seeks to revise the condition to read: "The criminal conduct that is the subject of the Conviction did not directly or indirectly involve the assets of any plan subject to Part 4 of Title I of ERISA (an ERISA-covered plan) or section 4975 of the Code (an IRA)." The Department has decided to revise the condition in the manner requested by RBC.

Next, RBC notes that Section I(h) of the proposed temporary exemption requires that each RBC QPAM "immediately:" Develop, implement, maintain and follow certain written policies; and develop and implement a program of training. RBC seeks a period of up to four months following the date of its impending conviction to meet these requirements. The Department agrees that four months is a reasonable period of time with which to comply with the requirement of Section I(h) and has revised the condition accordingly.

RBC seeks another change to Section I(h)(1)(i), through the deletion of the bolded language, "The asset management decisions of the RBC QPAM are conducted independently of the management and business activities of RBC, including RBCTC Bahamas. RBC represents that it has neither committed, nor been accused of committing, a crime. The Department has revised the condition accordingly.

RBC also seeks to change the start date of the notice requirement set forth in Section I(i), such that each RBC must provide such notice within six months of the Conviction Date, rather than within six months of the date of publication of this granted temporary exemption. The Department concurs with this request, and has revised the temporary exemption accordingly.

RBC seeks deletion of the requirement in Section I(i) that requires each RBC QPAM to separately warrant in writing its obligations to ERISA-Covered Plans and IRAs. While the Department has made such revision for purposes of the limited relief herein, the Department re-emphasizes, as noted above, that it may

decide to propose more permanent relief that does not contain this revision.

RBC seeks deletion of requirement set forth in Section I(i)(6) that, each RBC QPAM agrees: "Not to include exculpatory provisions disclaiming or otherwise limiting liability of the RBC QPAM for a violation of such agreement's terms." The Department declines to make such deletion, but has revised the condition to read: "Not to include exculpatory provisions disclaiming or otherwise limiting liability of the RBC QPAM for a violation of such agreement's terms, except for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of RBC."

RBC notes that, in addition to the asset managers identified in the proposed exemption, the following managers are owned in whole or in part by RBC: BlueBay Asset Management USA, LLC; City National Bank; City National Rochdale, LLC; City National Securities, Inc.; Convergent Wealth Advisors, LLC; LMCG Investments, LLC; Mid-Continent Capital, L.L.C.; and Symphonic Financial Advisors LLC be added to the list of primary U.S. bank and U.S. registered adviser affiliates in which RBC owns a significant interest. Three additional managers are owned in part but not currently controlled by RBC: Matthews International Capital Management, LLC; SKBA Capital Management, LLC; and O'Shaughnessy Asset Management, LLC. Further, RBC believes that Footnote 16 of the proposed exemption implies that the Hong Kong investigation is connected to RBCTC Bahamas' alleged conduct that is the subject of the French prosecution described in Section II(a) of the proposal. According to RBC, the Hong Kong investigation is entirely unrelated to the matter that is the subject of the French prosecution described in Section II(a).

Condition (l) set forth in the proposed exemption provided that during the effective period of this temporary exemption, neither RBC nor any affiliate enters into a Deferred Prosecution Agreement (a DPA) or a Non-Prosecution Agreement (an NPA) with the U.S. Department of Justice, in connection with conduct described in Section I(g) of PTE 84-14 or section 411 of ERISA. RBC sought to reserve its right to comment on this condition in connection with the Department's consideration of more permanent relief. The Department has nonetheless revised condition (l) such that it now reads: During the effective period of this temporary exemption, RBC: (1)

Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) that RBC or an affiliate enters into with the U.S. Department of Justice, to the extent such DPA or NPA involves conduct described in Section I(g) of PTE 84-14 or section 411 of ERISA; and (2) immediately provides the Department any information requested by the Department, as permitted by law, regarding the agreement and/or the conduct and allegations that led to the agreements.

## The Clearing House Comment

The Clearing House Association L.L.C. (TCH) submitted a comment that expresses concern regarding condition (l) in Section I of the proposed temporary exemption. As noted above, the Department has revised that condition. The Department will continue to consider TCH's comment in connection with its consideration of more permanent relief for RBC.

After giving full consideration to the record, the Department has decided to grant the temporary exemption, as described above. The complete application file (Application No. D-11868) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1515, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this temporary exemption, refer to the notice of proposed temporary exemption published on October 12, 2016 at 81 FR 70562.

**FOR FURTHER INFORMATION CONTACT:** Ms. Anna Mpras Vaughan of the Department, telephone (202) 693-8565. (This is not a toll-free number.)

**Northern Trust Corporation (Together With Its Current and Future Affiliates, Northern or the Applicant), Located in Chicago, Illinois**

[Prohibited Transaction Exemption 2016-11; Exemption Application No. D-11875]

*Temporary Exemption*

## Section I—Covered Transactions

Certain entities with specified relationships to Northern Trust Fiduciary Services (Guernsey) Ltd. (NTFS) (hereinafter, the Northern QPAMs, as further defined in Section II(b)) will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Exemption 84-

14 (PTE) 84–14,<sup>6</sup> notwithstanding a judgment of conviction against NTFS for aiding and abetting tax fraud, to be entered in France in the District Court of Paris (the Conviction, as further defined in Section II(a)),<sup>7</sup> for a period of up to twelve months beginning on the date of the Conviction (the Conviction Date), provided that the following conditions are satisfied:

(a) The Northern QPAMs (including their officers, directors, agents other than Northern, and employees of such Northern QPAMs) did not know of, have reason to know of, or participate in the criminal conduct of NTFS that is the subject of the Conviction (for purposes of this paragraph (a), “participate in” includes the knowing or tacit approval of the misconduct underlying the Conviction);

(b) The Northern QPAMs (including their officers, directors, agents other than Northern, and employees of such Northern QPAMs) did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct that is the subject of the Conviction;

(c) The Northern QPAMs will not employ or knowingly engage any of the individuals that participated in the criminal conduct that is the subject of the Conviction (for purposes of this paragraph (c), “participated in” includes the knowing or tacit approval of the misconduct underlying the Conviction);

(d) A Northern QPAM will not use its authority or influence to direct an “investment fund,” (as defined in Section VI(b) of PTE 84–14) that is subject to ERISA or the Code and managed by such Northern QPAM, to enter into any transaction with NTFS or engage NTFS to provide any service to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption;

(e) Any failure of the Northern QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction;

(f) No entities holding assets that constitute the assets of any plan subject to Part 4 of Title I of ERISA (an ERISA-covered plan) or section 4975 of the Code (an IRA) were involved in the criminal conduct that is the subject of the Conviction;

(g) NTFS has not provided nor will provide discretionary asset management services to ERISA-covered plans or IRAs, nor will it otherwise act as a fiduciary with respect to ERISA-covered plan and IRA assets;

(h)(1) Within four months of the date of the Conviction, each Northern QPAM must develop, implement, maintain, and follow written policies (the Policies) requiring and reasonably designed to ensure that:

(i) The asset management decisions of the Northern QPAM are conducted independently of the management and business activities of NTFS;

(ii) The Northern QPAM fully complies with ERISA’s fiduciary duties and with ERISA and the Code’s prohibited transaction provisions, and does not knowingly participate in any violations of these duties and provisions with respect to ERISA-covered plans and IRAs;

(iii) The Northern QPAM does not knowingly participate in any other person’s violation of ERISA or the Code with respect to ERISA-covered plans and IRAs;

(iv) Any filings or statements made by the Northern QPAM to regulators, including but not limited to, the Department of Labor, the Department of the Treasury, the Department of Justice, and the Pension Benefit Guaranty Corporation, on behalf of ERISA-covered plans or IRAs are materially accurate and complete, to the best of such QPAM’s knowledge at that time;

(v) The Northern QPAM does not make material misrepresentations or omit material information in its communications with such regulators with respect to ERISA-covered plans or IRAs, or make material misrepresentations or omit material information in its communications with ERISA-covered plan and IRA clients;

(vi) The Northern QPAM complies with the terms of this temporary exemption; and

(vii) Any violation of, or failure to comply with, an item in subparagraph (ii) through (vi), is corrected promptly upon discovery, and any such violation or compliance failure not promptly corrected is reported, upon discovering the failure to promptly correct, in writing, to appropriate corporate officers, the head of compliance and the General Counsel (or their functional equivalent) of the relevant Northern

QPAM, and an appropriate fiduciary of any affected ERISA-covered plan or IRA where such fiduciary is independent of Northern; however, with respect to any ERISA-covered plan or IRA sponsored by an “affiliate” (as defined in Section VI(d) of PTE 84–14) of Northern or beneficially owned by an employee of Northern or its affiliates, such fiduciary does not need to be independent of Northern. A Northern QPAM will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided that it corrects any instance of noncompliance promptly when discovered or when it reasonably should have known of the noncompliance (whichever is earlier), and provided that it adheres to the reporting requirements set forth in this subparagraph (vii);

(2) Within four months of the date of the Conviction, Northern QPAM must develop and implement a program of training (the Training), conducted at least annually, for all relevant Northern QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. The Training must be set forth in the Policies and at a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions), ethical conduct, the consequences for not complying with the conditions of this temporary exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing;

(i) Effective as of the effective date of this temporary exemption, with respect to any arrangement, agreement, or contract between a Northern QPAM and an ERISA-covered plan or IRA for which a Northern QPAM provides asset management or other discretionary fiduciary services, each Northern QPAM agrees:

(1) To comply with ERISA and the Code, as applicable with respect to such ERISA-covered plan or IRA; to refrain from engaging in prohibited transactions that are not otherwise exempt (and to promptly correct any inadvertent prohibited transactions); and to comply with the standards of prudence and loyalty set forth in section 404 of ERISA with respect to each such ERISA-covered plan and IRA;

(2) Not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the Northern QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(3) Not to require the ERISA-covered plan or IRA (or sponsor of such ERISA-covered plan or beneficial owner of

<sup>6</sup> 49 FR 9494 (March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985), as amended at 70 FR 49305 (August 23, 2005), and as amended at 75 FR 38837 (July 6, 2010).

<sup>7</sup> Section I(g) of PTE 84–14 generally provides that “[n]either the QPAM nor any affiliate thereof . . . nor any owner . . . of a 5 percent or more interest in the QPAM is a person who within the 10 years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of” certain felonies including income tax evasion, and aiding and abetting tax evasion.

such IRA) to indemnify the Northern QPAM for violating ERISA or engaging in prohibited transactions, except for violations or prohibited transactions caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of Northern;

(4) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the Northern QPAM (including any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM), with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors as a result of an actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors;

(5) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors;

(6) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the Northern QPAM for a violation of such agreement's terms, except for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of Northern Trust; and

(7) To indemnify and hold harmless the ERISA-covered plan or IRA for any damages resulting from a violation of applicable laws, a breach of contract, or any claim arising out of the failure of such Northern QPAM to qualify for the exemptive relief provided by PTE 84-14 as a result of a violation of Section I(g) of PTE 84-14 other than the Conviction.

Within six (6) months of the date of the Conviction, each Northern QPAM will: Provide a notice of its obligations under this Section I(i) to each ERISA-covered plan and IRA for which a Northern QPAM provides asset management or other discretionary fiduciary services;

(j) The Northern QPAMs comply with each condition of PTE 84-14, as amended, with the sole exceptions of the violations of Section I(g) of PTE 84-14 that are attributable to the Conviction;

(k) Each Northern QPAM will maintain records necessary to demonstrate that the conditions of this temporary exemption have been met, for six (6) years following the date of any transaction for which such Northern QPAM relies upon the relief in the temporary exemption;

(l) During the effective period of this temporary exemption, Northern Trust: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) that Northern Trust enters into with the U.S. Department of Justice, to the extent such DPA or NPA involves conduct described in Section I(g) of PTE 84-14 or section 411 of ERISA; and (2) immediately provides the Department any information requested by the Department, as permitted by law, regarding the agreement and/or the conduct and allegations that led to the agreements; and

(m) A Northern QPAM will not fail to meet the terms of this temporary exemption, solely because a different Northern QPAM fails to satisfy a condition for relief under this temporary exemption, described in Sections I(c), (d), (h), (i), (j), and (k).

#### Section II—Definitions

(a) The term “Conviction” means the potential judgment of conviction against NTFS for aiding and abetting tax fraud to be entered in France in the District Court of Paris, French Special Prosecutor No. 1120392066, French Investigative Judge No. JIRSIF/11/12;

(b) The term “Northern QPAM” means a “qualified professional asset manager” (as defined in section VI(a)<sup>8</sup> of PTE 84-14) that relies on the relief provided by PTE 84-14 and with respect to which NTFS is a current or future “affiliate” (as defined in section VI(d) of PTE 84-14);

(c) The term “NTFS” means Northern Trust Fiduciary Services (Guernsey) Ltd., an affiliate” of Northern (as defined in section VI(c) of PTE 84-14) located in Guernsey;

(d) The terms “ERISA-covered plan” and “IRA” mean, respectively, a plan

<sup>8</sup> In general terms, a QPAM is an independent fiduciary that is a bank, savings and loan association, insurance company, or investment adviser that meets certain equity or net worth requirements and other licensure requirements and that has acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM.

subject to Part 4 of Title I of ERISA and a plan subject to section 4975 of the Code; and

(e) The term “Northern” means Northern Trust Corporation, together with its current and future affiliates.

*Effective Date:* This temporary exemption is effective for the period beginning on the Conviction Date until the earlier of: The date that is twelve months following the Conviction Date; or the effective date of a final agency action made by the Department in connection with an application for long-term exemptive relief for the covered transactions described herein.

#### Supplementary Information

On October 12, 2016, the Department of Labor (the Department) published a notice of proposed temporary exemption in the **Federal Register** at 81 FR 70562, proposing that certain entities with specified relationships to NTFS could continue to rely upon the relief provided by PTE 84-14 (49 FR 9494 (March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985), as amended at 70 FR 49305 (August 23, 2005), and as amended at 75 FR 38837 (July 6, 2010)), notwithstanding a judgment of conviction against NTFS for aiding and abetting tax fraud, to be entered in France in the District Court of Paris (the Conviction, as further defined in Section II(a)),<sup>9</sup> for a period of up to twelve months beginning on the date of the Conviction.

The Department is today granting this temporary exemption in order to protect ERISA-covered plans and IRAs from certain costs and/or investment losses that may arise to the extent entities with a corporate relationship to NTFS lose their ability to rely on PTE 84-14 as of the Conviction Date, as described in the proposed temporary exemption. The Department is considering proposing longer-term relief for Northern QPAMs to rely on PTE 84-14 notwithstanding the Conviction, in Application No. D-11911. The relief in this temporary exemption provides the Department more time to consider whether longer-term relief is warranted.

No relief from a violation of any other law is provided by this temporary exemption, including any criminal conviction described in the proposed temporary exemption. Furthermore, the

<sup>9</sup> Section I(g) of PTE 84-14 generally provides that “[n]either the QPAM nor any affiliate thereof . . . nor any owner . . . of a 5 percent or more interest in the QPAM is a person who within the 10 years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of” certain felonies including income tax evasion, and aiding and abetting tax evasion.



Department cautions that the relief in this temporary exemption will terminate immediately if, among other things, an entity within the Northern corporate structure is convicted of a crime described in Section I(g) of PTE 84–14 (other than the Conviction) during the effective period of the temporary exemption. While such an entity could apply for a new exemption in that circumstance, the Department would not be obligated to grant the exemption. The terms of this temporary exemption have been specifically designed to permit plans to terminate their relationships in an orderly and cost effective fashion in the event of an additional conviction or a determination that it is otherwise prudent for a plan to terminate its relationship with an entity covered by the temporary exemption.

#### *Written Comments*

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed temporary exemption, published on October 12, 2016. All comments and requests for hearing were due by October 18, 2016. The Department received two written comments, one from Northern Trust, the other from Clearing House Association L.L.C. (TCH), both of which are described below.

Although the Department has revised, in part, the proposed exemption in the manner requested by Northern Trust, the Department cautions that it may decline to include such revisions in any decision to grant more permanent relief.

#### *Northern Trust Comment*

Northern Trust notes that Section I(h) of the proposed exemption requires that each Northern QPAM “immediately:” Develop, implement, maintain and follow certain written policies; and develop and implement a program of training. Northern Trust seeks a period of up to four months following the date of its impending conviction to meet these requirements. The Department agrees that four months is a reasonable period of time with which to comply with the requirement of Section I(h) and has revised the condition accordingly.

Northern Trust seeks another change to Section I(h)(1)(i), through the deletion of the bracketed language, “The asset management decisions of the Northern QPAM are conducted independently of the management and business activities of [Northern, including] NTFS [and Northern’s non-asset management affiliates.]” Northern Trust represents that it has neither committed, nor been accused of committing, a crime. The

Department has revised the condition accordingly.

Northern Trust seeks deletion of the requirement in Section I(i) that requires each Northern QPAM to separately warrant in writing its obligations to ERISA-Covered Plans and IRAs. While the Department has made such revision for purposes of the limited relief herein, the Department re-emphasizes, as noted above, that it may decide to propose more permanent relief that does not contain this revision.

Northern Trust seeks deletion of the requirement set forth in Section I(i)(6) that, each Northern QPAM agrees: “Not to include exculpatory provisions disclaiming or otherwise limiting liability of the Northern QPAM for a violation of such agreement’s terms.” The Department declines to make such deletion, but has revised the condition to read: “Not to include exculpatory provisions disclaiming or otherwise limiting liability of the Northern QPAM for a violation of such agreement’s terms, except for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of Northern Trust.”

Condition (l) of the proposed exemption provided that neither Northern Trust nor any affiliate could enter into a Deferred Prosecution Agreement (a DPA) or a Non-Prosecution Agreement (an NPA) with the U.S. Department of Justice, in connection with conduct described in Section I(g) of PTE 84–14 or section 411 of ERISA. Northern Trust sought to reserve its right to comment on this condition in connection with the Department’s consideration of more permanent relief. The Department has nonetheless determined to revise condition (l), to require that, during the effective period of this temporary exemption, Northern Trust: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) that Northern Trust enters into with the U.S. Department of Justice, to the extent such DPA or NPA involves conduct described in Section I(g) of PTE 84–14 or section 411 of ERISA; and (2) immediately provides the Department any information requested by the Department, as permitted by law, regarding the agreement and/or the conduct and allegations that led to the agreements.

#### *The Clearing House Comment*

The Clearing House Association L.L.C. (TCH) submitted a comment that expresses concern regarding condition

(l) in Section I of the proposed temporary exemption. Although the Department has revised condition (l) in the manner described above, the Department will continue to consider TCH’s comment in connection with its consideration of more permanent relief for Northern Trust.

After giving full consideration to the record, the Department has decided to grant the temporary exemption, as described above. The complete application file (Application No. D–11875) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department’s decision to grant this temporary exemption, refer to the notice of proposed temporary exemption published on October 12, 2016 at 81 FR 70569.

**FOR FURTHER INFORMATION CONTACT:** Ms. Anna Mpras Vaughan of the Department, telephone (202) 693–8565. (This is not a toll-free number.)

#### **Extension of PTE 2015–15 (the Extension) Involving Deutsche Bank AG (Deutsche Bank), Located in Frankfurt, Germany**

[Prohibited Transaction Exemption 2016–12; Exemption Application No. D–11879]

#### *Exemption*

##### Section I—Covered Transactions

Certain asset managers with specified relationships to Deutsche Bank (hereinafter, the DB QPAMs, as further defined in Section II(b)) shall not be precluded from relying on the exemptive relief provided by Prohibited Transaction Exemption (PTE) 84–14,<sup>10</sup> notwithstanding a judgment of conviction against Deutsche Securities Korea Co., a South Korean affiliate of Deutsche Bank (hereinafter, DSK, as further defined in Section II(c)), entered on January 25, 2016 (the Korean Conviction, as further defined in Section II(a)),<sup>11</sup> provided that the following conditions are satisfied:

<sup>10</sup> 49 FR 9494 (March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985), as amended at 70 FR 49305 (August 23, 2005), and as amended at 75 FR 38837 (July 6, 2010).

<sup>11</sup> Section I(g) of PTE 84–14 generally provides that “[n]either the QPAM nor any affiliate thereof . . . nor any owner . . . of a 5 percent or more interest in the QPAM is a person who within the 10 years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of” certain felonies including income tax evasion and



(a) The DB QPAMs (including their officers, directors, agents other than Deutsche Bank, and employees of such DB QPAMs) did not know of, have reason to know of, or participate in the criminal conduct of DSK that is the subject of the Korean Conviction;

(b) Any failure of the DB QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Korean Conviction;

(c) The DB QPAMs (including their officers, directors, agents other than Deutsche Bank, and employees of such DB QPAMs) did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct that is the subject of the Conviction;

(d) A DB QPAM will not use its authority or influence to direct an “investment fund” (as defined in Section VI(b) of PTE 84–14) that is subject to ERISA and managed by such DB QPAM to enter into any transaction with DSK or engage DSK to provide additional services to such investment fund, for a direct or indirect fee borne by such investment fund regardless of whether such transactions or services may otherwise be within the scope of relief provided by an administrative or statutory exemption;

(e)(1) Each DB QPAM maintains and follows written policies (the Policies) requiring and reasonably designed to ensure that: (i) The asset management decisions of the DB QPAM are conducted independently of Deutsche Bank’s management and business activities; (ii) the DB QPAM fully complies with ERISA’s fiduciary duties and ERISA and the Code’s prohibited transaction provisions and does not knowingly participate in any violations of these duties and provisions with respect to ERISA-covered plans and IRAs; (iii) the DB QPAM does not knowingly participate in any other person’s violation of ERISA or the Code with respect to ERISA-covered plans and IRAs; (iv) any filings or statements made by the DB QPAM to regulators, including but not limited to, the Department of Labor, the Department of the Treasury, the Department of Justice, and the Pension Benefit Guaranty Corporation, on behalf of ERISA-covered plans or IRAs are materially accurate and complete, to the best of such DB QPAM’s knowledge at that time; (v) the DB QPAM does not make material misrepresentations or omit material information in its communications with such regulators with respect to ERISA-covered plans or IRAs, or make material

misrepresentations or omit material information in its communications with ERISA-covered plan and IRA clients; (vi) the DB QPAM complies with the terms of this Extension; and (vii) any violations of or failure to comply with items (ii) through (vi) are corrected promptly upon discovery and any such violations or compliance failures not promptly corrected are reported, upon discovering the failure to promptly correct, in writing to appropriate corporate officers, the head of Compliance and the General Counsel of the relevant DB QPAM (or their functional equivalent), the independent auditor responsible for reviewing compliance with the Policies, and an appropriate fiduciary of any affected ERISA-covered plan or IRA that is independent of Deutsche Bank; however, with respect to any ERISA-covered plan or IRA sponsored by an “affiliate” (as defined in Section VI(d) of PTE 84–14) of Deutsche Bank or beneficially owned by an employee of Deutsche Bank or its affiliates, such fiduciary does not need to be independent of Deutsche Bank. DB QPAMs will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided that they correct any instances of noncompliance promptly when discovered or when they reasonably should have known of the noncompliance (whichever is earlier), and provided that they adhere to the reporting requirements set forth in this item (vii);

(2) Each DB QPAM maintains and follows a program of training (the Training), conducted during the effective period of this Extension, for relevant DB QPAM asset management, legal, compliance, and internal audit personnel (other than personnel who received training in a manner that meets the requirements of PTE 2015–15 within the prior 12 months); the Training must be set forth in the Policies and, at a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions) and ethical conduct, the consequences for not complying with the conditions of this Extension, (including the loss of the exemptive relief provided therein), and prompt reporting of wrongdoing;

(f)(1) Each DB QPAM submits to an audit conducted by an independent auditor, who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code to evaluate the adequacy of, and compliance with, the Policies and Training described herein; the audit requirement must be

incorporated in the Policies. The audit must cover the period of time during which this Extension is effective, and must be completed no later than six (6) months after the period to which the audit applies;

(2) To the extent necessary for the auditor, in its sole opinion, to complete its audit and comply with the conditions for relief described herein, and as permitted by law, each DB QPAM and, if applicable, Deutsche Bank, will grant the auditor unconditional access to its business, including, but not limited to: its computer systems, business records, transactional data, workplace locations, training materials, and personnel;

(3) The auditor’s engagement must specifically require the auditor to determine whether each DB QPAM has developed, implemented, maintained, and followed Policies in accordance with the conditions of this Extension and developed and implemented the Training, as required herein;

(4) The auditor’s engagement shall specifically require the auditor to test each DB QPAM’s operational compliance with the Policies and Training. In this regard, the auditor must test a sample of the QPAM’s transactions involving ERISA-covered plans and IRAs sufficient in size and nature to afford the auditor a reasonable basis to determine the operational compliance with the Policies and Training;

(5) On or before the end of the period described in Section I(f)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to Deutsche Bank and the DB QPAM to which the audit applies that describes the procedures performed by the auditor during the course of its examination. The Audit Report must include the auditor’s specific determinations regarding the adequacy of, and compliance with, the Policies and Training; the auditor’s recommendations (if any) with respect to strengthening such Policies and Training; and any instances of the respective DB QPAM’s noncompliance with the written Policies and Training described in paragraph (e) above. Any determinations made by the auditor regarding the adequacy of the Policies and Training and the auditor’s recommendations (if any) with respect to strengthening the Policies and Training of the respective DB QPAM must be promptly addressed by such DB QPAM, and any actions taken by such DB QPAM to address such recommendations must be included in an addendum to the Audit Report. Any determinations by the auditor that the

respective DB QPAM has maintained and followed sufficient Policies and Training shall not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that the DB QPAM has complied with the requirements under this subsection must be based on evidence that demonstrates the DB QPAM has actually maintained and followed the Policies and Training required by this Extension and not solely on a lack of evidence that the DB QPAM has violated ERISA;

(6) The auditor shall notify the respective DB QPAM of any instances of noncompliance identified by the auditor within five (5) business days after such noncompliance is identified by the auditor, regardless of whether the audit has been completed as of that date;

(7) With respect to each Audit Report, the General Counsel or one of the three most senior executive officers of the DB QPAM to which the Audit Report applies certifies in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this Extension; addressed, corrected, or remedied any inadequacies identified in the Audit Report; and determined that the Policies and Training in effect at the time of signing are adequate to ensure compliance with the conditions of this Extension and with the applicable provisions of ERISA and the Code;

(8) An executive officer of Deutsche Bank reviews the Audit Report for each DB QPAM and certifies in writing, under penalty of perjury, that such officer has reviewed each Audit Report;

(9) Each DB QPAM provides its certified Audit Report to the Department's Office of Exemption Determinations (OED), 200 Constitution Avenue NW., Suite 400, Washington DC 20210, no later than 45 days following its completion, and each DB QPAM makes its Audit Report unconditionally available for examination by any duly authorized employee or representative of the Department, other relevant regulators, and any fiduciary of an ERISA-covered plan or IRA, the assets of which are managed by such DB QPAM;

(10) Each DB QPAM and the auditor will submit to OED (A) any engagement agreement(s) entered into pursuant to the engagement of the auditor under this Extension, and (B) any engagement agreement entered into with any other entities retained in connection with such QPAM's compliance with the Training or Policies conditions of this Extension, no later than three (3) months after the effective date of the Extension (and one month after the execution of any agreement thereafter);

(11) The auditor shall provide OED, upon request, all of the workpapers created and utilized in the course of the audit, including, but not limited to: the audit plan, audit testing, identification of any instances of noncompliance by the relevant DB QPAM, and an explanation of any corrective or remedial actions taken by the applicable DB QPAM; and

(12) Deutsche Bank must notify the Department at least 30 days prior to any substitution of an auditor, except that no such replacement will meet the requirements of this paragraph unless and until Deutsche Bank demonstrates to the Department's satisfaction that such new auditor is independent of Deutsche Bank, experienced in the matters that are the subject of the Extension, and capable of making the determinations required of this Extension.

Notwithstanding the above, this audit requirement will be deemed met to the extent the Department issues more permanent relief that expressly supersedes this paragraph (f), and the terms of such new audit requirement have been met;

(g) With respect to each ERISA-covered plan or IRA for which a DB QPAM provides asset management or other discretionary fiduciary services, each DB QPAM agrees: (1) To comply with ERISA and the Code, as applicable with respect to such ERISA-covered plan or IRA, and refrain from engaging in prohibited transactions that are not otherwise exempt; (2) not to waive, limit, or qualify the liability of the DB QPAM for violating ERISA or the Code or engaging in prohibited transactions; (3) not to require the ERISA-covered plan or IRA (or sponsor of such ERISA-covered plan or beneficial owner of such IRA) to indemnify the DB QPAM for violating ERISA or engaging in prohibited transactions, except for violations or prohibited transactions caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of Deutsche Bank; (4) not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the DB QPAM, with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such restrictions are applied consistently and in like manner to all such investors; and (5) not to impose any fees, penalties, or charges

for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors. Within two (2) months of the date of publication of this notice of Extension in the **Federal Register**, each DB QPAM will provide a notice to such effect to each ERISA-covered plan or IRA for which a DB QPAM provides asset management or other discretionary fiduciary services in reliance on PTE 84-14, unless such notice was previously provided consistent with PTE 2015-15;

(h) Each DB QPAM will maintain records necessary to demonstrate that the conditions of this Extension have been met, for six (6) years following the date of any transaction for which such DB QPAM relies upon the relief in the Extension;

(i) The DB QPAMs comply with each condition of PTE 84-14, as amended, with the sole exception of the violation of Section I(g) that is attributable to the Korean Conviction;

(j) The DB QPAMs will not employ any of the individuals that engaged in the spot/futures-linked market manipulation activities that led to the Korean Conviction;

(k) Deutsche Bank disgorged all of its profits generated by the spot/futures-linked market manipulation activities of DSK personnel that led to the Korean Conviction;

(l) Deutsche Bank imposes internal procedures, controls, and protocols on DSK designed to reduce the likelihood of any recurrence of the conduct that is the subject of the Korean Conviction, to the extent permitted by local law;

(m) DSK will not provide fiduciary or QPAM services to ERISA-covered Plans or IRAs, and will not otherwise exercise discretionary control over plan assets;

(n) No DB QPAM is a subsidiary of DSK, and DSK is not a subsidiary of any DB QPAM;

(o) The criminal conduct of DSK that is the subject of the Korean Conviction did not directly or indirectly involve the assets of any plan subject to Part 4 of Title I of ERISA or section 4975 of the Code; and

(p) A DB QPAM will not fail to meet the terms of this Extension solely because a different DB QPAM fails to satisfy the conditions for relief under

this Extension described in Sections I(d), (e), (f), (g), (h), (i) and (j).

## Section II—Definitions

(a) The term “Korean Conviction” means the judgment of conviction against DSK entered on January 25, 2016, in Seoul Central District Court, relating to charges filed against DSK under Articles 176, 443, and 448 of South Korea’s Financial Investment Services and Capital Markets Act for spot/futures-linked market price manipulation;

(b) The term “DB QPAM” means a “qualified professional asset manager” (as defined in section VI(a) <sup>12</sup> of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which DSK is a current or future “affiliate” (as defined in section VI(d) of PTE 84–14). For purposes of this Extension, Deutsche Bank Securities, Inc. (DBSI), including all entities over which it exercises control; and Deutsche Bank AG, including all of its branches, are excluded from the definition of a DB QPAM; and

(c) The term “DSK” means Deutsche Securities Korea Co., a South Korean “affiliate” of Deutsche Bank (as the term “affiliate” is defined in section VI(c) of PTE 84–14).

*Effective Date:* This Extension will be effective for the period beginning October 24, 2016 and ending on the earlier of: April 23, 2017 or the effective date of a final agency action made by the Department in connection with Exemption Application No. D–11856.<sup>13</sup>

### Supplementary Information

On October 12, 2016, the Department of Labor (the Department) published a notice of proposed extension in the **Federal Register** at 81 FR 70577, proposing that certain entities with specified relationships to DSK could continue to rely upon the relief provided by PTE 84–14 (49 FR 9494 (March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985), as amended at 70 FR 49305 (August 23, 2005), and as amended at 75 FR 38837 (July 6, 2010)), notwithstanding the Korean Conviction.

The Department is today granting this Extension in order to protect ERISA-covered plans and IRAs from certain

costs and/or investment losses that may arise to the extent entities with a corporate relationship to DSK lose their ability to rely on PTE 84–14 as of the expiration of PTE 2015–15. The relief in this Extension provides the Department more time to consider whether more permanent relief is warranted.

No relief from a violation of any other law is provided by this Extension, including any criminal conviction described in the proposed extension or in PTE 2015–15. Furthermore, the Department cautions that the relief in this Extension will terminate immediately if, among other things, an entity within the Deutsche Bank corporate family is convicted of a crime described in Section I(g) of PTE 84–14 during the effective period of the Extension. While such an entity could apply for a new exemption in that circumstance, the Department would not be obligated to grant that exemption. The terms of this Extension have been specifically designed to permit plans to terminate their relationships in an orderly and cost effective fashion in the event of an additional conviction or a determination that it is otherwise prudent for a plan to terminate its relationship with an entity covered by the Extension.

### Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed extension, published on October 12, 2016, at 81 FR 70577. All comments and requests for hearing were due by October 19, 2016. Because of the abbreviated comment period, the Department will consider comments received within a reasonable period of time after October 19, 2016 in connection with its consideration of long-term exemptive relief for the DB QPAMs in connection with Exemption Application No. D–11908, described above. During the comment period, the Department received two written comments, one from the independent auditor and one from Deutsche Bank AG, both of which are described below. Although the Department has, for the most part, revised the proposed exemption in the manner requested by Deutsche Bank AG, the Department cautions that it may decline to include those revisions in any decision to grant more permanent relief.

### Independent Auditor’s Comment

Section I(f)(1) of the proposed extension requires that the audit, along with the report, must be completed no later than three months after the period

to which the audit relates. In its comment, the auditor requested that the audit requirement described in Section I(f)(1) of the proposed extension be modified to require that the audit report must be completed no later than six months after the period to which the audit relates. The auditor explains that, during the course of its audit, it needs to review an extensive amount of materials, relevant systems and training, and digest the information provided in response to various requests for information. Furthermore, the auditor states that it will take a significant amount of time to develop and review follow-up questions based upon its initial analysis of the materials and systems; and the report that the auditor provides to the Department needs to be robust, comprehensive and detailed.

The Department views a rigorous, transparent, and comprehensive audit as essential to ensuring that the conditions for exemptive relief described herein are followed by the DB QPAMs. As such, the Department has extended the deadline by which point the audit must be completed from three months following the period to which the audit applies to six months.

### Deutsche Bank’s Comment

Deutsche Bank seeks several changes and/or clarifications to the proposed extension. First, Deutsche Bank requests that the Department revise the proposed exemption in a manner that would potentially extend the duration of this Extension. The Department declines to extend this duration of the Extension in the manner requested by Deutsche Bank, but notes that it is currently considering proposing more permanent relief pursuant to Application Numbers D–11879 and D–11908.

Regarding the audit, Deutsche Bank seeks to extend the certification period set forth in Section I(f)(9) from 30 days to 45 days. The Department has revised the condition accordingly. Deutsche Bank also requests that the timing of the audit be adjusted in the same manner sought by the auditor. This adjustment is discussed above.

Deutsche requests certain changes to the training requirement described in Section I(e)(2) of the proposed extension. Deutsche Bank seeks to coordinate that condition with the training requirement set forth in PTE 2015–15, such that duplicative training is not required over a short period of time. The Department has revised Section I(e)(2) to exclude training for personnel who received training in a manner that meets the requirements of PTE 2015–15 within the prior 12 months.

<sup>12</sup> In general terms, a QPAM is an independent fiduciary that is a bank, savings and loan association, insurance company, or investment adviser that meets certain equity or net worth requirements and other licensure requirements and that has acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM.

<sup>13</sup> In this regard, as noted below, the Applicant has requested substantially similar relief to the relief described herein, but on a more permanent basis.

Deutsche Bank also seeks changes to the notice requirement described in Section I(g) of the proposed exemption. Deutsche Bank seeks to add the following bracketed language, such that Section I(g) reads: "Within two (2) months of the date of publication of this notice of Extension in the **Federal Register**, each DB QPAM will provide a notice to such effect to each ERISA-covered plan or IRA for which a DB QPAM provides asset management or other discretionary fiduciary services [in reliance on PTE 84-14], unless such notice was previously provided consistent with PTE 2015-15." The Department has revised the condition accordingly.

Deutsche Bank requests an adjustment to certain restrictions the proposed exemption places on DSK. In this regard, Deutsche Bank seeks to add the following bracketed language, and to delete the following italicized language, such that Section I(m) reads: "DSK has not, and will not, provide [discretionary asset management services or other discretionary] fiduciary *or QPAM* services to ERISA-covered Plans or IRAs, and will not otherwise exercise discretionary control over plan assets." The Department declines Deutsche Bank's request, but has revised the condition to more clearly require that this condition is intended to be met prospectively, not retroactively.

Deutsche Bank also seeks clarification that for purposes of the Extension, the auditor, and not the QPAMs, must provide the relevant workpapers to the Department. The Department agrees with that interpretation of the condition.

In its letter to the Department, Deutsche Bank states that footnotes 38 and 42, which reference tax-related crimes, are unrelated to Deutsche Bank's application and should be deleted. Deutsche Bank also requests that the Department note for the record that "Deutsche Bank identified Mr. Ripley both as an employee of DBSI and a subject of the Korean case on numerous prior occasions, including as far back as 2011, as well as more recently."

After giving full consideration to the entire record, the Department has decided to grant the Extension. The complete application file for the Extension (Exemption Application No. D-11879), including all supplemental submissions received by the Department, as well as the application file for PTE 2015-15 (Exemption Application No. D-11696), are available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1515, U.S. Department of Labor, 200

Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this Extension, refer to the notice of proposed extension, published on October 12, 2016, at 81 FR 70577.

**FOR FURTHER INFORMATION CONTACT:** Mr. Scott Ness of the Department, telephone (202) 693-8561. (This is not a toll-free number.)

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 24th day of October, 2016.

**Lyssa E. Hall,**

*Director of Exemption Determinations,  
Employee Benefits Security Administration,  
U.S. Department of Labor.*

[FR Doc. 2016-26089 Filed 10-27-16; 8:45 am]

**BILLING CODE 4510-29-P**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### Proposed Extension of Information Collection Requests Submitted for Public Comment

**AGENCY:** Employee Benefits Security Administration, Department of Labor

**ACTION:** Notice

**SUMMARY:** The Department of Labor (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Employee Benefits Security Administration (EBSA) is soliciting comments on the proposed extension of the information collection requests (ICRs) contained in the documents described below. A copy of the ICRs may be obtained by contacting the office listed in the **ADDRESSES** section of this notice. ICRs also are available at [reginfo.gov](http://www.reginfo.gov/public/do/PRAMain) (<http://www.reginfo.gov/public/do/PRAMain>).

**DATES:** Written comments must be submitted to the office shown in the Addresses section on or before December 27, 2016.

**ADDRESSES:** G. Christopher Cosby, Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N-5718, Washington, DC 20210, [ebbsa.opr@dol.gov](mailto:ebbsa.opr@dol.gov), (202) 693-8410, FAX (202) 693-4745 (these are not toll-free numbers).

**SUPPLEMENTARY INFORMATION:** This notice requests public comment on the Department's request for extension of the Office of Management and Budget's (OMB) approval of ICRs contained in the rules and prohibited transaction exemptions described below. The Department is not proposing any changes to the existing ICRs at this time. An agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a valid OMB control number. A summary of the ICRs and the current burden estimates follows:

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Notice to Employees of Coverage Options Under Fair Labor Standards Act Section 18B.

*Type of Review:* Extension of a currently approved collection of information.

*OMB Number:* 1210–0149.

*Affected Public:* Businesses or other for-profits, Farms, Not-for-profit institutions.

*Respondents:* 6,160,461.

*Responses:* 72,484,292.

*Estimated Total Burden Hours:* 374,502.

*Estimated Total Burden Cost (Operating and Maintenance):* \$12,229,992.

*Description:* Section 1512 of the Affordable Care Act creates a new Fair Labor Standards Act (FLSA) section 18B requiring a notice to employees of coverage options available through the Health Insurance Marketplace. On May 8, 2013, the Department issued Technical Release 2013–2, which provided temporary guidance regarding the notice requirement under FLSA section 18B and announced the availability of the Model Notice to Employees of Coverage Options. This ICR refers to the Model Notice, which was approved by OMB under OMB Control Number 1210–0149 and is currently scheduled to expire on January 31, 2017.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Prohibited Transaction Class Exemption (PTE) 92–6: Sale of Individual Life Insurance or Annuity Contracts By a Plan.

*Type of Review:* Extension of a currently approved information collection.

*OMB Number:* 1210–0063.

*Affected Public:* Businesses or other for-profits.

*Respondents:* 10,600.

*Responses:* 10,600.

*Estimated Total Burden Hours:* 2,100.

*Estimated Total Burden Cost (Operating and Maintenance):* \$5,500.

*Description:* PTE 92–6 exempts from the prohibited transaction restrictions of ERISA the sale of individual life insurance or annuity contracts by a plan to participants, relatives of participants, employers any of whose employees are covered by the plan, other employee benefit plans, owner-employees or shareholder-employees. In the absence of this exemption, certain aspects of these transactions might be prohibited by section 406 of ERISA.

Among other conditions, PTE 1992–6 requires that pension plans inform the insured participant of a proposed sale of a life insurance or annuity policy to the

employer, a relative, another plan, an owner-employee, or a shareholder employee. This recordkeeping requirement constitutes an information collection within the meaning of the PRA, which was approved by OMB under OMB Control Number 1210–0063 and is currently scheduled to expire on February 28, 2017.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Loans to Plan Participants and Beneficiaries Who Are Parties in Interest With Respect to The Plan Regulation.

*Type of Review:* Extension of a currently approved collection of information.

*OMB Number:* 1210–0076.

*Affected Public:* Businesses or other for-profits, Not-for-profit institutions.

*Respondents:* 2,500.

*Responses:* 2,500.

*Estimated Total Burden Hours:* 0.

*Estimated Total Burden Cost (Operating and Maintenance):* \$946,000.

*Description:* ERISA prohibits a plan fiduciary from causing the plan to engage in a transaction if he knows or should know that such transaction constitutes direct or indirect loan or extension of credit between the plan and a party in interest. ERISA section 408(b)(1) exempts from this prohibition loans from a plan to parties in interest who are participants and beneficiaries of the plan, provided that certain requirements are satisfied. In final regulations published in the **Federal Register** on July 20, 1989, (54 FR 30520), the Department provided additional guidance on section 408(b)(1)(C), which requires that loans be made in accordance with specific provisions in the plan. The ICR contained within this rule was approved by OMB under OMB Control Number 1210–0076, which is scheduled to expire on February 28, 2017.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* PTE 85–68 to Permit Employee Benefit Plans to Invest in Customer Notes of Employers.

*Type of Review:* Extension of a currently approved collection of information.

*OMB Number:* 1210–0094.

*Affected Public:* Not-for-profit institutions, Businesses or other for-profits.

*Respondents:* 69.

*Responses:* 325.

*Estimated Total Burden Hours:* 1.

*Estimated Total Burden Cost (Operating and Maintenance):* \$0.

*Description:* Pursuant to section 408 of ERISA, the Department has authority to grant an exemption from the

prohibitions of sections 406 and 407(a) if it can determine that the exemption is administratively feasible, in the interest of participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan. PTE 85–68 describes the conditions under which a plan is permitted to acquire customer notes accepted by an employer of employees covered by the plan in the ordinary course of the employer's primary business activity. The exemption covers sales as well as contributions of customer notes by an employer to its plan. Specifically, the exemption requires the employer to provide a written guarantee to repurchase a note which becomes more than 60 days delinquent, such notes to be secured by a perfected security interest in the property financed by the note, and the collateral to be insured. The exemption requires records pertaining to the transaction to be maintained for a period of six years for the purpose of ensuring that the transactions are protective of the rights of participants and beneficiaries. This recordkeeping requirement constitutes an information collection within the meaning of the PRA, which was approved by OMB under OMB Control Number 1210–0094 and is currently scheduled to expire on February 28, 2017.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Default Investment Alternatives under Participant Directed Individual Account Plans.

*Type of Review:* Extension of a currently approved collection of information.

*OMB Number:* 1210–0132.

*Affected Public:* Not-for-profit institutions, Businesses or other for-profits.

*Respondents:* 239,000.

*Responses:* 31,100,000.

*Estimated Total Burden Hours:* 201,000.

*Estimated Total Burden Cost (Operating and Maintenance):* \$10,800,000.

*Description:* Section 404(c) of ERISA states that participants or beneficiaries who can hold individual accounts under their pension plans, and who can exercise control over the assets in their accounts “as determined in regulations of the Secretary [of Labor]” will not be treated as fiduciaries of the plan. Moreover, no other plan fiduciary will be liable for any loss, or by reason of any breach, resulting from the participants’ or beneficiaries exercise of control over their individual account assets.

The Pension Protection Act (PPA), Public Law 109–280, amended ERISA section 404(c) by adding subparagraph (c)(5)(A). The new subparagraph says that a participant in an individual account plan who fails to make investment elections regarding his or her account assets will nevertheless be treated as having exercised control over those assets so long as the plan provides appropriate notice (as specified) and invests the assets “in accordance with regulations prescribed by the Secretary [of Labor].” Section 404(c)(5)(A) further requires the Department of Labor (Department) to issue corresponding final regulations within six months after enactment of the PPA. The PPA was signed into law on August 17, 2006.

The Department of Labor issued a final regulation under ERISA section 404(c)(5)(A) offering guidance on the types of investment vehicles that plans may choose as their “qualified default investment alternative” (QDIA). The regulation also outlines two information collections. First, it implements the statutory requirement that plans provide annual notices to participants and beneficiaries whose account assets could be invested in a QDIA. Second, the regulation requires plans to pass certain pertinent materials they receive relating to a QDIA to those participants and beneficiaries with assets invested in the QDIA as well to provide certain information on request. The ICRs are approved under OMB Control Number 1210–0132, which is scheduled to expire on February 28, 2017.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* PTE 96–62, Process for Expedited Approval of an Exemption for Prohibited Transaction.

*Type of Review:* Extension of a currently approved information collection.

*OMB Number:* 1210–0098.

*Affected Public:* Businesses or other for-profits.

*Respondents:* 25.

*Responses:* 11,250.

*Estimated Total Burden Hours:* 200.

*Estimated Total Burden Cost*

*(Operating and Maintenance):* \$40,000.

*Description:* Section 408(a) of ERISA provides that the Secretary of Labor may grant exemptions from the prohibited transaction provisions of sections 406 and 407(a) of ERISA, and directs the Secretary to establish an exemption procedure with respect to such provisions. On July 31, 1996, the Department published PTE 96–62, which, pursuant to the exemption procedure set forth in 29 CFR 2570, subpart B, permits a plan to seek

approval on an accelerated basis of otherwise prohibited transactions. A PTE will only be granted on the conditions that the plan demonstrate to the Department that the transaction is substantially similar to those described in at least two prior individual exemptions granted by the Department and that it presents little, if any, opportunity for abuse or risk of loss to a plan’s participants and beneficiaries. This ICR is intended to provide the Department with sufficient information to support a finding that the exemption meets the statutory standards of section 408(a) of ERISA, and to provide affected parties with the opportunity to comment on the proposed transaction, while at the same time reducing the regulatory burden associated with processing individual exemptions for transactions prohibited under ERISA. The ICR was approved by OMB under OMB Control Number 1210–0098 and is scheduled to expire on July 31, 2017.

#### Focus of Comments

The Department is particularly interested in comments that:

- Evaluate whether the collections of information are 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 collections 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., by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICRs for OMB approval of the extension of the information collection; they will also become a matter of public record.

#### Phyllis C. Borzi,

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

[FR Doc. 2016–26046 Filed 10–27–16; 8:45 am]

**BILLING CODE 4510–29–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

#### Workforce Information Advisory Council (WIAC)

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to Section 308 of the Workforce Innovation and Opportunity Act of 2014 (WIOA) (Pub. L. 113–128), which amends section 15 of the Wagner-Peyser Act of 1933 (29 U.S.C. 491–2), notice is hereby given that the WIAC meet on November 16 and 17, 2016. The meeting will take place at the Bureau of Labor Statistics (BLS) Janet Norwood Training and Conference Center in Washington, DC. The WIAC was established in accordance with provisions of the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. App.) and will act in accordance with the applicable provisions of FACA and its implementing regulation at 41 CFR 102–3. The meeting will be open to the public.

**DATES:** The meeting will take place on Wednesday, November 16 and Thursday, November 17, 2016 from 9:00 a.m. to 4:30 p.m. Public statements and requests for special accommodations or to address the Advisory Council must be received by November 9, 2016.

**ADDRESSES:** The meeting will be held at the BLS Janet Norwood Training and Conference Center, Rooms 9 and 10, in the Postal Square Building at 2 Massachusetts Ave. NE., Washington, DC 20212.

**FOR FURTHER INFORMATION CONTACT:** Steven Rietzke, Chief, Division of National Programs, Tools, and Technical Assistance, Employment and Training Administration, U.S. Department of Labor, Room C–4510, 200 Constitution Ave. NW., Washington, DC 20210; Telephone: 202–693–3912. Mr. Rietzke is the Designated Federal Officer for the WIAC.

#### SUPPLEMENTARY INFORMATION:

*Background:* The WIAC is an important component of the Workforce Innovation and Opportunity Act. The WIAC is a Federal Advisory Committee of workforce and labor market information experts representing a broad range of national, State, and local data and information users and producers. The purpose of the WIAC is to provide recommendations to the Secretary of Labor, working jointly through the Assistant Secretary for Employment and Training and the Commissioner of Labor Statistics, to

address: (1) The evaluation and improvement of the nationwide workforce and labor market information (WLMI) system and statewide systems that comprise the nationwide system; and (2) how the Department and the States will cooperate in the management of those systems. These systems include programs to produce employment-related statistics and State and local workforce and labor market information.

The Department of Labor anticipates the WIAC will accomplish its objectives by: (1) Studying workforce and labor market information issues; (2) seeking and sharing information on innovative approaches, new technologies, and data to inform employment, skills training, and workforce and economic development decision making and policy; and (3) advising the Secretary on how the workforce and labor market information system can best support workforce development, planning, and program development. Additional information is available at [www.doleta.gov/wioa/wiac/](http://www.doleta.gov/wioa/wiac/).

*Purpose:* The WIAC is currently in the process of identifying and reviewing issues and aspects of the WLMI system and statewide systems that comprise the nationwide system and how the Department and the States will cooperate in the management of those systems. As part of this process, the Advisory Council meets to gather information and to engage in deliberative and planning activities to facilitate the development and provision of its recommendations to the Secretary in a timely manner.

*Agenda:* Beginning at 9:00 a.m. on November 16, 2016, the Advisory Council will briefly review the minutes of the previous meeting held July 13 and 14, 2016. The Advisory Council will then hear briefings from members on the current WLMI systems and its customers, and begin to discuss where and how improvements can be made to the existing WLMI system. The meeting will end for the day at 4:30 p.m.

The meeting will resume at 9:00 a.m. on November 17, 2016. The second day will continue the previous day's discussions, with the goal of outlining the next steps for drafting recommendations for making improvements to the WLMI systems. The Advisory Council will open the floor for public comment at 1:00 p.m. on November 17, 2016. However, the precise schedule of events is subject to change and an up-to-date agenda will be available on WIAC's Web page (see URL below) prior to the meeting. The second day will conclude with a discussion of next steps, including action items and

planning for the next meeting of the Advisory Council.

The meeting will adjourn at 4:30 p.m. The full agenda for the meeting, and changes or updates to the agenda, will be posted on the WIAC's Web page, [www.doleta.gov/wioa/wiac/](http://www.doleta.gov/wioa/wiac/).

*Attending the meeting:* BLS is located in the Postal Square Building, the building that also houses the U.S. Postal Museum, at 2 Massachusetts Ave. NE., Washington, DC. You must have a picture ID to be admitted to the BLS offices at Postal Square Building, and you must enter through the Visitors' Entrance. The BLS Visitors' Entrance is on First Street, NE., mid-block, across from Union Station. Members of the public who require reasonable accommodations to attend the meeting may submit requests for accommodations by mailing them to the person and address indicated in the **FOR FURTHER INFORMATION CONTACT** section by the date indicated in the **DATES** section or transmitting them as email attachments in PDF format to the email address indicated in the **FOR FURTHER INFORMATION CONTACT** section with the subject line "November WIAC Meeting Accommodations" by the date indicated in the **DATES** section. Please include a specific description of the accommodations requested and phone number or email address where you may be contacted if additional information is needed to meet your request.

*Public statements:* Organizations or members of the public wishing to submit written statements may do so by mailing them to the person and address indicated in the **FOR FURTHER INFORMATION CONTACT** section by the date indicated in the **DATES** section or transmitting them as email attachments in PDF format to the email address indicated in the **FOR FURTHER INFORMATION CONTACT** section with the subject line "November WIAC Meeting Public Statements" by the date indicated in the **DATES** section. Submitters may include their name and contact information in a cover letter for mailed statements or in the body of the email for statements transmitted electronically. Relevant statements received before the date indicated in the **DATES** section will be included in the record of the meeting. No deletions, modifications, or redactions will be made to statements received, as they are public records. Please do not include personally identifiable information (PII) in your public statement.

*Requests to Address the Advisory Council:* Members of the public or representatives of organizations wishing to address the Advisory Council should

forward their requests to the contact indicated in the **FOR FURTHER INFORMATION CONTACT** section, or contact the same by phone, by the date indicated in the **DATES** section. Oral presentations will be limited to 10 minutes, time permitting, and shall proceed at the discretion of the Council chair. Individuals with disabilities, or others, who need special accommodations, should indicate their needs along with their request.

**Portia Wu,**

*Assistant Secretary, Employment and Training Administration.*

[FR Doc. 2016-26047 Filed 10-27-16; 8:45 am]

**BILLING CODE 4510-FN-P**

## DEPARTMENT OF LABOR

### Office of Workers' Compensation Programs

#### Division of Longshore and Harbor Workers' Compensation; Proposed Revision of Existing Collection; Comment Request

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506 (c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Workers' Compensation Programs (OWCP) is soliciting comments concerning the proposed collection: Regulations Governing the Administration of the Longshore and Harbor Workers' Compensation Act (LS-200, LS-201, LS-203, LS-204, LS-262, LS-267, LS-271, LS-274, and LS-513). A copy of the proposed information collection request can be obtained by contacting the office listed below in the address section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addresses section below on or before December 27, 2016.



**ADDRESSES:** Ms. Yoon Ferguson, U.S. Department of Labor, 200 Constitution Ave. NW., Room S-3323, Washington, DC 20210, telephone/fax (202)354-9647, Email *Ferguson.Yoon@dol.gov*. Please use only one method of transmission for comments (mail, fax, or Email).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Office of Workers' Compensation Programs (OWCP) administers the Longshore and Harbor Workers' Compensation Act (LHWCA). LHWCA provides benefits to workers injured in maritime employment on the navigable waters of the United States or in an adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel. In addition, several Acts extend the Longshore Act's coverage to certain other employees. The following regulations have been developed to implement the Act's provisions and to provide clarification in those areas where it was deemed necessary (20 CFR 702.162, 702.174, 702.175, 20 CFR 702.242, 20 CFR 702.285, 702.321, 702.201, and 702.111). In some cases, prior regulations have been updated and changed either to reflect the intent of

the amended Act or to correct recognized deficiencies. This information collection is currently approved for use through January 31, 2017.

**II. Review Focus**

The Department of Labor is particularly interested in comments which:

- \* 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 submissions of responses.

**III. Current Actions**

The Department of Labor seeks the approval for the revision of this currently approved information collection.

*Agency:* Office of Workers' Compensation Programs.

*Type of Review:* Revision.

*Title:* Regulations Governing the Administration of the Longshore and Harbor Workers' Compensation Act.

*OMB Number:* 1240-0014.

**AGENCY NUMBER:** (LS-200, LS-201, LS-203, LS-204, LS-262, LS-267, LS-271, LS-274, and LS-513).

*Affected Public:* Individuals or households, Businesses or other for-profit.

*Total Respondents:* 90,759.

*Total Annual Responses:* 90,759.

*Estimated Total Burden Hours:* 32,971.

*Estimated Time per Response:* 2 minutes to 3 hours.

*Frequency:* On occasion and annually.

*Total Burden Cost (capital/startup):* \$0.

*Total Burden Cost (operating/maintenance):* \$26,203.

Burden summary	Hours
LS-200 (20 CFR 702.285) .....	571
20 CFR 702.162 (Liens) .....	5
20 CFR 702.174 (Certifications) .....	4
20 CFR 702.175 (Reinstatements) .....	1
20 CFR 702.242 (Settlement Applications) .....	11,646
20 CFR 702.321 (Section 8(f) Payments) .....	2,900
ESA-100 (20 CFR 702.201) .....	840
LS-271 (Self Insurance Application) .....	27
LS-274 (Injury Report of Insurance Carrier and Self-Insured Employer) .....	569
LS-201 (Injury or Death Notice) .....	325
LS-513 (Payment Report) .....	290
LS-267 (Claimant's Statement) .....	25
LS-203 (Employee Comp. Claim) .....	2,048
LS-204 (Medical Report) .....	13,650
LS-262 (Claim for Death Benefits) .....	70
<b>Total Burden Hours</b> .....	<b>32,971</b>

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: October 24, 2016.

**Yoon Ferguson,**

*Agency Clearance Officer, Office of Workers' Compensation Programs, U.S. Department of Labor.*

[FR Doc. 2016-26085 Filed 10-27-16; 8:45 am]

**BILLING CODE 4510-CF-P**

**DEPARTMENT OF LABOR**

**Office of the Secretary**

**Agency Information Collection Activities; Submission for OMB Review; Comment Request; Family and Medical Leave Act (FMLA) Wave 4 Surveys**

**AGENCY:** Office of the Assistant Secretary for Policy, Chief Evaluation Office, Department of Labor.

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL), as part of its continuing effort to

reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection



requirements on respondents is properly assessed.

Currently, the Department of Labor is soliciting comments concerning the collection of data about the Family and Medical Leave Act (FMLA) Wave 4 Surveys. A copy of the proposed Information Collection Request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice.

**DATES:** Written comments must be submitted to the office listed in the addressee section below on or before December 27, 2016.

**ADDRESSES:** You may submit comments by either one of the following methods: *Email: ChiefEvaluationOffice@dol.gov; Mail or Courier:* Christina Yancey, Chief Evaluation Office, OASP, U.S. Department of Labor, Room S-2312, 200 Constitution Avenue NW., Washington, DC 20210. *Instructions:* Please submit one copy of your comments by only one method. All submissions received must include the agency name and OMB Control Number identified above for this information collection. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via email or to submit them by mail early. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for OMB approval of the information collection request.

**FOR FURTHER INFORMATION CONTACT:** Christina Yancey by email at *ChiefEvaluationOffice@dol.gov*.

**SUPPLEMENTARY INFORMATION:**

I. *Background:* Enacted in 1993, the Family and Medical Leave Act (FMLA) guarantees eligible U.S. employees of covered employers the right to take unpaid leave to attend to their own medical issues or those of their family. The Act further allows for the continuation of employer-sponsored health insurance coverage during leave and reinstatement of the previous or an equivalent job upon return to work. To better understand the range of perspectives on FMLA, the Chief Evaluation Office of the U.S. Department of Labor (DOL) has commissioned the development and administration of two surveys to collect information about the need for and the experience with family and medical leave from employees' and employers' respective perspectives. This effort will build on previous information collection efforts, as the new surveys will update and expand on the evidence about FMLA use and leave-taking that has been generated by three prior "waves" of surveys (1995, 2000, and 2012).

This **Federal Register** Notice provides the opportunity to comment on two proposed data collection instruments that will be used to collect information on employee and employer perspectives on FMLA:

\* *Survey of Employees.* The survey of employees on use of leave, need for leave, and their experience with FMLA-eligible leave is anticipated to occur in 2017 and 2018.

\* *Survey of Employers.* The survey of employers on employee use of leave, and their experience managing FMLA

leaves (for those covered by FMLA) is anticipated to occur in 2017 and 2018.

II. *Desired Focus of Comments:*

Currently, the Department of Labor is soliciting comments concerning the above data collection for the FMLA Wave 4 Surveys. DOL is particularly interested in comments that do the following:

\* Evaluate whether the proposed collection of information is necessary for the proper performance functions of the agency, including whether the information will have practical utility;

\* evaluate the accuracy of the agency's burden estimate of the proposed information collection, including the validity of the methodology and assumptions;

\* 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—for example, permitting electronic submissions of responses.

III. *Current Actions:* At this time, the Department of Labor is requesting clearance for the implementation site visit protocols, the focus group protocols, and a survey.

*Type of Review:* New information collection request.

*OMB Control Number:* 1205-0NEW.

*Affected Public:* Individuals contacted to conduct the employee survey; Staff at employers contacted for the employer survey.

**ESTIMATED TOTAL BURDEN HOURS**

Respondents	Estimated total respondents	Number of responses per respondent	Average burden time per response (minutes)	Estimated total burden (hours)
<b>Employee Survey</b>				
Screeners (cellphone) .....	21,500	1	1	358
Screeners (landline) .....	5,091	1	3	255
Interviewee: Leave-taker .....	1,778	1	18	533
Interviewee: Leave-needer.				
<b>Site Visit</b>				
Round 1:				
P3 Youth .....	72	1	1	72
Round 2:				
P3 Youth .....	72	1	1	72
<b>Partner Survey</b>				
Round 1:				
P3 Administrators/Staff .....	90	1	.25	22.5
Round 2:				

## ESTIMATED TOTAL BURDEN HOURS—Continued

Respondents	Estimated total respondents	Number of responses per respondent	Average burden time per response (minutes)	Estimated total burden (hours)
P3 Administrators/Staff .....	90	1	.25	22.5
Total .....	594	.....	.....	526.5

**Employee Survey**

*Sampled households/individuals:* 26,591.

*Respondents:* 4,000.

*Frequency of response:* once.

*Annual hour burden:*

*Screeners:*

*Cell-phone:* 21,500 individuals; 1 minute each; 358 hours.

*Landline:* 5,091 households; 3 minutes each; 255 hours.

*Extended interview:*

*Leave-taker interview:* 1,778 respondents; 18 minutes each; 533 hours.

*Leave-needer interview:* 422 respondents; 18 minutes each; 127 hours.

*Employed-only interview:* 1,800 respondents; 10 minutes each; 300 hours.

*Nonresponse follow-up:* 500 respondents; 10 minutes each; 83 hours.

*Total burden:* 4,000 respondents; 1,656 hours.

*Annualized hour burden:* 1,656 hours; \$25.62 per hour;<sup>1</sup> \$42,427.

Comments submitted in response to this request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: October 20, 2016.

**Sharon Block,**

*Principal Deputy Assistant Secretary for Policy, U.S. Department of Labor.*

[FR Doc. 2016-26084 Filed 10-27-16; 8:45 am]

**BILLING CODE 4510-HX-P**

<sup>1</sup> Hourly wage reflects the June 2016 (seasonally-adjusted) average hourly earnings for private nonfarm payrolls, as reported by the U.S. Department of Labor, Bureau of Labor Statistics, Table B-3. "Average hourly and weekly earnings of all employees on private nonfarm payrolls by industry sector, seasonally adjusted" (accessed from the following Web site as of September 26, 2016: <http://www.bls.gov/news.release/empsit.t19.htm>).

**DEPARTMENT OF LABOR****Office of Workers' Compensation Programs****Division of Energy Employees Occupational Illness Compensation; Proposed Extension of Existing Collection; Comment Request**

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Workers' Compensation Programs is soliciting comments concerning the proposed collection: Energy Employees Occupational Illness Compensation Program Act Forms (Forms EE-1, EE-2, EE-3, EE-4, EE-7, EE-8, EE-9, EE-10, EE-11A, EE-11B, EE-12, EE-13, EE-16, EE-20). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addresses section below on or before December 27, 2016.

**ADDRESSES:** Ms. Yoon Ferguson, U.S. Department of Labor, 200 Constitution Ave. NW., Room S-3323, Washington, DC 20210, telephone/fax (202) 354-9647, Email [Ferguson.yoon@dol.gov](mailto:Ferguson.yoon@dol.gov). Please use only one method of transmission for comments (mail, fax, or Email).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Office of Workers' Compensation Programs (OWCP) is the primary agency responsible for the administration of the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or Act), 42 U.S.C. 7384 *et seq.* The Act provides for timely payment of compensation to covered employees and, where applicable, survivors of such employees, who sustained either "occupational illnesses" or "covered illnesses" incurred in the performance of duty for the Department of Energy and certain of its contractors and subcontractors. The Act sets forth eligibility criteria for claimants for compensation under Part B and Part E of the Act, and outlines the various elements of compensation payable from the Fund established by the Act. The information collections in this ICR collect demographic, factual and medical information needed to determine entitlement to benefits under the EEOICPA. This information collection is currently approved for use through December 31, 2016.

**II. Review Focus**

The Department of Labor is particularly interested in comments which:

\* 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 submissions of responses.

### III. Current Actions

The Department of Labor seeks approval for the revision of this information collection in order to carry out its responsibility to determine a claimant's eligibility for compensation under the EEOICPA.

*Type of Review:* Extension.

*Agency:* Office of Workers' Compensation Programs.

*Title:* Energy Employees Occupational Illness Compensation Act Forms (various).

*OMB Number:* 1240-0002.

*Agency Number:* EE-1, EE-2, EE-3, EE-4, EE-7, EE-8, EE-9, EE-10, EE-11A, EE-11B, EE-12, EE-13, EE-16 and EE-20.

*Affected Public:* Individuals or households; Business or other for-profit.

*Total Respondents:* 57,277.

*Total Responses:* 60,621.

*Estimated Total Burden Hours:* 20,539.

*Total Burden Cost (capital/startup):* \$0.

*Total Burden Cost (operating/maintenance):* \$27,800.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: October 21, 2016.

#### Yoon Ferguson,

*Agency Clearance Officer, Office of Workers' Compensation Programs, U.S. Department of Labor.*

[FR Doc. 2016-26091 Filed 10-27-16; 8:45 am]

**BILLING CODE 4510-CR-P**

### LEGAL SERVICES CORPORATION

#### Sunshine Act Meeting

**DATE AND TIME:** The Legal Services Corporation's Institutional Advancement Committee will meet telephonically on November 2, 2016. The meeting will commence at 3:00 p.m., EDT, and will continue until the conclusion of the Committee's agenda.

**LOCATION:** John N. Erlenborn Conference Room, Legal Services Corporation Headquarters, 3333 K Street NW., Washington DC 20007.

**PUBLIC OBSERVATION:** Members of the public who are unable to attend in person but wish to listen to the public proceedings may do so by following the telephone call-in directions provided below.

#### CALL-IN DIRECTIONS FOR OPEN SESSIONS:

- Call toll-free number: 1-866-451-4981;

- When prompted, enter the following numeric pass code: 9328090043

- When connected to the call, please immediately "MUTE" your telephone.

Members of the public are asked to keep their telephones muted to eliminate background noises. To avoid disrupting the meeting, please refrain from placing the call on hold if doing so will trigger recorded music or other sound. From time to time, the Chair may solicit comments from the public.

**STATUS OF MEETING:** Open.

#### MATTERS TO BE CONSIDERED:

1. Approval of agenda
2. Year-end appeal
3. Leaders Council call update
4. Update on staffing
5. New business
6. Adjourn open session

#### CONTACT PERSON FOR INFORMATION:

Katherine Ward, Executive Assistant to the Vice President & General Counsel, at (202) 295-1500. Questions may be sent by electronic mail to [FR\\_NOTICE\\_QUESTIONS@lsc.gov](mailto:FR_NOTICE_QUESTIONS@lsc.gov).

**ACCESSIBILITY:** LSC complies with the Americans with Disabilities Act and Section 504 of the 1973 Rehabilitation Act. Upon request, meeting notices and materials will be made available in alternative formats to accommodate individuals with disabilities. Individuals needing other accommodations due to disability in order to attend the meeting in person or telephonically should contact Katherine Ward, at (202) 295-1500 or [FR\\_NOTICE\\_QUESTIONS@lsc.gov](mailto:FR_NOTICE_QUESTIONS@lsc.gov), at least 2 business days in advance of the meeting. If a request is made without advance notice, LSC will make every effort to accommodate the request but cannot guarantee that all requests can be fulfilled.

Dated: October 26, 2016.

#### Katherine Ward,

*Executive Assistant to the Vice President for Legal Affairs and General Counsel.*

[FR Doc. 2016-26249 Filed 10-26-16; 4:15 pm]

**BILLING CODE 7050-01-P**

### NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

#### National Endowment for the Arts

#### Membership of the National Endowment for the Arts Senior Executive Service Performance Review Board

**ACTION:** Notice.

**SUMMARY:** This notice announces the membership of the National Endowment

for the Arts (NEA) Senior Executive Service (SES) Performance Review Board (PRB).

**DATES:** *Effective Date:* October 25, 2016.

**ADDRESSES:** Send comments concerning this notice to: National Endowment for the Arts, 400 7th Street SW., Washington, DC 20506.

**FOR FURTHER INFORMATION CONTACT:** Craig McCord Sr. by telephone at (202) 682-5473 or by email at [mccordc@arts.gov](mailto:mccordc@arts.gov).

**SUPPLEMENTARY INFORMATION:** Sections 4314(c)(1) through (5) of Title 5, U.S.C., requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more SES Performance Review Boards. The Board shall review and evaluate the initial appraisal of a senior executive's performance by the supervisor, along with any response by the senior executive, and make recommendations to the appointing authority relative to the performance of the senior executive.

The following persons have been selected to serve on the Performance Review Board of the National Endowment for the Arts (NEA):  
 Michael Griffin—Chief of Staff, NEA  
 Sunil Iyengar—Director, Office of Research & Analysis, NEA  
 Ronald Luczak—Director, Office of Security, U.S. Department of Education  
 Teresa Grancorvitz—Deputy Office Head, Office of Budget, Finance & Award, National Science Foundation  
 Jeff Thomas—Assistant Chairman for Planning and Operations, National Endowment for the Humanities

Dated: October 24, 2016.

#### Kathy N. Daum,

*Director, Office of Administrative Services.*

[FR Doc. 2016-26042 Filed 10-27-16; 8:45 am]

**BILLING CODE P**

### NATIONAL MEDIATION BOARD

#### Notice of Proposed Information Collection Requests

**AGENCY:** National Mediation Board.

**SUMMARY:** The Assistant Chief of Staff, Administration invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments within 60 days from the date of this publication.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (U.S.C. Chapter 35) requires that the Office of Management and Budget

(OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Assistant Chief of Staff, Administration publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection contains the following: (1) Type of review requested, *e.g.* new, revision extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Currently, the National Mediation Board is soliciting comments concerning the proposed extension of the Application for Alternative Dispute Resolution (ADR) Services and is interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the agency; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the agency enhance the quality, utility, and clarity of the information to be collected; and (5) how might the agency minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: October 25, 2016.

**Samantha Jones,**

*Assistant Chief of Staff, Administration,  
National Mediation Board.*

#### **A. Application for ADR Services**

*Type of Review:* Extension.

*Title:* Application for ADR Services.

*Frequency:* On occasion.

*Affected Public:* Union Officials and Officials of Railroads and Airlines.

*Reporting and Recordkeeping Hour Burden: Responses:* Estimate about 45 annually.

*Burden Hours:* 9.

*Abstract:* The Railway Labor Act, 45 U.S.C., 151a. General Purposes, provides that the purposes of the Act are (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein. \* \* \* (4) to provide for the prompt and orderly settlement of all disputes concerning

rates of pay, rules, or working conditions, and (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. In fulfilling its role to administer the Act, the National Mediation Board offers the parties to disputes mediation and arbitration services. On a voluntary basis, training programs in Alternative Dispute Resolution (ADR) and facilitation services are also available. These ADR programs are designed to enhance the bargaining and grievance handling skill level of the disputants and to assist the parties in the resolution of disputes. The impact of these ADR programs is that mediation and arbitration can be avoided entirely or the scope and number of issues brought to mediation or arbitration is significantly reduced. This collection is necessary to confirm the voluntary participation of the parties in the ADR process. The information provided by the parties is used by the NMB to schedule the parties for ADR training and facilitation. Based on a recent survey of those who participated in the NMB's ADR Programs, 94.6% said they were satisfied with the ADR Programs and said they recommend the program for all negotiators. Collecting the brief information on the Application for ADR Services form allows the parties to voluntarily engage the services of the NMB in the orderly settlement of all disputes and fulfill the purposes of the Act.

Requests for copies of the proposed information collection request may be accessed from [www.nmb.gov](http://www.nmb.gov) or should be addressed to Denise Murdock, NMB, 1301 K Street NW., Suite 250 E, Washington, DC 20005 or addressed to the email address [murdock@nmb.gov](mailto:murdock@nmb.gov) or faxed to 202-692-5081. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Samantha Jones at 202-692-5010 or via Internet address [jones@nmb.gov](mailto:jones@nmb.gov). Individuals who use a telecommunications device for the deaf (TDD/TDY) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

[FR Doc. 2016-26115 Filed 10-27-16; 8:45 am]

**BILLING CODE 7550-01-P**

#### **NATIONAL SCIENCE FOUNDATION**

##### **Notice of Availability and Notice of Public Meetings for the Draft Environmental Impact Statement (DEIS) for the Arecibo Observatory, Arecibo, Puerto Rico**

**AGENCY:** National Science Foundation.

**ACTION:** Notice of Availability and Notice of Public Meetings.

**SUMMARY:** The National Science Foundation (NSF) has made available for public review and comment the Draft Environmental Impact Statement (DEIS) for Arecibo Observatory. This Draft Environmental Impact Statement (DEIS) has been prepared for the National Science Foundation (NSF) to evaluate the potential environmental effects of proposed operational changes due to funding constraints for the Arecibo Observatory in Arecibo, Puerto Rico. The DEIS was prepared in compliance with the National Environmental Policy Act of 1969. Consultation under Section 106 of the National Historic Preservation Act (NHPA) is being conducted concurrent to the NEPA process.

**DATES:** NSF will accept comments on the DEIS for 45 days following publication of this Notice of Availability. Comments may be submitted verbally during public meetings scheduled for November 16-17 (see **SUPPLEMENTARY INFORMATION** for more details) or in writing. Substantive comments will be addressed in a Final Environmental Impact Statement (FEIS).

**ADDRESSES:** You may submit comments by either of the following methods:

- *Email to:* [envcomp-AST@nsf.gov](mailto:envcomp-AST@nsf.gov) with subject line "Arecibo Observatory"
- *Mail to:* Ms. Elizabeth Pentecost, RE: Arecibo Observatory, National Science Foundation, Suite 1045, 4201 Wilson Blvd., Arlington, VA 22230.

*EIS Information:* The DEIS, as well as information about the public meetings, is posted at [www.nsf.gov/AST](http://www.nsf.gov/AST). A Spanish translation of the Executive Summary of the DEIS will be posted to the Web site.

A copy of the DEIS will be available for review at the following libraries in Puerto Rico:

Biblioteca Electrónica Pública  
Municipal Nicolás Nadal Barreto, 210  
Calle Santiago Iglesias, Arecibo, PR,  
Phone: (787) 878-1178  
Archivo General y Biblioteca Nacional  
de PR, 500 Avenida Juan Ponce De  
León, San Juan, PR, Phone: (787) 725-  
1060 ext. 2001

**FOR FURTHER INFORMATION CONTACT:** For further information regarding the EIS

process or Section 106 consultation, please contact: Ms. Elizabeth Pentecost, National Science Foundation, Division of Astronomical Sciences, Suite 1045, 4201 Wilson Blvd., Arlington, VA 22230; telephone: (703) 292-4907; email: [epenteco@nsf.gov](mailto:epenteco@nsf.gov).

**SUPPLEMENTARY INFORMATION:** The Arecibo Observatory is an NSF-owned scientific research and education facility located in Puerto Rico. In 2011, NSF awarded a Cooperative Agreement to SRI International (SRI), which together with Universities Space Research Association (USRA) and Universidad Metropolitana (UMET) formed the Arecibo Management Team to operate and maintain the Arecibo Observatory for the benefit of research communities. The initial 5-year period of performance of the Cooperative Agreement has recently been extended 18 months, to 31 March 2018. Arecibo Observatory enables research in three scientific disciplines: Space and atmospheric sciences, radio astronomy, and solar system radar studies; the last of these is largely funded through a research award to USRA from the National Aeronautics and Space Administration. An education and public outreach program complements the Arecibo Observatory scientific program. A key component of the Arecibo Observatory research facility is a 305-meter diameter, fixed, spherical reflector. Arecibo Observatory infrastructure includes instrumentation for radio and radar astronomy, ionospheric physics, office and laboratory buildings, a heavily utilized visitor and education facility, and lodging facilities for visiting scientists.

Through a series of academic community-based reviews, NSF has identified the need to divest of several facilities from its portfolio in order to retain the balance of capabilities needed to deliver the best performance on the key science of the present decade and beyond. In 2012, NSF's Division of Astronomical Sciences' (AST's) portfolio review committee recommended that "continued AST involvement in Arecibo . . . be re-evaluated later in the decade in light of the science opportunities and budget forecasts at that time. In 2016, NSF's Division of Atmospheric and Geospace Sciences' (AGS') portfolio review committee recommended significantly decreasing funding for the Space and Atmospheric Sciences portion of the Arecibo mission. In response to these evolving recommendations, in 2016, NSF completed a feasibility study to inform and define options for the observatory's future disposition that would involve significantly decreasing

or eliminating NSF funding of Arecibo. Concurrently, NSF sought viable concepts of operations from the scientific community via a Dear Colleague Letter NSF 16-005 (see [www.nsf.gov/AST](http://www.nsf.gov/AST)), with responses due in January 2016. NSF issued a Notice of Intent to prepare an EIS on May 23, 2016, held scoping meetings on June 7, 2016 and held a 30-day public comment period that closed on June 23, 2016. In October 2016, NSF issued Dear Colleague Letter NSF 16-144 (see [www.nsf.gov/AST](http://www.nsf.gov/AST)) to notify the Observatory stakeholder community that NSF intends to issue a follow-up solicitation, requesting the submission of formal proposals involving the continued operation of Arecibo Observatory. The intent of this solicitation will be to input additional information into the decision process for the ultimate disposition of Arecibo Observatory.

Proposed Alternatives to be analyzed in the DEIS include:

- Continued NSF investment for science-focused operations (No-Action Alternative).
- Collaboration with interested parties for continued science-focused operations (Agency Preferred Alternative).
- Collaboration with interested parties for transition to education-focused operations.
- Mothballing of facilities (suspension of operations in a manner such that operations could resume efficiently at some future date).
- Partial deconstruction and site restoration.
- Full deconstruction and site restoration.

No final decisions will be made regarding the proposed changes to operations at Arecibo Observatory prior to issuance of a Final Environmental Impact Statement and, subsequently, a Record of Decision for the Proposed Action.

*Public Meetings:* Public meetings to address the DEIS will take place in Puerto Rico with notification of the times and locations published in the local newspapers, as follows:

(1) Colegio de Ingenieros y Agrimensores de Puerto Rico/Puerto Rico Professional College of Engineers and Land Surveyors (Arecibo Chapter), Ave. Manuel T. Guillan Urdaz, Conector 129 Carr. 10, Arecibo, Puerto Rico, Phone: (787) 758-2250, November 16, 6:00 p.m. to 8:00 p.m.

(2) Doubletree by Hilton Hotel San Juan, 105 Avenida De Diego, San Juan, PR, Phone: (787) 721-6500, November 17, from 10:00 a.m. to 12:00 p.m.

The meetings will be transcribed by a court reporter. Spanish language translation will be provided. Please contact NSF at least one week in advance of the meeting if you would like to request special accommodations (*i.e.*, sign language interpretation, etc.).

A separate consultation meeting, pursuant to Section 106 of the NHPA, will be held from 1:00 p.m. to 2:30 p.m. at the Doubletree by Hilton Hotel San Juan, 105 Avenida De Diego, San Juan, PR on November 17, 2016, beginning one hour after the public meeting on the DEIS. All persons and entities that are consulting parties or are interested in becoming consulting parties are invited to attend. Spanish language translation will also be provided for this meeting.

Dated: October 24, 2016.

**Suzanne H. Plimpton,**

*Reports Clearance Officer, National Science Foundation.*

[FR Doc. 2016-26061 Filed 10-27-16; 8:45 am]

**BILLING CODE 7555-01-P**

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## NUCLEAR REGULATORY COMMISSION

[NRC-2016-0001]

### Sunshine Act Meeting Notice

*Date:* October 31, November 7, 14, 21, 28, December 5, 2016.

*Place:* Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

*Status:* Public and Closed.

#### Week of October 31, 2016

*Friday, November 4, 2016*

10:00 a.m. Briefing on Security Issues (Closed Ex. 1)

#### Week of November 7, 2016—Tentative

There are no meetings scheduled for the week of November 7, 2016.

#### Week of November 14, 2016—Tentative

There are no meetings scheduled for the week of November 14, 2016.

#### Week of November 21, 2016—Tentative

There are no meetings scheduled for the week of November 21, 2016.

#### Week of November 28, 2016—Tentative

*Tuesday, November 29, 2016*

9:00 a.m. Briefing on Uranium Recovery (Public Meeting) (Contact: Samantha Crane: 301-415-6380)

This meeting will be webcast live at the Web address—<http://www.nrc.gov/>.

**Week of December 5, 2016—Tentative**

*There are no meetings scheduled for the week of December 5, 2016.*

\* \* \* \* \*

The schedule for Commission meetings is subject to change on short notice. For more information or to verify the status of meetings, contact Denise McGovern at 301-415-0681 or via email at [Denise.McGovern@nrc.gov](mailto:Denise.McGovern@nrc.gov).

\* \* \* \* \*

The NRC Commission Meeting Schedule can be found on the Internet at: <http://www.nrc.gov/public-involve/public-meetings/schedule.html>.

\* \* \* \* \*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Kimberly Meyer, NRC Disability Program Manager, at 301-287-0739, by videophone at 240-428-3217, or by email at [Kimberly.Meyer-Chambers@nrc.gov](mailto:Kimberly.Meyer-Chambers@nrc.gov). Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

\* \* \* \* \*

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555 (301-415-1969), or email [Brenda.Akstulewicz@nrc.gov](mailto:Brenda.Akstulewicz@nrc.gov) or [Patricia.Jimenez@nrc.gov](mailto:Patricia.Jimenez@nrc.gov).

Dated: October 26, 2016.

**Denise L. McGovern**,  
Policy Coordinator, Office of the Secretary.

[FR Doc. 2016-26271 Filed 10-26-16; 4:15 pm]

BILLING CODE 7590-01-P

## NUCLEAR REGULATORY COMMISSION

[NRC-2016-0174]

**Information Collections: DOE/NRC Form 740M, "Concise Note;" DOE/NRC Form 741, "Nuclear Material Transaction Report;" DOE/NRC Form 742, "Material Balance Report;" and DOE/NRC Form 742C, "Physical Inventory Listing"**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Renewal of existing information collection; request for comment.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for four existing collections of information. The information collections are entitled, DOE/NRC Form 740M, "Concise Note;" DOE/NRC Form 741, "Nuclear Material Transaction Report;" DOE/NRC Form 742, "Material Balance Report;" and DOE/NRC Form 742C, "Physical Inventory Listing."

**DATES:** Submit comments by December 27, 2016. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

**ADDRESSES:** You may submit comments by any of the following methods:

- *Federal Rulemaking Web site:* Go to <http://www.regulations.gov> and search for Docket ID NRC-2016-0174. Address questions about NRC dockets to Carol Gallagher; telephone: 301-415-3463; email: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov). For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *Mail comments to:* David Cullison, Office of the Chief Information Officer, Mail Stop: T-5 F53, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

For additional direction on obtaining information and submitting comments, see "Obtaining Information and Submitting Comments" in the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-2084; email: [INFOCOLLECTS.Resource@NRC.GOV](mailto:INFOCOLLECTS.Resource@NRC.GOV).

### SUPPLEMENTARY INFORMATION:

#### I. Obtaining Information and Submitting Comments

##### A. Obtaining Information

Please refer to Docket ID NRC-2016-0174 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal rulemaking Web site:* Go to <http://www.regulations.gov> and search for Docket ID NRC-2016-0174. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC-2016-0174 on this Web site.

- *NRC's Agencywide Documents Access and Management System*

(ADAMS): You may obtain publicly-available documents online in the ADAMS Public Documents collection at <http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "ADAMS Public Documents" and then select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by email to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov). A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession No. ML16252A183. Guidance documents are available for the Forms, as follows: NUREG/BR-0006, Revision 7 (ADAMS Accession No. ML111740924), and NUREG/BR-0007 (ADAMS Accession No. ML090120288). The supporting statements for each DOE/NRC Form and the Forms themselves are available, as follows: DOE/NRC Form 740M, "Concise Note" (ADAMS Accession No(s) ML16252A184 and ML16252A189); DOE/NRC Form 741, "Nuclear Material Transaction Report" (ADAMS Accession No(s) ML16252A185 and ML16252A191); DOE/NRC Form 742, "Material Balance Report" (ADAMS Accession No(s) ML16252A186 and ML16252A192); and DOE/NRC Form 742C, "Physical Inventory Listing" (ADAMS Accession No(s) ML16252A187 and ML16252A193).

- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-2084; email: [INFOCOLLECTS.Resource@NRC.GOV](mailto:INFOCOLLECTS.Resource@NRC.GOV).

##### B. Submitting Comments

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at <http://www.regulations.gov> and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact

information that they do not want to be publicly disclosed in their comment submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

## II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collections:* DOE/NRC Form 740M, "Concise Note;" DOE/NRC Form 741, "Nuclear Material Transaction Report;" DOE/NRC Form 742, "Material Balance Report;" and DOE/NRC Form 742C, "Physical Inventory Listing."

2. *OMB approval numbers:*  
DOE/NRC Form 740M: 3150-0057  
DOE/NRC Form 741: 3150-0003  
DOE/NRC Form 742: 3150-0004  
DOE/NRC Form 742C: 3150-0058

3. *Type of submission:* Revision.

4. *The form number, if applicable:*  
DOE/NRC Forms 740M, 741, 742, and 742C.

5. *How often the collection is required or requested:* DOE/NRC Form 741, "Nuclear Material Transaction Report," will be collected whenever source or special nuclear material is shipped or received into the Material Balance Area; DOE/NRC Form 742, "Material Balance Report," will be collected on an annual basis; DOE/NRC Form 742C, "Physical Inventory Listing," will be collected on an annual basis; DOE/NRC Form 740M, "Concise Note" forms are used as needed to provide additional information such as qualifying statements or exceptions to data on any of the other data forms required under the U.S.-IAEA Safeguards Agreements (including DOE/NRC Forms 741, 742, and 742C).

6. *Who will be required or asked to respond:* Persons licensed to possess specified quantities of special nuclear material or source material and entities subject to the U.S.-IAEA Caribbean Territories Safeguards Agreement (INFCIRC/366) are required to respond as follows:

Any licensee who ships, receives, or otherwise undergoes an inventory change of special nuclear material or source material is required to submit a DOE/NRC Form 741 to document the change. Additional information regarding these transactions shall be submitted through Form 740M, with

Safeguards Information identified and handled in accordance with title 10 of the *Code of Federal Regulations* (10 CFR) section 73.21, "Requirements for the Protection of Safeguards Information."

Any licensee who had possessed in the previous reporting period, at any one time and location, special nuclear material in a quantity totaling one gram or more shall complete DOE/NRC Form 742. In addition, each licensee, Federal or State, who is authorized to possess, at any one time or location, one kilogram of foreign obligated source material, is required to file with the NRC an annual statement of source material inventory which is foreign obligated.

Any licensee, who had possessed in the previous reporting period, at any one time and location, special nuclear material in a quantity totaling one gram or more shall complete DOE/NRC Form 742C.

7. *The estimated number of annual responses:*

DOE/NRC Form 740M: 175  
DOE/NRC Form 741: 10,000  
DOE/NRC Form 742: 385  
DOE/NRC Form 742C: 385

8. *The estimated number of annual respondents:*

DOE/NRC Form 740M: 40  
DOE/NRC Form 741: 350  
DOE/NRC Form 742: 385  
DOE/NRC Form 742C: 385

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:*

DOE/NRC Form 740M: 131  
DOE/NRC Form 741: 12,500  
DOE/NRC Form 742: 1,310  
DOE/NRC Form 742C: 1,490

10. *Abstract:* Persons licensed to possess specified quantities of special nuclear material or source material currently report inventory and transaction of material to the Nuclear Materials Management and Safeguards System via the DOE/NRC Forms: DOE/NRC Form 740M, "Concise Note;" DOE/NRC Form 741, "Nuclear Material Transaction Report;" DOE/NRC Form 742, "Material Balance Report;" DOE/NRC Form 742C, "Physical Inventory Listing." This collection is being renewed to include approximately 25 entities subject to the U.S.-IAEA Caribbean Territories Safeguards Agreement (INFCIRC/366). Part 75 of 10 CFR requires licensees to provide reports of source and special nuclear material inventory and flow for entities under the U.S.-IAEA Caribbean Territories Safeguards Agreement

(INFCIRC/366), permit inspections by IAEA inspectors, give immediate notice to the NRC in specified situations involving the possibility of loss of nuclear material, and give notice for imports and exports of specified amounts of nuclear material. These licensees will also follow written material accounting and control procedures. Reporting of transfer and material balance records to the IAEA will be done through Nuclear Materials Management and Safeguards System, collected under OMB clearance numbers 3150-0003, 3150-0004, 3150-0057, and 3150-0058. The NRC needs this information to implement its international obligations under the U.S.-IAEA Caribbean Territories Safeguards Agreement (INFCIRC/366).

## III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the estimate of the burden of the information collection accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated at Rockville, Maryland, this 19th day of October 2016.

For the Nuclear Regulatory Commission.

**David Cullison,**

*NRC Clearance Officer, Office of the Chief Information Officer.*

[FR Doc. 2016-26067 Filed 10-27-16; 8:45 am]

**BILLING CODE 7590-01-P**

## NUCLEAR REGULATORY COMMISSION

### Advisory Committee on Reactor Safeguards; Notice of Meeting

In accordance with the purposes of Sections 29 and 182b of the Atomic Energy Act (42 U.S.C. 2039, 2232b), the Advisory Committee on Reactor Safeguards (ACRS) will hold a meeting on November 3-5, 2016, 11545 Rockville Pike, Rockville, Maryland.

**Thursday, November 3, 2016,  
Conference Room T2-B1, 11545  
Rockville Pike, Rockville, Maryland**

*8:30 a.m.-8:35 a.m.: Opening Remarks by the ACRS Chairman (Open)*—The ACRS Chairman will make



opening remarks regarding the conduct of the meeting.

*8:35 a.m.–10:30 a.m.: North Anna 3 Combined License Application (COLA) (Open)*—The Committee will hear presentations by and hold discussions with representatives of the NRC staff and Virginia Electric & Power Co. to discuss the safety evaluation associated with the North Anna 3 Combined License Application.

*10:45 a.m.–12:45 p.m.: AREVA Extended Flow Window/Monticello (Open/Closed)*—The Committee will hear presentations by and hold discussions with representatives of the NRC staff, AREVA, and Xcel Energy regarding amendment requesting operation of Monticello at AREVA's Extended Flow Window. [Note: A portion of this meeting may be closed in order to discuss and protect information designated as proprietary, pursuant to 5 U.S.C. 552b(c)(4).]

*1:45 p.m.–5:30 p.m. 10 CFR part 61 Rulemaking (Open)*—The Committee will hear presentations by and hold discussions with representatives of the NRC staff regarding the proposed final rule, 10 CFR part 61, "Low-Level Radioactive Waste," and associated guidance documents.

*5:30 p.m.–6:00 p.m.: Preparation of ACRS Reports (Open/Closed)*—The Committee will discuss proposed ACRS reports on matters discussed during this meeting. [Note: A portion of this meeting may be closed in order to discuss and protect information designated as proprietary, pursuant to 5 U.S.C. 552b(c)(4).]

**Friday, November 4, 2016, Conference Room T2–B1, 11545 Rockville Pike, Rockville, Maryland**

*8:35 a.m.–10:00 a.m.: Future ACRS Activities/Report of the Planning and Procedures Subcommittee (Open/Closed)*—The Committee will discuss the recommendations of the Planning and Procedures Subcommittee regarding items proposed for consideration by the Full Committee during future ACRS Meetings, and matters related to the conduct of ACRS business, including anticipated workload and member assignments. [Note: A portion of this meeting may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.]

*10:00 a.m.–10:15 a.m.: Reconciliation of ACRS Comments and Recommendations (Open)*—The Committee will discuss the responses

from the NRC Executive Director for Operations to comments and recommendations included in recent ACRS reports and letters.

*10:30 a.m.–11:30 a.m.: Research Quality Review Panels (Open)*—The Committee will discuss the Office of Nuclear Regulatory Research projects.

*12:30 p.m.–6:00 p.m.: Preparation of ACRS Reports (Open)*—The Committee will continue its discussion of proposed ACRS reports discussed during this meeting. [Note: A portion of this meeting may be closed in order to discuss and protect information designated as proprietary, pursuant to 5 U.S.C. 552b(c)(4).]

**Saturday, November 5, 2016, Conference Room T2–B1, 11545 Rockville Pike, Rockville, Maryland**

*8:30 a.m.–11:30 a.m.: Preparation of ACRS Reports (Open/Closed)*—The Committee will continue its discussion of proposed ACRS reports. [Note: A portion of this meeting may be closed in order to discuss and protect information designated as proprietary, pursuant to 5 U.S.C. 552b(c)(4).]

*11:30 a.m.–12:00 p.m.: Miscellaneous (Open)*—The Committee will continue its discussion related to the conduct of Committee activities and specific issues that were not completed during previous meetings.

Procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2016 (81 FR 71543). In accordance with those procedures, oral or written views may be presented by members of the public, including representatives of the nuclear industry. Persons desiring to make oral statements should notify Quynh Nguyen, Cognizant ACRS Staff (Telephone: 301–415–5844, Email: [Quynh.Nguyen@nrc.gov](mailto:Quynh.Nguyen@nrc.gov)), 5 days before the meeting, if possible, so that appropriate arrangements can be made to allow necessary time during the meeting for such statements. In view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the Cognizant ACRS staff if such rescheduling would result in major inconvenience.

Thirty-five hard copies of each presentation or handout should be provided 30 minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the Cognizant ACRS Staff one day before meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the Cognizant ACRS Staff with a CD containing each

presentation at least 30 minutes before the meeting.

In accordance with Subsection 10(d) of Public Law 92–463 and 5 U.S.C. 552b(c), certain portions of this meeting may be closed, as specifically noted above. Use of still, motion picture, and television cameras during the meeting may be limited to selected portions of the meeting as determined by the Chairman. Electronic recordings will be permitted only during the open portions of the meeting.

ACRS meeting agendas, meeting transcripts, and letter reports are available through the NRC Public Document Room at [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov), or by calling the PDR at 1–800–397–4209, or from the Publicly Available Records System (PARS) component of NRC's document system (ADAMS) which is accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html> or <http://www.nrc.gov/reading-rm/doc-collections/ACRS/>.

Video teleconferencing service is available for observing open sessions of ACRS meetings. Those wishing to use this service should contact Mr. Theron Brown, ACRS Audio Visual Technician (301–415–8066), between 7:30 a.m. and 3:45 p.m. (ET), at least 10 days before the meeting to ensure the availability of this service. Individuals or organizations requesting this service will be responsible for telephone line charges and for providing the equipment and facilities that they use to establish the video teleconferencing link. The availability of video teleconferencing services is not guaranteed.

Dated at Rockville, Maryland, this 25th day of October 2016.

For the Nuclear Regulatory Commission.

**Annette L. Vietti-Cook,**

*Advisory Committee Management Officer.*

[FR Doc. 2016–26083 Filed 10–27–16; 8:45 am]

**BILLING CODE 7590–01–P**

## POSTAL SERVICE

### Temporary Emergency Committee of the Board of Governors; Sunshine Act Meeting

**DATES AND TIMES:** Monday, November 14, 2016, at 1:00 p.m.; and Tuesday, November 15, at 10:00 a.m. and 1:00 p.m.

**PLACE:** Washington, DC, at U.S. Postal Service Headquarters, 475 L'Enfant Plaza SW., in the Benjamin Franklin Room.

**STATUS:** Monday, November 14, at 1:00 p.m.—Closed; Tuesday, November 15, at



10:00 a.m.—Open; and Tuesday, November 15, at 1:00 p.m.—Closed

**MATTERS TO BE CONSIDERED:**

**Monday, November 14, 2016, at 1:00 p.m. (Closed)**

1. Strategic Issues.
2. Pricing.
3. Financial Matters.
4. Compensation and Personnel Matters.
5. Governors' Executive Session—  
Discussion of prior agenda items and Board governance.

**Tuesday, November 15, at 10:00 a.m. (Open)**

1. Remarks of the Chairman of the Temporary Emergency Committee of the Board.
2. Remarks of the Postmaster General and CEO.
3. Approval of Minutes of Previous Meetings.
4. Committee Reports.
5. FY2016 10K and Financial Statements.
6. FY2017 IFP and Financing Resolution.
7. FY2018 Appropriations Request.
8. Quarterly Service Performance Report.
9. Approval of Annual Report and Comprehensive Statement.
10. Draft Agenda for the teleconference tentatively scheduled for December 1.
11. Appointment of the TEC Chair.

**Tuesday, November 15, at 1:00 p.m. (Closed—if needed)**

1. Continuation of Monday's closed session agenda.

**CONTACT PERSON FOR MORE INFORMATION:**

Julie S. Moore, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260–1000. Telephone: (202) 268–4800.

**Julie S. Moore,**  
Secretary.

[FR Doc. 2016–26127 Filed 10–26–16; 11:15 am]

**BILLING CODE 7710–12–P**

**RAILROAD RETIREMENT BOARD**

**Agency Forms Submitted for OMB Review, Request for Comments**

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Railroad Retirement Board (RRB) is forwarding an Information Collection Request (ICR) to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB). Our ICR describes the information we seek to collect from the public. Review and approval by OIRA ensures that we impose appropriate paperwork burdens.

The RRB invites comments on the proposed collections of information to determine (1) the practical utility of the collections; (2) the accuracy of the estimated burden of the collections; (3) ways to enhance the quality, utility, and clarity of the information that is the subject of collection; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology. Comments to the RRB or OIRA must contain the OMB control number of the ICR. For proper consideration of your comments, it is best if the RRB and OIRA receive them within 30 days of the publication date.

*1. Title and purpose of information collection:* Vocational Report; OMB 3220–0141.

Section 2 of the Railroad Retirement Act (RRA) provides for payment of disability annuities to qualified employees and widow(ers). The establishment of permanent disability for work in the applicant's "regular occupation" or for work in any regular employment is prescribed in 20 CFR 220.12 and 220.13 respectively.

The RRB utilizes Form G–251, *Vocational Report*, to obtain an applicant's work history. This information is used by the RRB to

determine the effect of a disability on an applicant's ability to work. Form G–251 is designed for use with the RRB's disability benefit application forms and is provided to all applicants for employee disability annuities and to those applicants for a widow(er)'s disability annuity who indicate that they have been employed at some time.

Completion is required to obtain or retain a benefit. One response is requested of each respondent.

*Previous Requests for Comments:* The RRB has already published the initial 60-day notice (81 FR 17511 on August 29, 2016) required by 44 U.S.C. 3506(c)(2). That request elicited no comments.

**Information Collection Request (ICR)**

*Title:* Vocational Report.

*OMB Control Number:* 3220–0141.

*Form(s) submitted:* G–251.

*Type of request:* Extension without change of a currently approved collection.

*Affected public:* Individuals or Households.

*Abstract:* Section 2 of the Railroad Retirement Act provides for the payment of disability annuities to qualified employees and widow(ers). In order to determine the effect of a disability on an annuitant's ability to work, the RRB needs the applicant's work history. The collection obtains the information needed to determine their ability to work.

*Changes proposed:* The RRB proposes no changes to Form G–251.

*The burden estimate for the ICR is as follows:*

Form number	Annual responses	Time (minutes)	Burden (hours)
G–251 (with assistance) .....	5,730	40	3,820
G–251 (without assistance) .....	270	50	225
<b>Total .....</b>	<b>6,000</b>	<b>.....</b>	<b>4,045</b>

*Additional Information or Comments:* Copies of the forms and supporting documents can be obtained from Dana Hickman at (312) 751–4981 or [Dana.Hickman@RRB.GOV](mailto:Dana.Hickman@RRB.GOV). Board, 844 North Rush Street, Chicago, Illinois 60611–2092 or [Charles.Mierzwa@RRB.GOV](mailto:Charles.Mierzwa@RRB.GOV) and to the OMB Desk Officer for the RRB, Fax:

Comments regarding the information collection should be addressed to Charles Mierzwa, Railroad Retirement

202–395–6974, Email address: [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov).

**Charles Mierzwa,**  
*Associate Chief Information Officer of Policy and Compliance.*

[FR Doc. 2016–25889 Filed 10–27–16; 8:45 am]

**BILLING CODE 7905–01–P**

## OFFICE OF SCIENCE AND TECHNOLOGY POLICY

### Plan for Ocean Research in the Coming Decade

**ACTION:** Notice of request for information.

**SUMMARY:** The Subcommittee on Ocean Science and Technology (SOST) is requesting input on the overall framing and content of a plan for Ocean Research in the Coming Decade (“the Plan”). The SOST is chartered under the National Science and Technology Council to advise and assist on national issues related to ocean science and technology. The SOST contributes to the goals for Federal ocean science and technology, including identifying priorities and developing coordinated interagency strategies. The Plan will describe the most pressing research questions and most promising areas of opportunity within the ocean science and technology enterprise for the coming decade. It will set the stage for agency-specific and interagency coordinated actions across Federal agencies and with non-Federal sectors to address societal needs and issues of national importance. This notice solicits relevant public input, particularly suggestions directed toward how the Plan should be structured and specific topic areas that should be considered for inclusion.

**DATES:** Public comments must be received by January 1, 2017 to be considered.

**ADDRESSES:** Public input for the Plan can be submitted electronically at <https://contribute.globalchange.gov/plan-ocean-research-coming-decade>.

*Instructions:* Additional instructions for submitting are found on the Web site provided above. To comment on the Plan, please select “Ocean Research in the Coming Decade” from the list of available documents. Response to this Request for Information (RFI) is voluntary. All submissions must be in English. Please clearly label submissions as “Ocean Research in the Coming Decade Input.” When the final Plan is issued, relevant comments and the commenters’ names, along with the authors’ responses, will become part of the public record and be made available to view online. Further information about the Plan, including the Plan prospectus, is provided at <https://www.nsf.gov/geo/oce/orp/>.

Responses to this RFI may be used by the government for program planning on a non-attribution basis. The Office of Science and Technology Policy (OSTP) therefore requests that no business

proprietary information, copyrighted information, or personally identifiable information be submitted in response to this RFI. Please note that the U.S. Government will not pay for response preparation, or for the use of any information contained in the response.

**FOR FURTHER INFORMATION CONTACT:** Roxanne Nikolaus, Division of Ocean Sciences, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, (703) 292-8580, or [rnikolau@nsf.gov](mailto:rnikolau@nsf.gov), or visit <https://contribute.globalchange.gov/plan-ocean-research-coming-decade> or <https://www.nsf.gov/geo/oce/orp/>.

**SUPPLEMENTARY INFORMATION:** A Plan prospectus intended to stimulate feedback from the public on the overall framing and content of the Plan is available for public viewing at <https://www.nsf.gov/geo/oce/orp/prospectus.jsp>. The prospectus outlines the purpose and intended uses of the Plan, the proposed structure and content of the Plan, how the Plan will be developed and reviewed, and opportunities for community and stakeholder engagement. Additional information, including any updates to this **Federal Register** notice, is available at <https://www.nsf.gov/geo/oce/orp/>. A draft Plan will also be available for public comment upon its completion and prior to production of the final Plan.

The Plan will describe:

- Societal Themes that highlight the benefits-based rationale for conducting ocean research;
- Research Goals that reflect and address the Societal Themes; and
- Research Activities that support the Research Goals and represent current and growing opportunities to provide the Nation with the scientific and technical means to address the Societal Themes.

**Ted Wackler,**

*Deputy Chief of Staff and Assistant Director.*

[FR Doc. 2016-26118 Filed 10-27-16; 8:45 am]

**BILLING CODE 3270-F7-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79146; File No. SR-MIAX-2016-36]

### Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the MIAX Options Fee Schedule

October 24, 2016.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) <sup>1</sup> and Rule 19b-4 thereunder, <sup>2</sup> notice is hereby given that on October 14, 2016, Miami International Securities Exchange LLC (“MIAX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Options Fee Schedule (the “Fee Schedule”).

The text of the proposed rule change is available on the Exchange’s Web site at [http://www.miaxoptions.com/filter/wotitle/rule\\_filing](http://www.miaxoptions.com/filter/wotitle/rule_filing), at MIAX’s principal office, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange proposes to amend the Fee Schedule to reflect the addition of

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

new features to a number of existing interfaces and data feeds, and one new market data feed, as described below, to support the trading of complex orders on the Exchange. The Exchange is not proposing to adopt any new fees at this time and is simply proposing to state in the Fee Schedule that the interfaces and data feeds listed below will support the trading of complex orders on MIAX initially at no additional charge.

#### Background

The Exchange recently adopted new rules governing the trading in, and detailing the functionality of the MIAX System<sup>3</sup> in the handling of, complex orders on the Exchange.<sup>4</sup> In order to support the trading of complex orders on the Exchange, the Exchange is proposing to expand several current interfaces and data feeds (for which a fee is presently charged) to include complex orders in the current interfaces and data feeds and in the proposed new data feed. The Exchange is not proposing to adopt new fees, and instead is proposing to enhance the current interfaces and data feeds, and to introduce a new data feed, cToM (described below) to support the trading of complex orders on the Exchange.

#### Interfaces

The Exchange is proposing to include complex orders in its current interfaces to the System that enable Members to connect with the System for various uses. Specifically, the Exchange is proposing to enhance the MIAX Financial Information Exchange (“FIX”) Port, the MIAX Express Interface (“MEI”) Port, the MIAX Clearing Trade Drop (“CTD”) Port, and the MIAX FIX Trade Drop (“FXD”) Port (each described below) to support the trading of complex orders on MIAX. The Exchange is proposing to reflect this enhancement by adding new language to the Fee Schedule describing the application of these interfaces to complex orders.

#### FIX Port

The Financial Information Exchange (“FIX”) Port<sup>5</sup> allows Members to electronically send orders in all products traded on the Exchange.

<sup>3</sup> The term “System” means the automated trading system used by the Exchange for the trading of securities. See Exchange Rule 100.

<sup>4</sup> See Securities Exchange Act Release No. 79072 (October 7, 2016), 81 FR 71131 (October 14, 2016) (SR-MIAX-2016-26) (Order Approving a Proposed Rule Change to Adopt New Rules to Govern the Trading of Complex Orders).

<sup>5</sup> A FIX Port is an interface with MIAX systems that enables the Port user (typically an EEM or a Market Maker) to submit orders electronically to MIAX.

Section 5(d)(i) of the Fee Schedule currently provides that MIAX will assess monthly FIX Port Fees on Members in each month the Member is credentialed to use a FIX Port in the production environment and based upon the number of credentialed FIX Ports. The Exchange is proposing to amend Section 5(d)(i) of the Fee Schedule to state clearly in footnote 25 that a FIX Port is an interface with MIAX systems that enables the Port user (typically an Electronic Exchange Member (“EEM”)<sup>6</sup> or a Market Maker) to submit simple and complex orders electronically to MIAX.

#### MEI Port

The MIAX Express Interface (“MEI”)<sup>7</sup> Port, allows Market Makers to submit electronic quotes to the Exchange. Section 5(d)(ii) of the Fee Schedule provides that MIAX will assess monthly MEI Port Fees on Market Makers in each month the Member has been credentialed to use the MEI Port in the production environment and has been assigned to quote in at least one class. The amount of the monthly MEI Port Fee is based upon the number of classes in which the Market Maker was assigned to quote on any given day within the calendar month, and upon various levels of class volume percentages. In addition to its current features, the MEI Port will now include the identification of the complex strategies currently trading on MIAX. The Exchange is proposing to amend Section 5(d)(ii) of the Fee Schedule to state clearly in footnotes 27, 28 and 29 that MIAX Express Interface is a connection to MIAX systems that enables Market Makers to submit simple and complex electronic quotes to MIAX; that Full Service MEI Ports provide Market Makers with the ability to send Market Maker simple and complex quotes, eQuotes, and quote purge messages to the MIAX System; and that Limited Service MEI Ports provide Market Makers with the ability to send simple and complex eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAX System.

#### CTD Port

The Clearing Trade Drop (“CTD”) provides Exchange members with real-time clearing trade updates. The updates include the Member’s clearing trade messages on a low latency, real-

<sup>6</sup> The term “Electronic Exchange Member” means the holder of a Trading Permit who is not a Market Maker. Electronic Exchange Members are deemed “members” under the Act. See Exchange Rule 100.

<sup>7</sup> MIAX Express Interface is a connection to MIAX systems that enables Market Makers to submit electronic quotes to MIAX.

time basis. The trade messages are routed to a Member’s connection containing certain information. The information includes, among other things, the following: (i) Trade date and time; (ii) symbol information; (iii) trade price/size information; (iv) Member type (for example, and without limitation, Market Maker, EEM, Broker-Dealer); and (v) Exchange Member Participant Identifier (“MPID”) for each side of the transaction, including Clearing Member MPID. CTD Port Fees are assessed in any month the Member is credentialed to use the CTD Port in the production environment. The Exchange is proposing to state clearly in Section 5(d)(iii) of the Fee Schedule that the CTD Port users will receive strategy specific information for complex transactions.

#### FXD Port

The FIX Drop Copy Port (“FXD”) is a messaging interface that provides a copy of real-time trade execution, trade correction and trade cancellation information to FIX Drop Copy Port users who subscribe to the service. FIX Drop Copy Port users are those users who are designated by an EEM to receive the information and the information is restricted for use by the EEM only. FXD Port Fees are assessed in any month the Member is credentialed to use the FXD Port in the production environment. The Exchange is proposing to state clearly in Section 5(d)(iv) of the Fee Schedule that the FXD is a messaging interface that will provide a copy of real-time trade execution, trade correction and trade cancellation information for simple and complex orders to FIX Drop Copy Port users who subscribe to the service. FXD Port users will receive a copy of real-time trade execution, trade correction and cancellation information for transactions in simple and complex orders on MIAX.

#### Market Data Feeds

The Exchange is also proposing to expand the scope of certain market data products to include data relating to complex orders traded on the Exchange at no additional cost to subscribers. Specifically, the Exchange is proposing to expand the MIAX Top of Market (“ToM”) feed, the MIAX Order Feed (“MOR”), and the Administrative Information Subscriber (“AIS”) data feeds, as described below, to include data for complex orders traded on MIAX.

#### MIAX ToM and cToM

MIAX Top of Market (“ToM”) is a market data product that provides a

direct data feed that includes the Exchange's best bid and offer, with aggregate size, based on displayable order and quoting interest on the Exchange. The ToM data feed includes data that is identical to the data sent to the processor for the Options Price Reporting Authority ("OPRA").

The Exchange is proposing to provide complex order market data in a similar fashion by way of a new market data product known as MIAX Complex Top of Market ("cToM"). The cToM data feed is a separate new product that is complex order specific and is available to those who wish to subscribe to it. cToM will provide subscribers with the same information as the ToM market data product as it relates to the Strategy Book, *i.e.*, the Exchange's best bid and offer for a complex strategy, known as the "cMBBO," with aggregate size, based on displayable order and quoting interest in the complex strategy on the Exchange.<sup>8</sup>

cToM will also contain a feature ("feature") that provides the number of Priority Customer<sup>9</sup> contracts that are included in the size associated with the Exchange's best bid and offer. This feature will be implemented on a date determined by the Exchange and communicated to membership via Regulatory Circular. The Exchange will announce the implementation date of the feature no later than 90 days after the publication of the Commission Order ("Order") approving the trading of complex orders on MIAX in the **Federal Register**.<sup>10</sup> The implementation date will be no later than 90 days following publication of the Regulatory Circular announcing publication of the approval Order in the **Federal Register**.

In addition, cToM will provide subscribers with the identification of the complex strategies currently trading on MIAX; complex strategy last sale information; and the status of securities underlying the complex strategy (*e.g.*, halted, open, or resumed). As stated above, cToM is distinct from ToM, and anyone wishing to receive cToM data must subscribe to cToM regardless of whether they are a current ToM subscriber. ToM subscribers are not required to subscribe to cToM, and cToM subscribers are not required to subscribe to ToM. The cToM feed will

be available initially at no cost, as reflected in the proposed changes to the table in Section 6(a) of the Fee Schedule.

#### AIS

The Exchange will include certain administrative information concerning complex orders to Administrative Information Subscribers ("AIS"). The AIS market data feed includes opening imbalance condition information; opening routing information; Expanded Quote Range information, as provided in MIAX Rule 503(f)(5); Post-Halt Notification, as provided in MIAX Rule 504(d); and Liquidity Refresh condition information, as provided in MIAX Rule 515(c)(2) (collectively, the "administrative information"). An AIS is a market participant that connects with the MIAX System for purposes of receiving the administrative information. Thus, an AIS that elects not to receive the top of market data through a subscription to cToM or act as a MIAX Market Maker will be able to receive the administrative information via connectivity to the MIAX System through an AIS Port.<sup>11</sup> The Exchange proposes to enhance AIS to include information concerning the commencement of a Complex Auction under the complex order rules.<sup>12</sup> The addition of complex order information to the AIS data feed is a value-added feature of AIS, and the Exchange proposes to state clearly in Section 6(b) of the Fee Schedule that the AIS market data feed will include administrative information for simple and complex orders. The fee for the AIS market data feed is currently waived for distributors that also subscribe to ToM. The Exchange proposes to amend Section 6(b) of the Fee Schedule to provide that the AIS market data feed is also waived if the distributor subscribes to cToM.

#### MOR

The Exchange proposes to include complex order information as an enhanced feature of the MIAX Order Feed ("MOR") data product. MOR is a real-time full order book data feed that provides information for orders on the MIAX Book. MOR will now also include the same information regarding complex orders on the Strategy Book. MOR will provide real-time information to enable users to keep track of the Strategy Book for all complex strategies traded on

MIAX. Specifically, MOR will now include information concerning the identification of complex orders on the Strategy Book (as described in the proposal to establish rules for the trading of complex orders on the Exchange).<sup>13</sup> MOR will provide real-time data including the limit price, origin, and size of each order for the entire Strategy Book to its users and the Exchange proposes to state clearly in Section 6(c) of the Fee Schedule that the AIS market data feed will include administrative information for simple and complex orders.

#### 2. Statutory Basis

MIAX believes that its proposed rule change is consistent with Section 6(b) of the Act<sup>14</sup> in general, and furthers the objectives of Section 6(b)(4)<sup>15</sup> of the Act, in that it is designed to provide for an equitable allocation of reasonable dues, fees and other charges among Exchange Members and other persons using its facilities, because it applies equally to all Members and any persons using the facilities or services of the Exchange.

In addition, the Exchange believes the proposed rule change also furthers the objectives of Section 6(b)(5)<sup>16</sup> of the Act in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest, and it is not designed to permit unfair discrimination among customers, brokers, or dealers.

The proposed addition of complex order information to the various enumerated ports and market data products are [sic] designed to promote just and equitable principles of trade by providing MIAX participants with trading information and market data that should enable them to make informed decisions concerning complex orders on the MIAX Exchange by using the data provided by MIAX to assess market conditions that directly affect such decisions. The proposal to include the value-added feature of complex order information to existing ports and data products removes impediments to, and is designed to further perfect, the mechanisms of a free and open market

<sup>8</sup> For a complete description of ToM, *see* Securities Exchange Act Release No. 69007 (February 28, 2013), 78 FR 14617 (March 6, 2013) (SR-MIAX-2013-05).

<sup>9</sup> The term "Priority Customer" means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). *See* Exchange Rule 100.

<sup>10</sup> *See supra* note 4.

<sup>11</sup> An AIS Port provides an AIS with the connectivity necessary to receive administrative information from the MIAX System. *See* Securities Exchange Act Release No. 73326 (October 9, 2014), 79 FR 62233 (October 16, 2014) (SR-MIAX-2014-51).

<sup>12</sup> *See supra* note 4.

<sup>13</sup> *See supra* note 4.

<sup>14</sup> 15 U.S.C. 78f(b).

<sup>15</sup> 15 U.S.C. 78f(b)(4).

<sup>16</sup> 15 U.S.C. 78f(b)(5).

and a national market system by making the MIAX market, more transparent and accessible to market participants as MIAX begins to trade complex orders.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. On the contrary, the Exchange believes that the addition of information concerning complex orders to the various ports and market data products will enhance inter-market competition by supplementing existing ports and data products with information concerning complex orders traded on MIAX. This transparency and access should enable MIAX to compete with other exchanges for order flow in complex orders in the options markets.

Additionally, respecting intra-market competition, the value-added features relating to complex orders in the various ports and data products are available to all subscribers at no additional cost, thus providing all subscribers to the ports and data products with an even playing field with respect to information and access to trade complex orders on MIAX.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited nor received.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>17</sup> and Rule 19b-4(f)(6) thereunder.<sup>18</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days from the date of filing. However, pursuant to

Rule 19b-4(f)(6)(iii),<sup>19</sup> 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. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Such waiver will allow the Exchange to offer the features relating to the trading of complex orders that will be embedded in the Exchange's enumerated ports and market data products on the date that coincides with the projected October 24, 2016 launch of the trading of complex orders on the Exchange.<sup>20</sup> Accordingly, the Commission hereby waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest; for the protection of investors; or otherwise in furtherance of the purposes of the Act.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-MIAX-2016-36 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-MIAX-2016-36. 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 Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MIAX-2016-36, and should be submitted on or before November 18, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

**Robert W. Errett,**  
*Deputy Secretary.*

[FR Doc. 2016-26054 Filed 10-27-16; 8:45 am]

**BILLING CODE 8011-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-79145; File No. SR-Phlx-2016-109]

### **Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt Phlx Rule 765 (Prohibition Against Trading Ahead of Customer Orders)**

October 24, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 20, 2016, 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, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to

<sup>17</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>18</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>19</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>20</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>21</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt Phlx Rule 765 (Prohibition Against Trading Ahead of Customer Orders). Phlx also proposes to amend Rule 3404 (Recording of Order Information) to include an additional order reporting requirement related to one of the exceptions in Rule 765.

The text of the proposed rule change is set forth below. Proposed new language is italicized; deleted text is in brackets.

\* \* \* \* \*

#### Rules of the Exchange

\* \* \* \* \*

#### Rule 765 Prohibition Against Trading Ahead of Customer Orders

(a) *Phlx members and persons associated with a member shall comply with FINRA Rule 5320 as if such Rule were part of Phlx's rules.*

(b) *For purposes of this Rule:*

(1) *References to FINRA Rules 5310, 5320 and 7440 shall be construed as references to Phlx Rules 764, 765 and 3404, respectively;*

(2) *The reference in FINRA Rule 5320 to an "institutional account", as defined in FINRA Rule 4512(c), shall be construed to apply to accounts of customers that do not meet the definition of "non-institutional customer", as defined in Phlx Rule 763(c);*

(3) *FINRA Rule 5320.02(b) and the reference to FINRA Rule 6420 therein shall be disregarded;*

(4) *References to "FINRA" shall be construed as references to "Phlx".*

(c) *Phlx members and persons associated with a member relying upon the exception set forth in FINRA Rule 5320.03 shall comply with the reporting requirements stated therein. Phlx and FINRA are parties to the Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of Phlx. Therefore, Phlx members are complying with Phlx Rule 765 by complying with FINRA Rule 5320.03 as written, including, for example, reporting requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Phlx Rule 765 are being performed by FINRA on behalf of Phlx.*

\* \* \* \* \*

#### Rule 3000 NASDAQ OMX PSX

\* \* \* \* \*

#### Rule 3404 Recording of Order Information

With respect to orders for securities listed on the NASDAQ Stock Market or the Exchange, member organizations and persons associated with a member organization shall comply with the following Rule:

(a) No Change.

(b) *Order Origination and Receipt* Unless otherwise indicated, the following order information must be recorded under this Rule when an order is received or originated. For purposes of this Rule, the order origination or receipt time is the time the order is received from the customer.

(1) through (16) No Change.

(17) *an identification of the order as related to a Program Trade or an Index Arbitrage Trade; [and]*

(18) *the type of account, i.e., retail, wholesale, employee, proprietary, or any other type of account designated by the Exchange, for which the order is submitted[.]; and*

(19) *if the member is relying on the exception provided in FINRA Rule 5320.02 with respect to the order, the unique identification of any appropriate information barriers in place at the department within the member where the order was received or originated.*

\* \* \* \* \*

### 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

Phlx proposes to adopt Rule 765 (Prohibition Against Trading Ahead of Customer Orders). This rule will largely incorporate FINRA Rule 5320 (Prohibition Against Trading Ahead of Customer Orders), commonly known as the "Manning Rule", by reference. Phlx also proposes to adopt, as part of Rule 3404 (Recording of Order Information), language that specifies how members shall comply with the exception set

forth in FINRA Rule 5320.02 (No-Knowledge Exception) if the member implements information barriers in reliance on that exception.

Phlx believes that Rule 765 will add important additional safeguards to the treatment of customer orders by members, and that the amendment to Rule 3404 will increase regulatory efficiency in conducting surveillance to ensure compliance with Rule 765. In addition, both The Nasdaq Stock Market LLC ("Nasdaq") and NASDAQ BX, Inc. ("BX") have previously adopted rules prohibiting the trading ahead of customer orders that reference FINRA Rule 5320, and so this proposal will further align the Phlx rules with Nasdaq and BX rules in this regard.<sup>3</sup>

Proposed Rule 765 contains three distinct elements. First, Rule 765 states that members shall be required to comply with FINRA Rule 5320 as if that rule were part of Phlx's rules. As part of incorporating FINRA Rule 5320 by reference, Rule 765 states that references to FINRA shall be construed as references to Phlx, and replaces cross-references to other FINRA rules with cross-references to corresponding Phlx rules. Second, Rule 765 exempts members from complying with FINRA Rule 5320.02(b) and the reference to FINRA Rule 6420 therein, as those provisions deal with trading in OTC equity securities, which Phlx does not regulate. Finally, Rule 765 addresses how members and persons associated with a member relying upon the exception set forth in FINRA Rule 5320.03 (relating to riskless principal transactions) shall comply with the reporting requirements stated therein. These elements are further discussed below.

<sup>3</sup> FINRA Rule 5320 was previously codified as NASD IM-2110-2 (Trading Ahead of Customer Limit Order) and NASD Rule 2111 (Trading Ahead of Customer Market Orders). FINRA adopted FINRA Rule 5320 in 2011, which combined NASD IM-2110-2 and NASD Rule 2111 into one rule and made several changes. See Securities Exchange Act Release No. 63895 (February 11, 2011), 76 FR 9386 (February 17, 2011) (SR-FINRA-2009-090). Nasdaq adopted IM-2110-2 as part of its Form 1 application that it submitted in 2001. See Securities Exchange Act Release No. 44396 (June 7, 2001), 66 FR 31952 (June 13, 2001) (File No. 10-131). Nasdaq subsequently amended that rule to reflect the adoption of FINRA Rule 5320. See Securities Exchange Act Release No. 68153 (November 5, 2012), 77 FR 67409 (November 9, 2012) (SR-NASDAQ-2012-124). In 2008, BX adopted IM-2110-2 (Trading Ahead of Customer Limit Order), which incorporates NASD IM-2110-2 by reference, and Rule 2111 (Trading Ahead of Customer Market Orders), which incorporates NASD Rule 2111 by reference. See Securities and Exchange Act Release No. 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008) (SR-BSE-2008-48).

### Compliance with FINRA Rule 5320

Rule 765 states that Phlx members and persons associated with a member shall comply with FINRA Rule 5320 as if such Rule were part of Phlx's rules. As part of incorporating FINRA Rule 5320 by reference, Rule 765 states that references to "FINRA" shall be construed as references to "Phlx".

Rule 765 also changes cross-references from FINRA rules to Phlx rules. Specifically, FINRA Rule 5320 cross-references FINRA Rules 5310 (Best Execution and Interpositioning), 5320 (Prohibition Against Trading Ahead of Customer Orders) and 7440 (Recording of Order Information). Rule 765 changes those cross-references to references to Phlx Rules 764 (Best Execution and Interpositioning), 765 (Prohibition Against Trading Ahead of Customer Orders) and 3404 (Recording of Order Information), respectively.

Finally, FINRA Rule 5320 contains an exception for large orders (10,000 shares or more, unless such orders are less than \$100,000 in value) and for orders for customers that meet the definition of an "institutional account", as defined in FINRA Rule 4512(c). Phlx proposes to adopt a similar exception by cross-referencing Phlx Rule 763(c), which defines a "non-institutional customer" using the same criteria as FINRA Rule 4512(c).<sup>4</sup> Although the two definitions use the same criteria, those criteria are used to define opposite concepts ("institutional account" versus "non-institutional customer"). Since the same criteria is used to define opposite concepts, Rule 765 states that the reference in FINRA Rule 5320 to an "institutional account" as defined in FINRA Rule 4512(c) shall be construed to apply to accounts of customers that do not meet the definition of "non-institutional customer", as defined in Rule 763(c).

Phlx believes that it is appropriate to adopt a Manning rule that is substantively the same as the current FINRA rule, including the various exceptions to that rule. First, Phlx believes that the rationale for initially adopting the Manning rule continues to apply today. In initially approving NASD IM-2110-2, the Commission

found that the rule would enhance investor confidence by allowing more trade volume to be made available to customers by giving customer orders priority over the market maker's proprietary trading, which would result in quicker and more frequent executions for customers.<sup>5</sup> The Commission also found that the rule would improve the price discovery process, as market makers would be encouraged to handle customer limit orders in a timely fashion, which would provide investors with a more accurate indication of the buy and sell interest at a given moment.<sup>6</sup> Phlx believes that the reasons justifying the proposal of the original NASD rule also apply here.

Second, as noted above, both Nasdaq and BX have adopted rules prohibiting the trading ahead of customer orders that largely adopt FINRA Rule 5320 by reference, and so this proposal will further align the Phlx rules with Nasdaq and BX rules in this regard.

Phlx also believes that it is appropriate to incorporate by reference the various exceptions set forth in the FINRA rule. With respect to incorporating FINRA's definition of an institutional account, and that rule's corresponding carve-out for institutional accounts, the SEC noted in originally approving NASD IM-2110-2 (which allowed members to set the specific terms and conditions for acceptance of institutional orders) that institutional orders may qualify for special treatment. The SEC found that, because most market makers cannot typically fill institutional-size orders out of inventory, institutions generally only hold market makers to a "best efforts" standard in return for the willingness of the market maker to put up substantial capital to provide liquidity for large orders.<sup>7</sup> Phlx believes that a similar rationale applies here, and that this rationale justifies incorporating this exception by reference.

Phlx also believes that it is appropriate to incorporate by reference the exception in FINRA Rule 5320 for riskless principal trades.<sup>8</sup> In initially

proposing this exception, the NASD stated that it considered trades that met the standards of the riskless principal exception to be functionally equivalent to an agency trade and therefore did not materially implicate a market maker's proprietary trading.<sup>9</sup> According to NASD, this position was primarily based on the rule's requirement that only trades where a market maker gives the customer a trade price that reflects the market maker's actual cost in acquiring the stock would be eligible for the exception, as the requirement to "trade flat" effectively removed concerns that a member would breach its fiduciary duty to customer limit orders that it holds.<sup>10</sup> Phlx believes that the same rationale applies here, and that this rationale justifies incorporating this exception by reference.

### Exception From Requirement To Comply With FINRA Rule 5320.02(b)

Rule 765 excludes a provision of FINRA's Manning rule that relates to the over-the-counter market. Specifically, Rule 765 provides that FINRA Rule 5320.02(b) and its reference to FINRA Rule 6420 therein shall be disregarded. FINRA Rule 5320.02 applies the Manning rule to OTC equity securities, which are defined in FINRA Rule 6420.<sup>11</sup> Phlx is excluding FINRA Rule

the facilitated order, identifying the trade as riskless principal to FINRA (or another self-regulatory organization if not required under FINRA rules); and (b) has written policies and procedures to ensure that riskless principal transactions for which the member is relying upon this exception comply with applicable FINRA rules. At a minimum these policies and procedures must require that the customer order was received prior to the offsetting principal transaction, and that the offsetting principal transaction is at the same price as the customer order exclusive of any markup or markdown, commission equivalent or other fee and is allocated to a riskless principal or customer account in a consistent manner and within 60 seconds of execution. Members must have supervisory systems in place that produce records that enable the member and FINRA to reconstruct accurately, readily, and in a time-sequenced manner all facilitated orders for which the member relies on this exception."

<sup>9</sup> See Securities Exchange Act Release No. 46006 (May 30, 2002), 67 FR 39455 (June 7, 2002) (SR-NASD-2002-66). NASD extended this exception to NASD Rule 2111 (Trading Ahead of Customer Market Orders) when NASD adopted that rule in 2005. See Securities Exchange Act Release No. 52226 (August 9, 2005), 70 FR 48219 (August 16, 2005) (SR-NASD-2004-045).

<sup>10</sup> See Securities Exchange Act Release No. 46006 (May 30, 2002), 67 FR 39455 (June 7, 2002) (SR-NASD-2002-66).

<sup>11</sup> FINRA Rule 5320.02 provides that, with respect to OTC equity securities, if a member implements and utilizes an effective system of internal controls, such as appropriate information barriers, that operate to prevent a non-market-making trading unit from obtaining knowledge of customer orders held by a separate trading unit, the non-market-making trading unit trading in a proprietary capacity may continue to trade at prices that would satisfy the customer orders held by the separate

<sup>4</sup> Rule 763(c) defines a non-institutional customer as "a customer that is not (1) a bank, savings and loan association, insurance company, or registered investment company; (2) an investment adviser registered either with the Commission under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or (3) any other entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least \$50 million." FINRA Rule 4512(c) uses the same criteria to define an "institutional account". See FINRA Rule 4512(c).

<sup>5</sup> See Securities Exchange Act Release No. 34279 (June 29, 1994), 59 FR 16369 (July 7, 1994) (SR-NASD-93-58).

<sup>6</sup> *Id.*

<sup>7</sup> See Securities Exchange Act Release No. 34279 (June 29, 1994), 59 FR 16369 (July 6, 1994) (SR-NASD-93-58).

<sup>8</sup> FINRA Rule 5320.03 provides that the obligations under the rule "shall not apply to a member's proprietary trade if such proprietary trade is for the purposes of facilitating the execution, on a riskless principal basis, of an order from a customer (whether its own customer or the customer of another broker-dealer) (the "facilitated order"), provided that the member: (a) Submits a report, contemporaneously with the execution of



5320.02(b) and its reference to FINRA Rule 6420 from Rule 765 because this provision relates to over-the-counter securities, and Phlx does not regulate the over-the-counter market.<sup>12</sup>

#### Compliance With FINRA Rule 5320.03

Finally, Phlx proposes to adopt language governing how Phlx members may comply with one of the exceptions to FINRA's Manning rule; specifically, the exception for riskless principal trades.<sup>13</sup> If a member relies upon the riskless principal exception, FINRA Rule 5320.03 requires that the member, among other things, submit a report contemporaneous with the execution of the customer trade identifying the trade as riskless principal, and have written policies and procedures in place to ensure that the riskless principal trades for which the member is relying upon the exception comply with applicable FINRA rules. Rule 765(c) states that members and persons associated with a member relying upon the exception set forth in FINRA Rule 5320.03 shall comply with the reporting requirements stated therein. The Rule further states that Phlx and FINRA are parties to the Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of Phlx. Therefore, Phlx members are complying with Phlx Rule 765 by complying with FINRA Rule 5320.03 as written, including, for example, reporting requirements and notifications. In addition, Rule 765 states that functions performed by FINRA, FINRA departments, and FINRA staff under Phlx Rule 765 are being performed by FINRA on behalf of Phlx. Phlx believes that this provision provides useful clarification as to how members may comply with the rule's riskless principal exception.

#### Rule 3404 and Compliance with the No-Knowledge Exception

Phlx also proposes to adopt, as part of Rule 3404 (Recording of Order Information) language that specifies how members shall comply with the exception set forth in FINRA Rule 5320.02 (No-Knowledge Exception) if the member implements information barriers in reliance on that exception.

trading unit. FINRA defines an OTC equity security as "any equity security that is not an 'NMS stock' as that term is defined in Rule 600(b)(47) of SEC Regulation NMS; provided, however, that the term 'OTC Equity Security' shall not include any Restricted Equity Security." See FINRA Rule 6420(f).

<sup>12</sup> Nasdaq proposed a similar exclusion when updating its Manning rule to reflect the adoption of FINRA Rule 5320. See Securities Exchange Act Release No. 68153 (November 5, 2012), 77 FR 67409 (November 9, 2012) (SR-NASDAQ-2012-124).

<sup>13</sup> That exception is discussed in note 8 above.

Under this exception, if a member implements and utilizes an effective system of internal controls, such as appropriate information barriers, that operate to prevent one trading unit from obtaining knowledge of customer orders held by a separate trading unit, those other trading units trading in a proprietary capacity may continue to trade at prices that would satisfy the customer orders held by the separate trading unit.<sup>14</sup> FINRA Rule 5320.02 further specifies that, if a member implements and utilizes appropriate information barriers in reliance on this exception, the member must uniquely identify such information barriers as prescribed in FINRA Rule 7440(b)(19).<sup>15</sup> That rule states that, if the member is relying on the exception provided in FINRA Rule 5320.02 with respect to the order, the member must record the unique identification of any appropriate information barriers in place at the department within the member where the order was received or originated. Members must record this information when an order is received or originated, which means the time the order is received from the customer.<sup>16</sup>

As part of incorporating FINRA's Manning rule, Phlx proposes to adopt, as Rule 3404(b)(19), corresponding language that sets forth how members shall comply with the no-knowledge exception if members utilize information barriers in reliance on that exception. Just as FINRA Rule 5320.02 references the applicable requirement in FINRA Rule 7440(b) that members identify the appropriate information barriers in place in connection with the order that is subject to the no-knowledge exception, Rule 765 shall reference the corresponding requirement in Rule 3404.

Phlx believes that it is appropriate to adopt a corresponding requirement that a member identify, at the time of order receipt or origination, the appropriate information barriers in place if a member is utilizing information barriers in reliance on the no-knowledge exception. In initially proposing this requirement as part of FINRA Rule 7440, FINRA stated that it would enhance regulatory efficiency by allowing FINRA to ascertain, on an automated basis, those firms that are claiming the no-knowledge exception, thereby reducing the number of "false

<sup>14</sup> See FINRA Rule 5320.02. This exception applies to NMS stocks, as defined in Rule 600 of Regulation NMS. See 17 CFR 242.600(47).

<sup>15</sup> FINRA Rule 7440(b)(19) has subsequently been re-numbered as Rule 7440(b)(20). See Securities Exchange Act Release No. 77523 (April 5, 2016), 81 FR 21427 (April 11, 2016) (SR-FINRA-2016-006).

<sup>16</sup> See FINRA Rule 7440(b)(20).

positives" where trading ahead may otherwise be indicated.<sup>17</sup> Phlx believes that the same rationale applies here. Phlx also notes that Nasdaq has incorporated the no-knowledge exception as part of its Manning rule and the corresponding language that sets forth how members shall comply with the no-knowledge exception if members utilize information barriers in reliance on that exception.<sup>18</sup>

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>19</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>20</sup> 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. Phlx believes that the proposed rule will add important additional safeguards to the treatment of customer orders by members, and notes that the SEC has previously found that the Manning rule may result in increased market quality for market participants. Phlx also notes that the SEC has previously approved the various exceptions to the rule, such as the exception for institutional accounts and the riskless principal exception, which Phlx proposes to incorporate by reference. Phlx believes that the proposed amendment to Rule 3404 will increase regulatory efficiency in conducting surveillance to ensure compliance with Rule 765. Finally, Nasdaq and BX already contain rules prohibiting trading ahead of customer orders that reference the applicable FINRA rule, and so this proposal will further align the Phlx rules with Nasdaq and BX rules in this regard.

#### 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 will apply equally to all similarly-situated members, *i.e.*, members that handle customer market and limit orders. To the extent that the rule contains exceptions for certain kinds of accounts (such as trades for accounts of customers that do not meet the definition of "non-institutional

<sup>17</sup> See Securities Exchange Act Release No. 65692 (November 4, 2011), 76 FR 70195 (November 10, 2011) (Notice of filing of SR-FINRA-2011-063).

<sup>18</sup> See Nasdaq Rule 5320A and Rule 7440A.

<sup>19</sup> 15 U.S.C. 78f(b).

<sup>20</sup> 15 U.S.C. 78f(b)(5).



customer”) and certain kinds of trades (such as riskless principal trades), and additional reporting requirements for firms that use information barriers pursuant to the no-knowledge exception, these exceptions and requirements will also apply equally to all similarly-situated market participants. In addition, the SEC has previously found that such exceptions and requirements are consistent with the Act.

*C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>21</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>22</sup>

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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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:

<sup>21</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>22</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

*Electronic Comments*

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2016-109 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number *SR-Phlx-2016-109*. 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 Web site (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission’s Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-Phlx-2016-109 and should be submitted on or before November 18, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2016-26053 Filed 10-27-16; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>23</sup> 17 CFR 200.30-3(a)(12).

**SECURITIES AND EXCHANGE COMMISSION**

[Investment Company Act Release No. 32324; 812-14542]

**ALAIA Market Linked Trust and Beech Hill Securities, Inc.; Notice of Application**

October 24, 2016.

**AGENCY:** Securities and Exchange Commission (“Commission”).

**ACTION:** Notice of an application under (a) section 6(c) of the Investment Company Act of 1940 (“Act”) for an exemption from sections 2(a)(32), 2(a)(35), 14(a), 19(b), 22(d) and 26(a)(2)(C) of the Act and rules 19b-1 and rule 22c-1 thereunder and (b) sections 11(a) and 11(c) of the Act for approval of certain exchange and rollover privileges.

*Applicants:* ALAIA Market Linked Trust and Beech Hill Securities Inc. (“BHSI”).<sup>1</sup>

*Summary of Application:* Applicants request an order to permit certain unit investment trusts (“UIT”) to: (a) Impose sales charges on a deferred basis and waive the deferred sales charge in certain cases; (b) offer unitholders certain exchange and rollover options; (c) publicly offer units without requiring the Depositor to take for its own account \$100,000 worth of units; and (d) distribute capital gains resulting from the sale of portfolio securities within a reasonable time after receipt.

*Filing Dates:* The application was filed on September 3, 2015, and amended on January 6, 2016, and October 17, 2016.

*Hearing or Notification of Hearing:* An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission’s Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on November 17, 2016, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer’s interest, any facts

<sup>1</sup> Applicants also request relief for future unit investment trusts (collectively, with ALAIA Market Linked Trust, the “Trusts”) and series of the Trusts (“Series”) that are sponsored by BHSI or any entity controlling, controlled by or under common control with BHSI (together with BHSI, the “Depositors”). Any future Trust and Series that relies on the requested order will comply with the terms and conditions of the application. All existing entities that currently intend to rely on the requested order are named as applicants.

bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested.

Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090; Applicants, c/o Anna T. Pinedo, Esq., Morrison & Foerster LLP, 250 West 55th Street, New York, NY 10019-9601.

**FOR FURTHER INFORMATION CONTACT:** Bruce R. MacNeil, Senior Counsel, at (202) 551-6817, or Daniele Marchesani, Branch Chief, at (202) 551-6821 (Division of Investment Management, Chief Counsel's Office).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

#### Applicants' Representations

1. ALAIA Market Linked Trust is a UIT that is registered under the Act. Any future Trust will be a registered UIT. BHSI, a New York corporation, is registered under the Securities Exchange Act of 1934 as a broker-dealer and is the Depositor of ALAIA Market Linked Trust. Each Series will be created by a trust indenture between the Depositor and a banking institution or trust company as trustee ("Trustee").

2. The Depositor acquires a portfolio of securities, which it deposits with the Trustee in exchange for certificates representing units of fractional undivided interest in the Series' portfolio ("Units"). The Units are offered to the public through the Depositor and dealers at a price which, during the initial offering period, is based upon the aggregate market value of the underlying securities, or, the aggregate offering side evaluation of the underlying securities if the underlying securities are not listed on a securities exchange, plus a front-end sales charge, a deferred sales charge or both. The maximum sales charge may be reduced in compliance with rule 22d-1 under the Act in certain circumstances, which are disclosed in the Series' prospectus.

3. The Depositor may, but is not legally obligated to, maintain a secondary market for Units of an outstanding Series. Other broker-dealers may or may not maintain a secondary market for Units of a Series. If a secondary market is maintained, investors will be able to purchase Units

on the secondary market at the current public offering price plus a front-end sales charge. If such a market is not maintained at any time for any Series, holders of the Units ("Unitholders") of that Series may redeem their Units through the Trustee.

#### A. Deferred Sales Charge and Waiver of Deferred Sales Charge Under Certain Circumstances

1. Applicants request an order to the extent necessary to permit one or more Series to impose a sales charge on a deferred basis ("DSC"). For each Series, the Depositor would set a maximum sales charge per Unit, a portion of which may be collected "up front" (*i.e.*, at the time an investor purchases the Units). The DSC would be collected subsequently in installments ("Installment Payments") as described in the application. The Depositor would not add any amount for interest or any similar or related charge to adjust for such deferral.

2. When a Unitholder redeems or sells Units, the Depositor intends to deduct any unpaid DSC from the redemption or sale proceeds. When calculating the amount due, the Depositor will assume that Units on which the DSC has been paid in full are redeemed or sold first. With respect to Units on which the DSC has not been paid in full, the Depositor will assume that the Units held for the longest time are redeemed or sold first. Applicants represent that the DSC collected at the time of redemption or sale, together with the Installment Payments and any amount collected up front, will not exceed the maximum sales charge per Unit. Under certain circumstances, the Depositor may waive the collection of any unpaid DSC in connection with redemptions or sales of Units. These circumstances will be disclosed in the prospectus for the relevant Series and implemented in accordance with rule 22d-1 under the Act.

3. Each Series offering Units subject to a DSC will state the maximum charge per Unit in its prospectus. In addition, the prospectus for such Series will include the table required by Form N-1A (modified as appropriate to reflect the difference between UITs and open-end management investment companies) and a schedule setting forth the number and date of each Installment Payment, along with the duration of the collection period. The prospectus also will disclose that portfolio securities may be sold to pay the DSC if distribution income is insufficient and that securities will be sold pro rata, if practicable, otherwise a specific security will be designated for sale.

#### B. Exchange Option and Rollover Option

1. Applicants request an order to the extent necessary to permit Unitholders of a Series to exchange their Units for Units of another Series ("Exchange Option") and Unitholders of a Series that is terminating to exchange their Units for Units of a new Series of the same type ("Rollover Option"). The Exchange Option and Rollover Option would apply to all exchanges of Units sold with a front-end sales charge, a DSC or both.

2. A Unitholder who purchases Units under the Exchange Option or Rollover Option would pay a lower sales charge than that which would be paid for the Units by a new investor. The reduced sales charge will be reasonably related to the expenses incurred in connection with the administration of the DSC program, which may include an amount that will fairly and adequately compensate the Depositor and participating underwriters and brokers for their services in providing the DSC program.

#### Applicants' Legal Analysis

##### A. DSC and Waiver of DSC

1. Section 4(2) of the Act defines a "unit investment trust" as an investment company that issues only redeemable securities. Section 2(a)(32) of the Act defines a "redeemable security" as a security that, upon its presentation to the issuer, entitles the holder to receive approximately his or her proportionate share of the issuer's current net assets or the cash equivalent of those assets. Rule 22c-1 under the Act requires that the price of a redeemable security issued by a registered investment company for purposes of sale, redemption or repurchase be based on the security's current net asset value ("NAV"). Because the collection of any unpaid DSC may cause a redeeming Unitholder to receive an amount less than the NAV of the redeemed Units, applicants request relief from section 2(a)(32) and rule 22c-1.

2. Section 22(d) of the Act and rule 22d-1 under the Act require a registered investment company and its principal underwriter and dealers to sell securities only at the current public offering price described in the investment company's prospectus, with the exception of sales of redeemable securities at prices that reflect scheduled variations in the sales load. Section 2(a)(35) of the Act defines the term "sales load" as the difference between the sales price and the portion of the proceeds invested by the

depositor or trustee. Applicants request relief from section 2(a)(35) and section 22(d) to permit waivers, deferrals or other scheduled variations of the sales load.

3. Under section 6(c) of the Act, the Commission may exempt classes of transactions, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants state that their proposal meets the standards of section 6(c). Applicants state that the provisions of section 22(d) are intended to prevent (a) riskless trading in investment company securities due to backward pricing, (b) disruption of orderly distribution by dealers selling shares at a discount, and (c) discrimination among investors resulting from different prices charged to different investors. Applicants assert that the proposed DSC program will present none of these abuses. Applicants further state that all scheduled variations in the sales load will be disclosed in the prospectus of each Series and applied uniformly to all investors, and that applicants will comply with all the conditions set forth in rule 22d-1.

4. Section 26(a)(2)(C) of the Act, in relevant part, prohibits a trustee or custodian of a UIT from collecting from the trust as an expense any payment to the trust's depositor or principal underwriter. Because the Trustee's payment of the DSC to the Depositor may be deemed to be an expense under section 26(a)(2)(C), applicants request relief under section 6(c) from section 26(a)(2)(C) to the extent necessary to permit the Trustee to collect Installment Payments and disburse them to the Depositor. Applicants submit that the relief is appropriate because the DSC is more properly characterized as a sales load.

#### *B. Exchange Option and Rollover Option*

1. Sections 11(a) and 11(c) of the Act prohibit any offer of exchange by a UIT for the securities of another investment company unless the terms of the offer have been approved in advance by the Commission. Applicants request an order under sections 11(a) and 11(c) for Commission approval of the Exchange Option and the Rollover Option.

#### *C. Net Worth Requirement*

1. Section 14(a) of the Act requires that a registered investment company have \$100,000 of net worth prior to making a public offering. Applicants state that each Series will comply with

this requirement because the Depositor will deposit more than \$100,000 of securities. Applicants assert, however, that the Commission has interpreted section 14(a) as requiring that the initial capital investment in an investment company be made without any intention to dispose of the investment. Applicants state that, under this interpretation, a Series would not satisfy section 14(a) because of the Depositor's intention to sell all the Units of the Series.

2. Rule 14a-3 under the Act exempts UITs from section 14(a) if certain conditions are met, one of which is that the UIT invest only in "eligible trust securities," as defined in the rule. Applicants state that they may not rely on rule 14a-3 because certain Series (collectively, "Structured Series") will invest all or a portion of their assets in equity securities, shares of registered investment companies, or Flexible Exchange® Options ("FLEX Options")<sup>2</sup> which do not satisfy the definition of eligible trust securities.

3. Applicants request an exemption under section 6(c) of the Act to the extent necessary to exempt the Structured Series from the net worth requirement in section 14(a). Applicants state that the Series and the Depositor will comply in all respects with the requirements of rule 14a-3, except that the Structured Series will not restrict their portfolio investments to "eligible trust securities."

#### *D. Capital Gains Distribution*

1. Section 19(b) of the Act and rule 19b-1 under the Act provide that, except under limited circumstances, no registered investment company may distribute long-term gains more than once every twelve months. Rule 19b-1(c), under certain circumstances, exempts a UIT investing in eligible trust securities (as defined in rule 14a-3) from the requirements of rule 19b-1. Because the Structured Series do not limit their investments to eligible trust securities, however, the Structured Series will not qualify for the exemption in paragraph (c) of rule 19b-1. Applicants therefore request an exemption under section 6(c) from section 19(b) and rule 19b-1 to the extent necessary to permit capital gains earned in connection with the sale of portfolio securities to be distributed to Unitholders along with the Structured

Series' regular distributions. In all other respects, applicants will comply with section 19(b) and rule 19b-1.

2. Applicants state that their proposal meets the standards of section 6(c). Applicants assert that any sale of portfolio securities would be triggered by the need to meet Trust expenses, Installment Payments, or by redemption requests, events over which the Depositor and the Structured Series do not have control. Applicants further state that, because principal distributions must be clearly indicated in accompanying reports to Unitholders as a return of principal and will be relatively small in comparison to normal dividend distributions, there is little danger of confusion from failure to differentiate among distributions.

#### **Applicants' Conditions**

Applicants agree that any order granting the requested relief will be subject to the following conditions:

##### *A. DSC Relief and Exchange and Rollover Options*

1. Whenever the Exchange Option or Rollover Option is to be terminated or its terms are to be amended materially, any holder of a security subject to that privilege will be given prominent notice of the impending termination or amendment at least 60 days prior to the date of termination or the effective date of the amendment, provided that: (a) No such notice need be given if the only material effect of an amendment is to reduce or eliminate the sales charge payable at the time of an exchange, to add one or more new Series eligible for the Exchange Option or the Rollover Option, or to delete a Series which has terminated; and (b) no notice need be given if, under extraordinary circumstances, either (i) there is a suspension of the redemption of Units of the Series under section 22(e) of the Act and the rules and regulations promulgated thereunder, or (ii) a Series temporarily delays or ceases the sale of its Units because it is unable to invest amounts effectively in accordance with applicable investment objectives, policies and restrictions.

2. An investor who purchases Units under the Exchange Option or Rollover Option will pay a lower sales charge than that which would be paid for the Units by a new investor.

3. The prospectus of each Series offering exchanges or rollovers and any sales literature or advertising that mentions the existence of the Exchange Option or Rollover Option will disclose that the Exchange Option and the Rollover Option are subject to modification, termination or suspension

<sup>2</sup> Applicants state that a Structured Series will invest in FLEX Options with expiration dates that coincide with the Structured Series' maturity date and any relief granted from the provisions of sections 14(a) and 19(b) of the Act and rule 19b-1 under the Act included in the Order will not extend to any Series that intends to hold a derivative security other than FLEX Options.

without notice, except in certain limited cases.

4. Any DSC imposed on a Series' Units will comply with the requirements of subparagraphs (1), (2) and (3) of rule 6c-10(a) under the Act.

5. Each Series offering Units subject to a DSC will include in its prospectus the disclosure required by Form N-1A relating to deferred sales charges (modified as appropriate to reflect the differences between UITs and open-end management investment companies) and a schedule setting forth the number and date of each Installment Payment.

#### B. Net Worth Requirement

Applicants will comply in all respects with the requirements of rule 14a-3 under the Act, except that the Structured Series will not restrict their portfolio investments to "eligible trust securities."

For the Commission, by the Division of Investment Management, under delegated authority.

**Robert W. Errett,**  
Deputy Secretary.

[FR Doc. 2016-26055 Filed 10-27-16; 8:45 am]

BILLING CODE 8011-01-P

## DEPARTMENT OF STATE

[Public Notice: 9775]

### Culturally Significant Object Imported for Exhibition Determinations: "Archaic Bronze Globular Jug With Figured Handle" Exhibition

**SUMMARY:** Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236-3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the object to be included in the exhibition "Archaic Bronze Globular Jug with Figured Handle," imported from abroad for temporary exhibition within the United States, is of cultural significance. The object is imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit object at The Metropolitan Museum of Art, New York, New York, from on or about December 1, 2016, until on or about November 30, 2025, and at possible additional exhibitions or venues yet to be

determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** For further information, including an imported object list, contact the Office of Public Diplomacy and Public Affairs in the Office of the Legal Adviser, U.S. Department of State (telephone: 202-632-6471; email: [section2459@state.gov](mailto:section2459@state.gov)). The mailing address is U.S. Department of State, L/PA, SA-5, Suite 5H03, Washington, DC 20522-0505.

Dated: October 24, 2016.

**Mark Taplin,**

*Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2016-26095 Filed 10-27-16; 8:45 am]

BILLING CODE 4710-05-P

## DEPARTMENT OF STATE

[Public Notice 9776]

### Culturally Significant Objects Imported for Exhibition Determinations: "Picasso and Rivera: Conversations Across Time" Exhibition

**SUMMARY:** Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236-3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition "Picasso and Rivera: Conversations Across Time," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Los Angeles County Museum of Art, Los Angeles, California, from on or about December 4, 2016, until on or about April 30, 2017, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** For further information, including a list of the imported objects, contact the Office of Public Diplomacy and Public Affairs in the Office of the Legal Adviser, U.S.

Department of State (telephone: 202-632-6471; email: [section2459@state.gov](mailto:section2459@state.gov)). The mailing address is U.S. Department of State, L/PA, SA-5, Suite 5H03, Washington, DC 20522-0505.

Dated: October 24, 2016.

**Mark Taplin,**

*Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2016-26097 Filed 10-27-16; 8:45 am]

BILLING CODE 4710-05-P

## SURFACE TRANSPORTATION BOARD

[Docket No. MCF 21071]

### AAAH Acquisition Corporation—Acquisition of Control—All Aboard America! Holdings, Inc., Ace Express Coaches, LLC, All Aboard America! School Transportation, LLC, All Aboard Transit Services, LLC, Hotard Coaches, Inc., Industrial Bus Lines, Inc. d/b/a All Aboard America, and Sureride Charter Inc. d/b/a Sundiego Charter Co.

**AGENCY:** Surface Transportation Board.

**ACTION:** Notice tentatively approving and authorizing finance transaction.

**SUMMARY:** On September 29, 2016, AAAHI Acquisition Corporation (AAC), a noncarrier, filed an application under 49 U.S.C. 14303 for AAC to acquire All Aboard America! Holdings, Inc. (AAAH), a noncarrier holding company that wholly owns passenger motor carriers Hotard Coaches, Inc. (Hotard), Industrial Bus Lines, Inc. d/b/a All Aboard America (Industrial), Sureride Charter Inc. d/b/a Sundiego Charter Co. (Sundiego), Ace Express Coaches, LLC (Ace Express), All Aboard Transit Services, LLC (AATS), and All Aboard America! School Transportation, LLC (AAAST) (collectively Acquisition Carriers). The Board is tentatively approving and authorizing the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action. Persons wishing to oppose the application must follow the rules at 49 CFR 1182.5 and 1182.8.

**DATES:** Comments must be filed by December 12, 2016. The applicant may file a reply by December 27, 2016. If no opposing comments are filed by December 12, 2016, this notice shall be effective December 13, 2016.

**ADDRESSES:** Send an original and 10 copies of any comments referring to Docket No. MCF 21071 to: Surface Transportation Board, 395 E Street SW., Washington, DC 20423-0001. In addition, send one copy of comments to

AAC's representative: Andrew K. Light, Scopelitis, Garvin, Light, Hanson, & Feary, P.C., 10 W. Market Street, Suite 1500, Indianapolis, IN 46204.

**FOR FURTHER INFORMATION CONTACT:** Amy Ziehm (202) 245-0391. Federal Information Relay Service (FIRS) for the hearing impaired: 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:** AAC states that it is a noncarrier Delaware corporation that is wholly owned by AAAHI Intermediate Holdings LLC, which is wholly owned by AAAHI Topco Corporation, which is in turn wholly owned by AAAHI Holdings LLC. According to AAC, the majority owner of AAAHI Holdings LLC is Tensile-AAAHI Holdings LLC, and the majority holder of Tensile-AAAHI Holdings LLC is Tensile Capital Partners Master Fund LP. AAC states that Tensile Capital Partners LP owns 89.6% of Tensile Capital Partners Master Fund LP. AAC further states that AAC and the above-named entities in its ownership chain (Ownership Entities) do not possess motor carrier authority, do not have USDOT Numbers or Safety Ratings, and do not have any direct or indirect ownership interest in any interstate or intrastate passenger motor carriers.

AAC states that each of the Acquisition Carriers is a direct wholly owned subsidiary of AAAHI, and AAAHI's plurality shareholder is Celerity AHI Holdings SPV, LLC (Celerity Holdings). According to AAC, Celerity Holdings is a consortium of corporate and institutional investors along with Celerity Partners IV, LLC, a private equity firm that also acts as the managing member of Celerity Holdings. AAC states that other capital providers (including Gemini Investors V, L.P., a private equity firm) do not participate in Celerity Holdings but do hold minority interests in AAAHI directly. None of AAAHI's investors currently hold a controlling interest in any regulated bus transportation provider other than the Acquisition Carriers. According to AAC, the Acquisition Carriers exercise substantial independence in running their diverse operations.

AAC provides a description of each of the Acquisition Carriers, as summarized below:

- Hotard is a Louisiana corporation that provides local and regional charter services within Louisiana and Mississippi, and to and from various points in the continental United States. It holds common carrier operating authority from the Federal Motor Carrier Safety Administration (FMCSA) as a motor carrier of passengers (MC-143881). Hotard operates a fleet of 240 vehicles, of which 79 are full-sized

motor coaches and the remainder are mid-sized buses, minibuses, and school buses. The school buses are mainly used for employee shuttle services under contract with large employers, operating interstate between Texas and Louisiana and intrastate within Louisiana.

- Industrial is a New Mexico corporation that provides local and regional charter services in Arizona, New Mexico, and Texas. Industrial holds common carrier operating authority from FMCSA as a motor carrier of passengers (MC-133171). Its fleet consists of 80 full-sized motor coaches and 10 minibuses.

- Sundiego is a California corporation that operates a fleet of 72 full-sized motor coaches and 8 minibuses. It holds common carrier operating authority from FMCSA as a motor carrier of passengers (MC-324772). Sundiego provides local and regional charter, tour, and contract shuttles services from its base in National City, Cal., and from satellite locations in San Marcos and Anaheim, Cal.

- Ace Express is a Delaware limited liability company with its principal place of business in Golden, Colo. Ace Express operates charter, contract, and casino services. It holds common carrier operating authority from FMCSA as a motor carrier of passengers (MC-908184). Ace Express provides charter services with its fleet of 57 motor coaches and 17 minibuses. Other services are provided on a contract basis for corporate and municipal clients.

- AATS is a Delaware limited liability company with its principal place of business in Commerce City, Colo. It provides paratransit services under a contract with Denver Rapid Transit District (RTD). AATS operates 80 paratransit vehicles that are provided by RTD. AATS provides the drivers, maintenance of vehicles, and supervision of employees involved in the paratransit service. AATS does not conduct interstate passenger operations and thus does not hold passenger carrier operating authority from FMCSA. AATS does not possess Colorado intrastate passenger carrier authority, as its operations are exempt from the need for such authority. *See Colo. Rev. Stat. 40-10.1-105(e)* (2011).

- AAST is a Texas limited liability company that provides transportation for school children under contract with a number of school districts in Texas. The school districts typically provide the school buses and AAST provides the drivers, maintenance of vehicles, and supervisions of employees. AAST currently operates 72 buses for five school districts. AAST does not conduct interstate passenger operations

and thus does not hold passenger carrier operating authority from FMCSA. AAST does not possess Texas intrastate passenger carrier authority, as all of the school bus operations in which AAST participates are exempt from state regulation. *See Tex. Transp. Code Ann. 643.002(4), (6)* (West 2007).

AAC explains that under the proposed transaction, AAC would acquire the ownership interest of AAAHI, the effect of which would be to place the Acquisition Carriers under the control of AAC. AAC states that it will assume indirect 100% control of the Acquisition Carriers.

Under 49 U.S.C. 14303(b), the Board must approve and authorize a transaction that it finds consistent with the public interest, taking into consideration at least: (1) The effect of the proposed transaction on the adequacy of transportation to the public; (2) the total fixed charges that result; and (3) the interest of affected carrier employees. AAC has submitted the information required by 49 CFR 1182.2, including information to demonstrate that the proposed transaction is consistent with the public interest under 49 U.S.C. 14303(b) and a statement that the gross operating revenues of AAC and its motor carrier affiliated companies exceeded \$2 million for the preceding 12-month period. *See 49 U.S.C. 14303(g)*.<sup>1</sup>

AAC asserts that this acquisition is in the public interest. AAC states that services currently provided by the Acquisition Carriers would continue to be provided under the same names currently used to provide such services. AAC further explains that it anticipates that services to the public would be improved, because the Acquisition Carriers would continue to operate, but in the future they would operate as part of the AAC corporate family. Under this new ownership, AAC states that it intends to use its business and financial management skills, as well as its capital, to increase the efficiencies and enhance the viability of the Acquisition Carriers, thereby ensuring the continued availability of adequate passenger transportation service for the public.

AAC states that there are no fixed charges associated with the proposed transaction or the proposed acquisition of control. In addition, according to AAC, the proposed transaction would have no material impact on employees or labor conditions, as AAC intends to continue the existing operations of the Acquisition Carriers and does not

<sup>1</sup> Applicants with gross operating revenues exceeding \$2 million are required to meet the requirements of 49 CFR 1182.

anticipate a measurable reduction in force or changes in compensation levels or benefits.

AAC also claims that neither competition nor the public interest would be adversely affected, as the proposed transaction involves merely a transfer of one holding company to another holding company. AAC states that, because it does not currently have any ownership interest in any passenger motor carrier, there would be no net gain in market power with respect to the Acquisition Carriers under the proposed transaction. Furthermore, AAC states that the bus operations of the Acquisition Carriers are geographically dispersed and there is little or no overlap in service areas or in customer base. Thus, AAC states that the impact of the proposed transaction on the regulated motor carrier industry would be minimal and that neither competition nor the public interest would be adversely affected.

On the basis of the application, the Board finds that the proposed acquisition is consistent with the public interest and should be tentatively approved and authorized. If any opposing comments are timely filed, these findings will be deemed vacated, and, unless a final decision can be made on the record as developed, a procedural schedule will be adopted to reconsider the application. See 49 CFR 1182.6(c). If no opposing comments are filed by the expiration of the comment period, this notice will take effect automatically and will be the final Board action.

This action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available on our Web site at "[WWW.STB.GOV](http://WWW.STB.GOV)."

*It is ordered:*

1. The proposed transaction is approved and authorized, subject to the filing of opposing comments.

2. If opposing comments are timely filed, the findings made in this notice will be deemed as having been vacated.

3. This notice will be effective December 13, 2016, unless opposing comments are filed by December 12, 2016.

4. A copy of this notice will be served on: (1) The U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue NW., Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of the General

Counsel, 1200 New Jersey Avenue SE., Washington, DC 20590.

Decided: October 25, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

**Marline Simeon,**

*Clearance Clerk.*

[FR Doc. 2016-26103 Filed 10-27-16; 8:45 am]

**BILLING CODE 4915-01-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

## DEPARTMENT OF INTERIOR

### National Park Service

#### List of Units of the National Park System Exempt From the Provisions of the National Parks Air Tour Management Act

**AGENCY:** Federal Aviation Administration, Transportation; National Park Service, Interior.

**ACTION:** List of exempt parks.

**SUMMARY:** The National Parks Air Tour Management Act (NPATMA) requires the Federal Aviation Administration (FAA) and National Park Service (NPS) to develop an air tour management plan for units of the national park system where an operator has applied for authority to conduct commercial air tours. The FAA Modernization and Reform Act of 2012 amended various provisions of NPATMA. One provision exempted national park units with 50 or fewer annual flights from the requirement to prepare an air tour management plan or voluntary agreement and requires FAA and NPS to jointly publish a list of exempt parks. By **Federal Register** notice (See 77 FR 75254, December 19, 2012), FAA and NPS published an initial list of exempt parks in 2012 and another list in 2014 (See 79 FR 14569-14570, March 14, 2014). This notice provides the annual updated list of parks that are exempt for calendar years 2014 and 2015.

**FOR FURTHER INFORMATION CONTACT:**

Keith Lusk—Mailing address: Federal Aviation Administration, P.O. Box 92007, Los Angeles, California 90009-2007. Telephone: (310) 725-3808. Email address: [Keith.Lusk@faa.gov](mailto:Keith.Lusk@faa.gov). Vicki Ward—Mailing address: Natural Sounds and Night Skies Division, National Park Service, 1201 Oakridge Drive, Suite 100-31, Fort Collins, CO 80525. Telephone: (970) 267-2117. Email address: [Vicki\\_Ward@nps.gov](mailto:Vicki_Ward@nps.gov).

**SUPPLEMENTARY INFORMATION:**

## I. Authority

1. NPATMA (Pub. L. 106-181, codified at 49 U.S.C. 40128) requires the FAA and NPS to develop an air tour management plan for units of the national park system where an operator has requested authority to provide commercial air tours. The FAA Modernization and Reform Act of 2012 (2012 Act) amended various provisions of NPATMA.

2. This **Federal Register** Notice addresses the following 2012 Act amendment provisions (which are codified at 49 U.S.C. 40128(a)(5)):

a. Exempt national park units that have 50 or fewer commercial air tour operations each year from the requirement to prepare an air tour management plan or voluntary agreement.

b. Authorize NPS to withdraw the exemption if the Director determines that an air tour management plan or voluntary agreement is necessary to protect resources and values or visitor use and enjoyment.

c. Require FAA and NPS to publish a list each year of national parks covered by the exemption.

## II. List of Exempt Parks 2014

1. This list is based on the number of commercial air tour operations reported to the FAA and NPS by air tour operators conducting air tours under interim operating authority at national park units in calendar year 2014 for which the total operations was 50 or fewer. Parks on the exempt list are those that have at least one operator who has been granted operating authority to conduct commercial air tours over that park. Exempt parks are as follows:

Acadia National Park, ME  
Big Bend National Park, TX  
Black Canyon of the Gunnison National Park, CO  
Capitol Reef National Park, UT  
Capulin Volcano National Monument, NM  
Carlsbad Caverns National Park, NM  
Casa Grande Ruins National Monument, AZ  
Cedar Breaks National Monument, UT  
Colonial National Historical Park, VA  
Colorado National Monument, CO  
Coronado National Memorial, AZ  
Devils Tower National Monument, WY  
Dinosaur National Monument, UT/CO  
Dry Tortugas National Park, FL  
El Malpais National Monument, NM  
El Morro National Monument, NM  
Fort Bowie National Historic Site, AZ  
Fort Davis National Historic Site, TX  
Fort Union National Monument, NM  
Gila Cliff Dwellings National Monument, NM

Golden Spike National Historic Site, UT  
 Grand Teton National Park, WY  
 Great Sand Dunes National Park and Preserve, CO  
 Guadalupe Mountains National Park, NM  
 Hohokam Pima National Monument, AZ  
 Hovenweep National Monument, CO/UT  
 Hubbell Trading Post National Historic Site, AZ  
 Kings Canyon National Park, CA  
 Lake Chelan National Recreation Area, WA  
 Lassen Volcanic National Park, CA  
 Mesa Verde National Park, CO  
 Mojave National Preserve, CA  
 Montezuma Castle National Monument, AZ  
 Navajo National Monument, AZ  
 North Cascades National Park, WA  
 Olympic National Park, WA  
 Organ Pipe Cactus National Monument, AZ  
 Pecos National Historical Park, NM  
 Petrified Forest National Park, AZ  
 Petroglyph National Monument, NM  
 Pipe Spring National Monument, AZ  
 Rio Grande Wild and Scenic River, TX  
 Saguaro National Park, AZ  
 Salinas Pueblo Missions National Monument, NM  
 San Juan Island National Historical Park, WA  
 Sequoia National Park, CA  
 Sunset Crater Volcano National Monument, AZ  
 Timpanogos Cave National Monument, UT  
 Tumacacori National Historic Park, AZ  
 Tuzigoot National Monument, AZ  
 Voyageurs National Park, MN  
 Walnut Canyon National Monument, AZ  
 Wupatki National Monument, AZ  
 Yellowstone National Park, ID/MT/WY  
 Yosemite National Park, CA  
 Yucca House National Monument, CO  
 Zion National Park, UT

2. NPS is authorized to withdraw a park from the exempt list if NPS determines that an air tour management plan or voluntary agreement is necessary to protect park resources and values or park visitor use and enjoyment. Under this statutory authority, the NPS Director informed the FAA Administrator in writing on September 15, 2015, that NPS withdrew the exemption for Death Valley National Park and Mount Rainier National Park. These two parks have been removed from the 2014 exempt list.

### III. List of Exempt Parks 2015

1. This list is based on the number of commercial air tour operations reported to the FAA and NPS by air tour operators conducting air tours under

interim operating authority at national park units in calendar year 2015 for which the total operations was 50 or fewer. Parks on the exempt list are those that have at least one operator who has been granted operating authority to conduct commercial air tours over that park. Exempt parks are as follows:

Acadia National Park, ME  
 Big Bend National Park, TX  
 Black Canyon of the Gunnison National Park, CO  
 Cape Hatteras National Seashore, NC  
 Capitol Reef National Park, UT  
 Capulin Volcano National Monument, NM  
 Carlsbad Caverns National Park, NM  
 Casa Grande Ruins National Monument, AZ  
 Cedar Breaks National Monument, UT  
 Colorado National Monument, CO  
 Coronado National Memorial, AZ  
 Devils Tower National Monument, WY  
 Dinosaur National Monument, UT/CO  
 Dry Tortugas National Park, FL  
 El Malpais National Monument, NM  
 El Morro National Monument, NM  
 Fort Bowie National Historic Site, AZ  
 Fort Davis National Historic Site, TX  
 Fort Union National Monument, NM  
 Gila Cliff Dwellings National Monument, NM  
 Golden Spike National Historic Site, UT  
 Grand Teton National Park, WY  
 Great Sand Dunes National Park and Preserve, CO  
 Guadalupe Mountains National Park, NM  
 Hohokam Pima National Monument, AZ  
 Hovenweep National Monument, CO/UT  
 Hubbell Trading Post National Historic Site, AZ  
 Kings Canyon National Park, CA  
 Mojave National Preserve, CA  
 Montezuma Castle National Monument, AZ  
 Navajo National Monument, AZ  
 North Cascades National Park, WA  
 Olympic National Park, WA  
 Organ Pipe Cactus National Monument, AZ  
 Pecos National Historical Park, NM  
 Petrified Forest National Park, AZ  
 Petroglyph National Monument, NM  
 Pipe Spring National Monument, AZ  
 Rio Grande Wild and Scenic River, TX  
 Saguaro National Park, AZ  
 Salinas Pueblo Missions National Monument, NM  
 San Juan Island National Historical Park, WA  
 Sequoia National Park, CA  
 Sunset Crater Volcano National Monument, AZ  
 Timpanogos Cave National Monument, UT  
 Tumacacori National Historic Park, AZ

Tuzigoot National Monument, AZ  
 Voyageurs National Park, MN  
 Walnut Canyon National Monument, AZ  
 Wupatki National Monument, AZ  
 Yellowstone National Park, ID/MT/WY  
 Yosemite National Park, CA  
 Yucca House National Monument, CO  
 Zion National Park, UT

2. Mesa Verde National Park, CO, is on the 2014 exempt list but not on the 2015 exempt list because the combined number of commercial air tours reported by all air tour operators was 50 tours or fewer in 2014, but exceeded 50 tours in 2015.

3. Cape Hatteras National Seashore, NC, is not on the 2014 exempt list but is on the 2015 exempt list because the combined number of commercial air tours reported by all air tour operators exceeded 50 tours in 2014, but was 50 tours or fewer in 2015.

4. Colonial National Historical Park, VA; Lake Chelan National Recreation Area, WA; and Lassen Volcanic National Park, CA are on the 2014 exempt list but not on the 2015 exempt list because there is no longer any operator(s) who has applied for operating authority to conduct commercial air tours over those parks. At all the other parks on the 2015 list, there is at least one operator who has applied for operating authority to conduct tours over that park.

### IV. List of Exempt Parks for Future Years

The FAA and NPS will publish a list of exempt parks annually. The list could change from year to year since parks may be added to or removed from the exempt list based on the previous year's number of annual operations. In order to continue to be exempt, a park must have 50 or fewer annual commercial air tour operations in any given calendar year. The list could also change if NPS withdraws an exempted park. NPS is authorized to withdraw a park from the exempt list if NPS determines that an air tour management plan or a voluntary agreement is necessary to protect park resources and values or park visitor use and enjoyment. Pursuant to the 2012 Act, the NPS shall inform the FAA in writing of each determination to withdraw an exemption. At parks that lose exempt status, operators will return to interim operating authority requirements until an air tour management plan or a voluntary agreement has been established.



Issued in Hawthorne, CA, on August 11, 2016.

**Glen A. Martin,**

*Regional Administrator, Western-Pacific Region, Federal Aviation Administration.*

Issued in Washington, DC, on August 17, 2016.

**Raymond M. Sauvajot,**

*Associate Director, Natural Resource Stewardship and Science, National Park Service.*

[FR Doc. 2016-26092 Filed 10-27-16; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Public Notice for Waiver of Aeronautical Land-Use Assurance

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of intent of waiver with respect to land; Cherry Capital Airport, Traverse City, Michigan.

**SUMMARY:** The FAA is considering a proposal to change 1.25 acres of airport land from aeronautical use to non-aeronautical use and to authorize the sale of airport property located at Cherry Capital Airport, Traverse City, Michigan. The aforementioned land is not needed for aeronautical use.

The proposed property is located east of the airport terminal area adjacent to the current South Airport Road right-of-way at the Cherry Capital Airport. The property is currently a wooded area maintained for compatible land use surrounding the airfield. The proposed non-aeronautical land use would be for roadway improvements to support the new commercial/industrial development.

**DATES:** Comments must be received on or before November 28, 2016.

**ADDRESSES:** Documents are available for review by appointment at the FAA Detroit Airports District Office, Irene R. Porter, Program Manager, 11677 South Wayne Road, Suite 107, Romulus, Michigan 48174. Telephone: (734) 229-2915/Fax: (734) 229-2950 and Cherry Capital Administrative Offices, 727 Fly Don't Drive, Traverse City, Michigan. Telephone: (231) 947-2250.

*Written comments on the Sponsor's request must be delivered or mailed to:* Irene R. Porter, Program Manager, Federal Aviation Administration, Airports Detroit District Office, 11677 South Wayne Road, Suite 107, Romulus, Michigan 48174, Telephone Number: (734) 229-2915/FAX Number: (734) 229-2950.

#### FOR FURTHER INFORMATION CONTACT:

Irene R. Porter, Program Manager, Federal Aviation Administration, Airports Detroit District Office, 11677 South Wayne Road, Suite 107, Romulus, Michigan 48174, Telephone Number: (734) 229-2915/FAX Number: (734) 229-2950.

**SUPPLEMENTARY INFORMATION:** In accordance with section 47107(h) of Title 49, United States Code, this notice is required to be published in the **Federal Register** 30 days before modifying the land-use assurance that requires the property to be used for an aeronautical purpose.

The property is currently a wooded area maintained for compatible land use surrounding the airfield. The proposed non-aeronautical land use would be for roadway improvements to support the new commercial/industrial development. The property was originally owned by the City of Traverse City, Michigan and was subject to an AP-4 Instrument of conveyance from the City to the United States Government dated May 17, 1943. At the end of the war the U.S. Government transferred the property back to the City of Traverse City, Michigan. In 1966 the National Emergency Use Provision was released from this property. The airport will receive Fair Market Value for the land to be transferred to the County to support the road improvements. The disposition of proceeds from the sale of the airport property will be in accordance with FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in the **Federal Register** on February 16, 1999 (64 FR 7696).

This notice announces that the FAA is considering the release of the subject airport property at the Cherry Capital Airport, Traverse City, Michigan, from federal land covenants, subject to a reservation for continuing right of flight as well as restrictions on the released property as required in FAA Order 5190.6B section 22.16. Approval does not constitute a commitment by the FAA to financially assist in the disposal of the subject airport property nor a determination of eligibility for grant-in-aid funding from the FAA.

#### Property Description

Part of Section 18, T27N, R10W, City of Traverse City, Grand Traverse County, Michigan, described as: Commencing at the West ¼ corner of said Section; Thence S00°45'58" W. 1244.58 feet along the West line of said Section to the Point of Beginning of this description; Thence N87°42'41" E. 2098.16 feet along a line that is 75 feet north of and parallel with the South line

of the North ½ of the Southwest ¼ of said Section; Thence Northeasterly 127.77 feet along a 1834.86 foot radius curve to the left, the long chord of which bears N85°43'00" E. 127.74 feet to the North and South ¼ line of said Section as monumented; Thence S00°18'36" E. 22.12 feet along said North and South ¼ line to the Northerly line of the Right of Way as described in Document number 2007R-1 0240, Grand Traverse County Register of Deeds; Thence Southwesterly 127.00 feet along a 1856.86 foot radius curve to the right, the long chord of which bears S85°45'07" W. 126.97 feet; Thence S87°42'41" W. 2099.33 feet (previously recorded as 2101.33 feet) along a line which is 53 feet north of, and parallel with the South line of the North ½ of the Southwest ¼ of said Section to the West line of said Section; Thence N00°45'58" E. 22.03 feet to the point of Beginning of this description. Containing 1.25 Acres.

Issued in Romulus, Michigan, on October 12, 2016.

**John L. Mayfield, Jr.,**

*Manager, Detroit Airports District Office, FAA, Great Lakes Region.*

[FR Doc. 2016-26087 Filed 10-27-16; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Public Notice for Waiver of Aeronautical Land-Use Assurance

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of intent of waiver with respect to land; Cherry Capital Airport, Traverse City, Michigan.

**SUMMARY:** The FAA is considering a proposal to change 63.04 acres of airport land from aeronautical use to non-aeronautical use and to authorize the lease of airport property located at Cherry Capital Airport, Traverse City, Michigan. The aforementioned land is not needed for aeronautical use.

The proposed property is located east of the airport terminal area along South Airport Road at the Cherry Capital Airport. The property is currently a wooded area maintained for compatible land use surrounding the airfield. The proposed non-aeronautical land use would be for compatible commercial/industrial development, allowing the airport to become more self-sustaining.

**DATES:** Comments must be received on or before November 28, 2016.

**ADDRESSES:** Documents are available for review by appointment at the FAA



Detroit Airports District Office, Irene R. Porter, Program Manager, 11677 South Wayne Road, Suite 107, Romulus, Michigan, 48174. Telephone: (734) 229-2915/Fax: (734) 229-2950 and Cherry Capital Administrative Offices, 727 Fly Don't Drive, Traverse City, Michigan. Telephone: (231) 947-2250.

Written comments on the Sponsor's request must be delivered or mailed to: Irene R. Porter, Program Manager, Federal Aviation Administration, Airports Detroit District Office, 11677 South Wayne Road, Suite 107, Romulus, Michigan 48174, Telephone Number: (734) 229-2915/FAX Number: (734) 229-2950.

**FOR FURTHER INFORMATION CONTACT:**

Irene R. Porter, Program Manager, Federal Aviation Administration, Airports Detroit District Office, 11677 South Wayne Road, Suite 107, Romulus, Michigan 48174, Telephone Number: (734) 229-2915/FAX Number: (734) 229-2950.

**SUPPLEMENTARY INFORMATION:** In accordance with section 47107(h) of Title 49, United States Code, this notice is required to be published in the **Federal Register** 30 days before modifying the land-use assurance that requires the property to be used for an aeronautical purpose.

The property is currently a wooded area maintained for compatible land use surrounding the airfield. The proposed non-aeronautical land use would be for compatible commercial/industrial development, allowing the airport to become more self-sustaining. The property was originally owned by the City of Traverse City, Michigan and was subject to an AP-4 Instrument of conveyance from the City to the United States Government dated May 17, 1943. At the end of the war the US Government transferred the property back to the City of Traverse City, Michigan. In 1966 the National Emergency Use Provision was released from this property. A portion of the property has a proposed lessor/developer identified and it has been appraised. The airport will receive Fair Market Value for the land to be leased.

The disposition of proceeds from the lease of the airport property will be in accordance with FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in the **Federal Register** on February 16, 1999 (64 FR 7696).

This notice announces that the FAA is considering the release of the subject airport property at the Cherry Capital Airport, Traverse City, Michigan, from its obligations to be maintained for aeronautical purposes. Approval does

not constitute a commitment by the FAA to financially assist in the change in use of the subject airport property nor a determination of eligibility for grant-in-aid funding from the FAA.

**Property Description**

Part of section 18, T27N, R10W, city of Traverse City, Grand Traverse County, Michigan, described as: Commencing at the west ¼ corner of said section; thence N87°17'57" E. 333.91 feet along the east and west ¼ line of said section to the point of beginning of this description; thence N04°32'35" E. 263.99 feet; thence N51°40'33" E. 69.03 feet; thence S85°26'27" E. 1772.02 feet; thence S00°18'36" E. 78.23 feet to a point on the east and west ¼ line which is S87°17'57" W. 25.02 feet from the center of said section; thence S00°18'36" E. 1256.35 feet along a line which is 25 feet west of and parallel with the north and south ¼ line of said section to the northerly right of way of South Airport Road; thence westerly along said right of way 102.65 feet along a 1834.86 foot radius curve to the right, the long chord of which bears S86°06'31" W. 102.64 feet; thence continuing along said right of way S87°42'41" W. 1964.65 feet; thence N04°32'35" E. 101.31 feet; thence N48°01'46" E. 169.59 feet; thence N04°32'35" E. 1043.74 feet to the point of beginning of this description. Containing 63.04 acres.

Issued in Romulus, Michigan, on October 12, 2016.

**John L. Mayfield, Jr.,**

Manager, Detroit Airports District Office, FAA, Great Lakes Region.

[FR Doc. 2016-26088 Filed 10-27-16; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**Notice of Availability of the Record of Decision for the Proposed Airport, Angoon, Alaska**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of Availability (NOA), Record of Decision (ROD).

**SUMMARY:** In accordance with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and Council on Environmental Quality (CEQ) regulations, the FAA issues this notice to advise the public that the FAA has issued the Record of Decision (ROD) for the Final Environmental Impact Statement (FEIS) that evaluated the effects of a proposed airport in Angoon

Alaska. The ROD constitutes the final decision of the FAA and summarizes the FEIS analyses and selected mitigation measures.

**SUPPLEMENTARY INFORMATION:** In the ROD, the FAA selected the following alternative for implementation:

Airport 12a with Access 12a which involves the construction of a land-based airport consisting of a paved, 3,300-foot-long and 75-foot-wide runway and associated access road. The project will be located on lands owned or managed by private landowners; Kootznoowoo, Inc.; and the City of Angoon.

The FAA has included determinations on the project based upon evidence set forth in the FEIS, public input, and the supporting administrative record.

**ADDRESSES:** Copies of the ROD are available at the following locations. Paper copies may be viewed during regular business hours.

1. Online at [www.angoonairports.com](http://www.angoonairports.com)
2. Online at [http://www.faa.gov/airports/environmental/records\\_decision/](http://www.faa.gov/airports/environmental/records_decision/) under FAA Region: Alaskan
3. Juneau Public Library
  - Downtown Branch, 292 Marine Way, Juneau, AK 99801
  - Douglas Branch, 1016 3rd Street, Douglas, AK 99824
  - Mendenhall Mall Branch, 9109 Mendenhall Mall Road, Juneau, AK 99801
4. U.S. Forest Service, Admiralty Island National Monument Office, 8510 Mendenhall Loop Road, Juneau, AK 99801
5. Angoon Community Association Building, 315 Heendae Road, Angoon, AK 99820
6. Angoon City Government Office, 700 Aan Deina Aat Street, Angoon, AK 99820
7. Angoon Senior Center, 812 Xootz Road, Angoon, AK 99820
8. The FAA Airports Division in Anchorage, AK. Please contact Leslie Grey at (907) 271-5453 to schedule.

**FOR FURTHER INFORMATION CONTACT:**

Leslie Grey, AAL-611, Federal Aviation Administration, Alaskan Region, Airports Division, 222 W. 7th Avenue Box #14, Anchorage, AK 99513. Ms. Grey may be contacted during business hours at (907) 271-5453 (telephone) and (907) 271-2851 (fax), or by email at [Leslie.Grey@faa.gov](mailto:Leslie.Grey@faa.gov).

Issued in Anchorage, Alaska, on October 21, 2016.

**Kristi A. Warden,**

Deputy Division Manager, Airports Division, AAL-600.

[FR Doc. 2016-26090 Filed 10-27-16; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF TRANSPORTATION****Maritime Administration****[Docket No. MARAD-2016 0108]****Requested Administrative Waiver of the Coastwise Trade Laws: Vessel KINSHIP; Invitation for Public Comments****AGENCY:** Maritime Administration, Department of Transportation.**ACTION:** Notice.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before November 28, 2016.

**ADDRESSES:** Comments should refer to docket number MARAD-2016-0108. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at <http://www.regulations.gov>. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23-453, Washington, DC 20590. Telephone 202-366-9309, Email [Bianca.carr@dot.gov](mailto:Bianca.carr@dot.gov).

**SUPPLEMENTARY INFORMATION:**

As described by the applicant the intended service of the vessel KINSHIP is:

*Intended Commercial Use of Vessel:* "Carrying up to 12 passengers for hire."  
*Geographic Region:* "Washington, Oregon, California."

The complete application is given in DOT docket MARAD-2016-0108 at <http://www.regulations.gov>. Interested parties may comment on the effect this action may have on U.S. vessel builders

or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

**Privacy Act**

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78).

By Order of the Maritime Administrator.

Dated: October 18, 2016.

**T. Mitchell Hudson, Jr.,**

*Secretary, Maritime Administration.*

[FR Doc. 2016-26037 Filed 10-27-16; 8:45 am]

**BILLING CODE 4910-81-P**

**DEPARTMENT OF TRANSPORTATION****Maritime Administration****[Docket No. MARAD-2016 0106]****Requested Administrative Waiver of the Coastwise Trade Laws: Vessel VALKYRIE; Invitation for Public Comments****AGENCY:** Maritime Administration, Department of Transportation.**ACTION:** Notice.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before November 28, 2016.

**ADDRESSES:** Comments should refer to docket number MARAD-2016-0106. Written comments may be submitted by

hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at <http://www.regulations.gov>. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:**

Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23-453, Washington, DC 20590. Telephone 202-366-9309, Email [Bianca.carr@dot.gov](mailto:Bianca.carr@dot.gov).

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel VALKYRIE is:

*Intended Commercial Use of Vessel:* Sunset charters, day sails and sailing excursions.

*Geographic Region:* "Ohio, Michigan, Florida."

The complete application is given in DOT docket MARAD-2016-0106 at <http://www.regulations.gov>. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

**Privacy Act**

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78).

By Order of the Maritime Administrator.

Dated: October 18, 2016.

**T. Mitchell Hudson, Jr.,**

*Secretary, Maritime Administration.*

[FR Doc. 2016-26036 Filed 10-27-16; 8:45 am]

**BILLING CODE 4910-81-P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

[Docket No. MARAD-2016 0107]

#### Requested Administrative Waiver of the Coastwise Trade Laws: Vessel QUIET CHAOS; Invitation for Public Comments

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Notice.

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before November 28, 2016.

**ADDRESSES:** Comments should refer to docket number MARAD-2016-0107. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at <http://www.regulations.gov>. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23-453, Washington, DC 20590. Telephone 202-366-9309, Email [Bianca.carr@dot.gov](mailto:Bianca.carr@dot.gov).

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel QUIET CHAOS is:

Intended Commercial Use of Vessel: Primarily overnight charter sighting

seeing and sport fishing trips. Occasional day trips.

*Geographic Region:* “Oregon, Washington State, California, and Alaska (excluding those waters in Southeast Alaska that are north of a line between Gore Point and Cape Suckling, including the North Gulf Coast and Prince William Sound).”

The complete application is given in DOT docket MARAD-2016-0107 at <http://www.regulations.gov>. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD’s regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter’s interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD’s regulations at 46 CFR part 388.

#### Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT’s complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78).

By Order of the Maritime Administrator.

Dated: October 18, 2016.

**T. Mitchell Hudson, Jr.,**

*Secretary, Maritime Administration.*

[FR Doc. 2016-26040 Filed 10-27-16; 8:45 am]

**BILLING CODE 4910-81-P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

#### Petition for Exemption From the Federal Motor Vehicle Theft Prevention Standard; Fiat Chrysler Automobiles US LLC

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

**ACTION:** Grant of petition for exemption.

**SUMMARY:** This document grants in full the Fiat Chrysler Automobiles US LLC,

(FCA) petition for exemption of the “MP” MPV line in accordance with 49 CFR part 543, *Exemption from Vehicle Theft Prevention Standard*. This petition is granted because the agency has determined that the antitheft device to be placed on the line as standard equipment is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of 49 CFR part 541, *Federal Motor Vehicle Theft Prevention Standard*. (Theft Prevention Standard). FCA also requested confidential treatment for specific information in its petition. While official notification granting or denying its request for confidential treatment will be addressed by separate letter, no confidential information provided for purposes of this notice has been disclosed.

**DATES:** The exemption granted by this notice is effective beginning with 2017 model year (MY).

**FOR FURTHER INFORMATION CONTACT:** Ms. Carlita Ballard, International Policy, Fuel Economy and Consumer Programs, NHTSA, West Building, W43-439, 1200 New Jersey Avenue SE., Washington, DC 20590. Ms. Ballard’s phone number is (202) 366-5222. Her fax number is (202) 493-2990.

**SUPPLEMENTARY INFORMATION:** In a petition dated June 1, 2016, FCA requested an exemption from the parts-marking requirements of the Theft Prevention Standard for its “MP” MPV line beginning with MY 2017. The petition requested an exemption from parts-marking pursuant to 49 CFR part 543, *Exemption from Vehicle Theft Prevention Standard*, based on the installation of an antitheft device as standard equipment for the entire vehicle line.

Under 49 CFR part 543.5(a), a manufacturer may petition NHTSA to grant an exemption for one vehicle line per model year. In its petition, FCA provided a detailed description and diagram of the identity, design, and location of the components of the antitheft device for its “MP” MPV line. FCA stated that its MY 2017 “MP” MPV line will be installed with the Sentry Key Immobilizer System (SKIS)/MiniCrypt antitheft device as standard equipment on the entire vehicle line. The SKIS will provide passive vehicle protection by preventing the engine from operating unless a valid electronically encoded key is detected in the ignition system of the vehicle. Key components of the antitheft device will include an immobilizer, Radio Frequency Hub Module (RFHM), Engine Control Module (ECM), Body Controller

Module (BCM), the transponder key which performs the immobilizer function and an Instrument Panel Cluster (IPC) which contains the telltale function only. According to FCA, all of these components work collectively to perform the immobilizer function. FCA stated that the SKIS does not provide an audible alert, however, the vehicle will be equipped with a security indicator in the instrument panel cluster that will flash if an invalid transponder key is detected.

FCA's submission is considered a complete petition as required by 49 CFR 543.7 in that it meets the general requirements contained in 543.5 and the specific content requirements of 543.6.

In addressing the specific content requirements of 49 CFR part 543.6, FCA provided information on the reliability and durability of the device. FCA conducted tests based on its own specified standards (*i.e.*, voltage range and temperature range) and stated its belief that the device meets the stringent performance standards prescribed. Specifically, FCA stated that its device must demonstrate a minimum of 95 percent reliability with 90 percent confidence. In addition to the design and validation test criteria, FCA stated that 100% of its systems undergo a series of three functional tests prior to being shipped from the supplier to the vehicle assembly plant for installation in the vehicles.

FCA stated that the SKIS will be placed on its keyless entry and keyed vehicles. According to FCA, in its keyed vehicles, the SKIS immobilizer feature is activated when the key is removed from the ignition system (whether the doors are open or not). Specifically, the RFHM is paired with the IGNM that contains either a rotary ignition switch (keyed vehicles) or a START/STOP push button (keyless vehicles). FCA stated that the functions and features of the SKIS are all integral to the BCM in this vehicle. The RFHM contains a Radio Frequency (RF) transceiver and a microprocessor and it initiates the ignition process by communicating with the BCM through SKIS. The microprocessor-based SKIS hardware and software also uses electronic messages to communicate with other electronic modules in the vehicle.

FCA also stated that, in its keyed vehicles, the SKIS uses RF communication to obtain confirmation that the transponder key is a valid key to operate the vehicle. The RFHM receives Low Frequency (LF) and/or RF signals from the Sentry Key transponder. For its keyed vehicles, the IGNM transmits an LF signal to excite the transponder in the key when the

ignition switch is turned to the ON position. The IGNM waits for a signal response from the transponder and transmits the response to the RFHM. If the response identifies that the transponder key is invalid or if no response is received from the transponder key, the RFHM will send an invalid key message to the Engine Control Module, which will disable engine operation and immobilize the vehicle after two seconds of running.

Only a valid key inserted into the ignition system will allow the vehicle to start and continue to run. FCA stated that, in its keyless vehicles, the RFHM is connected to a Keyless Ignition Node (KIN) with a START/STOP push button as an ignition switch. FCA stated that when the keyless START/STOP button is pressed, the RFHM transmits a signal to the transponder key through LF antennas to the RFHM. The RFHM then waits for a signal from the key FOB transponder. If the response from the transponder identifies the transponder key as invalid or the transponder key is not within the car's interior, the engine will be disabled and the vehicle will be immobilized after two seconds of running.

To avoid any perceived delay when starting the vehicle with a valid transponder key and also to prevent unburned fuel from entering the exhaust, FCA stated that the engine is permitted to run for no more than two seconds if an invalid transponder key is used. Additionally, FCA stated that only six consecutive invalid vehicle start attempts will be permitted and that all other attempts will be locked out by preventing the fuel injectors from firing and the starter will be disabled.

FCA stated that its vehicles are also equipped with a security indicator that acts as a diagnostic indicator. FCA stated that if the RFHM detects an invalid transponder key or if a transponder key related fault occurs, the security indicator will flash. If the RFHM detects a system malfunction or the SKIS becomes ineffective, the security indicator will stay on. The SKIS also performs a self-test each time the ignition system is turned to the RUN position and will store fault information in the form of a diagnostic trouble code in RFHM memory if a system malfunction is detected. FCA also stated that the vehicle is equipped with a Customer Learn transponder programming feature that when in use will cause the security indicator to flash.

FCA stated that each ignition key used in the SKIS has an integral transponder chip included on the circuit board. Each transponder key has

a unique transponder identification code that is permanently programmed into it by the manufacturer and must be programmed into the RFHM to be recognized by the SKIS as a valid key. FCA stated that once a Sentry Key has been programmed to a particular vehicle, it cannot be used on any other vehicle.

FCA further stated that it expects the 'MP' MPV vehicle line to mirror the lower theft rate results achieved by the Jeep Grand Cherokee vehicle line when ignition immobilizer systems were installed as standard equipment on the line. FCA stated that it has offered the SKIS immobilizer device as standard equipment on all Jeep Grand Cherokee vehicles since the 1999 model year. According to FCA, the average theft rate, based on NHTSA's theft rate data, for Jeep Grand Cherokee vehicles for the four model years prior to 1999 (1995–1998), when a vehicle immobilizer device was not installed as standard equipment, was 5.3574 per one thousand vehicles produced and significantly higher than the 1990/1991 median theft rate of 3.5826. However, FCA also indicated that the average theft rate for the Jeep Grand Cherokee for the nine model years (1999–2009, excluding MY 2007 and 2009) after installation of the standard immobilizer device was 2.5704, which is significantly lower than the median. The Jeep Grand Cherokee vehicle line was granted an exemption from the parts-marking requirements beginning with MY 2004 (67 FR 79687, December 30, 2002). FCA further asserts that NHTSA's theft data for the Jeep Grand Cherokee indicates that the inclusion of a standard immobilizer device resulted in a 52 percent net average reduction in vehicle thefts.

Based on the evidence submitted by FCA, the agency believes that the anti-theft device for the 'MP' MPV line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard (49 CFR 41). The agency concludes that the device will provide four of the five types of performance listed in 49 CFR part 543.6(a)(3): promoting activation; preventing defeat or circumvention of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device.

Pursuant to 49 U.S.C. 33106 and 49 CFR part 543.7(b), the agency grants a petition for exemption from the parts-marking requirements of part 541, either in whole or in part, if it determines that, based upon substantial evidence, the

standard equipment antitheft device is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of part 541. The agency finds that FCA has provided adequate reasons for its belief that the antitheft device for the vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard (49 CFR part 541). This conclusion is based on the information FCA provided about its device.

For the foregoing reasons, the agency hereby grants in full CFCA's petition for exemption for its 'MP' MPV line from the parts-marking requirements of 49 CFR part 541, beginning with its 'MP' MPV model year vehicles. The agency notes that 49 CFR part 541, Appendix A-1, identifies those lines that are exempted from the Theft Prevention Standard for a given model year. 49 CFR part 543.7(f) contains publication requirements incident to the disposition of all part 543 petitions. Advanced listing, including the release of future product nameplates, the beginning model year for which the petition is granted and a general description of the antitheft device is necessary in order to notify law enforcement agencies of new vehicle lines exempted from the parts marking requirements of the Theft Prevention Standard. FCA stated that an official nameplate for the vehicle has not yet been determined. However, as a condition to the formal granting of FCA's petition for exemption from the parts-marking requirements of 49 CFR part 541 for the MY 2017 'MP' MPV line, the agency fully expects FCA to notify the agency of the nameplate for the vehicle line prior to its introduction into the United States commerce for sale.

If FCA decides not to use the exemption for this vehicle line, it must formally notify the agency. If such a decision is made, the vehicle line must be fully marked as required by 49 CFR parts 541.5 and 541.6 (marking of major component parts and replacement parts).

NHTSA notes that if FCA wishes in the future to modify the device on which this exemption is based, the company may have to submit a petition to modify the exemption. 49 CFR part 543.7(d) states that a part 543 exemption applies only to vehicles that belong to a line exempted under this part and equipped with the anti-theft device on which the line's exemption is based. Further, 49 CFR part 543.9(c)(2) provides for the submission of petitions "to modify an exemption to permit the

use of an antitheft device similar to but differing from the one specified in that exemption."

The agency wishes to minimize the administrative burden that 49 CFR part 543.9(c)(2) could place on exempted vehicle manufacturers and itself. The agency did not intend in drafting part 543 to require the submission of a modification petition for every change to the components or design of an antitheft device. The significance of many such changes could be *de minimis*. Therefore, NHTSA suggests that if the manufacturer contemplates making any changes, the effects of which might be characterized as *de minimis*, it should consult the agency before preparing and submitting a petition to modify.

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

**Raymond R. Posten,**

*Associate Administrator for Rulemaking.*

[FR Doc. 2016-26072 Filed 10-27-16; 8:45 am]

**BILLING CODE 4910-59-P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA-2016-0104]

#### Request for Comment on Cybersecurity Best Practices for Modern Vehicles

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

**ACTION:** Request for public comment.

**SUMMARY:** NHTSA invites public comment on its *Cybersecurity Best Practices for Modern Vehicles*. The document is available for a 30 day comment period at [http://www.nhtsa.gov/staticfiles/nvs/pdf/812333\\_CybersecurityForModernVehicles.pdf](http://www.nhtsa.gov/staticfiles/nvs/pdf/812333_CybersecurityForModernVehicles.pdf).

**DATES:** You should submit your comments early enough to ensure that Docket Management receives them no later than November 28, 2016.

**ADDRESSES:** Comments should refer to the docket number above and be submitted by one of the following methods:

- **Federal Rulemaking 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 Ground Floor, Room W12-140, Washington, DC 20590-0001.

- **Hand Delivery:** 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12-140, Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal Holidays.

- **Instructions:** For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

- **Privacy Act:** Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78). For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> or the street address listed above. Follow the online instructions for accessing the dockets.

**FOR FURTHER INFORMATION CONTACT:** For technical issues: Mr. Arthur Carter of NHTSA's Office of Vehicle Crash Avoidance & Electronic Controls Research at (202) 366-5669 or by email at [arthur.carter@dot.gov](mailto:arthur.carter@dot.gov). For legal issues: Mr. Steve Wood of NHTSA's Office of Chief Counsel at (202) 366-5240 or by email at [steve.wood@dot.gov](mailto:steve.wood@dot.gov).

**SUPPLEMENTARY INFORMATION:** A top NHTSA priority is enhancing vehicle cybersecurity to mitigate cyber threats that could present unreasonable safety risks to the public or compromise sensitive data such as personally identifiable information. And, the agency is actively engaged in approaches to improve the cybersecurity of modern vehicles. The agency has been conducting research and actively engaging stakeholders to identify effective methods to address the vehicle cybersecurity challenges. For example, in January 2016, NHTSA convened a public vehicle cybersecurity roundtable meeting in Washington, DC to facilitate diverse stakeholder discussion on key vehicle cybersecurity topics. Over 300 individuals attended this meeting. These attendees represented over 200 unique organizations that included 17 Original Equipment Manufacturers (OEMs), 25 government entities, and 13 industry associations. During the roundtable meeting, the stakeholder groups identified actionable steps for

the vehicle manufacturing industry to effectively and expeditiously address vehicle cybersecurity challenges. As a follow up, NHTSA held a meeting with other government agencies in February 2016 to discuss possibilities for collaboration among Federal partners to help the industry improve vehicle cybersecurity.

As a result of the extensive public and private stakeholder engagement, NHTSA has developed a set of best practices for the automotive industry that the agency believes will further automotive cybersecurity. The agency notes that the Alliance of Automobile Manufacturers and the Association of Global Automakers, through the Auto Information Sharing and Analysis Center (Auto ISAC), released a "Framework for Automotive Cybersecurity Best Practices" on July 22, 2016.<sup>1</sup> The primary goal of the NHTSA best practices, therefore, is to not supplant the industry-led efforts, but, rather, to support this effort and provide the agency's views on how the broader automotive industry (including those who are not members of the Auto ISAC) can develop and apply sound risk-based cybersecurity management practices to their product development processes. The document will also help the automotive sector organizations effectively demonstrate and communicate their cybersecurity risk management approach to both the public and internal and external stakeholders. NHTSA intends for the document to be updated with some frequency as new information, research, and practices become available.

NHTSA invites public comments on all aspects of these best practices, including how to make the best practices more robust, what gaps remain and whether there is sufficient research and/or practices to address those gaps.

### Public Participation

#### *How do I prepare and submit comments?*

Your comments must be written and in English. To ensure that your comments are filed correctly in the docket, please include the docket number of this document in your comments.

Your comments must not be more than 15 pages long (49 CFR 553.21). NHTSA established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your

comments. There is no limit on the length of the attachments.

Please submit one copy (two copies if submitting by mail or hand delivery) of your comments, including the attachments, to the docket following the instructions given above under **ADDRESSES**. Please note, if you are submitting comments electronically as a PDF (Adobe) file, we ask that the documents submitted be scanned using an Optical Character Recognition (OCR) process, thus allowing the agency to search and copy certain portions of your submissions.

#### *How do I submit confidential business information?*

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Office of the Chief Counsel, NHTSA, at the address given above under **FOR FURTHER INFORMATION CONTACT**. In addition, you may submit a copy (two copies if submitting by mail or hand delivery), from which you have deleted the claimed confidential business information, to the docket by one of the methods given above under **ADDRESSES**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in NHTSA's confidential business information regulation (49 CFR part 512).

#### *Will the agency consider late comments?*

NHTSA will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, the agency will also consider comments received after that date.

#### *How can I read the comments submitted by other people?*

You may read the comments received at the address given above under *Comments*. The hours of the docket are indicated above in the same location. You may also see the comments on the Internet, identified by the docket number at the heading of this notice, at <http://www.regulations.gov>.

Please note that, even after the comment closing date, NHTSA will continue to file relevant information in the docket as it becomes available. Further, some people may submit late comments. Accordingly, the agency recommends that you periodically check the docket for new material.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78) or you may visit <http://www.dot.gov/privacy.html>.

**Authority:** Sec. 31402, Pub. L. 112-141.

Issued in Washington, DC on October 24, 2016 under authority delegated in 49 CFR part 1.95.

**Nathaniel Beuse,**

*Associate Administrator for Vehicle Safety Research.*

[FR Doc. 2016-26045 Filed 10-27-16; 8:45 am]

**BILLING CODE 4910-59-P**

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## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

October 25, 2016.

The Department of the Treasury will submit the following information collection request(s) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104-13, on or after the date of publication of this notice.

**DATES:** Comments should be received on or before November 28, 2016 to be assured of consideration.

**ADDRESSES:** Send comments regarding the burden estimates, or any other aspect of the information collection(s), including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at [OIRA\\_Submission@OMB.EOP.gov](mailto:OIRA_Submission@OMB.EOP.gov) and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8142, Washington, DC 20220, or email at [PRA@treasury.gov](mailto:PRA@treasury.gov).

**FOR FURTHER INFORMATION CONTACT:** Copies of the submissions may be obtained by emailing [PRA@treasury.gov](mailto:PRA@treasury.gov), calling (202) 622-0934, or viewing the entire information collection request at [www.reginfo.gov](http://www.reginfo.gov).

### Internal Revenue Service (IRS)

*OMB Control Number:* N/A.  
*Type of Review:* New collection (Request for a new OMB Control Number).

<sup>1</sup> <https://www.automotiveisac.com/best-practices/>.

*Title:* Wage and Investment Strategies and Solutions Behavioral Laboratory Customer Surveys and Support.

*Abstract:* As outlined in the Internal Revenue Service (IRS) Strategic Plan, the Agency is working towards allocating IRS resources strategically to address the evolving scope and increasing complexity of tax administration. In order to do this, IRS must realize their operational efficiencies and effectively manage costs by improving enterprise-wide resource allocation and streamlining processes using feedback from various behavioral research techniques.

To assist the Agency is accomplishing the goal outlined in the Strategic Plan, the Wage and Investment Division continuously maintains a “customer-

first” focus through routinely soliciting information concerning the needs and characteristics of its customers and implementing programs based on the information received. W&I Strategies and Solutions (WISS), is developing the implementation of a Behavioral Laboratory to identify, plan and deliver business improvement processes that support fulfillment of the IRS strategic goals.

The collection of information through the Behavioral Laboratory is necessary to enable the Agency to garner customer and stakeholder feedback in an efficient, timely manner, in accordance with the commitment to improving taxpayer service delivery. Improving agency programs requires ongoing assessment

of service delivery. WISS, through the Behavioral Laboratory, will collect, analyze, and interpret information gathered through this generic clearance to identify strengths and weaknesses of current services and make improvements in service delivery based on feedback provided by taxpayers and employees of the Internal Revenue Service.

*Affected Public:* Individuals or Households.

*Estimated Total Annual Burden Hours:* 22,050.

**Bob Faber,**

*Acting Treasury PRA Clearance Officer.*

[FR Doc. 2016-26082 Filed 10-27-16; 8:45 am]

**BILLING CODE 4830-01-P**



# FEDERAL REGISTER

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Part II

Department of Energy

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10 CFR Part 430

Energy Conservation Program: Energy Conservation Standards for  
Miscellaneous Refrigeration Products; Final Rule



## DEPARTMENT OF ENERGY

## 10 CFR Part 430

[Docket Number EERE-2011-BT-STD-0043]

RIN 1904-AC51

**Energy Conservation Program: Energy Conservation Standards for Miscellaneous Refrigeration Products**

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

**ACTION:** Direct final rule.

*Synopsis:* The Energy Policy and Conservation Act of 1975, as amended, established the Energy Conservation Program for Consumer Products Other Than Automobiles. Based on provisions in EPCA that enable the Secretary of Energy to classify additional types of consumer products as covered products, the U.S. Department of Energy (DOE) classified miscellaneous refrigeration products as covered consumer products under EPCA. In this direct final rule, DOE is adopting new energy conservation standards for these products that correspond to the recommendations submitted jointly by interested persons that are fairly representative of relevant points of view. DOE has determined that the new energy conservation standards for these products would result in significant conservation of energy, and are technologically feasible and economically justified. A notice of proposed rulemaking that proposes identical energy efficiency standards is published elsewhere in this **Federal Register**. If DOE receives adverse comment and determines that such comment may provide a reasonable basis for withdrawal, DOE will withdraw the direct final rule and will proceed with the proposed rule.

**DATES:** The effective date of this rule is February 27, 2017 unless adverse comment is received by February 15, 2017. If adverse comments are received that DOE determines may provide a reasonable basis for withdrawal of the final rule, a timely withdrawal of this rule will be published in the **Federal Register**. If no such adverse comments are received, compliance with the new standards established in this direct final rule will be required for miscellaneous refrigeration products as detailed in the **SUPPLEMENTARY INFORMATION** section of this document. Compliance with these new standards for miscellaneous refrigeration products is required starting on October 28, 2019.

**ADDRESSES:** Any comments submitted must identify the direct final rule for Energy Conservation Standards for miscellaneous refrigeration products and provide docket number EERE-2011-BT-STD-0043 and/or regulatory information number (RIN) 1904-AC51. Comments may be submitted using any of the following methods:

(1) *Federal eRulemaking Portal:* [www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments.

(2) *Email:* [WineChillers-2011-STD-0043@ee.doe.gov](mailto:WineChillers-2011-STD-0043@ee.doe.gov). Include the docket number and/or RIN in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.

(3) *Postal Mail:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE-5B, 1000 Independence Avenue SW., Washington, DC 20585-0121. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

(4) *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW., 6th Floor, Washington, DC 20024. Telephone: (202) 586-6636. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimilies (faxes) will be accepted. For detailed instructions on submitting comments and additional information on the rulemaking process, see section VII of this document ("Public Participation").

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

A link to the docket Web page can be found at: <https://www.regulations.gov/docket?D=EERE-2011-BT-STD-0043>. This Web page contains a link to the docket for this document on the [www.regulations.gov](http://www.regulations.gov) site. The [www.regulations.gov](http://www.regulations.gov) Web page contains simple instructions on how to access all documents, including public comments, in the docket. For further information on how to submit a comment, review other public comments and the docket, or participate in the public meeting,

contact the Appliance and Equipment Standards Program Staff at (202) 586-6636 or by email: [appliance\\_standards\\_public\\_meetings@ee.doe.gov](mailto:appliance_standards_public_meetings@ee.doe.gov).

**FOR FURTHER INFORMATION CONTACT:** Joseph Hagerman, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE-5B, 1000 Independence Avenue SW., Washington, DC 20585-0121. Telephone: (202) 586-4549. Email: [refrigerators\\_and\\_freezers@ee.doe.gov](mailto:refrigerators_and_freezers@ee.doe.gov).

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**I. Synopsis of the Direct Final Rule**

Title III, Part B<sup>1</sup> of the Energy Policy and Conservation Act of 1975 (“EPCA” or in context, “the Act”), Public Law 94–163 (42 U.S.C. 6291–6309, as codified), established the Energy Conservation Program for Consumer Products Other Than Automobiles.<sup>2</sup> In addition to specifying a list of covered residential products and commercial equipment, EPCA contains provisions that enable the Secretary of Energy to classify additional types of consumer products as covered products. (42 U.S.C.

6292(a)(20)) In a final determination of coverage published in the **Federal Register** on July 18, 2016 (the July 2016 Final Coverage Determination), DOE classified miscellaneous refrigeration products (“MREFs”) as covered consumer products under EPCA. 81 FR 46768. The MREF category includes refrigeration products such as coolers (e.g., wine chillers) and combination cooler refrigeration products (e.g., wine chillers combined with a refrigerator, freezer, or refrigerator-freezer).

Pursuant to EPCA, any new or amended energy conservation standard must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, the new or amended standard must result in a significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

DOE received a statement submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of the covered equipment at issue, States, and efficiency advocates) containing recommendations with respect to new energy conservation standards for MREFs (see section III.A of this document for a description of the jointly-submitted statement). DOE has determined that the recommended standards contained in the statement are in accordance with 42 U.S.C. 6295(o), which prescribes the conditions under which DOE may adopt new standards. Under the authority provided by 42 U.S.C. 6295(p)(4), DOE is issuing this direct final rule to establish new energy conservation standards for MREFs.

The new MREF standards, which are expressed in maximum allowable annual energy use (“AEU”) in kilowatt-hours per year (“kWh/yr”) as a function of the calculated adjusted volume (“AV”) in cubic feet (“ft<sup>3</sup>”), are shown in Table I.1 and Table I.2. The standards will apply to all MREFs listed in Table I.1 and Table I.2 and manufactured in, or imported into, the United States starting on October 28, 2019.

TABLE I.1—ENERGY CONSERVATION STANDARDS FOR COOLERS

Product class	Maximum allowable AEU (kWh/yr)
Built-in Compact ..... Built-in, Freestanding Compact. Freestanding.	7.88AV † + 155.8

† AV = Adjusted volume, in ft<sup>3</sup>, as calculated according to title 10 of the Code of Federal Regulations (“CFR”) part 430, subpart B, appendix A.

<sup>1</sup> For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

<sup>2</sup> All references to EPCA in this document refer to the statute as amended through the Energy

Efficiency Improvement Act of 2015, Public Law 114–11 (April 30, 2015).

TABLE I.2—ENERGY CONSERVATION STANDARDS FOR COMBINATION COOLER REFRIGERATION PRODUCTS

Product class description	Product class designation *	Maximum allowable AEU (kWh/yr)
Cooler with all-refrigerator—automatic defrost .....	C-3A .....	4.57AV † + 130.4
Built-in cooler with all-refrigerator—automatic defrost .....	C-3A-BI .....	5.19AV + 147.8
Cooler with upright freezers with automatic defrost without an automatic icemaker .....	C-9 .....	5.58AV + 147.7
Built-in cooler with upright freezer with automatic defrost without an automatic icemaker .....	C-9-BI .....	6.38AV + 168.8
Cooler with upright freezer with automatic defrost with an automatic icemaker .....	C-9I .....	5.58AV + 231.7
Built-in cooler with upright freezer with automatic defrost with an automatic icemaker .....	C-9I-BI .....	6.38AV + 252.8
Compact cooler with all-refrigerator—automatic defrost .....	C-13A .....	5.93AV + 193.7
Built-in compact cooler with all-refrigerator—automatic defrost .....	C-13A-BI †† .....	6.52AV + 213.1

\* These product classes are consistent with the current product classes established for refrigerators, refrigerator-freezers, and freezers. 10 CFR 430.32.

† AV = Adjusted volume, in ft<sup>3</sup>, as calculated according to 10 CFR part 430, subpart B, appendix A.

†† There is no current product class 13A-BI for refrigerators, refrigerator-freezers, or freezers.

A. Benefits and Costs to Consumers

Table I.3 presents DOE’s evaluation of the economic impacts of the adopted standards on consumers of MREFs, as

measured by the average life-cycle cost (“LCC”) savings and the simple payback period (“PBP”).<sup>3</sup> The average LCC savings are positive for all product classes affected by the adopted

standards, and the PBPs are less than the average lifetime of MREFs, which is estimated to be at least 10 years (see section IV.F of this direct final rule).

TABLE I.3—IMPACTS OF NEW ENERGY CONSERVATION STANDARDS ON CONSUMERS OF MREFS

Product class	Average LCC savings* (2015\$)	Simple payback period* (years)
<b>Coolers</b>		
Freestanding compact coolers .....	265	1.4
Built-in compact coolers .....	28	4.6
Freestanding coolers .....	153	1.8
Built-in coolers .....	77	6.1
<b>Combination Cooler Refrigeration Products</b>		
C-3A .....	n.a.	n.a.
C-3A-BI .....	n.a.	n.a.
C-9 † .....	n.a.	n.a.
C-9-BI † .....	n.a.	n.a.
C-13A .....	32	4.3
C-13A-BI .....	n.a.	n.a.

\* Calculation of savings and PBP is not applicable (n.a.) if the standard is set at an efficiency level that is already met or exceeded in the MREF market.

† Results for C-9 and C-9-BI are also applicable to C-9I and C-9I-BI.

DOE’s analysis of the impacts of the adopted standards on consumers is described in section IV.F of this document.

B. Impact on Manufacturers

The industry net present value (“INPV”) is the sum of the discounted cash flows to the industry from the base year through the end of the analysis period (2016 to 2048). Using a real discount rate of 7.7 percent, DOE estimates that the INPV for manufacturers of MREFs in the case

without standards is \$263.3 million for coolers and \$108.2 million for combination cooler refrigeration products in 2015\$. Under the new standards, DOE expects that manufacturers may lose up to 20.8 percent of this INPV for coolers, which is approximately \$54.8 million; and manufacturers may lose up to 0.7 percent of this INPV for combination cooler refrigeration products, which is approximately \$0.8 million. Additionally, based on DOE’s interviews with the manufacturers of

MREFs, DOE does not expect significant impacts on manufacturing capacity or loss of employment for the industry as a whole to result from the standards for MREFs adopted in this direct final rule.

DOE’s analysis of the impacts of new standards on manufacturers is described in section IV.J of this document.

C. National Benefits and Costs<sup>4</sup>

DOE’s analyses indicate that the adopted energy conservation standards for MREFs would save a significant amount of energy. Relative to the no-new-standards case, the lifetime energy

<sup>3</sup> The average LCC savings are measured relative to the efficiency distribution in the compliance year in the absence of standards (see section IV.F of this document). The simple payback period, which is designed to compare specific efficiency levels, is

measured relative to the lowest efficiency level in the no-new-standards case (see section IV.F.9 of this document).

<sup>4</sup> All monetary values in this section are expressed in 2015 dollars and, where appropriate,

are discounted to 2016 unless explicitly stated otherwise. Energy savings in this section refer to the full-fuel-cycle (“FFC”) savings (see section IV.H of this document for discussion).

savings for MREFs purchased in the 30-year period that begins in the anticipated year of compliance with the new standards (2019–2048) amount to 1.5 quadrillion Btu (“quads”).<sup>5</sup> This represents a savings of 58 percent relative to the energy use of these products in the no-new-standards case.

The cumulative net present value (“NPV”) of total consumer costs and savings of the standards for MREFs ranges from \$4.78 billion (at a 7-percent discount rate) to \$11.02 billion (at a 3-percent discount rate). This NPV expresses the estimated total value of future operating-cost savings minus the estimated increased product costs for MREFs purchased in 2019–2048.

In addition, the standards for MREFs are projected to yield significant environmental benefits. DOE estimates

that the standards would result in cumulative greenhouse gas emission reductions (over the same period as for energy savings) of 91.8 million metric tons (“Mt”)<sup>6</sup> of carbon dioxide (“CO<sub>2</sub>”), 54.0 thousand tons of sulfur dioxide (“SO<sub>2</sub>”), 164.0 tons of nitrogen oxides (“NO<sub>x</sub>”), 387.1 thousand tons of methane (“CH<sub>4</sub>”), 1.1 thousand tons of nitrous oxide (“N<sub>2</sub>O”), and 0.2 tons of mercury (“Hg”).<sup>7</sup> The cumulative reduction in CO<sub>2</sub> emissions through 2030 amounts to 20.2 Mt, which is equivalent to the emissions resulting from the annual electricity use of more than 2.8 million homes.

The value of the CO<sub>2</sub> reductions is calculated using a range of values per metric ton of CO<sub>2</sub> (otherwise known as the “Social Cost of Carbon,” or “SCC”) developed by a Federal interagency

working group.<sup>8</sup> The derivation of the SCC values is discussed in section IV.L of this document. Using discount rates appropriate for each set of SCC values, DOE estimates that the net present monetary value of the CO<sub>2</sub> emissions reduction (not including CO<sub>2</sub> equivalent emissions of other gases with global warming potential) is between \$0.679 billion and \$9.271 billion, with a value of \$3.047 billion using the central SCC case represented by \$40.6/t in 2015. DOE also estimates that the net present monetary value of the NO<sub>x</sub> emissions reduction to be \$0.142 billion at a 7-percent discount rate, and \$0.326 billion at a 3-percent discount rate.<sup>9</sup>

Table I.4 summarizes the economic benefits and costs expected to result from the adopted standards for MREFs.

TABLE I.4—SUMMARY OF ECONOMIC BENEFITS AND COSTS OF NEW ENERGY CONSERVATION STANDARDS FOR MREFS \*

Category	Present value (billion 2015\$)	Discount rate (%)
<b>Benefits</b>		
Consumer Operating Cost Savings .....	6.4	7
	13.9	3
CO <sub>2</sub> Reduction (using mean SCC at 5% discount rate)** .....	0.7	5
CO <sub>2</sub> Reduction (using mean SCC at 3% discount rate)** .....	3.0	3
CO <sub>2</sub> Reduction (using mean SCC at 2.5% discount rate)** .....	4.8	2.5
CO <sub>2</sub> Reduction (using 95th percentile SCC at 3% discount rate)** .....	9.3	3
NO <sub>x</sub> Reduction † .....	0.1	7
	0.3	3
Total Benefits †† .....	9.6	7
	17.3	3
<b>Costs</b>		
Consumer Incremental Installed Costs .....	1.7	7
	2.9	3
<b>Net Benefits</b>		
Including CO <sub>2</sub> and NO <sub>x</sub> Reduction Monetized Value †† .....	8.0	7
	14.4	3

\* This table presents the costs and benefits associated with MREFs shipped in 2019–2048. These results include benefits to consumers which accrue after 2048 from the products purchased in 2019–2048. The incremental installed costs include incremental equipment cost as well as installation costs. The CO<sub>2</sub> reduction benefits are global benefits due to actions that occur nationally. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

<sup>5</sup> A quad is equal to 10<sup>15</sup> British thermal units (“Btu”). The quantity refers to FFC energy savings. FFC energy savings includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.*, coal, natural gas, petroleum fuels), and, thus, presents a more complete picture of the impacts of energy efficiency standards. For more information on the FFC metric, see section IV.H of this document.

<sup>6</sup> A metric ton is equivalent to 1.1 short tons. Results for NO<sub>x</sub> and Hg are presented in short tons.

<sup>7</sup> DOE calculated emissions reductions relative to the no-new-standards-case, which reflects key assumptions in the *Annual Energy Outlook 2015* (“AEO 2015”) Reference case, which generally represents current legislation and environmental regulations for which implementing regulations were available as of October 31, 2014.

<sup>8</sup> United States Government-Interagency Working Group on Social Cost of Carbon. *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866*. May 2013. Revised July 2015. Available at <https://www.whitehouse.gov/sites/default/files/omb/inforeg/scc-td-final-july-2015.pdf>.

<sup>9</sup> DOE estimated the monetized value of NO<sub>x</sub> emissions reductions associated with electricity savings using benefit per ton estimates from the *Regulatory Impact Analysis for the Clean Power Plan Final Rule*, published in August 2015 by EPA’s Office of Air Quality Planning and Standards. Available at [www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis](http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis). See section IV.L of this document for further discussion. The U.S. Supreme Court has stayed the

rule implementing the Clean Power Plan until the current litigation against it concludes. *Chamber of Commerce, et al. v. EPA, et al.*, Order in Pending Case, 577 U.S. (2016). However, the benefit-per-ton estimates established in the Regulatory Impact Analysis for the Clean Power Plan are based on scientific studies that remain valid irrespective of the legal status of the Clean Power Plan. DOE is primarily using a national benefit-per-ton estimate for NO<sub>x</sub> emitted from the Electricity Generating Unit sector based on an estimate of premature mortality derived from the ACS study (Krewski, *et al.* 2009). If the benefit-per-ton estimates were based on the Six Cities study (Lepuele, *et al.* 2011), the values would be nearly two-and-a-half times larger.

\*\* The interagency group selected four sets of SCC values for use in regulatory analyses. Three sets of values are based on the average SCC from the integrated assessment models, at discount rates of 5%, 3%, and 2.5%. For example, for 2015 emissions, these values are \$12.4/t, \$40.6/t, and \$63.2/t, in 2015\$, respectively. The fourth set (\$118/t in 2015\$ for 2015 emissions), which represents the 95th percentile of the SCC distribution calculated using a 3% discount rate, is included to represent higher-than-expected impacts from temperature change further out in the tails of the SCC distribution. The SCC values are emission year specific. See section IV.L.1 of this document for more details.

† DOE estimated the monetized value of NO<sub>x</sub> emissions reductions associated with electricity savings using benefit per ton estimates from the “Regulatory Impact Analysis for the Clean Power Plan Final Rule,” published in August 2015 by EPA’s Office of Air Quality Planning and Standards. (Available at [www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis](http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis).) See section IV.L of this document for further discussion. DOE is primarily using a national benefit-per-ton estimate for NO<sub>x</sub> emitted from the Electricity Generating Unit sector based on an estimate of premature mortality derived from the ACS study (Krewski *et al.* 2009). If the benefit-per-ton estimates were based on the Six Cities study (Lepule *et al.* 2011), the values would be nearly two-and-a-half times larger.

†† Total Benefits for both the 3% and 7% cases are presented using only the average SCC with 3-percent discount rate.

The benefits and costs of the adopted standards for MREFs sold in 2019 to 2048 can also be expressed in terms of annualized values. The monetary values for the total annualized net benefits are the sum of (1) the national economic value of the benefits in reduced operating costs, minus (2) the increases in product purchase prices and installation costs, plus (3) the value of the benefits of CO<sub>2</sub> and NO<sub>x</sub> emission reductions, all annualized.<sup>10</sup>

The national operating cost savings are domestic private U.S. consumer monetary savings that occur as a result of purchasing the covered products. The national operating cost savings is measured for the lifetime of MREFs shipped in 2019–2048. The CO<sub>2</sub> reduction is a benefit that accrues

globally due to decreased domestic energy consumption that is expected to result from this rule. Because CO<sub>2</sub> emissions have a very long residence time in the atmosphere, the SCC values in future years reflect future CO<sub>2</sub>-emissions impacts that continue beyond 2100 through 2300.

Estimates of annualized benefits and costs of the adopted standards are shown in Table I.5. The results under the primary estimate are as follows. Using a 7-percent discount rate for benefits and costs other than CO<sub>2</sub> reduction (for which DOE used a 3-percent discount rate along with the SCC series that has a value of \$40.6/t in 2015),<sup>11</sup> the estimated cost of the standards in this rule is \$153 million per year in increased equipment costs,

while the estimated annual benefits are \$593 million in reduced equipment operating costs, \$165 million in CO<sub>2</sub> reductions, and \$13.1 million in reduced NO<sub>x</sub> emissions. In this case, the net benefit amounts to \$619 million per year.

Using a 3-percent discount rate for all benefits and costs and the SCC series has a value of \$40.6/t in 2015, the estimated cost of the standards is \$157 million per year in increased equipment costs, while the estimated annual benefits are \$754 million in reduced operating costs, \$165 million in CO<sub>2</sub> reductions, and \$17.7 million in reduced NO<sub>x</sub> emissions. In this case, the net benefit amounts to \$779 million per year.

TABLE I.5—ANNUALIZED BENEFITS AND COSTS OF NEW STANDARDS FOR MREFS \*

	Discount rate	Primary estimate	Low net benefits estimate	High net benefits estimate
(million 2015\$/year)				
<b>Benefits</b>				
Consumer Operating Cost Savings .....	7% .....	593 .....	545 .....	649.
	3% .....	754 .....	686 .....	839.
CO <sub>2</sub> Reduction (using mean SCC at 5% discount rate)** ...	5% .....	49 .....	46 .....	53.
CO <sub>2</sub> Reduction (using mean SCC at 3% discount rate)** ...	3% .....	165 .....	155 .....	179.
CO <sub>2</sub> Reduction (using mean SCC at 2.5% discount rate)**	2.5% .....	242 .....	227 .....	263.
CO <sub>2</sub> Reduction (using 95th percentile SCC at 3% discount rate)**	3% .....	502 .....	471 .....	546.
NO <sub>x</sub> Reduction † .....	7% .....	13.1 .....	12.4 .....	31.6.
	3% .....	17.7 .....	16.6 .....	43.6.
Total Benefits †† .....	7% plus CO <sub>2</sub> range ...	655 to 1,108 .....	603 to 1,028 .....	733 to 1,226.
	7% .....	771 .....	712 .....	860.
	3% plus CO <sub>2</sub> range ...	820 to 1,273 .....	748 to 1,173 .....	935 to 1,428.
	3% .....	937 .....	857 .....	1,062.
<b>Costs</b>				
Consumer Incremental Product Costs ††† .....	7% .....	153 .....	145 .....	118.
	3% .....	157 .....	148 .....	116.
<b>Net Benefits</b>				
Total †† .....	7% plus CO <sub>2</sub> range ...	503 to 956 .....	459 to 884 .....	615 to 1,108.
	7% .....	619 .....	568 .....	742.
	3% plus CO <sub>2</sub> range ...	663 to 1,116 .....	601 to 1,026 .....	819 to 1,312.

<sup>10</sup> To convert the time-series of costs and benefits into annualized values, DOE calculated a present value in 2015, the year used for discounting the NPV of total consumer costs and savings. For the benefits, DOE calculated a present value associated with each year’s shipments in the year in which the shipments occur (e.g., 2020 or 2030), and then

discounted the present value from each year to 2015. The calculation uses discount rates of 3 and 7 percent for all costs and benefits except for the value of CO<sub>2</sub> reductions, for which DOE used case-specific discount rates, as shown in Table I.4. Using the present value, DOE then calculated the fixed annual payment over a 30-year period, starting in

the compliance year that yields the same present value.

<sup>11</sup> DOE used a 3-percent discount rate because the SCC values for the series used in the calculation were derived using a 3-percent discount rate (see section IV.L of this document).

TABLE I.5—ANNUALIZED BENEFITS AND COSTS OF NEW STANDARDS FOR MREFS \*—Continued

	Discount rate	Primary estimate	Low net benefits estimate	High net benefits estimate
	(million 2015\$/year)			
	3% .....	779 .....	709 .....	946.

\* This table presents the annualized costs and benefits associated with MREFs shipped in 2019–2048. These results include benefits to consumers which accrue after 2048 from the MREFs purchased from 2019–2048. The incremental installed costs include incremental equipment cost as well as installation costs. The CO<sub>2</sub> reduction benefits are global benefits due to actions that occur nationally. The Primary, Low Benefits, and High Benefits Estimates utilize projections of energy prices and housing starts from the AEO 2015 Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental product costs reflect a constant price trend in the Primary Estimate and the Low Benefits Estimate, and a high decline rate in the High Benefits Estimate. The methods used to derive projected price trends are explained in section IV.F of this document. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

\*\* The CO<sub>2</sub> reduction benefits are calculated using 4 different sets of SCC values. The first three use the average SCC calculated using 5%, 3%, and 2.5% discount rates, respectively. The fourth represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. The SCC values are emission year specific. See section IV.L.1 of this document for more details.

† DOE estimated the monetized value of NO<sub>x</sub> emissions reductions associated with electricity savings using benefit per ton estimates from the “Regulatory Impact Analysis for the Clean Power Plan Final Rule,” published in August 2015 by EPA’s Office of Air Quality Planning and Standards. (Available at [www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis](http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis).) See section IV.L of this document for further discussion. For the Primary Estimate and Low Net Benefits Estimate, DOE used a national benefit-per-ton estimate for NO<sub>x</sub> emitted from the Electric Generating Unit sector based on an estimate of premature mortality derived from the ACS study (Krewski *et al.* 2009). For DOE’s High Net Benefits Estimate, the benefit-per-ton estimates were based on the Six Cities study (Lepuele *et al.* 2011), which are nearly two-and-a-half times larger than those from the ACS study.

†† Total Benefits for both the 3% and 7% cases are presented using only the average SCC with 3-percent discount rate. In the rows labeled “7% plus CO<sub>2</sub> range” and “3% plus CO<sub>2</sub> range,” the operating cost and NO<sub>x</sub> benefits are calculated using the labeled discount rate, and those values are added to the full range of CO<sub>2</sub> values.

††† The value of consumer incremental product costs is lower in the low net benefits estimate than it is in the primary estimate because both estimates use the same price trend and there are fewer shipments in the low net benefits estimate. The value of consumer incremental product costs is lower in the high net benefits scenario than it is in the primary case because the high net benefits scenario uses a highly declining price trend that more than offsets the increase in shipments due to higher economic growth.

DOE’s analysis of the national impacts of the adopted standards is described in sections IV.H, IV.K, and IV.L of this document.

**D. Conclusion**

Based on the analyses culminating in this direct final rule, DOE found the benefits to the nation of the standards (energy savings, consumer LCC savings, positive NPV of consumer benefit, and emission reductions) outweigh the burdens (reduction of INPV for manufacturers). DOE has concluded that the standards in this direct final rule represent the maximum improvement in energy efficiency that is technologically feasible and economically justified, and would result in significant conservation of energy.

Under the authority provided by 42 U.S.C. 6295(p)(4), DOE is issuing this direct final rule to establish new energy conservation standards for MREFs.

**II. Introduction**

The following section briefly discusses the statutory authority underlying this direct final rule, as well as some of the relevant historical background related to the establishment of standards for MREFs.

**A. Authority**

As indicated above, EPCA includes provisions covering the products addressed by this Direct final rule. EPCA addresses, among other things, the energy efficiency of certain types of consumer products. Relevant provisions

of the Act specifically include definitions (42 U.S.C. 6291), energy conservation standards (42 U.S.C. 6295), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

Under 42 U.S.C. 6292(a)(20), DOE may extend coverage over a particular type of consumer product provided that DOE determines that classifying products of such type as covered products is necessary or appropriate to carry out the purposes of EPCA and that the average annual per-household energy use by products of such type is likely to exceed 100 kilowatt-hours (“kWh”) or its British thermal unit (“Btu”) equivalent per year. See 42 U.S.C. 6292(b)(1). EPCA sets out the following additional requirements to establish energy conservation standards for a new covered product: (1) The average per household domestic energy use by such products exceeded 150 kWh or its Btu equivalent for any 12-month period ending before such determination; (2) the aggregate domestic household energy use by such products exceeded 4.2 million kWh or its Btu equivalent for any such 12-month period; (3) substantial energy efficiency of the products is technologically feasible; and (4) applying a labeling rule is unlikely to be sufficient to induce manufacturers to produce, and consumers and other persons to purchase, products of such

type that achieve the maximum level of energy efficiency. See 42 U.S.C. 6295(l)(1).

Pursuant to EPCA, DOE’s energy conservation program for covered products consists essentially of four parts: (1) Testing; (2) labeling; (3) the establishment of Federal energy conservation standards; and (4) certification and enforcement procedures. The Federal Trade Commission (“FTC”) is primarily responsible for labeling, and DOE implements the remainder of the program. Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product. (42 U.S.C. 6295(o)(3)(A) and (r)) Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c) and 6295(s)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted pursuant to EPCA. (42 U.S.C. 6295(s)) The DOE test procedure for MREFs currently appears at title 10 of the Code of Federal Regulations (“CFR”) part 430, subpart B, appendix A (appendix A).

DOE follows specific criteria when prescribing new or amended standards for covered products. As indicated above, any new or amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and (3)(B)) Furthermore, DOE may not adopt any standard that would not result in the significant conservation of energy. (42 U.S.C. 6295(o)(3)) Moreover, DOE may not prescribe a standard: (1) For certain products, including MREFs, if no test procedure has been established for the product, or (2) if DOE determines by rule that the new or amended standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)(A)–(B)) In deciding whether a new or amended standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination after receiving comments on the proposed standard and considering, to the greatest extent practicable, the following seven factors:

1. The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

2. The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the imposition of the standard;

3. The total projected amount of energy, or as applicable, water, savings likely to result directly from the imposition of the standard;

4. Any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;

5. The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

6. The need for national energy and water conservation; and

7. Other factors the Secretary of Energy (Secretary) considers relevant. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

Further, EPCA, as codified, establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the

consumer will receive as a result of the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii))

EPCA also contains what is known as an “anti-backsliding” provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4))

Additionally, DOE may set energy conservation standards for a covered product that has two or more subcategories. In those instances, DOE must specify a different standard level for a type or class of products that has the same function or intended use if DOE determines that products within such group: (A) Consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6295(q)(1)) In determining whether a performance-related feature justifies a different standard for a group of products, DOE must consider such factors as the utility to the consumer of such a feature and other factors DOE deems appropriate. *Id.* Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2))

Federal energy conservation requirements generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions set forth under 42 U.S.C. 6297(d).

DOE is also required to address standby mode and off mode energy use. (42 U.S.C. 6295(gg)(3)) Specifically, when DOE adopts a standard for a covered product after that date, it must, if justified by the criteria for the adoption of standards under EPCA (42 U.S.C. 6295(o)), incorporate standby

mode and off mode energy use into a single standard, or, if that is not feasible, adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A)–(B)) DOE’s test procedures for MREFs address standby mode and off mode energy use, as do the new standards adopted in this direct final rule.

With particular regard to direct final rules, the Energy Independence and Security Act of 2007 (“EISA 2007”), Public Law 110–140 (December 19, 2007), amended EPCA, in relevant part, to grant DOE authority to issue a type of final rule (*i.e.*, a “direct final rule”) establishing an energy conservation standard for a product on receipt of a statement that is submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates), as determined by the Secretary, and that contains recommendations with respect to an energy or water conservation standard. In the context of consumer products, if the Secretary determines that the recommended standard contained in the statement is in accordance with 42 U.S.C. 6295(o), the Secretary may issue a final rule establishing the recommended standard. A notice of proposed rulemaking (“NOPR”) that proposes an identical energy efficiency standard is published simultaneously with the direct final rule. A public comment period of at least 110 days is provided. See 42 U.S.C. 6295(p)(4). Not later than 120 days after the date on which a direct final rule issued under this authority is published in the **Federal Register**, the Secretary shall withdraw the direct final rule if the Secretary receives one or more adverse public comments relating to the direct final rule or any alternative joint recommendation and based on the rulemaking record relating to the direct final rule, the Secretary determines that such adverse public comments or alternative joint recommendation may provide a reasonable basis for withdrawing the direct final rule under subsection 42 U.S.C. 6295(o) or any other applicable law. On withdrawal of a direct final rule, the Secretary shall proceed with the NOPR published simultaneously with the direct final rule and publish in the **Federal Register** the reasons why the direct final rule was withdrawn. This direct final rule provision applies to the products at issue in this direct final rule. See 42 U.S.C. 6295(p)(4).

DOE also notes that it typically finalizes its test procedures for a given regulated product or equipment prior to

proposing new or amended energy conservation standards for that product or equipment, see 10 CFR part 430, subpart C, appendix A, sec. 7(c) (“Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products” or “Process Rule”). In this instance, although DOE has finalized its test procedure for MREFs, rather than issue a notice of proposed rulemaking to set standards for these products, DOE is moving forward with a direct final rule. As part of the negotiated rulemaking that led to the Term Sheet setting out the standards that DOE is proposing, Working Group members recommended (with ASRAC’s approval) that DOE implement the test procedure that DOE recently finalized. See 81 FR 46768 (July 18, 2016). The approach laid out in that final rule is consistent with the approach agreed upon by the various Working Group members who participated in the negotiated rulemaking. Accordingly, in accordance with section 14 of the Process Rule, DOE tentatively concludes that deviation from the Process Rule is appropriate here.

#### *B. History of Standards Rulemaking for Miscellaneous Refrigeration Products*

DOE has not previously established energy conservation standards for MREFs. Consistent with its statutory obligations, DOE sought to establish regulatory coverage over these products prior to establishing energy conservation standards to regulate MREF efficiency. On November 8, 2011, DOE published a notice of proposed determination of coverage (“NOPD”) to address the potential coverage of those refrigeration products that do not use a compressor-based refrigeration system. 76 FR 69147. Rather than employing a compressor/condenser-based system typically installed in the refrigerators, refrigerator-freezers, and freezers found in most U.S. homes, these “non-compressor-based” refrigeration products use a variety of other means to introduce chilled air into the interior of the storage cabinet of the product. Two systems that DOE specifically examined were thermoelectric- and absorption-based systems.<sup>12</sup> The former of these systems is used in some wine chiller applications. With respect to the latter group of products, DOE indicated its belief that these types of products were used primarily in mobile applications and would likely fall outside of DOE’s scope of coverage. See 42 U.S.C. 6292(a)

(excluding from coverage “those consumer products designed solely for use in recreational vehicles and other mobile equipment”).

On February 13, 2012, DOE published a document announcing the availability of the framework document, “Energy Conservation Standards Rulemaking Framework Document for Wine Chillers and Miscellaneous Refrigeration Products,” and a public meeting to discuss the proposed analytical framework for the energy conservation standards rulemaking. 77 FR 7547. In the framework document, DOE described the procedural and analytical approaches it anticipated using to evaluate potential energy conservation standards for four types of consumer refrigeration products: Wine chillers, non-compressor refrigerators, hybrid refrigerators (*i.e.*, a wine chiller combined with a refrigerator), and ice makers.

DOE held a public meeting on February 22, 2012, to present the framework document, describe the analyses DOE planned to conduct during the rulemaking, seek comments from interested parties on these subjects, and inform them about, and facilitate their involvement in, the rulemaking. At the public meeting and during the comment period, DOE received multiple comments that addressed issues raised in the framework document and identified additional issues relevant to the rulemaking.

On October 31, 2013, DOE published in the **Federal Register** a supplemental notice of proposed determination of coverage (the “October 2013 SNOPD”), in which it tentatively determined that the four categories of consumer products addressed in the framework document (wine chillers, non-compressor refrigeration products, hybrid refrigerators, and ice makers) satisfy the provisions of 42 U.S.C. 6292(b)(1). 78 FR 65223.

DOE published a notice of public meeting and availability of the preliminary technical support document (“TSD”) for the MREF energy conservation standards rulemaking on December 3, 2014. 79 FR 71705. The preliminary analysis considered potential standards for the products proposed for coverage in the October 2013 SNOPD. The preliminary TSD includes the results of the following DOE preliminary analyses: (1) Market and technology assessment; (2) screening analysis; (3) engineering analysis; (4) markups analysis; (5) energy use analysis; (6) LCC and PBP analyses; (7) shipments analysis; (8) national impact analysis (“NIA”); and

(9) preliminary manufacturer impact analysis (“MIA”).

DOE held a public meeting on January 9, 2015, during which it presented preliminary results for the engineering and downstream economic analyses and sought comments from interested parties on these subjects. At the public meeting and during the comment period, DOE received comments that addressed issues raised in the preliminary analysis and identified additional issues relevant to this rulemaking. After reviewing the comments received in response to both the preliminary analysis and a test procedure NOPR published on December 16, 2014 (the “December 2014 Test Procedure NOPR,” 79 FR 74894), DOE ultimately determined that the development of test procedures and potential energy conservation standards for MREFs would benefit from a negotiated rulemaking process.

On April 1, 2015, DOE published a notice of intent to establish an Appliance Standards and Rulemaking Federal Advisory Committee (“ASRAC”) negotiated rulemaking working group for MREFs (the “MREF Working Group” or in context, the “Working Group”) to discuss and, if possible, reach consensus on recommended scope of coverage, definitions, test procedures, and energy conservation standards. 80 FR 17355. The MREF Working Group consisted of 15 members, including two members from ASRAC and one DOE representative. The MREF Working Group met in person during six sets of meetings in 2015: May 4–5, June 11–12, July 15–16, August 11–12, September 16–17, and October 20.

On August 11, 2015, the MREF Working Group reached consensus on a term sheet to recommend a scope of coverage, set of definitions, and test procedures for MREFs (“Term Sheet #1”).<sup>13</sup> That document laid out the scope of products that the Working Group recommended that DOE adopt with respect to MREFs, the definitions that would apply to MREFs and certain other refrigeration products, and the test procedure that manufacturers of MREFs would need to use when evaluating the energy usage of these products. On October 20, 2015, the MREF Working Group reached consensus on a term sheet to recommend energy conservation standards for coolers and combination cooler refrigeration products (“Term Sheet #2”). ASRAC approved Term Sheet #1 during an open

<sup>12</sup> Chapter 3 of the direct final rule technical support document provides a detailed description of each of these refrigeration technologies.

<sup>13</sup> The MREF Working Group term sheets are available in docket ID EERE–2011–BT–STD–0043 on <http://regulations.gov>.



meeting on December 18, 2015, and Term Sheet #2 during an open meeting on January 20, 2016. ASRAC subsequently sent the term sheets to the Secretary for consideration.

In addition to these steps, DOE sought to ensure that it had obtained complete information and input regarding certain aspects related to manufacturers of thermoelectric refrigeration products. To this end, on December 15, 2015, DOE published a notice of data availability (the “December 2015 NODA”) in which it requested additional public feedback on the methods and information used in the development of the MREF Working Group term sheets. 80 FR 77589. DOE noted in particular its interest in information related to manufacturers of thermoelectric refrigeration products. *Id.* at 77590.

After considering the MREF Working Group recommendations and comments received in response to the December 2015 NODA, DOE published an SNOPT and notice of proposed rulemaking (the “March 2016 SNOPT”) on March 4, 2016. 81 FR 11454. The March 2016 SNOPT proposed establishing coverage, definitions, and terminology consistent with Term Sheet #1. It also proposed to determine that coolers and combination cooler refrigeration products—as defined under the proposal—would meet the requirements under EPCA to be considered covered products. *Id.* at 11456–11459.

The July 2016 Final Coverage Determination established coolers and combination cooler refrigeration products as covered products under EPCA. Because DOE did not receive any comments in response to the March 2016 SNOPT that would substantively alter its proposals, the findings of the final determination were unchanged from those presented in the March 2016 SNOPT. Moreover, DOE determined in the July 2016 Final Coverage Determination that MREFs, on average, consume more than 150 kWh/yr, and that the aggregate annual national energy use of these products exceeds 4.2 TWh. Accordingly, these data indicate that MREFs satisfy at least two of the four criteria required under EPCA in order for the Secretary to set standards for a product whose coverage is added pursuant to 42 U.S.C. 6292(b). See 42 U.S.C. 6295(l)(1)(A)–(D). See also 81 FR 46768 at 46773–46775 (detailing the data used to evaluate the energy usage of MREF products).

In addition to establishing coverage, the July 2016 Final Coverage Determination established definitions for “miscellaneous refrigeration products,” “coolers,” and “combination cooler refrigeration products” in 10 CFR

430.2. The July 2016 Final Coverage Determination also amended the existing definitions for “refrigerator,” “refrigerator-freezer,” and “freezer” for consistency with the newly established MREF definitions. These definitions were generally consistent with the March 2016 SNOPT. *Id.* at 46775–46778.

### III. General Discussion

#### A. Consensus Agreement

##### 1. Background

As discussed in section II.B of this document, the MREF Working Group approved two term sheets that recommended a scope of coverage, definitions, test procedures, and energy conservation standards for MREFs. ASRAC approved the two term sheets during open meetings and sent them to the Secretary of Energy for consideration.

After carefully considering the consensus recommendations related to new energy conservation standards for MREFs submitted by the MREF Working Group and adopted by ASRAC, DOE has determined that these recommendations comprise a statement submitted by interested persons who are fairly representative of relevant points of view on this matter. In reaching this determination, DOE took into consideration the fact that the Working Group, in conjunction with ASRAC members who approved the recommendations, consisted of representatives of manufacturers of covered products, States, and efficiency advocates—all of which are groups specifically identified by Congress as potentially relevant parties to any consensus recommendation submitted by ASRAC. (42 U.S.C. 6295(p)(4)(A)) As delineated above, Term Sheet #2 was submitted by a broad cross-section of interests, including the manufacturers who produce the subject products, a trade association representing these manufacturers, environmental and energy-efficiency advocacy organizations, and an electric utility company. Although States were not direct signatories to the Term Sheet, the ASRAC Committee approving the Working Group’s recommendations included one member representing the State of California.<sup>14</sup> Additionally, in spite of the MREF Working Group meetings already being publicized and open to all members of the public, DOE published the December 2015 NODA to present the data and analyses used in support of developing the term sheets to

provide an opportunity for further comment from interested parties. 80 FR 77589 (December 15, 2015). Moreover, DOE does not read the statute as requiring absolute agreement among all interested parties before the Department may proceed with issuance of a direct final rule. By explicit language of the statute, the Secretary has the discretion to determine when a joint recommendation for an energy or water conservation standard has met the requirement for representativeness (*i.e.*, “as determined by the Secretary”).

By its plain terms, the statute contemplates that the Secretary will exercise discretion to determine whether a given statement is submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates). In this case, given the broad range of persons participating in the process that led to the submission—in the Working Group and in ASRAC—and given the breadth of perspectives expressed in that process, DOE has determined that the statements it received meet this criterion.

Pursuant to 42 U.S.C. 6295(p)(4), the Secretary must also determine whether a jointly-submitted recommendation for an energy conservation standard satisfies the criteria presented in 42 U.S.C. 6295(o). To make this determination, DOE has conducted an analysis to evaluate whether the potential energy conservation standards under consideration would meet these requirements. This evaluation is the same comprehensive approach that DOE typically conducts whenever it considers potential energy conservation standards for a given type of product or equipment. DOE applies the same principles to any consensus recommendations it may receive to satisfy its statutory obligation to ensure that any energy conservation standard that it adopts achieves the maximum improvement in energy efficiency that is technologically feasible and economically justified and will result in the significant conservation of energy. Upon review, the Secretary determined that the standards recommended in Term Sheet #2 submitted to DOE through ASRAC meet the standard-setting criteria set forth under 42 U.S.C. 6295(o). The consensus-recommended efficiency levels were included as trial standard level (“TSL”) 2 for coolers and TSL 1 for combination cooler refrigeration products (see section V.A of this document for a description of all of the considered TSLs). The details regarding how the consensus-

<sup>14</sup> The individual was David Hungerford (California Energy Commission).

recommended TSLs comply with the standard-setting criteria are discussed and demonstrated in the relevant sections throughout this document.

In sum, as the relevant criteria under 42 U.S.C. 6295(p)(4) have been satisfied, the Secretary has determined that it is appropriate to adopt the consensus-recommended energy conservation standards for MREFs as presented in Term Sheet #2 through this direct final rule.

Pursuant to the same statutory provision, DOE is also simultaneously publishing a NOPR proposing that the identical standard levels contained in this direct final rule be adopted. Consistent with the statute, DOE is providing a 110-day public comment period on this direct final rule. Based on the comments received during this period, the direct final rule will either become effective or DOE will withdraw

it if: (1) One or more adverse comments is received; and (2) DOE determines that those comments, when viewed in light of the rulemaking record related to the direct final rule, provide a reasonable basis for withdrawal of the direct final rule under 42 U.S.C. 6295(o) and for DOE to continue this rulemaking under the NOPR. (Receipt of an alternative joint recommendation may also trigger a DOE withdrawal of the direct final rule in the same manner.) See 42 U.S.C. 6295(p)(4)(C). Typical of other rulemakings, it is the substance, rather than the quantity, of comments that will ultimately determine whether a direct final rule will be withdrawn. To this end, the substance of any adverse comment(s) received will be weighed against the anticipated benefits of the jointly-submitted recommendations and the likelihood that further consideration of the comment(s) would change the

results of the rulemaking. DOE notes that, to the extent an adverse comment had been previously raised and addressed in the rulemaking proceeding, such a submission will not typically provide a basis for withdrawal of a direct final rule.

2. Recommendations

The MREF Working Group recommended standards for all MREF product classes of coolers and combination cooler refrigeration products. Table III.1 and Table III.2 show the recommended standard levels, which are expressed as an equation whose value varies based on the calculated AV of a given product. The MREF Working Group recommended that these standard levels take effect three years following the publication of the direct final rule. See Term Sheet #2.

TABLE III.1—CONSENSUS-RECOMMENDED STANDARD LEVELS FOR COOLERS

Product class	Maximum allowable AEU (kWh/yr)
Built-in Compact ..... Built-in. Freestanding Compact. Freestanding.	7.88AV† + 155.8

† AV = Adjusted volume, in ft<sup>3</sup>, as calculated according to title 10 CFR part 430, subpart B, appendix A.

TABLE III.2—CONSENSUS-RECOMMENDED STANDARD LEVELS FOR COMBINATION COOLER REFRIGERATION PRODUCTS

Product class description	Product class designation *	Maximum allowable AEU (kWh/yr)
Cooler with all-refrigerator—automatic defrost .....	C-3A .....	4.57AV† + 130.4
Built-in cooler with all-refrigerator—automatic defrost .....	C-3A-BI .....	5.19AV + 147.8
Cooler with upright freezers with automatic defrost without an automatic icemaker .....	C-9 .....	5.58AV + 147.7
Built-in cooler with upright freezer with automatic defrost without an automatic icemaker .....	C-9-BI .....	6.38AV + 168.8
Cooler with upright freezer with automatic defrost with an automatic icemaker .....	C-9I .....	5.58AV + 231.7
Built-in cooler with upright freezer with automatic defrost with an automatic icemaker .....	C-9I-BI .....	6.38AV + 252.8
Compact cooler with all-refrigerator—automatic defrost .....	C-13A .....	5.93AV + 193.7
Built-in compact cooler with all-refrigerator—automatic defrost .....	C-13A-BI†† .....	6.52AV + 213.1

\* These product classes are consistent with the current product classes established for refrigerators, refrigerator-freezers, and freezers. 10 CFR 430.32.

† AV = Adjusted volume, in ft<sup>3</sup>, as calculated according to 10 CFR part 430, subpart B, appendix A.

†† There is no current product class 13A-BI for refrigerators, refrigerator-freezers, or freezers.

B. Compliance Date

When establishing new standards for products not previously covered, EPCA provides that newly-established standards shall not apply to products manufactured within five years after the publication of the final rule. See 42 U.S.C. 6295(l)(2). As part of its set of comprehensive recommendations, the MREF Working Group recommended that DOE instead apply a 3-year lead time.

DOE has the authority under section 42 U.S.C. 6295(p)(4) to accept

recommendations for compliance dates contained in a joint submission recommending amended standards. In DOE's view, the direct final rule authority provision specifies the finding DOE has to make. Specifically, Congress specified that if DOE determines that the recommended standard is in accordance with 42 U.S.C. 6295(o), DOE may issue a final rule establishing those standards. See 42 U.S.C. 6295(p)(4)(A)(i). Applying the direct final rule provision in this manner meets Congress's goal to promote consensus agreements that reflect broad

input from interested parties who can fashion agreements that best promote the aims of the statute. In the absence of a consensus agreement, DOE notes that the more specific prescriptions of EPCA would ordinarily prevail. However, when DOE receives a recommendation resulting from the appropriate process—in this case, the detailed procedure laid out in the direct final rule provision of EPCA—that process provides the necessary fidelity to the statute, along with compliance with section 6295(o), that Congress instructed DOE to apply.

DOE notes that its analysis of whether the consensus-recommended and other TSLs satisfy the criteria presented in 42 U.S.C. 6295(o) contemplates two compliance periods. For consensus-recommended TSLs, the analysis is based on a 2019 compliance date, as recommended by the MREF Working Group. The analysis for all other TSLs is based on a 2021 compliance date consistent with EPCA, which provides that newly-established standards shall not apply to products manufactured within five years after the publication of the final rule. In other words, DOE followed the prescriptions of EPCA for all TSLs that were not recommended by the MREF Working Group. The two different compliance dates are indicated in the relevant sections throughout this document.

*C. Scope of Coverage*

In the preliminary analysis, DOE considered potential standards for four consumer product categories proposed for coverage in the October 2013 SNOPD: Cooled cabinets, non-compressor refrigerators, ice makers, and hybrid products. See chapter 3 of the preliminary TSD.

Based on comments received in response to the preliminary analysis, and on the recommendations of the MREF Working Group, DOE subsequently proposed in the March

2016 SNOPD that consumer ice makers and non-compressor refrigerators would not be included within MREFs. DOE proposed to remove ice makers from the scope of MREFs because they are significantly different from the other product types being considered for coverage, consistent with the MREF Working Group’s recommendation. For non-compressor refrigerators, DOE is not aware of any products available on the market that would be considered non-compressor refrigerators. Instead, non-compressor products available on the market would be considered coolers under the March 2016 SNOPD proposal. DOE also revised the proposed definitions for cooled cabinets and hybrid products to designate these products as coolers and combination cooler refrigeration products, respectively, in accordance with the definitions recommended by the MREF Working Group in Term Sheet #1. See 81 FR 11454, 11456, 11458–11459. Interested parties generally supported the scope of coverage, energy use analysis, and definitions proposed in the March 2016 SNOPD. Therefore, in the July 2016 Final Coverage Determination, DOE determined that MREFs (including coolers and combination cooler refrigeration products) are covered products under EPCA. The July 2016 Final Coverage

Determination also established definitions for these products that are generally consistent with the March 2016 SNOPD proposal. 81 FR 46768. This direct final rule establishes energy conservation standards for MREFs as defined in the July 2016 Final Coverage Determination.

*D. Product Classes*

When evaluating and establishing energy conservation standards, DOE divides covered products into product classes by the type of energy used or by capacity or other performance-related features that justify differing standards. In making a determination whether a performance-related feature justifies a different standard, DOE must consider such factors as the utility of the feature to the consumer and other factors DOE determines are appropriate. (42 U.S.C. 6295(q))

In this direct final rule, DOE is establishing energy conservation standards for four product classes of coolers and nine product classes of combination cooler refrigeration products. These product classes are consistent with those recommended by the MREF Working Group in Term Sheet #2. The product classes established in this direct final rule and their descriptions are provided in Table III.3.

TABLE III.3—MREF PRODUCT CLASSES

Product class	Product class description
<b>Coolers</b>	
Built-in compact .....	Total refrigerated volume less than 7.75 ft <sup>3</sup> and meeting the built-in definition requirements
Built-in .....	Total refrigerated volume 7.75 ft <sup>3</sup> or greater and meeting the built-in definition requirements
Freestanding Compact .....	Total refrigerated volume less than 7.75 ft <sup>3</sup> and not built-in
Freestanding .....	Total refrigerated volume 7.75 ft <sup>3</sup> or greater and not built-in
<b>Combination Cooler Refrigeration Products</b>	
C-3A .....	Cooler with all-refrigerator—automatic defrost
C-3A-BI .....	Built-in cooler with all-refrigerator—automatic defrost
C-9 .....	Cooler with upright freezer with automatic defrost without an automatic icemaker
C-9-BI .....	Built-in cooler with upright freezer with automatic defrost without an automatic icemaker
C-9I .....	Cooler with upright freezer with automatic defrost with an automatic icemaker
C-9I-BI .....	Built-in cooler with upright freezer with automatic defrost with an automatic icemaker
C-13A .....	Compact cooler with all-refrigerator—automatic defrost
C-13A-BI .....	Built-In compact cooler with all-refrigerator—automatic defrost

*E. Test Procedure*

EPCA sets forth generally applicable criteria and procedures for DOE’s adoption and amendment of test procedures. (42 U.S.C. 6293) Manufacturers of covered products must use these test procedures to certify to DOE that their product complies with energy conservation standards and to quantify the efficiency of their product. Similarly, DOE must use these test procedures to determine compliance

with its energy conservation standards. (42 U.S.C. 6295(s))

DOE published the December 2014 Test Procedure NOPR on December 16, 2014, in which it proposed to establish definitions and test procedures for the product categories proposed for coverage in the October 2013 SNOPD. The proposed test procedures would measure the energy efficiency, energy use, and estimated annual operating cost of these products during a

representative average use period and that would not be unduly burdensome to conduct, as required under 42 U.S.C. 6293(b)(3). 79 FR 74894.

After reviewing comments responding to the December 2014 Test Procedure NOPR, DOE ultimately determined that developing the test procedures for these products would benefit from a negotiated rulemaking process. Therefore, DOE included potential test procedures within the scope of work for

the MREF Working Group. On August 11, 2015, the MREF Working Group reached consensus on Term Sheet #1, which recommended scope of coverage, definitions, and test procedures for MREFs. The MREF Working Group generally agreed with the approach proposed in the December 2014 Test Procedure NOPR, but recommended updating usage factors, ambient temperatures, and volume adjustment factors. See Term Sheet #1. ASRAC approved the term sheet during an open meeting on December 18, 2015, and subsequently sent it to the Secretary for consideration.

The test procedures for MREFs, which are consistent with the MREF Working Group Recommendation, were codified in appendix A by the July 2016 Final Coverage Determination. 81 FR 46768. The test procedures, which follow a similar methodology to those in place for refrigerators, refrigerator-freezers, and freezers, provide the provisions for determining a product's annual energy usage (kWh/yr) and total AV, which are the basis of the energy conservation standards established in this direct final rule.

#### F. Technological Feasibility

##### 1. General

To assess the technological feasibility of setting standards for a product, DOE conducts a screening analysis based on information gathered on all current technology options and prototype designs that could improve its efficiency. As the first step in such an analysis, DOE develops a list of technology options for consideration in consultation with manufacturers, design engineers, and other interested parties. DOE then determines which of those means for improving efficiency are technologically feasible. DOE considers technologies incorporated in commercially-available products or in working prototypes to be technologically feasible. 10 CFR part 430, subpart C, appendix A, section 4(a)(4)(i).

After DOE has determined that particular technology options are technologically feasible, it further evaluates each technology option in light of the following additional screening criteria: (1) Practicability to manufacture, install, and service; (2) adverse impacts on product utility or availability; and (3) adverse impacts on health or safety. 10 CFR part 430, subpart C, appendix A, section 4(a)(4)(ii)–(iv). Additionally, it is DOE policy not to include in its analysis any proprietary technology that is a unique pathway to achieving a certain

efficiency level. Section IV.B of this direct final rule discusses the results of the screening analysis for MREFs, particularly the designs DOE considered, those it screened out, and those that are the basis for the standards considered in this rulemaking. For further details on the screening analysis for this rulemaking, see chapter 4 of the direct final rule TSD.

##### 2. Maximum Technologically Feasible Levels

When DOE proposes to adopt a new standard for a type or class of covered product, it must determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for such product. (42 U.S.C. 6295(p)(1)) Accordingly, in the engineering analysis, DOE determined the maximum technologically feasible (“max-tech”) improvements in energy efficiency for MREFs, using the design parameters for the most efficient products available on the market or in working prototypes. The max-tech levels that DOE determined for this rulemaking are described in section IV.C of this direct final rule and in chapter 5 of the direct final rule TSD.

#### G. Energy Savings

##### 1. Determination of Savings

For each TSL, DOE projected energy savings from application of the TSL to MREFs purchased in the 30-year period that begins in the year of compliance with any new standards (2019–2048 for the TSLs recommended by the MREF Working Group, 2021–2050 for all other TSLs).<sup>15</sup> The savings are measured over the entire lifetime of products purchased in the 30-year analysis period. DOE quantified the energy savings attributable to each TSL as the difference in energy consumption between each standards case and the no-new-standards case. The no-new-standards case represents a projection of energy consumption that reflects how the market for a product would likely evolve in the absence of energy conservation standards.

DOE used its NIA spreadsheet models to estimate energy savings from potential standards for MREFs. The NIA spreadsheet model (described in section IV.H of this document) calculates savings in site energy, which is the energy directly consumed by products at the locations where they are used. Based on the site energy, DOE calculates national energy savings (“NES”) in

terms of primary energy savings at the site or at power plants, and also in terms of full-fuel-cycle (“FFC”) energy savings. The FFC metric includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.*, coal, natural gas, petroleum fuels), and thus presents a more complete picture of the impacts of energy conservation standards.<sup>16</sup> DOE's approach is based on the calculation of an FFC multiplier for each of the energy types used by covered products or equipment. For more information on FFC energy savings, see section IV.H.2 of this document. For natural gas, the primary energy savings are considered to be equal to the site energy savings.

##### 2. Significance of Savings

To adopt standards for a covered product, DOE must determine that such action would result in “significant” energy savings. (42 U.S.C. 6295(o)(3)(B)) Although the term “significant” is not defined in the Act, the U.S. Court of Appeals, for the District of Columbia Circuit in *Natural Resources Defense Council v. Herrington*, 768 F.2d 1355, 1373 (D.C. Cir. 1985), indicated that Congress intended “significant” energy savings in the context of EPCA to be savings that were not “genuinely trivial.” The energy savings for all the TSLs considered in this rulemaking, including the adopted standards, are nontrivial, and, therefore, DOE considers them “significant” within the meaning of section 325 of EPCA.

#### H. Economic Justification

##### 1. Specific Criteria

As noted above, EPCA provides seven factors to be evaluated in determining whether a potential energy conservation standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII)) The following sections discuss how DOE has addressed each of those seven factors in this rulemaking.

##### a. Economic Impact on Manufacturers and Consumers

In determining the impacts of potential energy conservation standards on manufacturers, DOE conducts a manufacturer impact analysis (*i.e.*, MIA), as discussed in section IV.J of this document. DOE first uses an annual cash-flow approach to determine the quantitative impacts. This step includes both a short-term assessment—based on the cost and capital requirements during the period between when a regulation is

<sup>15</sup> DOE also presents a sensitivity analysis that considers impacts for products shipped in a 9-year period.

<sup>16</sup> The FFC metric is discussed in DOE's statement of policy and notice of policy amendment. 76 FR 51282 (August 18, 2011), as amended at 77 FR 49701 (August 17, 2012).

issued and when entities must comply with the regulation—and a long-term assessment over a 30-year period. The industry-wide impacts analyzed include: (1) INPV, which values the industry on the basis of expected future cash flows; (2) cash flows by year; (3) changes in revenue and income; and (4) other measures of impact, as appropriate. Second, DOE analyzes and reports the impacts on different types of manufacturers, including impacts on small manufacturers. Third, DOE considers the impact of standards on domestic manufacturer employment and manufacturing capacity, as well as the potential for standards to result in plant closures and loss of capital investment. Finally, DOE takes into account cumulative impacts of various DOE regulations and other regulatory requirements on manufacturers.

For individual consumers, measures of economic impact include the changes in LCC and PBP associated with new standards. These measures are discussed further in the following section. For consumers in the aggregate, DOE also calculates the national NPV of the economic impacts applicable to a particular rulemaking. DOE often also evaluates the LCC impacts of potential standards on identifiable subgroups of consumers that may be affected disproportionately by a national standard, such as low income and senior households. In the case of MREFs, the available house sample sizes for identifiable subgroups were insufficient to yield meaningful results.

#### b. Savings in Operating Costs Compared to Increase in Price (LCC and PBP)

EPCA requires DOE to consider the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered product that are likely to result from a standard. (42 U.S.C. 6295(o)(2)(B)(i)(II)) DOE conducts this comparison in its LCC and PBP analysis.

The LCC is the sum of the purchase price of a product (including its installation) and the operating cost (including energy, maintenance, and repair expenditures) discounted over the lifetime of the product. The LCC analysis requires a variety of inputs, such as product prices, product energy consumption, energy prices, maintenance and repair costs, product lifetime, and discount rates appropriate for consumers. To account for uncertainty and variability in specific inputs, such as product lifetime and discount rate, DOE uses a distribution of

values, with probabilities attached to each value.

The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of a more-efficient product through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost due to a more-stringent standard by the change in annual operating cost for the year that standards are assumed to take effect.

For its LCC and PBP analysis, DOE assumes that consumers will purchase the covered products in the first year of compliance with new standards. The LCC savings for the considered efficiency levels are calculated relative to the case that reflects projected market trends in the absence of new standards (the no-new-standards case). DOE's LCC and PBP analysis is discussed in further detail in section IV.F of this document.

#### c. Energy Savings

Although significant conservation of energy is a separate statutory requirement for adopting an energy conservation standard, EPCA requires DOE, in determining the economic justification of a standard, to consider the total projected energy savings that are expected to result directly from the standard. (42 U.S.C. 6295(o)(2)(B)(i)(III)) As discussed in section IV.H of this document, DOE uses the NIA spreadsheet models to project national energy savings.

#### d. Lessening of Utility or Performance of Products

In establishing product classes, and in evaluating design options and the impact of potential standard levels, DOE evaluates potential standards that would not lessen the utility or performance of the considered products. (42 U.S.C. 6295(o)(2)(B)(i)(IV)) Based on data available to DOE, the standards adopted in this direct final rule would not reduce the utility or performance of the products under consideration in this rulemaking.

#### e. Impact of Any Lessening of Competition

EPCA directs DOE to consider the impact of any lessening of competition, as determined in writing by the Attorney General that is likely to result from a proposed standard. (42 U.S.C. 6295(o)(1)(B)(i)(V)) Specifically, it instructs DOE to consider the impact of any lessening of competition, as determined in writing by the Attorney General that is likely to result from the imposition of the standard. DOE is simultaneously publishing a NOPR

containing proposed energy conservation standards identical to those set forth in this direct final rule and has transmitted a copy of the rule and the accompanying TSD to the Attorney General, requesting that the U.S. Department of Justice (“DOJ”) provide its determination on this issue. DOE will consider DOJ’s comments on the direct final rule in determining whether to proceed with finalizing its standards. DOE will also publish and respond to the DOJ’s comments in the **Federal Register** in a separate notice.

#### f. Need for National Energy Conservation

DOE also considers the need for national energy conservation in determining whether a new standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(VI)) The energy savings from the adopted standards are likely to provide improvements to the security and reliability of the nation’s energy system. Reductions in the demand for electricity also may result in reduced costs for maintaining the reliability of the nation’s electricity system. DOE conducts a utility impact analysis to estimate how standards may affect the nation’s needed power generation capacity, as discussed in section IV.0 of this document.

Additionally, apart from the savings described above, the adopted standards also are likely to result in environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases associated with energy production and use. DOE conducts an emissions analysis to estimate how potential standards may affect these emissions, as discussed in section IV.K of this document; the emissions impacts are reported in section V.B.6 of this document. DOE also estimates the economic value of emissions reductions resulting from the considered TSLs, as discussed in section IV.L of this document.

#### g. Other Factors

In determining whether a standard is economically justified, DOE may consider any other factors that it deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) In developing the direct final rule, DOE has considered the submission of the jointly-submitted Term Sheet #2 from the MREF Working Group. In DOE’s view, the term sheet sets forth a statement by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered equipment, States, and efficiency advocates) and contains recommendations with respect to energy

conservation standards that are in accordance with 42 U.S.C. 6295(o), as required by EPCA's direct final rule provision. See 42 U.S.C. 6295(p)(4). DOE has encouraged the submission of agreements such as the one developed and submitted by the MREF Working Group as a way to bring diverse stakeholders together, to develop an independent and probative analysis useful in DOE standard setting, and to expedite the rulemaking process. DOE also believes that the standard levels recommended in Term Sheet #2 may increase the likelihood for regulatory compliance, while decreasing the risk of litigation.

## 2. Rebuttable Presumption

As set forth in 42 U.S.C. 6295(o)(2)(B)(iii), EPCA creates a rebuttable presumption that an energy conservation standard is economically justified if the additional cost to the consumer of a product that meets the standard is less than three times the value of the first year's energy savings resulting from the standard, as calculated under the applicable DOE test procedure. DOE's LCC and PBP analyses generate values used to calculate the effect potential new energy conservation standards would have on the payback period for consumers. These analyses include, but are not limited to, the 3-year payback period contemplated under the rebuttable-presumption test. In addition, DOE routinely conducts an economic analysis that considers the full range of impacts to consumers, manufacturers, the Nation, and the environment, as required under 42 U.S.C. 6295(o)(2)(B)(i). The results of this analysis serve as the basis for DOE's evaluation of the economic justification for a potential standard level (thereby supporting or rebutting the results of any preliminary determination of economic justification). The rebuttable presumption payback calculation is discussed in section IV.F of this direct final rule.

## IV. Methodology and Discussion of Related Comments

This section addresses the analyses DOE has performed for this rulemaking with regard to MREFs. Separate subsections address each component of DOE's analyses.

DOE presented information on its initial analytical approach in the preliminary analysis. As discussed in section II.B of this direct final rule, DOE received comments from interested parties in response to both the preliminary analysis and the December 2014 Test Procedure NOPR indicating

that these rulemakings would benefit from a negotiated rulemaking process. Based on the subsequent MREF Working Group discussions, in the July 2016 Final Coverage Determination, DOE revised its scope of coverage, product definitions, and test procedures for MREFs, which resulted in significant changes to the rulemaking analysis. 81 FR 46786. Because of these significant changes, many comments received in response to the preliminary analysis are no longer applicable.

Additionally, the substantive comments received in response to the preliminary analysis were from interested parties that were represented by members of the MREF Working Group. The Working Group discussed in detail all of the issues identified by these interested parties. As a result of these discussions, many MREF Working Group members revised their position on certain issues with respect to the analysis. To avoid presenting information that may not reflect the current opinions of Working Group members, DOE has not included summaries of comments received from Working Group members in response to the preliminary analysis in the following sections describing the direct final rule analyses. Rather, DOE has included summaries of the Working Group discussions, including citations to the relevant Working Group meeting transcripts that addressed issues with the preliminary analysis and recommended approaches for DOE in this direct final rule analysis.

DOE used several analytical tools to estimate the impact of the standards considered in this document. The first tool is a spreadsheet that calculates the LCC savings and PBP of potential amended or new energy conservation standards. The NIA uses a second spreadsheet set that provides shipments forecasts and calculates national energy savings and net present value of total consumer costs and savings expected to result from potential energy conservation standards. DOE uses the third spreadsheet tool, the Government Regulatory Impact Model ("GRIM"), to assess manufacturer impacts of potential standards. These three spreadsheet tools are available on the DOE Web site for this rulemaking: [https://www1.eere.energy.gov/buildings/appliance\\_standards/rulemaking.aspx/ruleid/71](https://www1.eere.energy.gov/buildings/appliance_standards/rulemaking.aspx/ruleid/71). Additionally, DOE used output from the latest version of the Energy Information Administration's ("EIA") *Annual Energy Outlook* ("AEO"), a widely known energy forecast for the United States, for the emissions and utility impact analyses.

## A. Market and Technology Assessment

### 1. Scope of Coverage

DOE develops information in the market and technology assessment that provides an overall picture of the market for the products concerned, including the purpose of the products, the industry structure, manufacturers, market characteristics, and technologies used in the products. This activity includes both quantitative and qualitative assessments, based primarily on publicly-available information. The subjects addressed in the market and technology assessment for this rulemaking include: (1) A determination of the scope of the rulemaking and product classes; (2) manufacturers and industry structure; (3) existing efficiency programs; (4) shipments information; (5) market and industry trends; and (6) technologies or design options that could improve the energy efficiency of MREFs. The key findings of DOE's market assessment are summarized below. See chapter 3 of the direct final rule TSD for further discussion of the market and technology assessment.

In the preliminary market and technology assessment, and consistent with the October 2013 SNO PD, DOE identified four consumer product categories that would be subject to potential energy conservation standards. These were: Cooled cabinets, non-compressor refrigerators, hybrid refrigerators, and ice makers. DOE received multiple comments about the scope of coverage and the product classes considered in the preliminary analysis, summarized in the following sections. As described in section II.B of this document, the MREF Working Group discussed concerns regarding scope of coverage raised in comments received in response to the preliminary analysis.

The following sections describe how DOE has revised its scope of coverage for MREFs since the preliminary analysis and after considering the MREF Working Group recommendations. DOE initially proposed a revised scope of coverage in the March 2016 SNO PD (81 FR 11454), and finalized the scope of coverage in the July 2016 Final Coverage Determination. 81 FR 46768.

#### a. Coolers

In the December 2014 Test Procedure NOPR, DOE generally proposed to define the term "cooled cabinet" as a product with a refrigeration system that requires electric energy input only that does not meet the regulatory definition for "refrigerator" because its compartment temperatures are warmer

than the 39 degrees Fahrenheit (°F) threshold established for refrigerators, as determined in a 72 °F ambient temperature. 79 FR 74894, 74901–74902 (December 16, 2014). In the preliminary analysis, DOE presented information regarding cooled cabinets that, based on the proposed definition, included those products using either vapor-compression or non-compressor refrigeration systems. See chapter 3 of the preliminary TSD.

The MREF Working Group's Term Sheet #1 recommended that DOE revise the term "cooled cabinet" to "cooler" and incorporated a number of other changes to the proposed definition of this new term. The Working Group recommended that compartment temperatures be determined during operation in a 90 °F ambient temperature to maintain consistency with the test conditions used for other refrigeration products. (ASRAC Public Meeting Transcript, No. 44 at pp. 158–202)<sup>17</sup> The Working Group also recommended excluding products designed to be used without doors, consistent with the exclusions DOE had proposed for the refrigerator, refrigerator-freezer, and freezer definitions in the December 2014 Test Procedure NOPR. 79 FR 74894, 74900 (December 16, 2014). The purpose of the exclusion would be to differentiate between consumer products and commercial equipment — in other words, products designed for use without doors (*e.g.* reach-in freezers) would be treated as commercial equipment rather than consumer products, consistent with the statutory coverage of refrigerators, refrigerator-freezers, and freezers. See 42 U.S.C. 6292(a)(1). (ASRAC Public Meeting Transcript, No. 85 at pp. 9–11; No. 92 at pp. 18–25) The Working Group further recommended the requirement that coolers operate on single-phase, alternating current rather than simply specifying operation with electric energy input. This approach would exclude those products designed for direct current or 3-phase power supplies, which, because of the nature of these power sources, would likely apply to products intended for use in mobile or commercial applications, respectively. (ASRAC Public Meeting

Transcript, No. 45 at pp. 83–97; No. 86 at pp. 19–21) See Term Sheet #1.

In the March 2016 SNOOP, DOE proposed to define coolers based on its proposed definition from the December 2014 Test Procedure NOPR but updated to reflect the Working Group's recommendations. 81 FR at 11458–11459. DOE did not receive any comments that would substantively change this proposed updated definition in response to the March 2016 SNOOP. Hence, in the July 2016 Final Coverage Determination, DOE established the definition for cooler as proposed in the March 2016 SNOOP, with minor revisions, in 10 CFR 430.2. 81 FR at 46775–46776.

#### b. Combination Cooler Refrigeration Products

In the December 2014 Test Procedure NOPR, DOE proposed the term "hybrid refrigeration product" to refer to products with a warm-temperature compartment (*e.g.*, a wine chiller), making up at least 50 percent of a product's volume, combined with a fresh food and/or freezer compartment. 79 FR at 74903–74904. DOE conducted the preliminary analysis for hybrid refrigeration products using that proposal's definitional scope. See chapter 3 of the preliminary TSD.

The MREF Working Group discussed the proposed definition and recommended that DOE revise the term from "hybrid refrigeration product" to "combination cooler refrigeration product" to more clearly describe the product category. The Working Group also recommended that DOE refer to the warmer compartment within combination cooler refrigeration products as a "cooler compartment" (defined by the same temperature ranges as proposed for coolers) and that DOE drop the proposed requirement that cooler compartments make up at least 50 percent of a combination cooler refrigeration product's total volume. The Working Group noted that all products with cooler compartments would likely be used in the same way and asserted that the 50-percent threshold was an arbitrary cutoff. It further recommended that DOE exclude products designed for use without doors from the combination cooler refrigeration product definitions for the same reasons discussed for coolers (*i.e.*, differentiating between commercial equipment and consumer products). (ASRAC Public Meeting Transcript, No. 85 at pp. 31–52; No. 91 at pp. 55–58) See Term Sheet #1.

DOE agreed with the recommended changes from the MREF Working Group and the Working Group's reasoning for each of them. The term "combination

cooler refrigeration product" more clearly describes the characteristics of the products that would fall in this category. Additionally, the recommendation to remove the 50-percent threshold would limit the potential for circumvention by manufacturing products with cooler compartment volumes either just above or below the threshold. Removing the cooler compartment volume threshold ensures that all products with cooler compartments (which are likely to be used in the same way, as indicated by the MREF Working Group) are categorized consistently. Therefore, DOE proposed to define terms for combination cooler refrigeration products in the March 2016 SNOOP consistent with the definitions included in Term Sheet #1. See 81 FR at 11459 (detailing DOE's rationale for adopting the Working Group's approach). DOE did not receive any comments that would substantively change the proposed definitions of combination cooler refrigeration products in response to the March 2016 SNOOP; therefore, DOE subsequently codified the definition, with only minor revisions, in 10 CFR 430.2 through the July 2016 Final Coverage Determination. Further, the July 2016 Final Coverage Determination codified the definition for "cooler compartment" as recommended by the MREF Working Group into appendix A. See 81 FR at 46776–46777.

#### c. Ice Makers

In the preliminary analysis, DOE presented information regarding ice makers, which DOE tentatively defined as a consumer product other than a refrigerator, refrigerator-freezer, freezer, hybrid refrigeration product, non-compressor refrigerator, or cooled cabinet designed to automatically produce and harvest ice, but excluding any basic model that is certified under American National Standards Institute (ANSI)/NSF International (NSF) 12–2012 "Automatic Ice Making Equipment."<sup>18</sup> Such a product would also include a means for storing ice, dispensing ice, or storing and dispensing ice. See chapter 3 of the preliminary TSD.

In response to the preliminary analysis, DOE received feedback from several interested parties regarding ice maker coverage within MREFs. As such, the MREF Working Group discussed the issue of whether ice makers should be considered MREFs for coverage under EPCA. The MREF Working Group

<sup>17</sup> A notation in the form "ASRAC Public Meeting Transcript, No. 44 at pp. 158–202" identifies a comment: (1) Made during an MREF Working Group public meeting; (2) recorded in document number 44 that is filed in the docket of this energy conservation standards rulemaking (Docket No. EERE–2011–BT–STD–0043) and available for review at [www.regulations.gov](http://www.regulations.gov); and (3) which appears on pages 158 through 202 of document number 44.

<sup>18</sup> ANSI/NSF 12–2012 is available for purchase online at <http://www.techstreet.com/nsf>.



decided that ice makers are fundamentally different from the other product categories considered to be MREFs, as evidenced by DOE proposing a separate test procedure for ice makers in the December 2014 Test Procedure NOPR. The Working Group also noted that ice makers are currently covered as commercial equipment, and that there is no clear means to differentiate between consumer and commercial ice makers. (ASRAC Public Meeting Transcript, No. 44 at pp. 143–145, No. 45 at pp. 134–145; No. 92 at pp. 39–51). Accordingly, the Working Group recommended that DOE not maintain coverage of ice makers under MREFs. (ASRAC Public Meeting Transcript, No. 92 at p. 138) See Term Sheet #1.

Consistent with the MREF Working Group's recommendation, the March 2016 SNOPI proposed excluding ice makers from coverage as MREFs. 81 FR at 11456. DOE did not receive comments opposing this approach in response to the March 2016 SNOPI, and, therefore, excluded ice makers from coverage as MREFs in the July 2016 Final Coverage Determination. 81 FR at 46773. Accordingly, DOE has not analyzed or adopted standards for ice makers as part of this direct final rule.

#### d. Non-Compressor Refrigerators

EPCA specifies that refrigerators, refrigerator-freezers, and freezers with compressor and condenser units as integral parts of the cabinet assembly (*i.e.*, products that utilize vapor-compression refrigeration technology) are covered consumer products. (42 U.S.C. 6292(a)(1)(B)) In the preliminary analysis, DOE stated that it had identified products that use thermoelectric and/or absorption technology that were sold as refrigerators but was unaware of any products using these technologies sold as refrigerator-freezers or freezers. For the preliminary analysis, DOE considered a non-compressor refrigerator as a cabinet that has a source of refrigeration that does not include a compressor and condenser unit, requires electric energy input only, and is capable of maintaining compartment temperatures above 32 °F (0 °C) and below 39 °F (3.9 °C) as determined in a 72 °F ambient temperature. See chapter 3 of the preliminary TSD.

DOE tested six non-compressor refrigerator models in support of the preliminary analysis. In that testing, DOE determined that none of the six models were able to maintain compartment temperatures in the specified refrigerator range when tested in a 90 °F ambient temperature consistent with the current DOE test

procedure for refrigerators and the approach recommended by the Working Group. See chapter 5 of the preliminary TSD.

The MREF Working Group discussed whether non-compressor refrigerators should be considered MREFs. As discussed in the March 2016 SNOPI, the Working Group recommended that the compartment temperature ranges included in definitions be determined during product operation in a 90 °F ambient temperature. 81 FR at 11458–11460. Based on this suggested definition, the Working Group members stated that they were unaware of any products that would be considered non-compressor refrigerators available on the market, and recommended that DOE not establish a definition for this product category. (ASRAC Public Meeting Transcript, No. 45 at pp. 49–52; No. 91 at pp. 157–158) See Term Sheet #1.

In examining the merits of creating a separate product category and definition for non-compressor refrigerators, DOE conducted additional literature reviews and manufacturer interviews. DOE, however, did not find any non-compressor (thermoelectric or absorption) products available on the market that would be capable of maintaining compartment temperatures in the range necessary for a refrigerator as specified in 10 CFR 430.2 when tested in a 90 °F ambient temperature consistent with the current refrigerator test procedure and the approach ultimately recommended by the Working Group. Accordingly, in light of the Working Group's recommendation, DOE did not establish a separate product category for non-compressor refrigerators under MREFs, as discussed in the July 2016 Final Coverage Determination. See 81 FR at 46775–46776. DOE notes that products previously analyzed as non-compressor refrigerators would be covered as coolers under the MREF definitions established in the July 2016 Final Coverage Determination.

## 2. Product Classes

### a. Coolers

In the preliminary analysis, DOE proposed a single product class for all coolers (at the time referred to as “cooled cabinets”). DOE was aware of both vapor-compression and non-compressor coolers available on the market; however, DOE did not analyze these products in separate product classes because it did not identify any unique consumer utility associated with the different refrigeration systems. See chapter 3 of the preliminary TSD.

The MREF Working Group discussed the topic of product classes when considering recommended standards for MREFs. For coolers, the Working Group agreed with DOE's preliminary analysis determination that there is no unique consumer utility associated with either thermoelectric or vapor-compression refrigeration systems. (ASRAC Public Meeting Transcript, No. 45 at pp. 13–14, 162) Working Group members also compared coolers to refrigerators, refrigerator-freezers, and freezers, and considered similar characteristics for differentiating product classes. Working Group members noted that compact and built-in coolers each provide unique consumer utility and have different energy use characteristics compared to full-size or freestanding coolers, respectively. (ASRAC Public Meeting Transcript, No. 44 at pp. 155–157; No. 45 at pp. 160–166) Accordingly, the Working Group recommended that DOE establish definitions and energy conservation standards for four cooler product classes: Built-in compact, built-in, freestanding compact, and freestanding. See Term Sheets #1 and #2.

DOE sought additional information related to the consideration of non-compressor products in the December 2015 NODA. 80 FR 77589. DOE did not receive any information indicating that the approach used by the MREF Working Group was inappropriate.

Based on the recommendations of the MREF Working Group, DOE proposed definitions for each of the cooler product classes in the March 2016 SNOPI, and subsequently codified the definitions in 10 CFR 430.2 in the July 2016 Final Coverage Determination. 81 FR at 11459; 81 FR at 46775–46776. The standards adopted in this direct final rule are based on these four cooler product classes discussed above.

### b. Combination Cooler Refrigeration Products

In the preliminary analysis, DOE proposed that combination cooler refrigeration products (at the time referred to as “hybrid refrigeration products”) would be subject to the same product class structure as currently in place for refrigerators, refrigerator-freezers, and freezers. See generally, 10 CFR 430.32(a) (detailing the different classes applicable to refrigerators, refrigerator-freezers, and freezers). Under this approach, the applicable product class would be determined based on the total product volume, the compartment temperature ranges for the non-cooler compartments, and any relevant product features (*e.g.*, configuration, defrost type, ice making,



etc.). See chapter 3 of the preliminary TSD. The MREF Working Group discussed the topic of product classes when considering recommended standards for MREFs. Similar to coolers, the Working Group discussed how combination cooler refrigeration products are similar to refrigerators, refrigerator-freezers, and freezers. The Working Group considered whether the product class structure DOE proposed in the preliminary analysis would be appropriate. However, the Working Group indicated that because only certain of the previously considered product classes were available on the market or likely to become available on the market, DOE should only conduct analysis and consider potential standards for these product classes. Accordingly, the Working Group recommended that DOE establish eight product classes for combination cooler refrigeration products. These eight product classes

represent the combination cooler refrigeration products that are either currently available on the market or very similar to products currently available (i.e., the associated freestanding equivalent to a built-in product). Although combination cooler refrigeration products are not currently available in each of the eight product classes, the MREF Working Group included the additional product classes as a means to prevent circumvention. For example, if DOE established only built-in product classes, a manufacturer could readily modify a product to be freestanding to avoid having to meet the MREF standards. Accordingly, the Working Group recommended product classes for both built-in and freestanding configurations for each product type currently available. (ASRAC Public Meeting Transcript, No. 103 at pp. 55–67, 72–86, 104–109) See Term Sheets #1 and #2.

Based on the recommendations of the MREF Working Group, in this direct final rule, DOE is establishing eight product classes for combination cooler refrigeration products. DOE has determined that each product class offers a unique consumer utility and has different energy use characteristics, warranting separate product classes. Table I.2 of this direct final rule includes a description of the eight product classes. More detailed descriptions of each of the product classes can be found in chapter 3 of the direct final rule TSD.

3. Technology Options

In the preliminary analysis, DOE identified multiple technology options that may be used to improve MREF efficiencies. The preliminary analysis technology options are listed in Table IV.1 and described in chapter 3 of the preliminary TSD.

TABLE IV.1—PRELIMINARY ANALYSIS TECHNOLOGY OPTIONS

	Technology options
Compressor .....	Improved compressor efficiency. Variable-speed compressor. Linear compressor.
Evaporator .....	Increased surface area. Enhanced heat exchanger. Forced-convection evaporator.
Condenser .....	Increased surface area. Enhanced heat exchanger. Forced-convection condenser.
Fan and Fan Motor .....	Higher-efficiency fan motors. Higher-efficiency fan blades.
Insulation .....	Improved resistivity of insulation. Increased insulation thickness. Vacuum-insulated panels (“VIPs”). Gas-filled panels.
Gasket .....	Improved gaskets. Double-door gaskets. Improved door face frame.
Doors .....	Improved resistivity of glass door. Solid door.
Expansion Valve .....	Improved: Thermostatic expansion valves (“TXV”) or electronic expansion valves (“EEV”).
Cycling Losses .....	Fluid control or solenoid valve.
Defrost .....	Off-cycle defrost. Reduced energy. Adaptive defrost. Hot-gas bypass.
Controls .....	Electronic temperature control.
Alternative Refrigeration System .....	Conversion to alternative refrigeration system.
Alternative Heat Transfer .....	Heat pipe.
Other .....	Component location.

After receiving feedback from interested parties, conducting manufacturer interviews, and participating in the MREF Working Group discussions, DOE did not identify any additional technology options beyond those considered in the preliminary analysis. In this direct final rule, DOE considered the same list of

technology options as presented in Table IV.1.

B. Screening Analysis

DOE uses the following four screening criteria to determine which technology options are suitable for further consideration in an energy conservation standards rulemaking:

1. *Technological feasibility.* Technologies that are not incorporated in commercial products or in working prototypes will not be considered further.

2. *Practicability to manufacture, install, and service.* If it is determined that mass production and reliable installation and servicing of a

technology in commercial products could not be achieved on the scale necessary to serve the relevant market at the time of the projected compliance date of the standard, then that technology will not be considered further.

3. *Impacts on product utility or product availability.* If it is determined that a technology would have significant adverse impact on the utility of the product to significant subgroups of consumers or would result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products

generally available in the United States at the time, it will not be considered further.

4. *Adverse impacts on health or safety.* If it is determined that a technology would have significant adverse impacts on health or safety, it will not be considered further.  
10 CFR part 430, subpart C, appendix A, 4(a)(4) and 5(b).

In sum, if DOE determines that a technology, or a combination of technologies, fails to meet one or more of the above four criteria, it will be excluded from further consideration in the engineering analysis. The reasons for eliminating any technology are discussed below.

1. Screened-Out Technologies

In the preliminary analysis, DOE assessed the feasibility of each of the technologies listed in Table IV.1. Several of these technology options were found not to meet the four required screening criteria and were therefore screened out from further consideration in DOE's analysis. Table IV.2 lists the technology options DOE screened out for the preliminary analysis. More details on why these technology options were screened out can be found in chapter 4 of the preliminary TSD.

TABLE IV.2—PRELIMINARY ANALYSIS SCREENED OUT TECHNOLOGY OPTIONS

Technology	Reason for screening out
Linear Compressors	Lack of information on commercially-available compressors, uncertainty on whether they would be readily incorporated on a widespread basis.
Increased Evaporator and Condenser Surface Area.	No physical room to increase the face area or add tubes, would impact product utility by requiring larger cabinets.
Improved Evaporator Heat Exchange	Most fin enhancements would increase frost accumulation, decreasing product utility.
Improved Condenser Heat Exchange	Maintenance concerns requiring more frequent cleaning of heat-exchanger, impacting product utility.
Forced-Convection Condensers	Already in use by baseline products, hence eliminated from consideration in subsequent analyses.
Higher-Efficiency Fan Blades	Likely already in use in baseline products, lack of information to provide credible calculation of savings and costs.
Improved Resistivity of Insulation Panels	Lack of information on available options, not technologically feasible based on available information.
Gas-Filled Panels	Not commercially-available, not practicable to manufacture on the scale necessary for the market.
Solid Doors (for coolers, and cooler compartments).	Would affect consumer utility ( <i>i.e.</i> , availability of glass-door units).
Improved Gaskets	Already in use by nearly all MREF products.
Improved Expansion Valves	Automatic valves or EEV's are typically oversized for these products, not practicable to manufacture on the scale necessary for the market.
Fluid-Control Valves	Potential decrease in product reliability, negatively impacting consumer utility.
Off-Cycle Defrost, Reduced Energy for Automatic Defrost, Adaptive Defrost, and Hot-Gas Bypass Defrost.	Already in use by nearly all MREF products.
Electronic Temperature Control	Lack of data on costs and savings.
Conversion to Thermoelectric or Absorption Refrigeration Systems.	Unlikely to result in energy savings.
Component Location (internal arrangement of components).	Already in use by nearly all MREF products.

For this direct final rule analysis, DOE has maintained one technology option for consideration in the engineering analysis that was screened out in the preliminary analysis. DOE is no longer screening out improved evaporator and condenser heat exchange. DOE received feedback during confidential manufacturer interviews that there may be opportunities to optimize evaporator and condenser designs for more effective heat transfer. For this direct final rule, DOE has continued to screen out the remaining technology options listed in Table IV.2.

2. Remaining Technologies

Through a review of each technology, DOE concludes that all of the other identified technology options listed in section IV.A.3 of this document meet all four screening criteria to be examined further as design options in the direct final rule engineering analysis. In summary, and as explained further in this section, DOE did not screen out the following technology options shown in Table IV.3.

TABLE IV.3—DIRECT FINAL RULE REMAINING DESIGN OPTIONS

Design option
Improved compressor efficiency. Variable-speed compressors.
Improved evaporator and condenser heat exchange.
Higher-efficiency fan motors.
Increased insulation thickness.
Vacuum-insulated panels.
Improved glass door resistivity.
Conversion to vapor-compression.
Heat pipes.

DOE determined that these technology options are technologically

feasible because they are being used or have previously been used in commercially-available products or working prototypes. DOE also found that all of the remaining technology options meet the other screening criteria (*i.e.*, are practicable to manufacture, install, and service and do not result in adverse impacts on consumer utility, product availability, health, or safety). For additional details, see chapter 4 of the direct final rule TSD.

*C. Engineering Analysis*

In the engineering analysis, DOE establishes the relationship between the manufacturer production cost (“MPC”) and improved efficiency of MREFs. This relationship serves as the basis for cost-benefit calculations for individual consumers, manufacturers, and the Nation. DOE typically structures the engineering analysis using one of three approaches: (1) Design-option; (2) efficiency-level; or (3) reverse-engineering (or cost assessment). The design-option approach involves adding the estimated cost and associated efficiency of various efficiency-improving design changes to the baseline product to model different levels of efficiency. The efficiency-level approach uses estimates of costs and efficiencies of products available on the market at distinct efficiency levels to develop the cost-efficiency relationship. The reverse-engineering approach involves testing products for efficiency and determining cost from a detailed bill of materials (“BOM”) derived from reverse-engineering representative products. The efficiency ranges from that of the least-efficient MREFs sold today to the max-tech efficiency level. At each efficiency level examined, DOE determines the MPC; this relationship is referred to as a cost-efficiency curve.

1. Coolers

a. Methodology

In the preliminary analysis, DOE adopted a combined efficiency-level/design-option/reverse-engineering approach to develop cost-efficiency curves for coolers. DOE first established efficiency levels by defining annual energy use as a percent of the California Energy Commission (“CEC”)–equivalent energy use. This is the maximum allowable energy use of the CEC energy standards for wine chillers with automatic defrost, adjusted to account for the fact that the CEC test procedure uses a different usage factor than DOE considered in its analysis. DOE based its analysis on the potential efficiency improvements associated with groups of

design options. See chapter 5 of the preliminary TSD.

DOE then developed manufacturing cost models based on its reverse-engineering of various MREF products. These reverse-engineering efforts yielded additional information that helped support DOE’s calculation of the incremental costs associated with efficiency improvements. To develop the analytically derived cost-efficiency curves, DOE collected information from various sources on the manufacturing costs and energy use reductions associated with each of the considered design options. DOE reviewed product literature, conducted testing and reverse-engineering of current products, and interviewed component and product manufacturers. DOE modeled energy use reductions associated with design options using the Efficient Refrigerator Analysis program developed for the 2011 residential refrigeration products rulemaking and modified for this MREF standards rulemaking analysis. The incremental cost estimates combined with test data and energy modeling results led to the cost-efficiency curves for coolers developed for the preliminary analysis. See chapter 5 of the preliminary TSD.

DOE did not receive any feedback on the overall methodology used for the coolers preliminary engineering analysis. In this direct final rule, DOE conducted the engineering analysis using the same approach as the preliminary analysis. However, DOE has updated its analysis to reflect the changes to the scope of coverage and product classes as discussed in sections IV.A.1 and IV.A.2 of this document. DOE also incorporated feedback from manufacturers obtained during additional interviews and information from MREF Working Group members during the Working Group discussions. Additional information on the methodology used for this direct final rule engineering analysis is available in chapter 5 of the direct final rule TSD.

b. Efficiency Levels

As described in section IV.C.1.a of this document, for the preliminary analysis, DOE considered efficiency levels defined by their performance with respect to the CEC-equivalent baseline level. DOE considered the CEC-equivalent standard level to be the baseline point of comparison for coolers; however, DOE observed that certain coolers performed worse than the CEC-equivalent standard level. From DOE’s test sample, the worst-performing unit was a non-compressor cooler that tested at 267 percent of the CEC-equivalent standard. DOE used this

level as the baseline in its preliminary engineering analysis. The best-performing unit in DOE’s test sample was a vapor-compression cooler that tested at 48 percent of the CEC-equivalent standard. DOE estimates that this level represented the maximum efficiency available on the market. In the preliminary analysis, DOE considered efficiency levels beyond the maximum available by using energy modeling. The energy model for the maximum technologically feasible (max-tech) level was based on incorporating all applicable design options for coolers. That energy modeling resulted in an efficiency level at 32 percent of the CEC-equivalent standard level. DOE analyzed efficiency levels at 10-percent intervals between the CEC-equivalent and max-tech levels, and at somewhat larger intervals between the baseline and CEC-equivalent levels.

Table IV.4 lists the efficiency levels considered for coolers in the preliminary analysis. Chapter 5 of the preliminary TSD provides additional information on the development of the preliminary analysis efficiency levels.

TABLE IV.4—PRELIMINARY ANALYSIS COOLER EFFICIENCY LEVELS

Efficiency level	Percent of CEC-equivalent energy consumption
Baseline .....	267
1 .....	200
2 .....	160
3 .....	130
4 (CEC-Equivalent) .....	100
5 .....	90
6 .....	80
7 .....	70
8 .....	60
9 .....	50
10 .....	40
11 (Max-Tech) .....	32

For this direct final rule, DOE primarily relied on the same test data and modeling data as used in the preliminary analysis to evaluate efficiency levels. However, because DOE is establishing four separate product classes for coolers, DOE used this information to determine appropriate efficiency levels for each product class.

The test data from the preliminary analysis apply to both the freestanding and freestanding compact product classes. Accordingly, DOE analyzed the same efficiency levels for these product classes as considered in the preliminary analysis. However, DOE also tested one additional freestanding unit with an energy consumption at approximately 300 percent of the CEC-equivalent level. DOE therefore revised the

corresponding baseline efficiency level in this direct final rule to account for the higher energy consumption of this newly tested unit.

**TABLE IV.5—DIRECT FINAL RULE EFFICIENCY LEVELS—FREESTANDING AND FREESTANDING COMPACT COOLERS**

Efficiency level	Percent of CEC-equivalent energy consumption
Baseline .....	300
1 .....	250
2 .....	200
3 .....	150
4 (CEC-Equivalent) .....	100
5 .....	90
6 .....	80
7 .....	70
8 .....	60
9 .....	50
10 .....	40
11 (Max-Tech) .....	32

For the built-in product classes, DOE reviewed available market information and sought information on product availability from manufacturers during interviews and during the MREF Working Group discussions. DOE determined that all built-in coolers use vapor-compression refrigeration systems, and that there are no built-in coolers available at efficiencies lower than the CEC-equivalent level. So, for built-in coolers and built-in compact coolers, DOE established Efficiency Level 4 (100 percent of the CEC-equivalent) as the baseline efficiency level.

DOE also received feedback from MREF Working Group members indicating that built-in coolers use more energy than similarly constructed freestanding coolers, consistent with the higher maximum allowable annual energy use standards for built-in refrigerator, refrigerator-freezer, and freezer product classes as compared to their corresponding freestanding

counterparts. The MREF Working Group recommended that DOE consider a similar energy adder for built-in coolers in its analysis. (ASRAC Public Meeting Transcript, No. 44 at pp. 155–157; No. 87 at pp. 74–77) DOE compared the built-in refrigerator, refrigerator-freezer, and freezer product classes to their equivalent freestanding counterparts, and determined that built-in products similar to coolers typically have approximately 10-percent higher energy use than freestanding products. See chapter 5 of the direct final rule TSD for the comparison of built-in and freestanding performance. DOE applied this 10-percent adder to its analysis for built-in coolers. DOE maintained intermediate efficiency levels at 10-percent CEC-equivalent intervals between the baseline and max-tech efficiency levels, so the built-in adder is only apparent at the max-tech efficiency level (*i.e.*, 32 percent of CEC-equivalent for freestanding plus a 10-percent energy use adder equals 35 percent of CEC-equivalent).

**TABLE IV.6—TABLE DIRECT FINAL RULE EFFICIENCY LEVELS—BUILT-IN AND BUILT-IN COMPACT COOLERS**

Efficiency level	Percent of CEC-equivalent energy consumption
4 (CEC-Equivalent) .....	100
5 .....	90
6 .....	80
7 .....	70
8 .....	60
9 .....	50
10 .....	40
11 (Max-Tech) .....	35

Additional details regarding the selection of efficiency levels for coolers are available in chapter 5 of the direct final rule TSD.

**c. Manufacturer Production Costs**

In the preliminary analysis, DOE developed cost-efficiency curves for

coolers with total refrigerated volumes of 2 ft<sup>3</sup> and 6 ft<sup>3</sup>. DOE focused its analysis on these product volumes because it determined they were most representative of products available on the market. The 2-ft<sup>3</sup> product represents the smaller units that would typically sit on a countertop, while the 6-ft<sup>3</sup> volume represents products designed to be installed underneath the counter.

For 2-ft<sup>3</sup> coolers, DOE developed a cost-efficiency curve using data from two reverse-engineered 2-ft<sup>3</sup> coolers and additional scaled data from reverse-engineered 6-ft<sup>3</sup> coolers to estimate costs at higher efficiencies. DOE used its cost model to estimate the MPCs of modeled units incorporating design options not included in the reverse-engineered units. For 2-ft<sup>3</sup> coolers, the cost-efficiency curve represents starting with a non-compressor cooler at the baseline efficiency level and converting to vapor-compression to reach the higher efficiency levels.

DOE followed a similar approach for developing a cost-efficiency curve for 6-ft<sup>3</sup> coolers in the preliminary analysis. DOE reverse-engineered three 6-ft<sup>3</sup> coolers at the CEC-equivalent efficiency level, a mid-efficiency level, and the maximum available efficiency level. DOE used its cost model to estimate the MPCs of modeled units incorporating design options not observed in the reverse-engineered units. For 6-ft<sup>3</sup> products, DOE was not aware of any non-compressor products available at the time of the preliminary analysis. Accordingly, DOE based the 6-ft<sup>3</sup> analysis only on vapor-compression coolers, with a baseline efficiency at the CEC-equivalent level.

Table IV.7 presents the cost-efficiency curves developed for 2-ft<sup>3</sup> and 6-ft<sup>3</sup> coolers in the preliminary analysis. Chapter 5 of the preliminary TSD provides additional discussion regarding the development of the preliminary cost-efficiency curves.

**TABLE IV.7—PRELIMINARY ANALYSIS COOLER COST-EFFICIENCY CURVES**  
[2013\$]

Efficiency level (percent of CEC-equivalent energy consumption)	Incremental MPC	
	6-ft <sup>3</sup>	2-ft <sup>3</sup>
Baseline (267)		
1 (200) .....		\$21
2 (160) .....		34
3 (130) .....		44
4 (100—CEC-Equivalent) .....		54
5 (90) .....	\$12	57
6 (80) .....	21	72
7 (70) .....	33	88
8 (60) .....	47	100
9 (50) .....	62	112

TABLE IV.7—PRELIMINARY ANALYSIS COOLER COST-EFFICIENCY CURVES—Continued  
[2013\$]

Efficiency level (percent of CEC-equivalent energy consumption)	Incremental MPC	
	6-ft <sup>3</sup>	2-ft <sup>3</sup>
10 (40) .....	135	170
11 (32—Max-Tech) .....	205	225

DOE used the preliminary engineering analysis as the basis for the MPCs in this direct final rule engineering analysis.

The primary updates made to the preliminary analysis MPCs reflected the incorporation of the four cooler product classes and updated market information.

Similar to the preliminary engineering analysis, DOE analyzed products at representative volumes in each of the four cooler product classes for this direct final rule. DOE did not reverse-engineer products at each of these volumes. To develop MPCs for those products, DOE used its cost model and scaled certain components to reflect the changes that would be necessary with different cabinet sizes. DOE also relied on market information to verify cost information and product specifications. Table IV.8 shows the representative product volumes DOE considered for this direct final rule engineering analysis.

TABLE IV.8—REPRESENTATIVE COOLER VOLUMES

Product class	Representative volumes
Freestanding .....	8-ft <sup>3</sup> , 12-ft <sup>3</sup> , 16-ft <sup>3</sup>
Built-in .....	8-ft <sup>3</sup> , 12-ft <sup>3</sup> , 16-ft <sup>3</sup>
Freestanding Compact.	2-ft <sup>3</sup> , 4-ft <sup>3</sup> , 6-ft <sup>3</sup>

TABLE IV.8—REPRESENTATIVE COOLER VOLUMES—Continued

Product class	Representative volumes
Compact Built-in .....	6-ft <sup>3</sup>

After reviewing updated market information, DOE is now aware of products with volumes greater than 2 ft<sup>3</sup> that use non-compressor refrigeration systems. In particular, DOE identified non-compressor coolers with volumes up to 12 ft<sup>3</sup> available on the market. DOE observed non-compressor products for only the two freestanding product classes, so for these product classes, DOE analyzed the changes and costs associated with moving from a baseline non-compressor product (*i.e.*, 300 percent of the CEC-equivalent standard) to the max-tech level. For the built-in product classes, which include only vapor-compression products, DOE analyzed the changes necessary to move from Efficiency Level 4 (the CEC-equivalent standard) to the max-tech.

For this direct final rule, DOE expects that manufacturers would rely on the same design changes as considered in the preliminary analysis to reach higher efficiency levels. DOE presented the design option changes associated with

higher efficiencies to manufacturers during interviews conducted under non-disclosure agreements and to the MREF Working Group. Feedback from the manufacturers and Working Group members generally supported the design option changes and their corresponding efficiency increases.<sup>19</sup>

DOE used the preliminary analysis as the basis for the costs associated with these design changes; however, DOE updated its cost estimates based on feedback from manufacturer interviews and from the MREF Working Group. This updated information included feedback on specific component pricing and on the order in which manufacturers would apply the different design options.

In addition to the revised analysis, DOE also updated its cost estimates to 2015\$, the most recent year for which full-year cost data was available at the time of the direct final rule analysis. Based on these updates to the preliminary analysis, DOE developed cost-efficiency curves presented in Table IV.9 for each of the analyzed volumes for the cooler product classes established in this direct final rule. Chapter 5 of the direct final rule TSD includes additional information on the engineering analysis.

TABLE IV.9—DIRECT FINAL RULE COOLER COST-EFFICIENCY CURVES  
[2015\$]

Efficiency level	Compact (<7.75 ft <sup>3</sup> )				Full-size (≥7.75 ft <sup>3</sup> )					
	Freestanding			Built-in	Freestanding			Built-in		
	2-ft <sup>3</sup>	4-ft <sup>3</sup>	6-ft <sup>3</sup>	6-ft <sup>3</sup>	8-ft <sup>3</sup>	12-ft <sup>3</sup>	16-ft <sup>3</sup>	8-ft <sup>3</sup>	12-ft <sup>3</sup>	16-ft <sup>3</sup>
Baseline .....	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
1 .....	0	16	14	0	27	36	0	0	0	0
2 .....	0	33	28	0	53	71	0	0	0	0
3 .....	0	49	42	0	80	107	0	0	0	0
4 .....	54	65	56	0	106	143	0	0	0	0
5 .....	57	73	64	7	118	160	22	8	10	11
6 .....	65	82	73	18	129	175	41	22	29	34
7 .....	76	95	88	31	149	204	74	38	51	58
8 .....	89	108	102	46	163	219	91	53	66	73
9 .....	102	120	113	51	173	227	98	57	68	75
10 .....	147	192	198	155	235	302	181	175	236	265
11 .....	237	282	288	223	378	500	403	259	337	376

<sup>19</sup> See document numbers 54, 58, and 75 in docket ID EERE-2011-BT-STD-0043 on <http://www.regulations.gov>

[www.regulations.gov](http://www.regulations.gov) for engineering materials presented to the MREF Working Group.

2. Combination Cooler Refrigeration Products

a. Methodology

In the preliminary analysis, DOE observed that combination coolers were very similar in design to refrigerators, refrigerator-freezers, and freezers. Because of these similarities, DOE did not conduct a full engineering analysis for these products. Instead, DOE considered whether it would be appropriate to apply the standards currently in place for refrigerators, refrigerator-freezers, and freezers to combination cooler refrigeration products. To do this, DOE modeled the heat loads for various combination product configurations at two representative product volumes (6 ft<sup>3</sup> and 12 ft<sup>3</sup>) incorporating different combinations of design options. From the modeling results, DOE concluded that all of the product configurations would be capable of meeting the existing standard for the corresponding product class for all-refrigerators with automatic defrost. Although DOE determined that combination cooler refrigeration products would be able to reach that efficiency level by incorporating certain design options, DOE did not estimate the incremental MPCs associated with improving performance to that level. See chapter 5 of the preliminary TSD.

During the MREF Working Group discussions, Working Group members recommended that DOE conduct the full analysis, including establishing product classes, efficiency levels, and

incremental MPC estimates for these products.<sup>20</sup>

For this direct final rule engineering analysis, DOE conducted the full engineering analysis as recommended by the MREF Working Group. DOE used an approach based on modeling different product configurations and design options to estimate performance. This approach was similar to what DOE used in the preliminary engineering analysis. DOE conducted its engineering analysis on three of the eight product classes of combination cooler refrigeration products, as discussed in section IV.A.2 of this document, and on the typical product configurations (*i.e.*, compartment volumes and door types) available on the market. DOE did not test or reverse-engineer any combination cooler refrigeration products, so it relied on modeling to determine baseline performance and incremental efficiency improvements. DOE modeled the typical product configurations observed in products available on the market, and incorporated design options to improve the refrigeration system efficiency and reduce the thermal load on the unit. DOE concluded that combination cooler refrigeration products would rely on the same design options to improve efficiency as for coolers. Accordingly, DOE applied similar cost estimates to each design option. DOE used its cost model to scale the design option cost estimates, as necessary, based on the different product configurations for combination cooler refrigeration products. A more detailed description of

the methodology used in this direct final rule engineering analysis is available in chapter 5 of the direct final rule TSD.

b. Efficiency Levels

For the preliminary engineering analysis, DOE did not specifically analyze different efficiency levels for combination cooler refrigeration products. DOE instead modeled sets of design options corresponding to the baseline and higher efficiencies to determine whether these products would be capable of meeting the existing energy conservation standards for refrigerators, refrigerator-freezers, and freezers.

In this direct final rule, DOE is establishing eight product classes for combination cooler refrigeration products, representing the product types either currently available on the market or likely to be available in the future. For the purposes of the engineering analysis, DOE analyzed only the product classes with current product offerings (C-3A, C-9, and C-13A). DOE applied this analysis to the remaining similar product classes in the downstream analyses. Based on market data, DOE identified a representative total refrigerated volume and configuration for each of these three analyzed product classes, as described in Table IV.10. For all three product classes, DOE observed that the cooler compartment typically had a glass door, while the fresh food or freezer compartment had a solid door.

TABLE IV.10—REPRESENTATIVE COMBINATION COOLER REFRIGERATION PRODUCT CONFIGURATIONS

Product class	Cooler compartment volume (ft <sup>3</sup> )	Fresh food or freezer compartment volume (ft <sup>3</sup> )	Total refrigerated volume (ft <sup>3</sup> )
C-3A .....	6	6	12
C-9 .....	6	6	12
C-13A .....	1.2	3.6	4.8

DOE then used its modeling tool (discussed in detail in chapter 5 of the direct final rule TSD) to evaluate the thermal load on a typical baseline unit (*i.e.*, thinnest insulation and baseline glass for the cooler compartment). DOE assumed that a baseline refrigeration system would be equivalent to the baseline refrigeration system for a corresponding refrigerator, refrigerator-freezer, or freezer. With the estimated thermal load and refrigeration system

efficiency, DOE calculated the associated energy performance for the baseline combination cooler refrigeration products.

For performance at higher efficiency levels, DOE modeled the thermal load impacts of increased insulation thickness and improved glass door resistivity. These design changes would reduce the total thermal load for the refrigeration system to offset. At the higher efficiency levels DOE also

considered improved refrigeration system efficiencies through higher-efficiency compressors and optimized heat exchangers, similar to the design options analyzed for coolers. DOE estimated max-tech performance by combining the lowest modeled thermal load with the highest-efficiency refrigeration system. DOE considered intermediate efficiency levels at even increments between the baseline and max-tech. For each product class, DOE

<sup>20</sup> See docket transcript documents EERE-2011-BT-STD-0043-0090 and EERE-2011-BT-STD-

0043-0103 for the discussions of the combination cooler refrigeration products analysis.

analyzed an intermediate efficiency level corresponding to the equivalent level of the refrigerator, refrigerator-freezer, and freezer energy conservation standards that apply to those manufacturers who have received permission to use a test procedure waiver, which provides a usage factor

that compensates for the less frequent door openings for these products. Based on the updated product class structure and DOE's modeling analysis, DOE analyzed the efficiency levels as shown in Table IV.11. The values corresponding to each efficiency level reflect the modeled energy use relative to the existing standards for the corresponding refrigerator, refrigerator-

freezer, or freezer product classes, where 100 percent represents the current standard level for products tested according to the existing test procedure waivers. Chapter 5 of the direct final rule TSD provides more information on the development of combination cooler refrigeration product efficiency levels.

TABLE IV.11—DIRECT FINAL RULE COMBINATION COOLER REFRIGERATION PRODUCT EFFICIENCY LEVELS

Efficiency level	Percent of DOE refrigerator standard equivalent		
	C-3A	C-9	C-13A
Baseline .....	136	145	171
1 .....	128	128	149
2 .....	100	106	128
3 .....	85	100	100
4 .....	77	85	85
5 .....	68	77	77
6 .....	60	68	68
7 (Max-tech) .....	46	58	60

c. Manufacturer Production Costs

As discussed in section IV.C.2.a of this document, DOE did not estimate the increases in MPC associated with improving combination cooler refrigeration product efficiencies in the preliminary analysis. For this direct final rule, DOE extended the engineering analysis to include the development of combination cooler refrigeration product cost-efficiency curves.

Because combination cooler refrigeration products are similar to coolers and refrigerators, DOE used data from the reverse-engineering of coolers and refrigerators to inform the cost

estimates associated with design options. DOE also considered information from confidential manufacturer interviews to determine which design options would be appropriate for combination cooler refrigeration products and to gather feedback on cost estimates. DOE used its cost model to scale certain design options to the three typical volumes identified for each of the analyzed product classes, as described in section IV.C.2.b of this document. DOE presented its initial updates to the engineering analysis to the MREF Working Group<sup>21</sup> and made additional revisions based on feedback from

Working Group members. (ASRAC Public Meeting Transcript, No. 90 at pp. 128–135)

To develop the cost-efficiency curves, DOE determined that manufacturers would likely make incremental improvements to both the thermal load and the refrigeration system when moving from baseline to max-tech. Table IV.12 presents the incremental MPCs, in 2015\$, associated with these improvements for the three product classes considered in this engineering analysis. Chapter 5 of the direct final rule TSD includes additional information regarding the cost-efficiency curves.

TABLE IV.12—DIRECT FINAL RULE COMBINATION COOLER REFRIGERATION PRODUCT COST-EFFICIENCY CURVES

Efficiency level	Incremental MPC		
	C-3A	C-9	C-13A
Baseline .....	\$0	\$0	\$0
1 .....	6	15	6
2 .....	28	45	15
3 .....	42	47	35
4 .....	44	50	52
5 .....	65	60	100
6 .....	116	132	155
7 (Max-tech) .....	256	264	207

D. Markups Analysis

The markups analysis develops appropriate markups (e.g., manufacturer markups, retailer markups, wholesaler markups, contractor markups) in the distribution chain and sales taxes to

convert the MPC estimates derived in the engineering analysis to consumer prices, which are then used in the LCC and PBP analysis and in the manufacturer impact analysis. At each step in the distribution channel,

companies mark up the price of the product to cover business costs and profit margin.

For MREFs, the main distribution chain goes from manufacturers to appliance retailers, and then to

<sup>21</sup> See document numbers 78, 79, and 99 in docket ID EERE-2011-BT-STD-0043 on <http://www.regulations.gov>

[www.regulations.gov](http://www.regulations.gov) for engineering materials presented to the MREF Working Group.

consumers. DOE included only this distribution channel during the preliminary analysis. Based on feedback from manufacturers, and the MREF Working Group, DOE understands a small fraction of freestanding coolers and combination cooler refrigeration products, and all built-in coolers and combination cooler refrigeration products, go through another distribution channel, in which manufacturers sell the products to wholesalers, who in turn sell the products to retailers and then to consumers. (ASRAC Public Meeting, No. 85 at pp. 142–145)

The manufacturer markup converts MPC to manufacturer selling price (“MSP”). DOE developed an average manufacturer markup by examining the annual Securities and Exchange Commission (“SEC”) 10-K reports filed by publicly-traded manufacturers engaged in producing MREFs.

For retailers and wholesalers, DOE developed separate markups for baseline products (baseline markups) and for the incremental cost of more-efficient products (incremental markups). Incremental markups are coefficients that relate the change in the MSP of higher-efficiency models to the change in the retailer sales price. DOE used the 2012 Annual Retail Trade Survey<sup>22</sup> and 2012 Annual Wholesale Trade Report<sup>23</sup> from the U.S. Census Bureau to estimate average baseline and incremental markups for retailers and wholesalers, respectively.

Chapter 6 of the direct final rule TSD provides details on DOE’s development of markups for MREFs.

#### E. Energy Use Analysis

The purpose of the energy use analysis is to determine the annual energy consumption of MREFs at different efficiencies in representative U.S. households, and to assess the energy savings potential of increased MREF efficiency. The energy use analysis estimates the range of energy use of MREFs in the field (*i.e.*, as they are actually used by consumers). The energy use analysis provides the basis for other analyses DOE performs, particularly assessments of the energy savings and the savings in consumer operating costs that could result from the adoption of new standards.

<sup>22</sup> U.S. Census Bureau, *2012 Annual Retail Trade Survey* (2012) (Available at: <http://www.census.gov/retail/index.html>) (Last Accessed November 12, 2015).

<sup>23</sup> U.S. Census Bureau, *2012 Annual Wholesale Trade Report* (2012), (Available at: <http://www.census.gov/wholesale/index.html>) (Last Accessed April 23, 2015).

DOE determined a range of annual energy use of MREFs as a function of unit volume. DOE developed a sample of households that use MREFs from surveys of MREF owners.<sup>24</sup> For each sample household, DOE randomly assigned a product volume from the volumes analyzed in the engineering analysis. For each volume and considered efficiency level, DOE derived the energy consumption as measured by the DOE test procedure in appendix A.

DOE developed distributions of product volumes for each product class based on the MREF models listed in DOE’s Compliance Certification Management System (“CCMS”) database,<sup>25</sup> the CEC database,<sup>26</sup> the Natural Resources Canada (“NRCan”) database,<sup>27</sup> as well as manufacturer and retailer Web sites.

Chapter 7 of the direct final rule TSD provides details on DOE’s energy use analysis for MREFs.

#### F. Life-Cycle Cost and Payback Period Analysis

DOE conducted LCC and PBP analyses to evaluate the economic impacts on individual consumers of potential energy conservation standards for MREFs. The effect of new or amended energy conservation standards on individual consumers usually involves a reduction in operating cost and an increase in purchase cost. DOE used the following two metrics to measure consumer impacts:

- The LCC (life-cycle cost) is the total consumer expense of an appliance or product over the life of that product, consisting of total installed cost (MPC, manufacturer markups, distribution chain markups, sales tax, and installation costs) plus operating costs (expenses for energy use, maintenance, and repair). To compute the operating costs, DOE discounts future operating costs to the time of purchase and sums them over the lifetime of the product.
- The PBP (payback period) is the estimated amount of time (in years) it takes consumers to recover the

<sup>24</sup> J.B. Greenblatt et al. *U.S. Residential Miscellaneous Refrigeration Products: Results from Amazon Mechanical Turk Surveys*. 2014. Lawrence Berkeley National Laboratory: Berkeley, CA. Report No. LBNL–6537E. See also S.M. Donovan, S.J. Young and J.B. Greenblatt. *Ice-Making in the U.S.: Results from an Amazon Mechanical Turk Survey*. 2015. Lawrence Berkeley National Laboratory: Berkeley, CA. Report No. LBNL–183899.

<sup>25</sup> For more information see: [www.regulations.doe.gov/certification-data/CCMS-77803762689.html](http://www.regulations.doe.gov/certification-data/CCMS-77803762689.html).

<sup>26</sup> Available at: <https://cacertappliances.energy.ca.gov>.

<sup>27</sup> Available at: <http://oe.nrcan.gc.ca/pml-lmp/index.cfm?action=app.search-recherche&appliance=REFRIGERATORS>.

increased purchase cost (including installation) of a more-efficient product through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost at higher efficiency levels by the change in annual operating cost for the year that amended or new standards are assumed to take effect.

For any given efficiency level, DOE measures the change in LCC relative to the LCC in the no-new-standards case, which reflects the estimated efficiency distribution of MREFs in the absence of new energy conservation standards. In contrast, the PBP for a given efficiency level is measured relative to the lowest efficiency level in the no-new-standards distribution.

For each considered efficiency level in each product class, DOE calculated the LCC and PBP for a nationally representative set of housing units. As stated previously, DOE developed household samples from the results of a study on MREFs using online surveys. For each sample household, DOE determined the energy consumption for the MREFs and the appropriate electricity price. By developing a representative sample of households, the analysis captured the variability in energy consumption and energy prices associated with the use of MREFs.

Inputs to the calculation of total installed cost include the cost of the product—which includes MPCs, manufacturer markups, retailer and distributor markups, and sales taxes—and installation costs. Inputs to the calculation of operating expenses include annual energy consumption, energy prices and price projections, repair and maintenance costs, product lifetimes, and discount rates. DOE created distributions of values for product lifetimes, discount rates, and sales taxes, with probabilities attached to each value, to account for their uncertainty and variability.

The computer model DOE uses to calculate the LCC and PBP, which incorporates Crystal Ball™ (a commercially-available software program), relies on a Monte Carlo simulation to incorporate uncertainty and variability into the analysis. The Monte Carlo simulations randomly sample input values from the probability distributions and MREF user samples. The model calculated the LCC and PBP for products at each efficiency level for 10,000 housing units per simulation run.

DOE calculated the LCC and PBP for all consumers as if each were to purchase a new product in the expected year of compliance with new standards. In its analysis, DOE used two different



compliance dates. For the consensus-recommended TSLs, the analysis is based on a 2019 compliance date, as recommended by the MREF Working Group. The analysis for all other TSLs is based on a 2021 compliance date consistent with EPCA, which provides that newly-established standards shall not apply to products manufactured

within five years after the publication of the final rule. In other words, DOE followed the prescriptions of EPCA for all TSLs that were not recommended by the MREF Working Group. The two different compliance dates are indicated in the relevant sections of the results and discussed in section III.B of this document.

Table IV.13 summarizes the approach and data DOE used to derive inputs to the LCC and PBP calculations. The subsections that follow provide further discussion. Details of the spreadsheet model, and of all the inputs to the LCC and PBP analyses, are contained in chapter 8 of the direct final rule TSD and its appendices.

TABLE IV.13—SUMMARY OF INPUTS FOR THE LCC AND PBP ANALYSIS \*

Inputs	Source/method
Product Cost .....	Derived by multiplying MPCs by manufacturer and retailer markups and sales tax, as appropriate.
Installation Costs .....	Did not include because no change with efficiency level.
Annual Energy Use .....	Annual weighted-average values are a function of energy use at each TSL and distribution of efficiencies observed on the market.
Energy Prices .....	Based on Edison Electric Institute (“EEI”) Typical Bills and Average Rates reports for summer and winter 2014.
Energy Price Trends .....	Based on AEO 2015 price forecasts.
Repair and Maintenance Costs .....	Did not include because no change with efficiency level.
Product Lifetime .....	Based on MREF Working Group feedback and values previously determined for refrigerators and freezers.
Discount Rates .....	Approach involves identifying all possible debt or asset classes that might be used to purchase the considered appliances, or might be affected indirectly. Primary data source was the Federal Reserve Board’s Survey of Consumer Finances.
Compliance Date .....	TSLs recommended by the MREF Working Group: 2019; Other TSLs: 2021.

\* Collectively, the references for the data sources mentioned in this table are either provided in the sections following the table or in chapter 8 of the direct final rule TSD.

#### 1. Product Cost

To calculate consumer product costs, DOE multiplied the MPCs developed in the engineering analysis by the markups described above (along with sales taxes). DOE used different markups for baseline products and higher-efficiency products, because DOE applies an incremental markup to the increase in MSP associated with higher-efficiency products.

Historical price data specific to MREFs are not available. Hence, DOE used a constant price assumption as the default product price trend to project the prices of MREFs sold in each year in the forecast period.

#### 2. Installation Cost

Installation cost includes labor, overhead, and any miscellaneous materials and parts needed to install the product. DOE included installation cost as part of the LCC analysis during the preliminary analysis, but the cost did not vary with efficiency levels. As part of the MREF Working Group discussions, stakeholders confirmed that installation cost for MREFs does not vary between efficiency levels. (ASRAC Public Meeting, No. 85 at pp. 155–157) As a result, DOE did not include installation cost as part of the analysis for this direct final rule.

#### 3. Annual Energy Consumption

For each sampled household, DOE determined the energy consumption for MREFs at different efficiency levels

using the approach described in section IV.E of this document.

#### 4. Energy Prices

For the LCC and PBP analysis, DOE used average electricity prices (for baseline products) and marginal prices (for higher-efficiency products) which vary by region. DOE estimated these prices using data published with the EEI Typical Bills and Average Rates reports for summer and winter 2014.<sup>28</sup> The report provides, for most of the major investor-owned utilities (“IOUs”) in the country, the total bill assuming household consumption levels of 500, 750, and 1,000 kWh for the billing period.

DOE defined the average price as the ratio of the total bill to the total electricity consumption. DOE used the EEI data to also define a marginal price as the ratio of the change in the bill to the change in energy consumption.

Regional weighted-average values for each type of price were calculated for the nine census divisions and four large States (CA, FL, NY and TX). Each EEI utility in a division or large State was assigned a weight based on the number of consumers it serves. Consumer counts were taken from the most recent

EIA Form 861 data (2012).<sup>29</sup> DOE adjusted these regional weighted-average prices to account for systematic differences between IOUs and publicly-owned utilities, as the latter are not included in the EEI data set.

Appropriate prices were assigned to each sample household depending on its location.

To estimate future prices, DOE used the projected annual changes in average residential electricity prices in the Reference case projection in AEO 2015. The AEO price trends do not distinguish between marginal and average prices, so DOE used the same trends for both. DOE reviewed the EEI data for the years 2007 to 2014 and determined that there is no systematic difference in the trends for marginal vs. average prices in the data.

#### 5. Maintenance and Repair Costs

Repair costs are associated with repairing or replacing product components that have failed in an appliance; maintenance costs are associated with maintaining the operation of the product. DOE included maintenance and repair costs as part of the LCC analysis during the preliminary analysis, but the costs did not vary with efficiency levels. As part of the MREF Working Group discussions, stakeholders confirmed that maintenance and repair costs for MREFs

<sup>28</sup> Edison Electric Institute. Typical Bills and Average Rates Report. Winter 2014 published April 2014, Summer 2014 published October 2014. See <http://www.eei.org/resourcesandmedia/products/Pages/Products.aspx>.

<sup>29</sup> U.S. Department of Energy, Energy Information Administration. Form EIA-861 Annual Electric Power Industry Database. [www.eia.doe.gov/cneaf/electricity/page/eia861.html](http://www.eia.doe.gov/cneaf/electricity/page/eia861.html).

do not vary between efficiency levels. (ASRAC Public Meeting, No. 85 at p. 171) As a result, DOE did not include maintenance and repair costs as part of the analysis for this direct final rule.

6. Product Lifetime

DOE is aware of only limited available data to be used in the modeling and analysis of MREF lifetimes. In the preliminary analysis, DOE estimated the average product lifetime for coolers based on survey data.<sup>30</sup> However, several MREF Working Group members indicated that the estimated lifetime for coolers was too short and that these products operate using the same refrigeration technology as currently covered refrigerators and refrigerator-freezers for which the projected lifetime is much longer. (ASRAC Public Meeting, No. 85 at pp. 164–170) Therefore, as part of the MREF Working Group deliberations, DOE applied the lifetime of related refrigeration products to all MREFs in this direct final rule.

For all full-size MREF product classes, DOE applied the lifetime distribution used for full-size refrigerators in the 2011 refrigerators, refrigerator-freezers, and freezers final rule, with an average lifetime of 17.4 years. 76 FR 57516 (September 15, 2011). For all compact MREF product classes, DOE scaled the lifetime distribution used for compact freezers in the 2011 refrigerators, refrigerator-freezers, and freezers final rule to match the estimated 10-year average lifetime

provided by the Association of Home Appliance Manufacturers (“AHAM”) and manufacturer feedback. (ASRAC Public Meeting, No. 85 at p. 160; ASRAC Public Meeting, No. 87 at pp. 93–94, 175–176) This resulted in an average lifetime of 10.3 years for compact MREF product classes. See chapter 8 of the direct final rule TSD.

7. Discount Rates

In calculating the LCC, DOE applies discount rates appropriate to households to estimate the present value of future operating costs. DOE estimated a distribution of residential discount rates for MREFs based on consumer financing costs and opportunity cost of funds related to appliance energy cost savings and maintenance costs.

To establish residential discount rates for the LCC analysis, DOE identified all relevant household debt or asset classes in order to approximate a consumer’s opportunity cost of funds related to appliance energy cost savings. It estimated the average percentage shares of the various types of debt and equity by household income group using data from the Federal Reserve Board’s Survey of Consumer Finances<sup>31</sup> (“SCF”) for 1995, 1998, 2001, 2004, 2007, and 2010. Using the SCF and other sources, DOE developed a distribution of rates for each type of debt and asset by income group to represent the rates that may apply in the year in which new standards would take effect. DOE

assigned each sample household a specific discount rate drawn from one of the distributions. The average rate across all types of household debt and equity and income groups, weighted by the shares of each type, is 5.1 percent. See chapter 8 of the direct final rule TSD for further details on the development of consumer discount rates.

8. Efficiency Distribution in the No-New-Standards Case

To accurately estimate the share of consumers that would be affected by a potential energy conservation standard at a particular efficiency level, DOE’s LCC analysis considered the projected distribution (market shares) of product efficiencies in the no-new-standards case (*i.e.*, the case without amended or new energy conservation standards).

DOE estimated the current distribution of product efficiencies using product owner surveys;<sup>32</sup> information from AHAM (AHAM, No. 106), and the databases maintained by DOE (CCMS),<sup>33</sup> the CEC,<sup>34</sup> and NRCan;<sup>35</sup> and information from manufacturer and retailer Web sites and manufacturer feedback. The approach is described in chapter 8 of the direct final rule TSD. DOE projected that the current distribution of product efficiencies would remain constant in future years in the absence of standards. Table IV.14 and Table IV.15 show the efficiency distributions that DOE used.

TABLE IV.14—PERCENTAGE OF COOLERS AT EACH EFFICIENCY LEVEL IN THE NO-NEW-STANDARDS CASE

Efficiency level	Product class			
	Freestanding compact	Built-in compact	Freestanding	Built-in
EL0 .....	10	0	3	0
EL1 .....	14	0	0	0
EL2 .....	24	0	1	0
EL3 .....	25	0	7	0
EL4 .....	9	17	28	47
EL5 .....	6	50	25	20
EL6 .....	7	17	23	27
EL7 .....	3	17	11	7
EL8 .....	2	0	1	0
EL9 .....	0	0	0	0
EL10 .....	0	0	0	0
EL11 .....	1	0	0	0

<sup>30</sup>J.B. Greenblatt et al. *U.S. Residential Miscellaneous Refrigeration Products: Results from Amazon Mechanical Turk Surveys*. 2014. Lawrence Berkeley National Laboratory: Berkeley, CA. Report No. LBNL-6537E.

<sup>31</sup>The Federal Reserve Board, SCF 1989, 1992, 1995, 1998, 2001, 2004, 2007, 2010. <http://www.federalreserve.gov/pubs/oss/oss2/scfindex.html>.

<sup>32</sup>J.B. Greenblatt et al. *U.S. Residential Miscellaneous Refrigeration Products: Results from Amazon Mechanical Turk Surveys*. 2014. Lawrence Berkeley National Laboratory: Berkeley, CA. Report No. LBNL-6537E. See also S.M. Donovan, S.J. Young and J.B. Greenblatt, *Ice-Making in the U.S.: Results from an Amazon Mechanical Turk Survey*. 2015. Lawrence Berkeley National Laboratory: Berkeley, CA. Report No. LBNL-183899.

<sup>33</sup>For more information see: [www.regulations.doe.gov/certification-data/CCMS-77803762689.html](http://www.regulations.doe.gov/certification-data/CCMS-77803762689.html).

<sup>34</sup>Available at: <https://cacertappliances.energy.ca.gov>.

<sup>35</sup>Available at: <http://oee.nrcan.gc.ca/pml-lmp/index.cfm?action=app.search-recherche&appliance=REFRIGERATORS>.

TABLE IV.15—PERCENTAGE OF COMBINATION COOLER REFRIGERATION PRODUCTS AT EACH EFFICIENCY LEVEL IN THE NO-NEW-STANDARDS CASE

Efficiency level	Product class					
	C-3A	C-3A-BI	C-9	C-9-BI	C-13A	C-13A-BI
EL0 .....	0	0	0	0	0	0
EL1 .....	0	0	0	0	0	0
EL2 .....	100	100	0	0	25	0
EL3 .....	0	0	100	100	75	100
EL4 .....	0	0	0	0	0	0
EL5 .....	0	0	0	0	0	0
EL6 .....	0	0	0	0	0	0
EL7 .....	0	0	0	0	0	0

### 9. Payback Period Analysis

The PBP is the amount of time it takes the consumer to recover the additional installed cost of more-efficient products, compared to baseline products, through energy cost savings. PBPs are expressed in years. PBPs that exceed the life of the product mean that the increased total installed cost is not recovered in reduced operating expenses.

The inputs to the PBP calculation for each efficiency level are the change in total installed cost of the product and the change in the first-year annual operating expenditures relative to the baseline. The PBP calculation uses the same inputs as the LCC analysis, except that discount rates are not needed.

As noted above, EPCA, as amended, establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the first year's energy savings resulting from the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii)) For each considered efficiency level, DOE determined the value of the first year's energy savings by calculating the energy savings in accordance with the applicable DOE test procedure, and multiplying those savings by the average energy price forecast for the year in which compliance with the new standards would be required.

#### G. Shipments Analysis

DOE uses forecasts of annual product shipments to calculate the national impacts of potential new energy conservation standards on energy use, NPV, and future manufacturer cash flows.<sup>36</sup> The shipments model takes an accounting approach, tracking market

<sup>36</sup> DOE used data on manufacturer shipments as a proxy for national sales, as aggregate data on sales are lacking. In general one would expect a close correspondence between shipments and sales.

shares of each product class and the vintage of units in the stock. Stock accounting uses product shipments as inputs to estimate the age distribution of in-service product stocks for all years. The age distribution of in-service product stocks is a key input to calculations of both the NES and NPV, because operating costs for any year depend on the age distribution of the stock.

To estimate cooler shipments, DOE first estimated total stock based on estimates of market saturation and stock from manufacturer feedback and surveys on product ownership.<sup>37</sup> DOE then estimated annual shipments by dividing the estimated stock by the average product lifetime. DOE verified that the estimated shipments agreed with estimates from AHAM. (AHAM, No. 106) DOE estimated that shipments would increase in line with the projected increase in the housing stock from the *AEO 2015*<sup>38</sup> estimates in order to project shipments forward to 2050. DOE allocated shipments to each product class using the distribution of available models on the market and feedback from manufacturers, the MREF Working Group, and AHAM. (See, e.g., AHAM, No. 106)

For combination cooler refrigeration products, DOE used manufacturer feedback from confidential interviews to estimate the number of units shipped in 2014. DOE estimated that shipments would increase in line with the increase in housing stock in the United States in order to project shipments forward to

<sup>37</sup> J.B. Greenblatt et al. *U.S. Residential Miscellaneous Refrigeration Products: Results from Amazon Mechanical Turk Surveys*. 2014. Lawrence Berkeley National Laboratory: Berkeley, CA. Report No. LBNL-6537E. See also S.M. Donovan, S.J. Young and J.B. Greenblatt. *Ice-Making in the U.S.: Results from an Amazon Mechanical Turk Survey*. 2015. Lawrence Berkeley National Laboratory: Berkeley, CA. Report No. LBNL 183899.

<sup>38</sup> U.S. Department of Energy-Energy Information Administration. *Annual Energy Outlook 2015 with projections to 2040*. April 2015. Washington, DC. DOE/EIA-0383 (2015). Available for download at: <http://www.eia.gov/forecasts/aeo/>.

2050. DOE used the distribution of available models to allocate shipments to each product class.

MREFs are a discretionary product and sales would be expected to be sensitive to the product price. To estimate the effect of new standards on MREF shipments, which are expected to result in higher prices, DOE applied relative price elasticity in the shipments model. This approach gives some weight to the operating cost savings from higher-efficiency products. In general, price elasticity reflects the expectation that demand will decrease when prices increase. The price elasticity value is derived from data on refrigerators, clothes washers, and dishwashers.<sup>39</sup> Based on evidence that the price elasticity of demand is significantly different over the short run and long run for other consumer goods (*i.e.*, automobiles), DOE assumed that the elasticity declines over time. DOE estimated shipments in each standards case using the relative price elasticity along with the change in the product price and operating costs between a standards case and the no-new-standards case.

For details on the shipments analysis, see chapter 9 of the direct final rule TSD.

#### H. National Impact Analysis

The NIA assesses the national energy savings (*i.e.*, NES) and the national net present value (*i.e.*, NPV) of total consumer costs and savings that would be expected to result from new or amended standards at specific efficiency levels.<sup>40</sup> ("Consumer" in this context refers to consumers of the product being regulated.) DOE calculates the NES and NPV based on projections of annual product shipments, along with the annual energy consumption and total

<sup>39</sup> Dale, L. and S.K. Fujita, *An Analysis of the Price Elasticity of Demand of Household Appliances*. 2008. Lawrence Berkeley National Laboratory: Berkeley, CA. Report No. LBNL-326E.

<sup>40</sup> The NIA accounts for impacts in the 50 states and U.S. territories.

installed cost data from the energy use and LCC analyses. For most of the TSLs considered in this direct final rule, DOE forecasted the energy savings, operating cost savings, product costs, and NPV of consumer benefits over the lifetime of MREFs sold from 2021–2050. For the TSLs that represent the MREF Working Group recommendations, DOE accounted for the lifetime impacts of MREFs sold from 2019–2048.

DOE evaluates the impacts of new and amended standards by comparing a case without such standards with standards-case projections. The no-new-standards case characterizes energy use and consumer costs for each product class in

the absence of new or amended energy conservation standards. For this projection, DOE considers historical trends in efficiency and various forces that are likely to affect the mix of efficiencies over time. DOE compares the no-new-standards case with projections characterizing the market for each product class if DOE adopted new or amended standards at specific energy efficiency levels (*i.e.*, the TSLs or standards cases) for that class. For the standards cases, DOE considers how a given standard would likely affect the market shares of products with efficiencies greater than the standard.

DOE uses a spreadsheet model to calculate the energy savings and the national consumer costs and savings from each TSL. Interested parties can review DOE’s analyses by changing various input quantities within the spreadsheet. The NIA spreadsheet model uses typical values (as opposed to probability distributions) as inputs.

Table IV.16 summarizes the inputs and methods DOE used for the NIA analysis for this direct final rule. Discussion of these inputs and methods follows the table. See chapter 10 of the direct final rule TSD for further details.

TABLE IV.16—SUMMARY OF INPUTS AND METHODS FOR THE NATIONAL IMPACT ANALYSIS

Inputs	Method
Shipments .....	Annual shipments from shipments model.
Compliance Date of Standard .....	TSLs recommended by the MREF Working Group: 2019; Other TSLs: 2021.
Efficiency Trends .....	Constant.
Annual Energy Consumption per Unit .....	Annual weighted-average values are a function of energy use at each TSL.
Total Installed Cost per Unit .....	Annual weighted-average values are a function of cost at each TSL. Incorporates projection of constant future product prices.
Annual Energy Cost per Unit .....	Annual weighted-average values as a function of the annual energy consumption per unit and energy prices.
Energy Prices .....	<i>AEO 2015</i> forecasts (to 2040) and extrapolation through 2050.
Energy Site-to-Primary and FFC Conversion.	A time-series conversion factor based on <i>AEO 2015</i> .
Discount Rate .....	Three and seven percent.
Present Year .....	2016.

1. Product Efficiency Trends

A key component of the NIA is the trend in energy efficiency projected for the no-new-standards case and each of the standards cases. As described in section IV.F.8 of this document, DOE developed an energy efficiency distribution for the no-new-standards case (which yields a shipment-weighted average efficiency) for each of the considered product classes. Because there are no data on trends in efficiency for MREFs, DOE assumed that these efficiency distributions will remain constant throughout the analysis period.

For the standards cases, DOE used a “roll-up” scenario to establish the shipment-weighted efficiency for the year that standards are assumed to become effective (2019 for TSLs from the MREF Working Group recommendations and 2021 for other TSLs). In this scenario, the market share of products in the no-new-standards case that do not meet the standard under consideration would “roll up” to meet the new standard level, and the market share of products above the standard would remain unchanged.

2. National Energy Savings

The national energy savings analysis involves a comparison of national

energy consumption of the considered products in each potential standards case (TSL) with consumption in the case with no new or amended energy conservation standards. DOE calculated the national energy consumption by multiplying the number of units (stock) of each product (by vintage or age) by the unit energy consumption (also by vintage). DOE calculated annual NES based on the difference in national energy consumption for the no-new-standards case and for each higher efficiency standard case. DOE estimated energy consumption and savings based on site energy and converted the electricity consumption and savings to primary energy (*i.e.*, the energy consumed by power plants to generate site electricity) using annual marginal conversion factors derived from *AEO 2015*. Cumulative energy savings are the sum of the NES for each year over the timeframe of the analysis.

In 2011, in response to the recommendations of a committee on “Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards” appointed by the National Academy of Sciences, DOE announced its intention to use full-fuel-cycle (“FFC”) measures of energy use and greenhouse gas and other emissions

in the national impact analyses and emissions analyses included in future energy conservation standards rulemakings. 76 FR 51281 (August 18, 2011). After evaluating the approaches discussed in the August 18, 2011 notice, DOE published a statement of amended policy in which DOE explained its determination that EIA’s National Energy Modeling System (“NEMS”) is the most appropriate tool for its FFC analysis and its intention to use NEMS for that purpose. 77 FR 49701 (August 17, 2012). NEMS is a public domain, multi-sector, partial equilibrium model of the U.S. energy sector<sup>41</sup> that EIA uses to prepare its *AEO*. The approach used for deriving FFC measures of energy use and emissions is described in appendix 10B of the direct final rule TSD.

3. Net Present Value Analysis

The inputs for determining the NPV of the total costs and benefits experienced by consumers are: (1) Total annual installed cost; (2) total annual operating costs; and (3) a discount factor to calculate the present value of costs and savings. DOE calculates net savings

<sup>41</sup> For more information on NEMS, refer to U.S. Energy Information Administration Web site (Available at: <http://www.eia.gov/forecasts/aeo/assumptions/>).

each year as the difference between the no-new-standards case and each standards case in terms of total savings in operating costs versus total increases in installed costs. DOE calculates operating cost savings over the lifetime of each product shipped during the forecast period.

As discussed in section IV.F.1 of this document, DOE assumed a constant MREF price trend to forecast prices for each product class at each considered efficiency level throughout the analysis period.

To evaluate the effect of uncertainty regarding the price trend estimates, DOE investigated the impact of different product price forecasts on the consumer NPV for the considered TSLs for MREFs. In addition to the default constant price trend, DOE considered two product price sensitivity cases: (1) A high price decline case based on the Producer Price Index (“PPI”) for household refrigerator and home freezer manufacturing from 1991 to 2014;<sup>42</sup> and (2) a low price decline case based on the same PPI series from 1976 to 1990. The derivation of these price trends and the results of these sensitivity cases are described in appendix 10C of the direct final rule TSD.

The operating cost savings are energy cost savings, which are calculated using the estimated energy savings in each year and the projected price of electricity. To estimate energy prices in future years, DOE multiplied the average regional energy prices by the forecast of annual national-average residential energy price changes in the Reference case from *AEO 2015*, which has an end year of 2040. To estimate price trends after 2040, DOE used the average annual rate of change in prices from 2025 to 2040. As part of the NIA, DOE also analyzed scenarios that used inputs from the *AEO 2015* Low Economic Growth and High Economic Growth cases. Those cases have higher and lower energy price trends compared to the Reference case. NIA results based on these cases are presented in appendix 10C of the direct final rule TSD.

In calculating the NPV, DOE multiplies the net savings in future years by a discount factor to determine their present value. For this direct final rule, DOE estimated the NPV of consumer benefits using both a 3-percent and a 7-percent real discount rate. DOE uses these discount rates in accordance with guidance provided by the Office of Management and Budget

(‘OMB’) to Federal agencies on the development of regulatory analysis.<sup>43</sup> The discount rates for the determination of NPV are in contrast to the discount rates used in the LCC analysis, which are designed to reflect a consumer’s perspective. The 7-percent real value is an estimate of the average before-tax rate of return to private capital in the U.S. economy. The 3-percent real value represents the “social rate of time preference,” which is the rate at which society discounts future consumption flows to their present value.

#### I. Consumer Subgroup Analysis

In analyzing the potential impact of new or amended standards on consumers, DOE evaluates the impact on identifiable subgroups of consumers that may be disproportionately affected by a new or amended national standard, such as low-income and senior households. DOE evaluates impacts on subgroups of consumers by analyzing the LCC impacts and PBP for those particular consumers from alternative standard levels. For this final rule, DOE analyzed the impacts of the considered standard levels on two subgroups: (1) Low-income households and (2) senior-only households. The analysis used subsets of the full household sample composed of households that meet the criteria for the considered subgroups. DOE used the LCC and PBP spreadsheet model to estimate the impacts of the considered efficiency levels on these subgroups. Chapter 11 in the final rule TSD describes the consumer subgroup analysis.

#### J. Manufacturer Impact Analysis

##### 1. Overview

DOE performed an MIA to estimate the potential financial impacts of energy conservation standards on manufacturers of MREFs and to estimate the potential impacts of such standards on employment and manufacturing capacity. The MIA has both quantitative and qualitative aspects and includes analyses of forecasted industry cash flows, the INPV, investments in research and development (“R&D”) and manufacturing capital, and domestic manufacturing employment. Additionally, the MIA seeks to determine how energy conservation standards might affect manufacturing employment, capacity, and competition, as well as how standards contribute to overall regulatory burden. Finally, the

MIA serves to identify any disproportionate impacts on manufacturer subgroups, including small business manufacturers.

The quantitative part of the MIA primarily relies on the Government Regulatory Impact Model (*i.e.*, GRIM), an industry cash flow model with inputs specific to this rulemaking. The key GRIM inputs include data on the industry cost structure, unit production costs, product shipments, manufacturer markups, and investments in R&D and manufacturing capital required to produce compliant products. The key GRIM outputs are the INPV, which is the sum of industry annual cash flows over the analysis period, discounted using the industry-weighted average cost of capital, and the impact to domestic manufacturing employment. The model uses standard accounting principles to estimate the impacts of more-stringent energy conservation standards on a given industry by comparing changes in INPV and domestic manufacturing employment between a no-new-standards case and the various TSLs. To capture the uncertainty relating to manufacturer pricing strategy following new standards, the GRIM estimates a range of possible impacts under different markup scenarios.

The qualitative part of the MIA addresses manufacturer characteristics and market trends. Specifically, the MIA considers such factors as manufacturing capacity, competition within the industry, the cumulative impact of other DOE and non-DOE regulations, and impacts on manufacturer subgroups. The complete MIA is outlined in chapter 12 of the direct final rule TSD.

DOE conducted the MIA for this rulemaking in three phases. In Phase 1 of the MIA, DOE prepared a profile of the MREF manufacturing industry based on the market and technology assessment, preliminary manufacturer interviews, and publicly-available information. This included a top-down analysis of MREF manufacturers that DOE used to derive preliminary financial inputs for the GRIM (*e.g.*, revenues; materials, labor, overhead, and depreciation expenses; selling, general, and administrative expenses (“SG&A”); and R&D expenses). DOE used public sources of information to further calibrate its initial characterization of MREFs, including company SEC 10-K filings, corporate annual reports, the U.S. Census

<sup>42</sup> Household refrigerator and home freezer manufacturing PPI series ID: PCU 335222335222 (Available at: <http://www.bls.gov/ppi/>).

<sup>43</sup> United States Office of Management and Budget, Circular A-4: Regulatory Analysis,” (Sept. 17, 2003), section E (Available at: [www.whitehouse.gov/omb/memoranda/m03-21.html](http://www.whitehouse.gov/omb/memoranda/m03-21.html)).

Bureau's Economic Census,<sup>44</sup> and Hoover's reports.<sup>45</sup>

In Phase 2 of the MIA, DOE prepared an industry cash-flow analysis to quantify the potential impacts of new energy conservation standards. The GRIM uses several factors to determine a series of annual cash flows starting with the announcement of the standard and extending over a 30-year period following the compliance date of the standard. These factors include annual expected revenues, costs of sales, SG&A and R&D expenses, taxes, and capital expenditures. In general, energy conservation standards can affect manufacturer cash flow in three distinct ways: (1) Create a need for increased investment; (2) raise production costs per unit; and (3) alter revenue due to higher per-unit prices and changes in sales volumes.

In addition, during Phase 2, DOE conducted structured, detailed interviews with manufacturers of MREFs in order to develop other key GRIM inputs, including product and capital conversion costs, and to gather additional information on the anticipated effects of energy conservation standards on revenues, direct employment, capital assets, industry competitiveness, and subgroup impacts. Before the interviews, DOE distributed an interview guide to interviewees. The interview guides are available in appendix 12A of the direct final rule TSD. See section IV.J.3 of this document for a description of the key issues raised by manufacturers during the interviews.

In Phase 3 of the MIA, DOE evaluated subgroups of manufacturers that may be disproportionately impacted by new standards or that may not be accurately represented by the average cost assumptions used to develop the industry cash flow analysis. Such manufacturer subgroups may include small business manufacturers, low-volume manufacturers ("LVMs"), niche players, and/or manufacturers exhibiting a cost structure that largely differs from the industry average. DOE identified two MREF manufacturer subgroups for which average cost assumptions may not hold: Small businesses and domestic LVMs.

<sup>44</sup> U.S. Census Bureau, *Annual Survey of Manufactures: General Statistics: Statistics for Industry Groups and Industries* (Available at: [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ASM\\_2011\\_31GS101&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ASM_2011_31GS101&prodType=table)).

<sup>45</sup> Hoovers Inc., *Company Profiles, Various Companies* (Available at: <http://www.hoovers.com>). Last Accessed December 15, 2015.

#### Small Businesses

Manufacturers of MREFs have primary North American Industry Classification System ("NAICS") codes of 335222, "Household Refrigerator and Home Freezer Manufacturing" and 333415, "Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing." Based on the size standards published by the Small Business Administration ("SBA"), to be categorized as a small business manufacturer of MREFs under NAICS codes 335222 or 333415, a MREF manufacturer and its affiliates may employ a maximum of 1,250 employees or less.<sup>46</sup> The employee threshold includes all employees in a business' parent company and any other subsidiaries. Using this classification in conjunction with a search of industry databases and the SBA member directory, DOE identified one manufacturer and one importer that qualify as small businesses.

#### Low-Volume Manufacturers

In addition to the small, domestic businesses described above, DOE identified three domestic manufacturers of niche MREF products that have much lower revenues than their diversified competitors. Although these manufacturers do not qualify as small businesses under the SBA definition, they are concentrated in the production of residential refrigeration products and, in some cases, commercial refrigeration equipment. DOE subsequently assigned these manufacturers to an LVM subgroup to evaluate any disproportionate impacts of new standards for MREFs on these manufacturers.

The MREF manufacturer subgroup analysis is discussed in greater detail in chapter 12 of the direct final rule TSD and in sections V.B.2 and VI.B of this document.

In addition, in Phase 3 of the MIA, DOE used feedback obtained from manufacturer interviews to assess the impacts of new standards on direct employment and manufacturing capacity within the MREF industry, and on the cumulative regulatory burdens felt by MREF manufacturers.

#### 2. Government Regulatory Impact Model

DOE uses the GRIM to quantify the changes in cash flow due to new standards that result in a higher or

<sup>46</sup> The size standards are codified at 13 CFR part 121. The standards are listed by North American Industry Classification System (NAICS) code and industry description and are available at [https://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table.pdf](https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf).

lower industry value. The GRIM analysis uses a standard annual, discounted cash-flow methodology that incorporates manufacturer costs, markups, shipments, and industry financial information as inputs. The GRIM models changes in costs, distribution of shipments, investments, and manufacturer margins that could result from new energy conservation standards. The GRIM spreadsheet uses the inputs to arrive at a series of annual cash flows, beginning in 2016 (the base year of the analysis) and continuing to 2048 (the end of the analysis period for TSLs with a 3-year compliance period) or 2050 (the end of the analysis period for TSLs with a 5-year compliance period).<sup>47</sup> DOE calculated INPVs by summing the stream of annual discounted cash flows during this period. For MREF manufacturers, DOE used a real discount rate of 7.7 percent, which was derived from industry financials and feedback received during manufacturer interviews.

The GRIM calculates cash flows using standard accounting principles and compares changes in INPV between the no-new-standards case and each standards case. The difference in INPV between the no-new-standards case and a standards case represents the financial impact of the new energy conservation standards on manufacturers. DOE collected this information on the critical GRIM inputs from a number of sources, including publicly-available data, interviews with manufacturers, and MREF Working Group meetings, including information gathered from manufacturers by a third-party consultant on behalf of AHAM.<sup>48</sup> The GRIM results are shown in section V.B.2 of this document. Additional details about the GRIM, the discount rate, and other financial parameters can be found in chapter 12 of the direct final rule TSD.

<sup>47</sup> As described in section III.B of this document, the MREF Working Group recommended a 3-year compliance period for the standards recommended in Term Sheet #2. DOE analyzed these recommended standards (TSL 2 for coolers and TSL 1 for combination cooler refrigeration products) using a 3-year compliance period. DOE analyzed all other TSLs in this direct final rule (representing standards not recommended by the MREF Working Group) using a 5-year compliance period consistent with the EPCA provisions for newly-established standards.

<sup>48</sup> Information presented during the MREF Working Group meeting which was a source of information for the MIA is available on <http://regulations.gov> under document ID EERE-2011-BT-STD-0043-0104.

### a. Government Regulatory Impact Model Key Inputs

#### Manufacturer Production Costs

Manufacturing higher-efficiency products is typically more costly than manufacturing baseline products due to the use of more complex components, which are typically more expensive than baseline components. The changes in the MPC of the analyzed products can affect the revenues, gross margins, and cash flow of the industry, making these product cost data key GRIM inputs for DOE's analysis.

In the MIA, DOE used the MPCs for each considered efficiency level calculated in the engineering analysis, as described in section IV.C of this document and further detailed in chapter 5 of the direct final rule TSD. In addition, DOE used information from its teardown analysis, described in chapter 5 of the direct final rule TSD, to disaggregate the MPCs into material, labor, and overhead costs. To calculate the MPCs for products above the baseline, DOE added the incremental material, labor, and overhead costs from the engineering cost-efficiency curves to the baseline MPCs. These cost breakdowns were validated and revised based on manufacturer comments received during interviews and the MREF Working Group discussions.

#### Shipments Forecasts

The GRIM estimates manufacturer revenues based on total unit shipment forecasts and the distribution of these values by product class and efficiency level. Changes in sales volumes and efficiency mix over time can significantly affect manufacturer finances. For the MREF analysis, the GRIM used the shipments analysis to estimate shipments either from 2016 (the base year of the analysis) and continuing to 2048 (the end of the analysis period for TSLs with a 3-year compliance period) or 2050 (the end of the analysis period for TSLs with a 5-year compliance period). See chapter 9 of the direct final rule TSD for additional details.

#### Conversion Costs

A new energy conservation standard would cause manufacturers to incur one-time conversion costs to bring their production facilities and product designs into compliance. DOE evaluated the level of conversion-related expenditures that would be needed to comply with each considered efficiency level in each product class. For the MIA, DOE classified these conversion costs into two major groups: (1) Product conversion costs and (2) capital

conversion costs. Product conversion costs are one-time investments in R&D, testing, marketing, and other non-capitalized costs necessary to make product designs comply with the new energy conservation standard. Capital conversion costs are one-time investments in property, plant, and equipment necessary to adapt or change existing production facilities such that products with new, compliant designs can be fabricated and assembled.

DOE used manufacturer interviews to gather data needed to evaluate the level of capital conversion expenditures manufacturers would likely incur to comply with new energy conservation standards at each efficiency level for MREFs. DOE also obtained information relating to capital conversion costs from manufacturers during the MREF Working Group meetings, including information gathered from manufacturers by a third-party consultant on behalf of AHAM.<sup>49</sup> DOE supplemented manufacturer comments with estimates of capital expenditure requirements derived from the engineering analysis.

DOE assessed the product conversion costs at each considered efficiency level by integrating data from quantitative and qualitative sources. DOE considered market-share-weighted feedback regarding the potential cost of each efficiency level from multiple manufacturers during confidential interviews and during the MREF Working Group meetings<sup>50</sup> to estimate product conversion costs, and validated those numbers against engineering estimates of redesign efforts. In general, DOE assumes that all conversion-related investments occur between the year of publication of the final rule and the year by which manufacturers must comply with the new standard. The conversion cost figures used in the GRIM can be found in section V.B.2.a of this document. For additional information on the estimated product and capital conversion costs, see chapter 12 of the direct final rule TSD.

### b. Government Regulatory Impact Model Scenarios

#### Manufacturer Markup Scenarios

To calculate the MSPs in the GRIM, DOE applied manufacturer markups to the MPCs estimated in the engineering analysis for each product class and efficiency level. Modifying these manufacturer markups in the standards

case yields different sets of manufacturer impacts. For the MIA, DOE modeled two standards-case manufacturer markup scenarios to represent the uncertainty regarding the potential impacts on prices and profitability for manufacturers following the implementation of new energy conservation standards: (1) A preservation of gross margin percentage markup scenario; and (2) a preservation of per-unit operating profit markup scenario. These scenarios lead to different manufacturer markup values that, when applied to the inputted MPCs, result in varying revenue and cash flow impacts.

Under the preservation of gross margin percentage scenario, DOE applied a single uniform "gross margin percentage" markup across all efficiency levels, which assumes that manufacturers would be able to maintain the same amount of profit as a percentage of revenues at all efficiency levels within a product class. As production costs increase with efficiency, this scenario implies that the absolute dollar markup will increase as well. Based on publicly-available financial information for manufacturers of MREFs as well as comments from manufacturer interviews, DOE estimated the average manufacturer markups by product class as shown in Table IV.17.

TABLE IV.17—BASELINE MANUFACTURER MARKUPS

Product class	Markup
Built-In Compact Coolers .....	1.41
Freestanding Compact Coolers ....	1.25
Built-In Coolers .....	1.41
Freestanding Coolers .....	1.41
C-3A/C-3A-BI .....	1.41
C-9/C-9-BI .....	1.41
C-13A/C-13A-BI .....	1.41

This markup scenario assumes that manufacturers would be able to maintain their gross margin percentage markup as production costs increase in response to a new energy conservation standard. Manufacturers stated that this scenario is optimistic and represents a high bound to industry profitability.

In the preservation of operating profit scenario, manufacturer markups are set so that operating profit one year after the compliance date of the new energy conservation standard is the same as in the no-new-standards case. Under this scenario, as the costs of production increase under a standards case, manufacturers are generally required to reduce their markups to a level that maintains no-new-standards case operating profit. The implicit assumption behind this markup

<sup>49</sup> The information presented during the MREF Working Group meeting is available on <http://regulations.gov> under document ID EERE-2011-BT-STD-0043-0104 at p. 6.

<sup>50</sup> Id.

scenario is that the industry can only maintain its operating profit in absolute dollars after compliance with the new standard is required. Therefore, operating margin in percentage terms is reduced between the no-new-standards case and standards case. DOE adjusted (*i.e.*, lowered) the manufacturer markups in the GRIM at each TSL to yield approximately the same earnings before interest and taxes in the standards case as in the no-new-standards case. This markup scenario represents a low bound to industry profitability under a new energy conservation standard.

### 3. Manufacturer Interviews

To inform the MIA, DOE interviewed several manufacturers with an estimated total cooler market share of approximately 25 percent and an estimated total combination cooler refrigeration products market share of 60 to 70 percent. (The remaining manufacturers in the market consist of overseas companies or those who were contacted but declined to participate.) The information gathered during these interviews enabled DOE to tailor the GRIM to reflect the unique financial characteristics of the MREF industry. These confidential interviews provided information that DOE used to evaluate the impacts of new energy conservation standards on manufacturer cash flows, manufacturing capacity, and employment levels.

During the interviews, DOE asked manufacturers to describe the major issues they anticipate to result from new energy conservation standards for MREFs. The following sections describe the most significant issues identified by manufacturers.

#### Cumulative Regulatory Burden

During confidential interviews, multiple manufacturers expressed concerns related to the impact of cumulative regulatory burdens on the MREF industry if DOE finalizes new energy conservation standards for MREFs. Because most manufacturers produce other residential products and commercial equipment, they already face regulations by DOE, the Environmental Protection Agency (“EPA”), the European Union, and Canada, as well as third-party industry certifications and standards. Complying with various overlapping regulatory and environmental standards puts a strain on manufacturers’ resources and profitability. Additionally, smaller, domestic manufacturers of high-end MREFs expressed concern that they have significantly less human and capital resources to devote to regulatory

compliance than larger, more diversified manufacturers. This has a direct impact on the amount of resources these companies are able to devote to product innovation, and thus MREF manufacturers expect that energy conservation standards would negatively impact their competitive position in the MREF industry.

#### Manufacturer Subgroup Impacts

Multiple manufacturers expressed concerns regarding the impact of new energy conservation standards for MREFs on smaller, domestic manufacturers (referred to as small businesses and LVMs in this direct final rule). These manufacturers stated that smaller, domestic manufacturers must devote a much larger percentage of their engineering resources to regulatory compliance than do the larger, multinational companies selling MREFs in the United States. These manufacturers also noted that the smaller, domestic manufacturers have substantially fewer overall shipments than larger, diversified manufacturers, and MREFs make up a much larger portion of the smaller, domestic companies’ sales. Finally, manufacturers commented that smaller, domestic manufacturers produce high-end, niche products. Accordingly, manufacturers stated that, depending on the stringency of new energy conservation standards for MREFs, the availability of these products could be threatened if these manufacturers are forced to drop certain product lines.

#### K. Emissions Analysis

The emissions analysis consists of two components. The first component estimates the effect of potential energy conservation standards on power sector and site (where applicable) combustion emissions of CO<sub>2</sub>, NO<sub>x</sub>, SO<sub>2</sub>, and Hg. The second component estimates the impacts of potential standards on emissions of two additional greenhouse gases, CH<sub>4</sub> and N<sub>2</sub>O, as well as the reductions to emissions of all species due to “upstream” activities in the fuel production chain. These upstream activities comprise extraction, processing, and transporting fuels to the site of combustion. The associated emissions are referred to as upstream emissions.

The analysis of power sector emissions uses marginal emissions factors that were derived from data in *AEO 2015*, as described in section IV.K of this document. The methodology is described in chapters 13 and 15 of the direct final rule TSD.

Combustion emissions of CH<sub>4</sub> and N<sub>2</sub>O are estimated using emissions

intensity factors published by the EPA, GHG Emissions Factors Hub.<sup>51</sup> The FFC upstream emissions are estimated based on the methodology described in chapter 15 of the direct final rule TSD. The upstream emissions include both emissions from fuel combustion during extraction, processing, and transportation of fuel, and “fugitive” emissions (direct leakage to the atmosphere) of CH<sub>4</sub> and CO<sub>2</sub>.

The emissions intensity factors are expressed in terms of physical units per megawatt-hour (MWh) or million Btu of site energy savings. Total emissions reductions are estimated using the energy savings calculated in the NIA.

For CH<sub>4</sub> and N<sub>2</sub>O, DOE calculated emissions reduction in tons and also in terms of units of carbon dioxide equivalent (CO<sub>2</sub>eq). Gases are converted to CO<sub>2</sub>eq by multiplying each ton of gas by the gas’ global warming potential (GWP) over a 100-year time horizon. Based on the Fifth Assessment Report of the Intergovernmental Panel on Climate Change,<sup>52</sup> DOE used GWP values of 28 for CH<sub>4</sub> and 265 for N<sub>2</sub>O.

The AEO incorporates the projected impacts of existing air quality regulations on emissions. *AEO 2015* generally represents current legislation and environmental regulations, including recent government actions, for which implementing regulations were available as of October 31, 2014. DOE’s estimation of impacts accounts for the presence of the emissions control programs discussed in the following paragraphs.

SO<sub>2</sub> emissions from affected electric generating units (EGUs) are subject to nationwide and regional emissions cap-and-trade programs. Title IV of the Clean Air Act sets an annual emissions cap on SO<sub>2</sub> for affected EGUs in the 48 contiguous States and the District of Columbia (DC). (42 U.S.C. 7651 *et seq.*) SO<sub>2</sub> emissions from 28 eastern States and DC were also limited under the Clean Air Interstate Rule (CAIR). 70 FR 25162 (May 12, 2005). CAIR created an allowance-based trading program that operates along with the Title IV program. In 2008, CAIR was remanded to EPA by the U.S. Court of Appeals for

<sup>51</sup> Available at: <http://www2.epa.gov/climate-leadership/center-corporate-climate-leadership-ghg-emission-factors-hub>.

<sup>52</sup> Intergovernmental Panel on Climate Change. Anthropogenic and Natural Radiative Forcing. In *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*. Chapter 8. 2013. Stocker, T.F., D. Qin, G.-K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex, and P.M. Midgley, Editors. Cambridge University Press: Cambridge, United Kingdom and New York, NY, USA.



the District of Columbia Circuit, but it remained in effect.<sup>53</sup> In 2011, EPA issued a replacement for CAIR, the Cross-State Air Pollution Rule (CSAPR). 76 FR 48208 (August 8, 2011). On August 21, 2012, the D.C. Circuit issued a decision to vacate CSAPR,<sup>54</sup> and the court ordered EPA to continue administering CAIR. On April 29, 2014, the U.S. Supreme Court reversed the judgment of the D.C. Circuit and remanded the case for further proceedings consistent with the Supreme Court's opinion.<sup>55</sup> On October 23, 2014, the D.C. Circuit lifted the stay of CSAPR.<sup>56</sup> Pursuant to this action, CSAPR went into effect (and CAIR ceased to be in effect) as of January 1, 2015.

EIA was not able to incorporate CSAPR into *AEO 2015*, so it assumes implementation of CAIR. Although DOE's analysis used emissions factors that assume that CAIR, not CSAPR, is the regulation in force, the difference between CAIR and CSAPR is not relevant for the purpose of DOE's analysis of emissions impacts from energy conservation standards.

The attainment of emissions caps is typically flexible among EGUs and is enforced through the use of emissions allowances and tradable permits. Under existing EPA regulations, any excess SO<sub>2</sub> emissions allowances resulting from the lower electricity demand caused by the adoption of an efficiency standard could be used to permit offsetting increases in SO<sub>2</sub> emissions by any regulated EGU. In past rulemakings, DOE recognized that there was uncertainty about the effects of efficiency standards on SO<sub>2</sub> emissions covered by the existing cap-and-trade system, but it concluded that negligible reductions in power sector SO<sub>2</sub> emissions would occur as a result of standards.

Beginning in 2016, however, SO<sub>2</sub> emissions will fall as a result of the Mercury and Air Toxics Standards (MATS) for power plants. 77 FR 9304 (Feb. 16, 2012). In the MATS rule, EPA established a standard for hydrogen

chloride as a surrogate for acid gas hazardous air pollutants (HAP), and also established a standard for SO<sub>2</sub> (a non-HAP acid gas) as an alternative equivalent surrogate standard for acid gas HAP. The same controls are used to reduce HAP and non-HAP acid gas; thus, SO<sub>2</sub> emissions will be reduced as a result of the control technologies installed on coal-fired power plants to comply with the MATS requirements for acid gas. *AEO 2015* assumes that, in order to continue operating, coal plants must have either flue gas desulfurization or dry sorbent injection systems installed by 2016. Both technologies, which are used to reduce acid gas emissions, also reduce SO<sub>2</sub> emissions. Under the MATS, emissions will be far below the cap established by CAIR, so it is unlikely that excess SO<sub>2</sub> emissions allowances resulting from the lower electricity demand would be needed or used to permit offsetting increases in SO<sub>2</sub> emissions by any regulated EGU.<sup>57</sup> Therefore, DOE believes that energy conservation standards will generally reduce SO<sub>2</sub> emissions in 2016 and beyond.

CAIR established a cap on NO<sub>x</sub> emissions in 28 eastern States and the District of Columbia.<sup>58</sup> Energy conservation standards are expected to have little effect on NO<sub>x</sub> emissions in those States covered by CAIR because excess NO<sub>x</sub> emissions allowances resulting from the lower electricity demand could be used to permit offsetting increases in NO<sub>x</sub> emissions from other facilities. However, standards would be expected to reduce NO<sub>x</sub> emissions in the States not affected by the caps, so DOE estimated NO<sub>x</sub> emissions reductions from the standards considered in this direct final rule for these States.

The MATS limit mercury emissions from power plants, but they do not include emissions caps and, as such, DOE's energy conservation standards would likely reduce Hg emissions. DOE

estimated mercury emissions reduction using emissions factors based on *AEO 2015*, which incorporates the MATS.

#### *L. Monetizing Carbon Dioxide and Other Emissions Impacts*

As part of the development of this rule, DOE considered the estimated monetary benefits from the reduced emissions of CO<sub>2</sub> and NO<sub>x</sub> that are expected to result from each of the TSLs considered. In order to make this calculation analogous to the calculation of the NPV of consumer benefit, DOE considered the reduced emissions expected to result over the lifetime of products shipped in the forecast period for each TSL. This section summarizes the basis for the monetary values used for each of these emissions and presents the values considered in this direct final rule.

For this direct final rule, DOE relied on a set of values for the social cost of carbon (SCC) that was developed by a Federal interagency process. The basis for these values is summarized in the next section, and a more detailed description of the methodologies used is provided as an appendix to chapter 14 of the direct final rule TSD.

#### 1. Social Cost of Carbon

The SCC is an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year. It is intended to include (but is not limited to) climate-change-related changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services. Estimates of the SCC are provided in dollars per metric ton of CO<sub>2</sub>. A domestic SCC value is meant to reflect the value of damages in the United States resulting from a unit change in CO<sub>2</sub> emissions, while a global SCC value is meant to reflect the value of damages worldwide.

Under section 1(b) of Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (Oct. 4, 1993), agencies must, to the extent permitted by law, "assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." The purpose of the SCC estimates presented here is to allow agencies to incorporate the monetized social benefits of reducing CO<sub>2</sub> emissions into cost-benefit analyses of regulatory actions. The estimates are presented with an acknowledgement of the many uncertainties involved and with a clear

<sup>53</sup> See *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008); *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).

<sup>54</sup> See *EME Homer City Generation, LP v. EPA*, 696 F.3d 7, 38 (D.C. Cir. 2012), cert. granted, 81 U.S.L.W. 3567, 81 U.S.L.W. 3696, 81 U.S.L.W. 3702 (U.S. June 24, 2013) (No. 12-1182).

<sup>55</sup> See *EPA v. EME Homer City Generation*, 134 S.Ct. 1584, 1610 (U.S. 2014). The Supreme Court held in part that EPA's methodology for quantifying emissions that must be eliminated in certain States due to their impacts in other downwind States was based on a permissible, workable, and equitable interpretation of the Clean Air Act provision that provides statutory authority for CSAPR.

<sup>56</sup> See *Georgia v. EPA*, Order (D.C. Cir. filed October 23, 2014) (No. 11-1302).

<sup>57</sup> DOE notes that the Supreme Court recently remanded EPA's 2012 rule regarding national emission standards for hazardous air pollutants from certain electric utility steam generating units. See *Michigan v. EPA* (Case No. 14-46, 2015). DOE has tentatively determined that the remand of the MATS rule does not change the assumptions regarding the impact of energy efficiency standards on SO<sub>2</sub> emissions. Further, while the remand of the MATS rule may have an impact on the overall amount of mercury emitted by power plants, it does not change the impact of the energy efficiency standards on mercury emissions. DOE will continue to monitor developments related to this case and respond to them as appropriate.

<sup>58</sup> CSAPR also applies to NO<sub>x</sub> and it would supersede the regulation of NO<sub>x</sub> under CAIR. As stated previously, the current analysis assumes that CAIR, not CSAPR, is the regulation in force. The difference between CAIR and CSAPR with regard to DOE's analysis of NO<sub>x</sub> emissions is slight.

understanding that they should be updated over time to reflect increasing knowledge of the science and economics of climate impacts.

As part of the interagency process that developed these SCC estimates, technical experts from numerous agencies met on a regular basis to consider public comments, explore the technical literature in relevant fields, and discuss key model inputs and assumptions. The main objective of this process was to develop a range of SCC values using a defensible set of input assumptions grounded in the existing scientific and economic literatures. In this way, key uncertainties and model differences transparently and consistently inform the range of SCC estimates used in the rulemaking process.

#### a. Monetizing Carbon Dioxide Emissions

When attempting to assess the incremental economic impacts of CO<sub>2</sub> emissions, the analyst faces a number of challenges. A report from the National Research Council<sup>59</sup> points out that any assessment will suffer from uncertainty, speculation, and lack of information about: (1) Future emissions of GHGs; (2) the effects of past and future emissions on the climate system; (3) the impact of changes in climate on the physical and biological environment; and (4) the translation of these environmental impacts into economic damages. As a result, any effort to quantify and monetize the harms associated with climate change will raise questions of science, economics, and ethics and should be viewed as provisional.

Despite the limits of both quantification and monetization, SCC estimates can be useful in estimating the social benefits of reducing CO<sub>2</sub> emissions. The agency can estimate the benefits from reduced (or costs from increased) emissions in any future year by multiplying the change in emissions in that year by the SCC values appropriate for that year. The NPV of the benefits can then be calculated by multiplying each of these future benefits by an appropriate discount factor and summing across all affected years.

It is important to emphasize that the interagency process is committed to

updating these estimates as the science and economic understanding of climate change and its impacts on society improves over time. In the meantime, the interagency group will continue to explore the issues raised by this analysis and consider public comments as part of the ongoing interagency process.

#### b. Development of Social Cost of Carbon Values

In 2009, an interagency process was initiated to offer a preliminary assessment of how best to quantify the benefits from reducing carbon dioxide emissions. To ensure consistency in how benefits are evaluated across Federal agencies, the Administration sought to develop a transparent and defensible method, specifically designed for the rulemaking process, to quantify avoided climate change damages from reduced CO<sub>2</sub> emissions. The interagency group did not undertake any original analysis. Instead, it combined SCC estimates from the existing literature to use as interim values until a more comprehensive analysis could be conducted. The outcome of the preliminary assessment by the interagency group was a set of five interim values: Global SCC estimates for 2007 (in 2006\$) of \$55, \$33, \$19, \$10, and \$5 per metric ton of CO<sub>2</sub>. These interim values represented the first sustained interagency effort within the U.S. government to develop an SCC for use in regulatory analysis. The results of this preliminary effort were presented in several proposed and final rules.

#### c. Current Approach and Key Assumptions

After the release of the interim values, the interagency group reconvened on a regular basis to generate improved SCC estimates. Specially, the group considered public comments and further explored the technical literature in relevant fields. The interagency group relied on three integrated assessment models commonly used to estimate the SCC: The FUND, DICE, and PAGE models. These models are frequently cited in the peer-reviewed literature and were used in the last assessment of the Intergovernmental Panel on Climate Change (IPCC). Each model was given equal weight in the SCC values that were developed.

Each model takes a slightly different approach to model how changes in emissions result in changes in economic damages. A key objective of the interagency process was to enable a consistent exploration of the three models, while respecting the different approaches to quantifying damages taken by the key modelers in the field. An extensive review of the literature was conducted to select three sets of input parameters for these models: Climate sensitivity, socio-economic and emissions trajectories, and discount rates. A probability distribution for climate sensitivity was specified as an input into all three models. In addition, the interagency group used a range of scenarios for the socio-economic parameters and a range of values for the discount rate. All other model features were left unchanged, relying on the model developers' best estimates and judgments.

In 2010, the interagency group selected four sets of SCC values for use in regulatory analyses. Three sets of values are based on the average SCC from the three integrated assessment models, at discount rates of 2.5, 3, and 5 percent. The fourth set, which represents the 95th percentile SCC estimate across all three models at a 3-percent discount rate, was included to represent higher-than-expected impacts from climate change further out in the tails of the SCC distribution. The values grow in real terms over time. Additionally, the interagency group determined that a range of values from 7 percent to 23 percent should be used to adjust the global SCC to calculate domestic effects,<sup>60</sup> although preference is given to consideration of the global benefits of reducing CO<sub>2</sub> emissions. Table IV.18 presents the values in the 2010 interagency group report,<sup>61</sup> which is reproduced in appendix 14A of the direct final rule TSD.

<sup>60</sup> It is recognized that this calculation for domestic values is approximate, provisional, and highly speculative. There is no *a priori* reason why domestic benefits should be a constant fraction of net global damages over time.

<sup>61</sup> *Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866*. Interagency Working Group on Social Cost of Carbon, United States Government (February 2010) (Available at: [www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RLA.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RLA.pdf)).

<sup>59</sup> National Research Council, *Hidden Costs of Energy: Unpriced Consequences of Energy Production and Use*, National Academies Press: Washington, DC (2009).

TABLE IV.18—ANNUAL SCC VALUES FROM 2010 INTERAGENCY REPORT, 2010–2050  
[2007\$ per metric ton CO<sub>2</sub>]

Year	Discount rate			
	5%	3%	2.5%	3%
	Average	Average	Average	95th percentile
2010	4.7	21.4	35.1	64.9
2015	5.7	23.8	38.4	72.8
2020	6.8	26.3	41.7	80.7
2025	8.2	29.6	45.9	90.4
2030	9.7	32.8	50.0	100.0
2035	11.2	36.0	54.2	109.7
2040	12.7	39.2	58.4	119.3
2045	14.2	42.1	61.7	127.8
2050	15.7	44.9	65.0	136.2

The SCC values used for this direct final rule were generated using the most recent versions of the three integrated assessment models that have been published in the peer-reviewed literature, as described in the 2013 update from the interagency working group (revised July 2015).<sup>62</sup> Table IV.19

shows the updated sets of SCC estimates from the latest interagency update in 5-year increments from 2010 to 2050. The full set of annual SCC estimates between 2010 and 2050 is reported in appendix 14B of the direct final rule TSD. The central value that emerges is the average SCC across models at the 3-percent

discount rate. However, for purposes of capturing the uncertainties involved in regulatory impact analysis, the interagency group emphasizes the importance of including all four sets of SCC values.

TABLE IV.19—ANNUAL SCC VALUES FROM 2013 INTERAGENCY UPDATE (REVISED JULY 2015), 2010–2050  
[2007\$ per metric ton CO<sub>2</sub>]

Year	Discount rate			
	5%	3%	2.5%	3%
	Average	Average	Average	95th percentile
2010	10	31	50	86
2015	11	36	56	105
2020	12	42	62	123
2025	14	46	68	138
2030	16	50	73	152
2035	18	55	78	168
2040	21	60	84	183
2045	23	64	89	197
2050	26	69	95	212

It is important to recognize that a number of key uncertainties remain, and that current SCC estimates should be treated as provisional and revisable because they will evolve with improved scientific and economic understanding. The interagency group also recognizes that the existing models are imperfect and incomplete. The National Research Council report mentioned previously points out that there is tension between the goal of producing quantified estimates of the economic damages from an incremental ton of carbon and the limits of existing efforts to model these

effects. There are a number of analytical challenges that are being addressed by the research community, including research programs housed in many of the Federal agencies participating in the interagency process to estimate the SCC. The interagency group intends to periodically review and reconsider those estimates to reflect increasing knowledge of the science and economics of climate impacts, as well as improvements in modeling.<sup>63</sup>

In summary, in considering the potential global benefits resulting from reduced CO<sub>2</sub> emissions, DOE used the

values from the 2013 interagency report (revised July 2015), adjusted to 2015\$ using the implicit price deflator for gross domestic product (GDP) from the Bureau of Economic Analysis. For each of the four sets of SCC cases specified, the values for emissions in 2015 were \$12.4, \$40.6, \$63.2, and \$118 per metric ton avoided (values expressed in 2015\$). DOE derived values after 2050 using the relevant growth rates for the 2040–2050 period in the interagency update.

DOE multiplied the CO<sub>2</sub> emissions reduction estimated for each year by the

<sup>62</sup> Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866, Interagency Working Group on Social Cost of Carbon, United States Government (May 2013; revised July 2015) (Available at: <http://www.whitehouse.gov/sites/default/files/omb/inforeg/scc-tsd-final-july-2015.pdf>).

<sup>63</sup> In November 2013, OMB announced a new opportunity for public comment on the interagency technical support document underlying the revised SCC estimates. 78 FR 70586. In July 2015 OMB published a detailed summary and formal response to the many comments that were received. <https://www.whitehouse.gov/blog/2015/07/02/estimating->

*benefits-carbon-dioxide-emissions-reductions*. It also stated its intention to seek independent expert advice on opportunities to improve the estimates, including many of the approaches suggested by commenters.

SCC value for that year in each of the four cases. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the four cases using the specific discount rate that had been used to obtain the SCC values in each case.

## 2. Social Cost of Other Air Pollutants

As noted previously, DOE has estimated how the considered energy conservation standards would reduce site NO<sub>x</sub> emissions nationwide and decrease power sector NO<sub>x</sub> emissions in those 22 States not affected by the CAIR.

DOE estimated the monetized value of NO<sub>x</sub> emissions reductions from electricity generation using benefit per ton estimates from the “Regulatory Impact Analysis for the Clean Power Plan Final Rule,” published in August 2015 by EPA’s Office of Air Quality Planning and Standards.<sup>64</sup> The report includes high and low values for NO<sub>x</sub> (as PM<sub>2.5</sub>) for 2020, 2025, and 2030 using discount rates of 3 percent and 7 percent; these values are presented in chapter 14 of the direct final rule TSD. DOE primarily relied on the low estimates to be conservative.<sup>65</sup> DOE assigned values for 2021–2024 and 2026–2029 using, respectively, the values for 2020 and 2025. DOE assigned values after 2030 using the value for 2030. DOE developed values specific to the end-use category for MREFs using a method described in appendix 14C of the direct final rule TSD.

DOE multiplied the emissions reduction (in tons) in each year by the associated \$/ton values, and then discounted each series using discount rates of 3 percent and 7 percent as appropriate.

DOE is evaluating appropriate monetization of avoided SO<sub>2</sub> and Hg emissions in energy conservation standards rulemakings. DOE has not

included monetization of those emissions in the current analysis.

### M. Utility Impact Analysis

The utility impact analysis estimates several effects on the electric power industry that would result from the adoption of new or amended energy conservation standards. The utility impact analysis estimates the changes in installed electrical capacity and generation that would result for each TSL. The analysis is based on published output from the NEMS associated with *AEO 2015*. NEMS produces the *AEO* Reference case, as well as a number of side cases that estimate the economy-wide impacts of changes to energy supply and demand. DOE uses published side cases to estimate the marginal impacts of reduced energy demand on the utility sector. These marginal factors are estimated based on the changes to electricity sector generation, installed capacity, fuel consumption and emissions in the *AEO* Reference case and various side cases. Details of the methodology are provided in the appendices to chapters 13 and 15 of the direct final rule TSD.

The output of this analysis is a set of time-dependent coefficients that capture the change in electricity generation, primary fuel consumption, installed capacity and power sector emissions due to a unit reduction in demand for a given end use. These coefficients are multiplied by the stream of electricity savings calculated in the NIA to provide estimates of selected utility impacts of new or amended energy conservation standards.

### N. Employment Impact Analysis

DOE considers employment impacts in the domestic economy as one factor in selecting a standard. Employment impacts from new or amended energy conservation standards include both direct and indirect impacts. Direct employment impacts are any changes in the number of employees of manufacturers of the products subject to standards, their suppliers, and related service firms. The MIA addresses those impacts. Indirect employment impacts are changes in national employment that occur due to the shift in expenditures and capital investment caused by the purchase and operation of more-efficient appliances. Indirect employment impacts from standards consist of the net jobs created or eliminated in the national economy, other than in the manufacturing sector being regulated, caused by: (1) Reduced spending by end users on energy; (2) reduced spending on new energy supplies by the utility industry; (3)

increased consumer spending on new products to which the new standards apply; and (4) the effects of those three factors throughout the economy.

One method for assessing the possible effects on the demand for labor of such shifts in economic activity is to compare sector employment statistics developed by the Labor Department’s Bureau of Labor Statistics (“BLS”).<sup>66</sup> BLS regularly publishes its estimates of the number of jobs per million dollars of economic activity in different sectors of the economy, as well as the jobs created elsewhere in the economy by this same economic activity. Data from BLS indicate that expenditures in the utility sector generally create fewer jobs (both directly and indirectly) than expenditures in other sectors of the economy.<sup>67</sup> There are many reasons for these differences, including wage differences and the fact that the utility sector is more capital-intensive and less labor-intensive than other sectors. Energy conservation standards have the effect of reducing consumer utility bills. Because reduced consumer expenditures for energy likely lead to increased expenditures in other sectors of the economy, the general effect of efficiency standards is to shift economic activity from a less labor-intensive sector (*i.e.*, the utility sector) to more labor-intensive sectors (*e.g.*, the retail and service sectors). Thus, based on the BLS data alone, DOE believes net national employment may increase due to shifts in economic activity resulting from energy conservation standards.

DOE estimated indirect national employment impacts for the standard levels considered in this direct final rule using an input/output model of the U.S. economy called Impact of Sector Energy Technologies version 3.1.1 (“ImSET”).<sup>68</sup> ImSET is a special-purpose version of the “U.S. Benchmark National Input-Output” (I–O) model, which was designed to estimate the national employment and income effects of energy-saving technologies. The ImSET software includes a computer-based I–O model having structural coefficients that characterize economic flows among 187

<sup>64</sup> Available at [www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis](http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis). See Tables 4A–3, 4A–4, and 4A–5 in the report. The U.S. Supreme Court has stayed the rule implementing the Clean Power Plan until the current litigation against it concludes. *Chamber of Commerce, et al. v. EPA, et al.*, Order in Pending Case, 577 U.S. \_\_\_ (2016). However, the benefit-per-ton estimates established in the Regulatory Impact Analysis for the Clean Power Plan are based on scientific studies that remain valid irrespective of the legal status of the Clean Power Plan.

<sup>65</sup> For the monetized NO<sub>x</sub> benefits associated with PM<sub>2.5</sub>, the related benefits are primarily based on an estimate of premature mortality derived from the ACS study (Krewski et al. 2009), which is the lower of the two EPA central tendencies. Using the lower value is more conservative when making the policy decision concerning whether a particular standard level is economically justified. If the benefit-per-ton estimates were based on the Six Cities study (Lepule et al. 2012), the values would be nearly two-and-a-half times larger. (See chapter 14 of the final rule TSD for further description of the studies mentioned above.)

<sup>66</sup> Data on industry employment, hours, labor compensation, value of production, and the implicit price deflator for output for these industries are available upon request by calling the Division of Industry Productivity Studies (202–691–5618) or by sending a request by email to [dipsweb@bls.gov](mailto:dipsweb@bls.gov).

<sup>67</sup> See Bureau of Economic Analysis, *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II)*, U.S. Department of Commerce (1992).

<sup>68</sup> J.M. Roop, M.J. Scott, and R.W. Schultz, *ImSET 3.1: Impact of Sector Energy Technologies*, PNNL–18412, Pacific Northwest National Laboratory (2009) (Available at: [www.pnl.gov/main/publications/external/technical\\_reports/PNNL-18412.pdf](http://www.pnl.gov/main/publications/external/technical_reports/PNNL-18412.pdf)).

sectors most relevant to industrial, commercial, and residential building energy use.

DOE notes that ImSET is not a general equilibrium forecasting model, and understands the uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Because ImSET does not incorporate price changes, the employment effects predicted by ImSET may over-estimate actual job impacts over the long run for this rule. Therefore, DOE generated results for near-term timeframes, where these uncertainties are reduced. For more details on the employment impact analysis, see chapter 16 of the direct final rule TSD.

**V. Analytical Results and Conclusions**

The following section addresses the results from DOE’s analyses with respect to the considered energy conservation standards for MREFs. It addresses the TSLs examined by DOE, the projected impacts of each of these levels if adopted as energy conservation standards for MREFs, and the standards levels that DOE is adopting in this direct final rule. Additional details regarding DOE’s analyses are contained in the direct final rule TSD supporting this notice.

*A. Trial Standard Levels*

DOE analyzed the benefits and burdens of four TSLs for coolers and four TSLs for combination cooler refrigeration products. These TSLs were

developed by combining specific efficiency levels for each of the product classes analyzed by DOE. DOE presents the results for the TSLs in this document, while the results for all efficiency levels that DOE analyzed are in the direct final rule TSD.

Table V.1 presents the TSLs and the corresponding efficiency levels for coolers. TSL 4 represents the max-tech efficiency levels for all product classes. TSL 3 consists of the efficiency levels with maximum consumer NPV at 7-percent discount rate. TSL 2 corresponds to the standard levels recommended by the MREF Working Group. TSL 1 represents the current CEC energy efficiency standard for wine chillers.

**TABLE V.1—EFFICIENCY LEVELS WITHIN EACH TRIAL STANDARD LEVEL FOR COOLERS**

Product class	Trial standard levels			
	1	2	3	4
Freestanding Compact Coolers .....	4	7	9	11
Built-in Compact Coolers .....	4	7	9	11
Freestanding Coolers .....	4	7	9	11
Built-in Coolers .....	4	7	9	11

Table V.2 presents the TSLs and the corresponding efficiency levels for combination cooler refrigeration products. TSL 4 represents the max-tech

efficiency levels for all product classes. TSL 3 represents a mid-point between TSL 2 and TSL 4. TSL 2 consists of the efficiency levels with maximum

consumer NPV at 7-percent discount rate. TSL 1 corresponds to the standard levels recommended by the MREF Working Group.

**TABLE V.2—EFFICIENCY LEVELS WITHIN EACH TRIAL STANDARD LEVEL FOR COMBINATION COOLER REFRIGERATION PRODUCTS**

Product class	Trial standard levels			
	1	2	3	4
C-3A .....	2	4	5	7
C-3A-BI .....	2	4	5	7
C-9* .....	3	5	6	7
C-9-BI* .....	3	5	6	7
C-13A .....	3	4	6	7
C-13A-BI .....	3	4	6	7

\* Results for C-9 and C-9-BI are also applicable to C-9I and C-9I-BI.

In its analysis of the benefits and burdens of each TSL, DOE used two different compliance dates. For the consensus-recommended TSLs, the analysis is based on a 2019 compliance date as recommended by the MREF Working Group. For all other TSLs the analysis is based on a 2021 compliance date consistent with EPCA, which provides that newly-established standards shall not apply to products manufactured within five years after the publication of the final rule. In other words, DOE followed the prescriptions of EPCA for all TSLs that were not recommended by the MREF Working

Group. The two different compliance dates are indicated in the relevant sections of the results and discussed in section III.B of this document.

*B. Economic Justification and Energy Savings*

**1. Economic Impacts on Individual Consumers**

DOE analyzed the economic impacts on MREF consumers by looking at the effects that potential new standards at each TSL would have on the LCC and PBP. These analyses are discussed below.

**a. Life-Cycle Cost and Payback Period**

In general, higher-efficiency products affect consumers in two ways: (1) Purchase prices increase and (2) annual operating costs decrease. Inputs used for calculating the LCC and PBP include total installed costs (*i.e.*, product price plus installation costs), and operating costs (*i.e.*, annual energy use, energy prices, energy price trends, repair costs, and maintenance costs). The LCC calculation also uses product lifetime and a discount rate. Chapter 8 of the direct final rule TSD provides detailed information on the LCC and PBP analyses.

Table V.3 through Table V.22 show the LCC and PBP results for the TSL efficiency levels considered for each product class. In the first of each pair of tables, the simple payback is measured relative to the baseline product. In the second table, the impacts are measured

relative to the efficiency distribution in the no-new-standards case in the compliance year (see section IV.F of this document). The average savings reflect the fact that some consumers purchase products with higher efficiency in the no-new-standards case, and the savings

refer only to the other consumers who are affected by a standard at a given TSL. Consumers for whom the LCC increases at a given TSL experience a net cost.

TABLE V.3—AVERAGE LCC AND PBP RESULTS BY EFFICIENCY LEVEL FOR FREESTANDING COMPACT COOLERS

TSL *	EL	Average costs (2015\$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
1 .....	4	400	40	325	726	1.1	10.3
2 .....	7	438	26	220	658	1.4	10.3
3 .....	9	478	19	158	636	1.6	10.3
4 .....	11	702	12	98	800	3.5	10.3

\*For TSL 2, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

**Note:** The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the lowest efficiency level in the no-new-standards case efficiency distribution.

TABLE V.4—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR FREESTANDING COMPACT COOLERS

TSL *	EL	Average LCC savings** (2015\$)	Percent of consumers that experience net cost
1 .....	4	279	6
2 .....	7	265	9
3 .....	9	288	12
4 .....	11	123	51

\*For TSL 2, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\* The savings represent the average LCC savings for affected consumers.

TABLE V.5—AVERAGE LCC AND PBP RESULTS BY EFFICIENCY LEVEL FOR BUILT-IN COMPACT COOLERS

TSL *	EL	Average costs (2015\$)				Simple payback** (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
1 .....	4	832	45	370	1202	n.a.	10.3
2 .....	7	894	30	250	1144	4.6	10.3
3 .....	9	934	22	180	1114	4.4	10.3
4 .....	11	1281	15	123	1404	14.8	10.3

\*For TSL 2, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\* The PBP is measured relative to the lowest efficiency level in the no-new-standards case efficiency distribution. Calculation of PBP is not applicable (n.a.) when the efficiency level is already met or exceeded in the MREF market.

**Note:** The results for each TSL are calculated assuming that all consumers use products at that efficiency level.

TABLE V.6—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR BUILT-IN COMPACT COOLERS

TSL *	EL	Average LCC savings** (2015\$)	Percent of consumers that experience net cost
1 .....	4	n.a.	0
2 .....	7	28	29
3 .....	9	60	27
4 .....	11	(230)	93

\*For TSL 2, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\* The savings represent the average LCC savings for affected consumers. Calculation of savings is not applicable (n.a.) when the efficiency level is already met or exceeded in the MREF market.

TABLE V.7—AVERAGE LCC AND PBP RESULTS BY EFFICIENCY LEVEL FOR FREESTANDING COOLERS

TSL *	EL	Average costs (2015\$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
1 .....	4	1303	58	728	2032	1.0	17.4
2 .....	7	1418	38	497	1915	1.8	17.4
3 .....	9	1460	28	359	1819	1.8	17.4
4 .....	11	1955	17	226	2180	4.8	17.4

\*For TSL 2, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

**Note:** The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the lowest efficiency level in the no-new-standards case efficiency distribution.

TABLE V.8—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR FREESTANDING COOLERS

TSL *	EL	Average LCC savings** (2015\$)	Percent of consumers that experience net cost
1 .....	4	648	0
2 .....	7	153	22
3 .....	9	240	9
4 .....	11	(121)	78

\*For TSL 2, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\*The savings represent the average LCC savings for affected consumers.

TABLE V.9—AVERAGE LCC AND PBP RESULTS BY EFFICIENCY LEVEL FOR BUILT-IN COOLERS

TSL *	EL	Average costs (2015\$)				Simple payback** (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
1 .....	4	1679	58	728	2407	n.a.	17.4
2 .....	7	1785	38	497	2281	6.1	17.4
3 .....	9	1819	28	359	2178	4.7	17.4
4 .....	11	2372	19	248	2619	17.7	17.4

\*For TSL 2, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\*The PBP is measured relative to the lowest efficiency level in the no-new-standards case efficiency distribution. Calculation of PBP is not applicable (n.a.) when the efficiency level is already met or exceeded in the MREF market.

**Note:** The results for each TSL are calculated assuming that all consumers use products at that efficiency level.

TABLE V.10—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR BUILT-IN COOLERS

TSL *	EL	Average LCC savings** (2015\$)	Percent of consumers that experience net cost
1 .....	4	n.a.	0
2 .....	7	77	22
3 .....	9	187	7
4 .....	11	(254)	86

\*For TSL 2, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\*The savings represent the average LCC savings for affected consumers. Calculation of savings is not applicable (n.a.) when the efficiency level is already met or exceeded in the MREF market.

TABLE V.11—AVERAGE LCC AND PBP RESULTS BY EFFICIENCY LEVEL FOR C-3A

TSL *	EL	Average costs (2015\$)				Simple payback** (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
1 .....	2	5839	28	360	6199	n.a.	17.4

TABLE V.11—AVERAGE LCC AND PBP RESULTS BY EFFICIENCY LEVEL FOR C-3A—Continued

TSL *	EL	Average costs (2015\$)				Simple payback ** (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
2 .....	4	5868	22	278	6146	4.1	17.4
3 .....	5	5904	20	247	6152	6.8	17.4
4 .....	7	6246	13	168	6413	25.3	17.4

\*For TSL 1, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\*The PBP is measured relative to the lowest efficiency level in the no-new-standards case efficiency distribution. Calculation of PBP is not applicable (n.a.) when the efficiency level is already met or exceeded in the MREF market.

**Note:** The results for each TSL are calculated assuming that all consumers use products at that efficiency level.

TABLE V.12—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR C-3A

TSL *	EL	Average LCC savings** (2015\$)	Percent of consumers that experience net cost
1 .....	2	n.a.	0
2 .....	4	58	4
3 .....	5	53	26
4 .....	7	(209)	92

\*For TSL 1, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\*The savings represent the average LCC savings for affected consumers. Calculation of savings is not applicable (n.a.) when an efficiency level is already met or exceeded in the MREF market.

TABLE V.13—AVERAGE LCC AND PBP RESULTS BY EFFICIENCY LEVEL FOR C-3A-BI

TSL *	EL	Average costs (2015\$)				Simple payback ** (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
1 .....	2	8594	32	406	9000	n.a.	17.4
2 .....	4	8627	25	314	8941	4.1	17.4
3 .....	5	8668	22	279	8947	6.8	17.4
4 .....	7	9055	15	189	9243	25.4	17.4

\*For TSL 1, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\*The PBP is measured relative to the lowest efficiency level in the no-new-standards case efficiency distribution. Calculation of PBP is not applicable (n.a.) when the efficiency level is already met or exceeded in the MREF market.

**Note:** The results for each TSL are calculated assuming that all consumers use products at that efficiency level.

TABLE V.14—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR C-3A-BI

TSL *	EL	Average LCC savings** (2015\$)	Percent of consumers that experience net cost
1 .....	2	n.a.	0
2 .....	4	66	4
3 .....	5	59	26
4 .....	7	(237)	92

\*For TSL 1, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\*The savings represent the average LCC savings for affected consumers. Calculation of savings is not applicable (n.a.) when an efficiency level is already met or exceeded in the MREF market.

TABLE V.15—AVERAGE LCC AND PBP RESULTS BY EFFICIENCY LEVEL FOR C-9

TSL *	EL	Average costs (2015\$)				Simple payback ** (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
1 .....	3	4373	36	465	4837	n.a.	17.4



TABLE V.15—AVERAGE LCC AND PBP RESULTS BY EFFICIENCY LEVEL FOR C–9—Continued

TSL *	EL	Average costs (2015\$)				Simple payback ** (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
2 .....	5	4396	29	359	4755	2.6	17.4
3 .....	6	4523	26	319	4841	12.1	17.4
4 .....	7	4757	22	269	5026	23.3	17.4

\*For TSL 1, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\* The PBP is measured relative to the lowest efficiency level in the no-new-standards case efficiency distribution. Calculation of PBP is not applicable (n.a.) when the efficiency level is already met or exceeded in the MREF market.

**Note:** The results for each TSL are calculated assuming that all consumers use products at that efficiency level.

TABLE V.16—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR C–9

TSL *	EL	Average LCC savings ** (2015\$)	Percent of consumers that experience net cost
1 .....	3	n.a.	0
2 .....	5	89	0
3 .....	6	3	62
4 .....	7	(182)	90

\*For TSL 1, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\* The savings represent the average LCC savings for affected consumers. Calculation of savings is not applicable (n.a.) when an efficiency level is already met or exceeded in the MREF market.

TABLE V.17—AVERAGE LCC AND PBP RESULTS BY EFFICIENCY LEVEL FOR C–9–BI

TSL *	EL	Average costs (2015\$)				Simple payback ** (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
1 .....	3	6438	41	530	6968	n.a.	17.4
2 .....	5	6464	33	410	6874	2.6	17.4
3 .....	6	6608	29	364	6972	12.0	17.4
4 .....	7	6874	25	307	7181	23.2	17.4

\*For TSL 1, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\* The PBP is measured relative to the lowest efficiency level in the no-new-standards case efficiency distribution. Calculation of PBP is not applicable (n.a.) when the efficiency level is already met or exceeded in the MREF market.

**Note:** The results for each TSL are calculated assuming that all consumers use products at that efficiency level.

TABLE V.18—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR C–9–BI

TSL *	EL	Average LCC savings ** (2015\$)	Percent of consumers that experience net cost
1 .....	3	n.a.	0
2 .....	5	102	0
3 .....	6	4	63
4 .....	7	(205)	90

\*For TSL 1, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\* The savings represent the average LCC savings for affected consumers. Calculation of savings is not applicable (n.a.) when an efficiency level is already met or exceeded in the MREF market.

TABLE V.19—AVERAGE LCC AND PBP RESULTS BY EFFICIENCY LEVEL FOR C–13A

TSL *	EL	Average costs (2015\$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
1 .....	3	2062	30	248	2310	4.3	10.3

TABLE V.19—AVERAGE LCC AND PBP RESULTS BY EFFICIENCY LEVEL FOR C-13A—Continued

TSL *	EL	Average costs (2015\$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
2 .....	4	2092	26	214	2306	5.0	10.3
3 .....	6	2275	21	170	2446	13.3	10.3
4 .....	7	2368	18	149	2517	16.0	10.3

\* For TSL 1, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the lowest efficiency level in the no-new-standards case efficiency distribution.

TABLE V.20—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR C-13A

TSL *	EL	Average LCC savings** (2015\$)	Percent of consumers that experience net cost
1 .....	3	32	6
2 .....	4	17	44
3 .....	6	(123)	94
4 .....	7	(194)	96

\* For TSL 1, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\* The savings represent the average LCC savings for affected consumers.

TABLE V.21—AVERAGE LCC AND PBP RESULTS BY EFFICIENCY LEVEL FOR C-13A-BI

TSL *	EL	Average costs (2015\$)				Simple payback ** (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
1 .....	3	3019	33	273	3292	n.a.	10.3
2 .....	4	3054	29	235	3289	6.5	10.3
3 .....	6	3261	23	187	3448	21.6	10.3
4 .....	7	3366	20	164	3530	24.6	10.3

\* For TSL 1, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\* The PBP is measured relative to the lowest efficiency level in the no-new-standards case efficiency distribution. Calculation of PBP is not applicable (n.a.) when the efficiency level is already met or exceeded in the MREF market.

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level.

TABLE V.22—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR C-13A-BI

TSL *	EL	Average LCC savings** (2015\$)	Percent of consumers that experience net cost
1 .....	3	n.a.	0
2 .....	4	8	49
3 .....	6	(151)	97
4 .....	7	(232)	98

\* For TSL 1, the results are forecasted over the lifetime of products sold in 2019. For the other TSLs, the results are forecasted over the lifetime of products sold in 2021.

\*\* The savings represent the average LCC savings for affected consumers. Calculation of savings is not applicable (n.a.) when an efficiency level is already met or exceeded in the MREF market.

b. Consumer Subgroup Analysis

In the consumer subgroup analysis, DOE estimated the impact of the considered TSLs on low-income households and senior-only households. DOE is not presenting the consumer subgroup results in this final rule,

because the household sample sizes for the above subgroups were not large enough to yield meaningful results. For information purposes, chapter 11 of the final rule TSD presents the LCC and PBP results for the subgroups.

c. Rebuttable Presumption Payback

As discussed in section III.H.2 of this document, EPCA establishes a rebuttable presumption that an energy conservation standard is economically justified if the increased purchase cost for a product that meets the standard is

less than three times the value of the first-year energy savings resulting from the standard. In calculating a rebuttable presumption payback period for each of the considered TSLs, DOE used discrete values, and, as required by EPCA, based the energy use calculation on the DOE test procedures for MREFs.

Table V.23 presents the rebuttable-presumption payback periods for the considered TSLs. While DOE examined the rebuttable-presumption criterion, it considered whether the standard levels evaluated for this rule are economically justified through a more detailed analysis of the economic impacts of those levels, pursuant to 42 U.S.C.

6295(o)(2)(B)(i), which considers the full range of impacts to the consumer, manufacturer, Nation, and environment. The results of that analysis serve as the basis for DOE to definitively evaluate the economic justification for a potential standard level, thereby supporting or rebutting the results of any preliminary determination of economic justification.

TABLE V.23—REBUTTABLE-PRESUMPTION PAYBACK PERIOD (IN YEARS) FOR MREFS

Product class	Trial standard level			
	1	2	3	4
<b>Coolers</b>				
Freestanding Compact Coolers .....	1.1	1.4	1.6	3.5
Built-in Compact Coolers .....	n.a. *	4.6	4.4	14.8
Freestanding Coolers .....	1.0	1.8	1.8	4.8
Built-in Coolers .....	n.a.	6.1	4.7	17.7
<b>Combination Cooler Refrigeration Products</b>				
C-3A .....	n.a.	4.1	6.8	25.3
C-3A-BI .....	n.a.	4.1	6.8	25.4
C-9 .....	n.a.	2.6	12.1	23.3
C-9-BI .....	n.a.	2.6	12.0	23.2
C-13A .....	4.3	5.0	13.3	16.0
C-13A-BI .....	n.a.	6.5	21.6	24.6

\* Calculation of PBP is not applicable (n.a.) if the efficiency level is already met or exceeded in the MREF market.

2. Economic Impacts on Manufacturers

DOE performed an MIA to estimate the impact of new energy conservation standards on manufacturers of MREFs. The section below describes the expected impacts on manufacturers at each TSL. Chapter 12 of the direct final rule TSD explains the analysis in further detail.

a. Industry Cash Flow Analysis Results

The following tables illustrate the estimated financial impacts (represented by changes in INPV) of new energy conservation standards on manufacturers of MREFs, as well as the conversion costs that DOE estimates manufacturers would incur for each product class at each TSL. To evaluate the range of cash flow impacts on MREF manufacturers, DOE modeled two different markup scenarios using different assumptions that correspond to the range of anticipated market responses to potential new energy conservation standards: (1) The preservation of gross margin percentage, and (2) the preservation of per-unit operating profit. Each of these scenarios is discussed below.

To assess the lower (less severe) end of the range of potential impacts, DOE modeled a preservation of gross margin percentage markup scenario, in which a uniform “gross margin percentage” markup is applied across all potential

efficiency levels. In this scenario, DOE assumed that a manufacturer’s absolute dollar markup would increase as production costs increase in the standards case. During confidential interviews, manufacturers indicated that it is optimistic to assume that they would be able to maintain the same gross margin markup as their production costs increase in response to a new energy conservation standard, particularly at higher TSLs.

To assess the higher (more severe) end of the range of potential impacts, DOE modeled the preservation of per-unit operating profit markup scenario, which assumes that manufacturers would be able to earn the same operating margin in absolute dollars per-unit in the standards case as in the no-new-standards case. In this scenario, while manufacturers make the necessary investments required to convert their facilities to produce new standards-compliant products, operating profit does not change in absolute dollars per unit and decreases as a percentage of revenue.

Each of the modeled scenarios results in a unique set of cash flows and corresponding industry values at each TSL. In the following discussion, the INPV results refer to the difference in industry value between the no-new-standards case and each standards case that results from the sum of discounted cash flows from the base year 2016

through 2048 (the end of the analysis period for TSLs with a 3-year compliance period, as recommended by the MREF Working Group) or 2050 (the end of the analysis period for TSLs with a 5-year compliance period).<sup>69</sup> To provide perspective on the short-run cash flow impact, DOE includes in the discussion of the results below a comparison on free cash flow between the no-new-standards case and the standards case at each TSL in the year before new standards would take effect. This figure provides an understanding of the magnitude of the required conversion costs relative to the cash flow generated by the industry in the no-new-standards case.

DOE modeled separate INPV impacts for the cooler and combination cooler refrigeration product industries. Table V.24 and Table V.25 display the potential INPV impacts on the cooler industry under the preservation of gross margin markup scenario and preservation of operating profit markup

<sup>69</sup> As described in section III.B of this document, the MREF Working Group recommended a 3-year compliance period for the standards recommended in Term Sheet #2. DOE analyzed these recommended standards (TSL 2 for coolers and TSL 1 for combination cooler refrigeration products) using a 3-year compliance period. DOE analyzed all other TSLs in this direct final rule (representing standards not recommended by the MREF Working Group) using a 5-year compliance period consistent with the EPCA provisions for newly-established standards.

scenarios, respectively. Table V.26 and Table V.27 contain estimated INPV impacts for the combination cooler

refrigeration product industry under the preservation of gross margin markup

scenario and preservation of operating profit markup scenarios, respectively.

TABLE V.24—MANUFACTURER IMPACT ANALYSIS FOR COOLERS—PRESERVATION OF GROSS MARGIN PERCENTAGE MARKUP SCENARIO\*

	Units	No-new-standards case	Trial standard level			
			1	2**	3	4
INPV .....	2015\$ M	263.3 .....	264.0	253.3	226.5	283.8
Change in INPV .....	2015\$ M	.....	0.7	(10.0)	(36.8)	20.5
	% .....	.....	0.3	(3.8)	(14.0)	7.8
Product Conversion Costs.	2015\$ M	.....	12.1	54.8	74.6	84.1
Capital Conversion Costs.	2015\$ M	.....	13.7	19.7	63.8	105.0
Total Conversion Costs	2015\$ M	.....	25.8	74.6	138.4	189.1
Free Cash Flow in 2020 (2018 for TSL 2).	2015\$ M	16.7 (16.3 for TSL 2) .....	7.1	(8.3)	(35.2)	(57.9)
Free Cash Flow change from no-new-standards case in 2020. (2018 for TSL 2) .....	% .....	.....	(57.7)	(151.0)	(310.0)	(446.0)

\* Values in parentheses are negative values. All values have been rounded to the nearest tenth.

\*\* TSL recommended by the MREF Working Group with 2019 compliance date (i.e. a 3-year compliance period); all other TSLs have a modeled compliance date of 2021 (i.e. a 5-year compliance period).

TABLE V.25 MANUFACTURER IMPACT ANALYSIS FOR COOLERS—PRESERVATION OF OPERATING PROFIT MARKUP SCENARIO\*

	Units	No-new-standards case	Trial standard level			
			1	2**	3	4
INPV .....	2015\$ M	263.3 .....	244.3	208.5	168.4	110.5
Change in INPV .....	2015\$ M	.....	(19.0)	(54.8)	(94.8)	(152.8)
	% .....	.....	(7.2)	(20.8)	(36.0)	(58.0)
Product Conversion Costs.	2015\$ M	.....	12.1	54.8	74.6	84.1
Capital Conversion Costs.	2015\$ M	.....	13.7	19.7	63.8	105.0
Total Conversion Costs	2015\$ M	.....	25.8	74.6	138.4	189.1
Free Cash Flow in 2020 (2018 for TSL 2).	2015\$ M	16.7 (16.3 for TSL 2) .....	7.1	(8.3)	(35.2)	(57.9)
Free Cash Flow change from no-new-standards case in 2020 (2018 for TSL 2).	% .....	.....	(57.7)	(151.0)	(310.0)	(446.0)

\* Values in parentheses are negative values. All values have been rounded to the nearest tenth.

\*\* TSL recommended by the MREF Working Group with 2019 compliance date (i.e. a 3-year compliance period); all other TSLs have a modeled compliance date of 2021 (i.e. a 5-year compliance period).

At TSL 1, DOE estimates impacts on INPV of cooler manufacturers to range from \$244.3 million to \$264.0 million, or a change in INPV of – 7.2 percent to 0.3 percent under the preservation of per-unit operating profit markup scenario and preservation of gross margin percentage markup scenario, respectively. At TSL 1, industry free cash flow is expected to decrease by approximately 57.7 percent to \$7.1 million, compared to the no-new-standards case value of \$16.7 million in 2020, the year prior to the 2021 compliance year.

An estimated 71 percent of cooler industry shipments are below the

efficiency level corresponding to TSL 1 (EL 4, the CEC-equivalent level for all cooler product classes). DOE estimated that compliance with TSL 1 will require a total industry investment of \$25.8 million. Implicit in this estimate is that DOE expects approximately two-thirds of cooler models using non-vapor-compression refrigeration systems will switch to vapor-compression refrigeration systems to reach TSL 1. Industry conversion costs are related to the integration of heat pipes for a portion of the non-vapor-compression coolers remaining on the market, increased production capacity for vapor-compression coolers, and testing and

marketing costs associated with all cooler models.

At TSL 2, the TSL recommended by the MREF Working Group, DOE estimates INPV for cooler manufacturers to range from \$208.5 million to \$253.3 million, or a change in INPV of – 20.8 percent to – 3.8 percent. At this standard level, industry free cash flow is estimated to decrease by as much as 151.0 percent to – \$8.3 million, compared to the no-new-standards case value of \$16.3 million in 2018, the year prior to the 2019 compliance year.

An estimated 95 percent of cooler industry shipments are below the efficiency level corresponding to TSL 2

(EL 7 for all cooler product classes). DOE estimated that compliance with TSL 2 will require a total industry investment of \$74.6 million. DOE assumed that, at this level, the majority of cooler models using non-vapor-compression refrigeration systems will not be able to reach TSL 2, and the corresponding share of the market will switch to coolers using vapor-compression refrigeration systems. Major sources of industry conversion costs include the integration of heat pipes and insulation changes for a portion of the non-vapor-compression coolers remaining on the market, increased production capacity for vapor-compression coolers, and testing and marketing costs associated with all cooler models.

At TSL 3, DOE estimates impacts on INPV for cooler manufacturers to range from \$168.4 million to \$226.5 million, or a change in INPV of -36.0 percent to -14.0 percent. At this standard level, industry free cash flow is estimated to decrease by as much as 310.0 percent to -\$35.2 million, compared to the no-new-standards case value of \$16.7 million in 2020.

An estimated 99 percent of cooler industry shipments are below the efficiency level corresponding to TSL 3 (EL 9 for all cooler product classes). DOE estimated that compliance with TSL 3 will require a total industry investment of \$138.4 million. Again, implicit in this estimate is that the majority of cooler models using non-vapor-compression refrigeration systems will not be able to reach TSL 3, and the corresponding share of the market will switch to coolers using vapor-compression refrigeration systems. Industry conversion costs are related to the integration of heat pipes and insulation changes for all non-vapor-compression coolers remaining on the market. For vapor-compression coolers, industry conversion costs are related to improved glass, increases in insulation thickness, the integration of forced-convection evaporators, more efficient compressors, and increased production capacity for vapor-compression coolers. Finally, all cooler models would incur testing and marketing costs.

At TSL 4, DOE estimates impacts on INPV for cooler manufacturers to range from \$110.5 million to \$283.8 million,

or a change in INPV of -58.0 percent to 7.8 percent. At TSL 4, industry free cash flow is estimated to decrease by as much as 446.0 percent to -\$57.9 million, compared to the no-new-standards case value of \$16.7 million in 2020.

Similar to TSL 3, an estimated 99 percent of cooler industry shipments are below the efficiency level corresponding to TSL 4 (EL 11 for all cooler product classes). DOE estimated that compliance with TSL 4 will require a total industry investment of \$189.1 million. At TSL 4, DOE assumed that none of the cooler models using non-vapor-compression refrigeration systems will be able to reach TSL 4, and the corresponding share of the market will switch to coolers using vapor-compression refrigeration systems. For vapor-compression coolers, in addition to the design changes associated with reaching TSL 3, industry conversion costs are related to improved heat exchangers, the integration of VIPs and triple-pane glass, and switching to brushless direct current (DC) condenser fan motors and variable-speed compressors.

TABLE V.26—MANUFACTURER IMPACT ANALYSIS FOR COMBINATION COOLER REFRIGERATION PRODUCTS—PRESERVATION OF GROSS MARGIN PERCENTAGE MARKUP SCENARIO \*

	Units	No-new-standards case	Trial standard level			
			1 **	2	3	4
INPV .....	2015\$ M	108.2 .....	107.6	107.5	117.7	128.5
Change in INPV .....	2015\$ M	.....	(0.5)	(0.6)	9.6	20.3
	% .....	.....	(0.5)	(0.6)	8.9	18.8
Product Conversion Costs.	2015\$ M	.....	0.5	3.1	4.3	4.6
Capital Conversion Costs.	2015\$ M	.....	0.5	3.7	5.2	6.7
Total Conversion Costs	2015\$ M	.....	1.0	6.8	9.5	11.3
Free Cash Flow in 2020 (2018 for TSL 1).	2015\$ M	6.9 (6.7 for TSL 1) .....	6.3	4.3	3.3	2.6
Free Cash Flow change from no-new-standards case in 2020 (2018 for TSL 1).	% .....	.....	(5.7)	(36.9)	(51.9)	(62.9)

\* Values in parentheses are negative values. All values have been rounded to the nearest tenth.

\*\* TSL recommended by the MREF Working Group with 2019 compliance date (i.e. a 3-year compliance period); all other TSLs have a modeled compliance date of 2021 (i.e. a 5-year compliance period).

TABLE V.27—MANUFACTURER IMPACT ANALYSIS FOR COMBINATION COOLER REFRIGERATION PRODUCTS—PRESERVATION OF OPERATING PROFIT MARKUP SCENARIO \*

	Units	No-new-standards case	Trial standard level			
			1 *	2	3	4
INPV .....	2015\$ M	108.2 .....	107.4	103.7	101.6	100.1
Change in INPV .....	2015\$ M	.....	(0.8)	(4.4)	(6.5)	(8.1)
	% .....	.....	(0.7)	(4.1)	(6.0)	(7.5)
Product Conversion Costs.	2015\$ M	.....	0.5	3.1	4.3	4.6
Capital Conversion Costs.	2015\$ M	.....	0.5	3.7	5.2	6.7
Total Conversion Costs	2015\$ M	.....	1.0	6.8	9.5	11.3

TABLE V.27—MANUFACTURER IMPACT ANALYSIS FOR COMBINATION COOLER REFRIGERATION PRODUCTS—PRESERVATION OF OPERATING PROFIT MARKUP SCENARIO \*—Continued

	Units	No-new-standards case	Trial standard level			
			1 *	2	3	4
Free Cash Flow in 2020 (2018 for TSL 1).	2015\$ M	6.9 (6.7 for TSL 1) .....	6.3	4.3	3.3	2.6
Free Cash Flow change from no-new-standards case in 2020 (2018 for TSL 1).	% .....	.....	(5.7)	(36.9)	(51.9)	(62.9)

\* Values in parentheses are negative values. All values have been rounded to the nearest tenth.

\*\* TSL recommended by the MREF Working Group with 2019 compliance date (*i.e.* a 3-year compliance period); all other TSLs have a modeled compliance date of 2021 (*i.e.* a 5-year compliance period).

TSL 1, the MREF Working Group recommended level, corresponds to EL 2 for combination cooler refrigeration product classes C-3A and C-3A-BI, and EL 3 for product classes C-9, C-9-BI, C-13A and C-13A-BI. At TSL 1, DOE estimates INPV for combination cooler refrigeration product manufacturers to range from \$107.4 million to \$107.6 million, or a change in INPV of -0.7 percent to -0.5 percent, relative to the no-new-standards case. At this TSL, industry free cash flow is estimated to decrease by as much as 5.7 percent to \$6.3 million, compared to the no-new-standards case value of \$6.7 million in 2018, the year before the 2019 compliance year.

An estimated 11 percent of combination cooler refrigeration product industry shipments are below the efficiency levels corresponding to TSL 1. Products with efficiencies below those corresponding to TSL 1 are concentrated in product class C-13A. At TSL 1, DOE estimated that manufacturers of C-13A combination cooler refrigeration products will incur conversion costs of \$1.0 million in order to comply with the 2019 standard. The design changes associated with this conversion cost estimate include increased compressor efficiency and increased insulation thickness.

At TSL 2, DOE estimates INPV for combination cooler refrigeration product manufacturers to range from \$103.7 million to \$107.5 million, or a change in INPV of -4.1 percent to -0.6 percent. At this TSL, industry free cash flow is estimated to decrease by as much as 36.9 percent to \$4.3 million, compared to the no-new-standards case value of \$6.9 million in 2020.

In contrast to TSL 1, an estimated 100 percent of combination cooler refrigeration product industry shipments are below the efficiency levels corresponding to TSL 2 (EL 4 for product classes C-3A, C-3A-BI, C-13A and C-13A-BI; EL 5 for product classes C-9 and C-9-BI). DOE estimated that

compliance with TSL 2 will require a total industry investment of \$6.8 million by 2021. The design changes associated with this conversion cost estimate include increased compressor efficiency, changes to insulation thickness, and the incorporation of VIPs.

At TSL 3, DOE estimates INPV for combination cooler refrigeration product manufacturers to range from \$101.6 million to \$117.7 million, or a change in INPV of -6.0 percent to 8.9 percent. At this TSL, industry free cash flow is estimated to decrease by as much as 51.9 percent to \$3.3 million, compared to the no-new-standards case value of \$6.9 million in 2020.

An estimated 100 percent of combination cooler refrigeration product industry shipments are below the efficiency levels corresponding to TSL 3 (EL 5 for product classes C-3A, C-3A-BI; EL 6 for product classes C-13A, C-13A-BI, C-9, and C-9-BI). DOE estimated that compliance with TSL 3 will require a total industry investment of \$9.5 million by 2021. Again, the design changes associated with this conversion cost estimate relate increased compressor efficiency, changes to insulation thickness, and the incorporation of VIPs. Incorporation of high efficiency glass would also be required for some product classes at TSL 3.

At TSL 4, DOE estimates INPV for combination cooler refrigeration product manufacturers to range from \$100.1 million to \$128.5 million, or a change in INPV of -7.5 percent to 18.8 percent. At this TSL, industry free cash flow is estimated to decrease by as much as 62.9 percent to \$2.6 million, compared to the no-new-standards case value of \$6.9 million in 2020.

An estimated 100 percent of combination cooler refrigeration product industry shipments are below the efficiency levels corresponding to TSL 4 (EL 7 for all combination cooler product classes). DOE estimated that

compliance with TSL 4 will require a total industry investment of \$11.3 million by 2021. Again, the design changes associated with this conversion cost estimate relate increased compressor efficiency, changes to insulation thickness, and the incorporation of VIPs. Incorporation of high-efficiency glass would also be required for all product classes at TSL 4.

#### b. Impacts on Direct Employment

To quantitatively assess the impacts of energy conservation standards on direct employment in the MREF industry, DOE used the GRIM to estimate the domestic labor expenditures and number of employees in the no-new-standards case and at each TSL from 2016 through either 2048 or 2050, the end of the analysis period depending on the TSL. DOE used statistical data from the U.S. Census Bureau's 2011 *Annual Survey of Manufactures* ("ASM"),<sup>70</sup> the results of the engineering analysis, and interviews with manufacturers to determine the inputs necessary to calculate industry-wide labor expenditures and domestic employment levels. Labor expenditures related to manufacturing of the product are a function of the labor intensity of the product, the sales volume, and an assumption that wages remain fixed in real terms over time. The total labor expenditures in each year are calculated by multiplying the MPCs by the labor percentage of MPCs.

The total labor expenditures in the GRIM were then converted to domestic production employment levels by dividing production labor expenditures by the annual payment per production worker (production worker hours multiplied by the labor rate found in the U.S. Census Bureau's 2011 ASM). DOE estimates that approximately 8 percent of coolers and 43 percent of

<sup>70</sup> "Annual Survey of Manufactures (ASM)," U.S. Census Bureau (2011) (Available at: <http://www.census.gov/manufacturing/asm/>).

combination cooler refrigeration products sold in the United States are manufactured domestically. The estimates of production workers in this section include line-supervisors who are directly involved in fabricating and assembling a product within the manufacturing facility. Workers performing services that are closely associated with production operations, such as materials handling tasks using forklifts, are also included as production labor.

DOE's estimates only account for production workers who manufacture the specific products covered by this rulemaking. Thus, the estimated number of impacted employees in the MIA is separate and distinct from the total number of employees used to determine whether a manufacturer is a small business. Finally, this analysis also does not factor in the dependence by some manufacturers on production volumes to make their operations viable.

In the GRIM, DOE used the labor content of each product and manufacturing production costs from the engineering analysis to estimate the annual labor expenditures in the MREF manufacturing industry. DOE used information gained through interviews with manufacturers to estimate the portion of the total labor expenditures

that can be attributed to domestic production labor. The employment impacts shown in Table V.28 represent the range of potential production employment impacts in the cooler industry that could result in the compliance year of new energy conservation standards and Table V.29 represents the range of potential production employment impacts in the combination cooler refrigeration product industry that could result in the compliance year of new energy conservation standards.

The upper end of the results in the tables represents the maximum increase in the number of production workers after the implementation of new energy conservation standards and assumes that manufacturers would continue to produce the same covered products within the United States. This corresponds to the direct employment impacts calculated in the GRIM. In general, more efficient products are more complex and more labor intensive to manufacture. Per-unit labor requirements and production time requirements increase with a higher energy conservation standard. As a result, if shipments remain relatively steady, the model forecasts job growth at the upper bound of direct employment impacts.

The lower bound assumes that as the standard increases, manufacturers choose to retire sub-standard product lines (or to move production of sub-standard product lines abroad) rather than invest in domestic manufacturing facility conversions and product redesigns. In this scenario, there is a loss of employment because manufacturers consolidate and operate fewer domestic production lines. To estimate this lower bound, DOE assumed that the percentage loss in employment relative to the no-new-standards case would be equal to the percentage of non-compliant, domestically-produced platforms relative to all domestically-produced platforms. Because this represents a worst-case scenario for employment, there is no consideration given to the fact that there may be employment growth in higher-efficiency product lines.

DOE estimates that in the absence of new energy conservation standards, there would be 168 and 173 domestic production workers in the cooler industry in 2019 and 2021, respectively, and 130 and 134 domestic production workers in the combination cooler refrigeration product industry in 2019 and 2021, respectively.

TABLE V.28—POTENTIAL CHANGES IN THE NUMBER OF INDUSTRY PRODUCTION WORKER EMPLOYMENT FOR COOLERS IN COMPLIANCE YEAR \*

	Trial standard level **				
	No-new-standards case	1	2	3	4
Total Number of Domestic Production Workers in Compliance Year.	173 (168 for TSL 2).	145 to 194 .....	66 to 207 .....	20 to 232 .....	12 to 307
Potential Changes in Domestic Production Workers in Compliance Year.	.....	(28) to 21 .....	(102) to 39 .....	(153) to 59 .....	(161) to 134

\* The standards compliance year is 2019 for TSL 2, as recommended by the MREF Working Group; all other TSLs have a modeled compliance year of 2021.

\*\* Numbers in parentheses represent negative values.

TABLE V.29—POTENTIAL CHANGES IN THE NUMBER OF INDUSTRY PRODUCTION WORKER EMPLOYMENT FOR COMBINATION COOLER REFRIGERATION PRODUCTS IN COMPLIANCE YEAR \*

	Trial standard level **				
	No-new-standards case	1	2	3	4
Total Number of Domestic Production Workers in Compliance Year.	134 (130 for TSL 1).	130 to 130 .....	0 to 141 .....	0 to 160 .....	0 to 180
Potential Changes in Domestic Production Workers in Compliance Year.	.....	0 to 0 .....	(134) to 7 .....	(134) to 26 .....	(134) to 46

\* The standards compliance year is 2019 for TSL 1, as recommended by the MREF Working Group; all other TSLs have a modeled compliance year of 2021.

\*\* Numbers in parentheses represent negative values.

Direct production employment impacts are also detailed in chapter 12 of the direct final rule TSD.

DOE notes that the direct employment impacts discussed here are independent of the indirect employment impacts to the broader U.S. economy, which are documented in chapter 16 of the direct final rule TSD.

c. Impacts on Manufacturing Capacity

Based on feedback from domestic MREF manufacturers during confidential interviews and MREF Working Group meetings, DOE does not expect significant impacts on domestic manufacturing capacity for the industry as a whole to result from the standards for MREFs adopted in this direct final rule. However, at more stringent standard levels than those adopted in this direct final rule, disproportionate impacts experienced by domestic manufacturers could lead these manufacturers to abandon certain niche production lines.

Additionally, although DOE does not believe the standards adopted in this direct final rule will lead to a decrease in manufacturing capacity for the MREF industry as a whole, DOE recognizes that standards will likely lead to decreased manufacturing capacity for cooler products using non-vapor-compression cooling technologies.

d. Impacts on Subgroups of Manufacturers

Small manufacturers, niche equipment manufacturers, and manufacturers exhibiting a cost structure substantially different from the industry average could be disproportionately affected by new energy conservation standards for MREFs. Using average cost assumptions developed for an industry cash-flow estimate is adequate to assess differential impacts among manufacturer subgroups. For the MREF industry, DOE identified and evaluated the impact of new energy conservation standards on two subgroups: Small businesses and domestic LVMs.

Small Businesses

The SBA defines a “small business” as having 1,250 employees or less for both NAICS 335222 (“Household Refrigeration and Home Freezer Manufacturing”) and NAICS 333415 (“Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing”). Based on the SBA employee threshold of 1,250 employees, DOE identified two entities involved in the sale of MREF products in the United States that qualify as small businesses. One of these businesses is a manufacturer of MREF products. The other small business imports and

rebrands MREFs for sale in the United States. For a discussion of the potential impacts on the small manufacturer subgroup, see section VI.B of this document and chapter 12 of the TSD.

Domestic, Low-Volume Manufacturers

In addition to the small businesses discussed previously, DOE identified three domestic LVMs of MREFs that could be disproportionately affected by a DOE energy conservation standard for MREFs. Unlike the larger, diversified manufacturers selling MREFs in the United States, these businesses are highly concentrated in specific market segments (refrigeration) and/or earn a greater proportion of their sales from products covered by this rulemaking. Additionally, although the LVMs do not qualify as small businesses according to the SBA criteria discussed above (*i.e.*, employee count exceeds 1,250), these manufacturers are significantly smaller in terms of annual revenues than the larger, diversified manufacturers selling MREFs in the United States. Table V.30 lists the range of the product offerings and annual sales figures for the LVMs. Table V.31 contains the range of annual sales figures for some of the large, diversified manufacturers selling MREFs in the U.S. market. Table V.31 also contains the range of segment concentration for these larger manufacturers.

TABLE V.30—LVM 2014 REVENUES AND PRODUCT OFFERINGS

Manufacturer type	Annual revenues (2015\$ M) *	Product offering
LVMs .....	216–1,600 **	High-end, built-in or fully integrated residential refrigeration products (undercounter and standard), commercial refrigeration equipment, and cooking products.

\* Annual sales values are from Hoovers: <http://www.hoovers.com/>.

\*\* This range reflects parent company revenues, where an LVM is owned by another company.

TABLE V.31—2014 REVENUES AND SEGMENT CONCENTRATION FOR LARGE MREF MANUFACTURERS

Manufacturer type	Annual revenues (2015\$ M) *	Concentration in segment containing residential refrigeration products
Larger, Diversified Manufacturers .....	11,400–150,000	5%–76%

\* Annual sales values are from Hoovers: <http://www.hoovers.com/>.

Based on manufacturer feedback, DOE believes that the three LVMs, along with the small domestic manufacturer identified by DOE, are four of only five manufacturers producing MREFs domestically. In contrast, the entities with the greatest estimated overall market share in the U.S. MREF market rebrand coolers and combination cooler refrigeration products sourced from

foreign original equipment manufacturers (“OEMs”).

DOE has estimated that two of the LVMs and the small MREF manufacturer account for approximately 50 percent of built-in cooler basic models (both compact and full-size) that are currently available in the U.S. market. DOE estimates that the standard adopted in this direct final rule (70

percent of the CEC-Equivalent) will require the LVMs to update over 70 percent of their cooler models (overall, and for built-in coolers only).<sup>71</sup>

Additionally, two of the LVMs are the only manufacturers producing combination cooler refrigeration products domestically. Combined, these

<sup>71</sup> This estimate is based on the LVM models for which energy use values are available.



two LVMs account for 40 percent of combination cooler refrigeration product basic models that are currently available in the United States. One of these LVMs is the only company to manufacture a combination cooler refrigeration product classified as C-3A-BI. The other LVM produces a C-13A-BI combination cooler refrigeration product. Both products have rated energy consumptions at the standard level established in this direct final rule. Accordingly, both manufacturers would incur product and capital conversion expenses to reach standard efficiency levels beyond those adopted in this direct final rule for combination cooler refrigeration products.

Generally, manufacturers indicated during confidential interviews that the MREF products produced by the domestic LVMs are niche products and are more expensive to produce (and, therefore, have higher selling prices) than the majority of the MREFs sold in the United States. The LVMs generally utilize a two-tier distribution system for MREFs, unlike large-scale manufacturers that sell directly to large-volume retail outlets. (ASRAC Public Meeting, No. 85 at p. 144) Accordingly, the cost and markup structure of these two types of manufacturers are significantly different.

Manufacturers also expressed during confidential interviews that LVMs (along with the small manufacturer) typically pay higher prices for components because of lower

purchasing volumes, while their large competitors likely receive volume purchasing discounts. Despite the fact that the MREF industry as a whole is a relatively low-volume industry, larger manufacturers, with a significantly larger proportion of their total sales derived from the sale of other products (non-MREF products), are able to purchase components in high quantities due to the similarities between MREFs and the other higher-volume products they sell (e.g., refrigerators and freezers). Alternatively, these larger manufacturers may produce their own components in-house.

LVMs may also be disproportionately affected by product and capital conversion costs. Product redesign, testing, and certification costs tend to be fixed per basic model and do not scale with sales volume. Both large manufacturers and LVMs must make investments in R&D to redesign their products, but LVMs lack the sales volumes to sufficiently recoup these upfront investments without substantially marking up their products' selling prices. Furthermore, the LVMs and major re-branders both offer similar numbers of MREF basic models. Up-front capital investments in new manufacturing for each platform redesign and any depreciated manufacturing capital would be spread across a lower volume of shipments for LVMs.

To this end, feedback from LVMs received during confidential interviews

suggested that new energy conservation standards for MREFs could result in such a significant increase in their costs (both per-unit and upfront costs) that selling prices would increase beyond what consumers are willing to pay. This could cause the LVMs to discontinue certain model lines that, in turn, would negatively impact customer choice, competition, and domestic employment within the MREF industry.

Finally, the LVMs considered in this analysis have fewer resources to devote to the cumulative regulations impacting the appliance industry. According to manufacturer feedback received during confidential interviews, the LVMs will be particularly challenged in meeting amended energy conservation standards for commercial refrigeration equipment (with an estimated compliance date of 2017) and for residential refrigerators and freezers (with an estimated compliance date of 2020), in addition to the EPA Significant New Alternatives Policy Program (SNAP) program restrictions relating to foam blowing agents and any future restrictions relating to acceptable refrigerants for use in consumer refrigeration products. Table V.32 lists the impending DOE energy conservation standards that may have a significant impact on the MREF LVMs, the corresponding expected industry conversion costs (where available), and the LVM U.S. market share for the products being regulated.

TABLE V.32—OTHER FEDERAL ENERGY CONSERVATION STANDARDS AFFECTING MREF LVMs

Regulation	Expected effective date(s)	Expected total industry investment	LVM U.S. market share
Commercial Refrigeration Equipment .....	2017	\$184 M 72 (2012\$)	41% of commercial refrigerator market. <sup>73</sup>
Refrigerators and Freezers .....	2020	TBD	75% of built-in undercounter refrigerator market; 5% of compact refrigerator market. <sup>74</sup>

In summary, DOE recognizes that, depending on the TSL selected, new

<sup>72</sup> Estimated industry conversion expenses were published in the TSD for the March 2014 commercial refrigeration energy conservation standards final rule. 79 FR 17725 (March 28, 2014).

<sup>73</sup> 2008 market share estimates were published in the TSD for the March 2014 commercial refrigeration equipment energy conservation standards final rule. 79 FR 17725 (March 28, 2014). Estimates are from Appliance Magazine, which does not provide a precise definition of what a commercial refrigerator is. It is therefore unclear what specific types of equipment that data covers—whether it is equipment that is self-contained or remote condensing, or equipment with doors or without doors.

<sup>74</sup> 2007 market share estimates were published in the TSD for the September 2011 residential refrigerators, refrigerator-freezers, and freezers

energy conservation standards may have disproportionate impacts on the LVMs relative to the larger, diversified competitors, and that this could impact domestic MREF production as well as the availability of certain MREF product types. In this industry, larger manufacturers may have a competitive advantage compared to the LVMs due to overall production volumes and the ability to procure components at a lower cost (either by purchasing component parts at a discount or producing components in-house).

energy conservation standards final rule. 76 FR 57516 (Sept. 15, 2011).

e. Cumulative Regulatory Burden

One aspect of assessing manufacturer burden involves looking at the cumulative impact of multiple DOE standards and the regulatory actions of other Federal agencies and States that affect the manufacturers of a covered product or equipment. A standard level is not economically justified if it contributes to an unacceptable cumulative regulatory burden. While any one regulation may not impose a significant burden on manufacturers, the combined effects of several existing or impending regulations may have serious consequences for some manufacturers, groups of manufacturers,

or an entire industry. Multiple regulations affecting the same manufacturer can strain profits and lead companies to abandon product lines or markets with lower expected future returns than competing products. For these reasons, DOE conducts an analysis of cumulative regulatory burden as part of its rulemakings pertaining to appliance efficiency.

DOE aims to recognize and seeks to mitigate the overlapping effects on manufacturers of new or revised DOE standards and other regulatory actions affecting the same products, components, and other equipment. DOE estimates that there are approximately 48 entities selling MREFs in the United States. Only approximately 16 of these entities are OEMs of MREF products. In addition to new energy conservation

standards for MREFs, DOE identified a number of requirements that MREF manufacturers will face for products they manufacture approximately 3 years prior to and 3 years after the estimated compliance date of these new standards. The following section addresses key concerns that manufacturers raised during interviews regarding cumulative regulatory burden.

TABLE V.33—OTHER FEDERAL ENERGY CONSERVATION STANDARDS AFFECTING MREF MANUFACTURERS

Federal energy conservation standard	Number of manufacturers *	Number of MREF manufacturers from this rule **	Approx. standards year	Industry conversion costs (millions \$)	Industry conversion costs/revenue *** (%)
Microwave Ovens 78 FR 36316 (June 17, 2013) .....	12	2	2016	43.1 (2011\$)	<1
Commercial Refrigeration Equipment 79 FR 17725 (March 28, 2014) .....	54	3	2017	184 (2012\$)	2.0
Commercial Clothes Washers 79 FR 74492 (December 15, 2014) .....	6	1	2018	10.2 (2013\$)	2.2
Residential Clothes Washers 77 FR 32308 (May 31, 2012) .....	16	3	2018	418.5 (2010\$) †	4.8
Residential Dehumidifiers 81 FR 38338 (June 13, 2016) .....	24	1	2019	52.5 (2014\$)	4.5
Residential Kitchen Ranges and Ovens †† 80 FR 33030 (June 10, 2015) .....	20	5	2019	109.9 (2014\$)	1.1
Residential Boilers 81 FR 2320 (January 15, 2016) .....	27	1	2021	2.48 (2014\$)	<1

\* This column presents the total number of manufacturers identified in the energy conservation standard rule contributing to cumulative regulatory burden.

\*\* This column presents the number of manufacturers producing MREFs that are also listed as manufacturers in the listed energy conservation standard contributing to cumulative regulatory burden.

\*\*\* This column presents conversion costs as a percentage of cumulative revenue for the industry during the conversion period. The conversion period is the timeframe over which manufacturers must make conversion costs investments and lasts from the announcement year of the final rule to the standards year of the final rule. This period typically ranges from 3 to 5 years, depending on the energy conservation standard.

† Energy conservation standards for residential clothes washers (77 FR 32308) are tiered, with standards years of 2015 and 2018. The conversion costs presented are for both the 2015 and 2018 standards.

†† The final rule for this energy conservation standard has not been published. The compliance date and analysis of conversion costs have not been finalized at this time. Values in this row are estimates for the standard level proposed in the NOPR.

In addition to Federal energy conservation standards, DOE identified other Federal-level and state-level regulatory burdens and third-party standard programs that would affect MREF manufacturers. For more details, see chapter 12 of the direct final rule TSD.

DOE will evaluate its approach to assessing cumulative regulatory burden for use in future rulemakings to ensure that it is effectively capturing the overlapping impacts of its regulations. In particular, DOE will assess whether looking at rules where any portion of

the compliance period potentially overlaps with the compliance period for the subject rulemaking would yield a more accurate reflection of cumulative regulatory burdens.

3. National Impact Analysis

a. Significance of Energy Savings

To estimate the energy savings attributable to potential standards for MREFs, DOE compared the energy consumption of those products under the no-new-standards case to their anticipated energy consumption under each TSL. The savings are measured

over the entire lifetime of products purchased in the 30-year period that begins in the year of anticipated compliance with new standards (2019–2048 for the TSLs that represent the MREF Working Group recommendations and 2021–2050 for other TSLs). Table V.34 and Table V.35 present DOE’s projections of the national energy savings for each TSL considered for coolers and combination cooler refrigeration products, respectively. The savings were calculated using the approach described in section IV.H of this document.

TABLE V.34—CUMULATIVE NATIONAL ENERGY SAVINGS FOR COOLERS

	Trial standard level *			
	1	2	3	4
	Quads			
Primary energy .....	1.08	1.44	1.76	1.93

TABLE V.34—CUMULATIVE NATIONAL ENERGY SAVINGS FOR COOLERS—Continued

	Trial standard level *			
	1	2	3	4
	Quads			
FFC energy .....	1.13	1.51	1.84	2.02

\* For TSL 2, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

TABLE V.35—CUMULATIVE NATIONAL ENERGY SAVINGS FOR COMBINATION COOLER REFRIGERATION PRODUCTS

	Trial standard level *			
	1	2	3	4
	Quads			
Primary energy .....	0.000802	0.00705	0.0117	0.0153
FFC energy .....	0.000838	0.00737	0.0123	0.0160

\* For TSL 1, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

OMB Circular A–4<sup>75</sup> requires agencies to present analytical results, including separate schedules of the monetized benefits and costs that show the type and timing of benefits and costs. Circular A–4 also directs agencies to consider the variability of key elements underlying the estimates of benefits and costs. For this rulemaking, DOE undertook a sensitivity analysis

using nine, rather than 30, years of product shipments. The choice of a 9-year period is a proxy for the timeline in EPCA for the review of certain energy conservation standards and potential revision of and compliance with such revised standards.<sup>76</sup> The review timeframe established in EPCA is generally not synchronized with the product lifetime, product manufacturing

cycles, or other factors specific to MREFs. Thus, such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology. The NES sensitivity analysis results for coolers and combination cooler refrigeration products based on a 9-year analytical period are presented in Table V.36 and Table V.37 respectively.

TABLE V.36—CUMULATIVE NATIONAL ENERGY SAVINGS FOR COOLERS; NINE YEARS OF SHIPMENTS

	Trial standard level *			
	1	2	3	4
	Quads			
Primary energy .....	0.294	0.389	0.479	0.513
FFC energy .....	0.307	0.407	0.500	0.537

\* For TSL 2, the results are forecasted over the lifetime of products sold from 2019–2027. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2029.

TABLE V.37—CUMULATIVE NATIONAL ENERGY SAVINGS FOR COMBINATION COOLER REFRIGERATION PRODUCTS; NINE YEARS OF SHIPMENTS

	Trial standard level *			
	1	2	3	4
	Quads			
Primary energy .....	0.000216	0.00191	0.00317	0.00414
FFC energy .....	0.000226	0.00200	0.00331	0.00432

\* For TSL 1, the results are forecasted over the lifetime of products sold from 2019–2027. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2029.

<sup>75</sup> U.S. Office of Management and Budget, “Circular A–4: Regulatory Analysis” (Sept. 17, 2003) (Available at: [http://www.whitehouse.gov/omb/circulars\\_a004\\_a-4/](http://www.whitehouse.gov/omb/circulars_a004_a-4/)).

<sup>76</sup> Section 325(m) of EPCA requires DOE to review its standards at least once every 6 years, and requires, for certain products, a 3-year period after

any new standard is promulgated before compliance is required, except that in no case may any new standards be required within 6 years of the compliance date of the previous standards. While adding a 6-year review to the 3-year compliance period adds up to 9 years, DOE notes that it may undertake reviews at any time within the 6 year

period and that the 3-year compliance date may yield to the 6-year backstop. A 9-year analysis period may not be appropriate given the variability that occurs in the timing of standards reviews and the fact that for some consumer products, the compliance period is 5 years rather than 3 years.

b. Net Present Value of Consumer Costs and Benefits

DOE estimated the cumulative NPV of the total costs and savings for

consumers that would result from the TSLs considered for MREFs. In accordance with OMB's guidelines on regulatory analysis,<sup>77</sup> DOE calculated NPV using both a 7-percent and a 3-

percent real discount rate. Table V.38 and Table V.39 show the consumer NPV results with impacts counted over the lifetime of products purchased in the relevant analysis period for each TSL.

TABLE V.38—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR COOLERS

Discount rate	Trial standard level *			
	1	2	3	4
	Billion 2015\$			
3 percent .....	8.34	11.02	12.19	6.83
7 percent .....	3.41	4.78	4.81	1.81

\* For TSL 2, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

TABLE V.39—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR COMBINATION COOLER REFRIGERATION PRODUCTS

Discount rate	Trial standard level *			
	1	2	3	4
	Billion 2015\$			
3 percent .....	0.00447	0.0347	(0.0575)	(0.142)
7 percent .....	0.00172	0.0110	(0.0422)	(0.0904)

\* For TSL 1, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

The NPV results based on the aforementioned 9-year analytical period are presented in Table V.40 and Table

V.41. As mentioned previously, such results are presented for informational purposes only and are not indicative of

any change in DOE's analytical methodology or decision criteria.

TABLE V.40—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR COOLERS; NINE YEARS OF SHIPMENTS

Discount rate	Trial standard level *			
	1	2	3	4
	Billion 2015\$			
3 percent .....	2.73	3.60	3.97	2.02
7 percent .....	1.48	2.06	2.07	0.68

\* For TSL 2, the results are forecasted over the lifetime of products sold from 2019–2027. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2029.

TABLE V.41—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR COMBINATION COOLER REFRIGERATION PRODUCTS; NINE YEARS OF SHIPMENTS

Discount rate	Trial standard level *			
	1	2	3	4
	Billion 2015\$			
3 percent .....	0.00142	0.0110	-0.0218	-0.0516
7 percent .....	0.000719	0.00456	-0.0199	-0.0420

\* For TSL 1, the results are forecasted over the lifetime of products sold from 2019–2027. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2029.

The above results reflect the use of a constant default trend to estimate the change in price for MREFs over the

analysis period (see section IV.H.3 of this document). DOE also conducted a sensitivity analysis that considered one

scenario with low price decline and one scenario with high price decline. The results of these alternative cases are

<sup>77</sup> U.S. Office of Management and Budget, "Circular A-4: Regulatory Analysis," section E,

(Sept. 17, 2003) (Available at: [http://www.whitehouse.gov/omb/circulars\\_a004\\_a-4/](http://www.whitehouse.gov/omb/circulars_a004_a-4/)).

presented in appendix 10C of the direct final rule TSD.

c. Indirect Impacts on Employment

DOE expects energy conservation standards for MREFs to reduce energy bills for consumers of those products, with the resulting net savings being redirected to other forms of economic activity. These expected shifts in spending and economic activity could affect the demand for labor. DOE used an input/output model of the U.S. economy to estimate indirect employment impacts of the TSLs that DOE considered in this rulemaking. DOE understands that there are uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Therefore, DOE generated results within five years of the compliance date, where these uncertainties are reduced.

The results suggest that the adopted standards are likely to have a negligible impact on the net demand for labor in the economy. The net change in jobs is so small that it would be imperceptible in national labor statistics and might be offset by other, unanticipated effects on employment. Chapter 16 of the direct final rule TSD presents detailed results regarding anticipated indirect employment impacts.

4. Impact on Utility or Performance of Products

As discussed in section IV.A.2.a of this document and chapter 3 of the

direct final rule TSD, DOE has concluded that the standards adopted in this direct final rule would not reduce the utility or performance of the MREFs under consideration in this rulemaking. Manufacturers of these products currently offer units that meet or exceed the adopted standards.

5. Impact of Any Lessening of Competition

As discussed in section III.H.1.e of this document, the Attorney General of the United States (Attorney General) determines the impact, if any, of any lessening of competition likely to result from a proposed standard and transmits such determination in writing to the Secretary, together with an analysis of the nature and extent of the impact. DOE published a proposed rule containing energy conservation standards identical to those set forth in this direct final rule and transmitted a copy of this direct final rule and the accompanying TSD to the Attorney General, requesting that DOJ provide its determination on this issue. DOE will consider DOJ's comments on the rule in determining whether to proceed with the direct final rule. DOE will also publish and respond to DOJ's comments in the **Federal Register** in a separate document.

6. Need of the Nation To Conserve Energy

Enhanced energy efficiency, where economically justified, improves the

Nation's energy security, strengthens the economy, and reduces the environmental impacts (costs) of energy production. Reduced electricity demand due to energy conservation standards is also likely to reduce the cost of maintaining the reliability of the electricity system, particularly during peak-load periods. As a measure of this reduced demand, chapter 15 in the direct final rule TSD presents the estimated reduction in generating capacity, relative to the no-new-standards case, for the TSLs that DOE considered in this rulemaking.

Energy conservation resulting from new standards for MREFs is expected to yield environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases. Table V.42 and Table V.43 provide DOE's estimate of cumulative emissions reductions expected to result from the TSLs considered in this rulemaking. The tables include both power sector emissions and upstream emissions. The emissions were calculated using the multipliers discussed in section IV.K of this document. DOE reports annual emissions reductions for each TSL in chapter 13 of the direct final rule TSD. The energy conservation standards being adopted by this direct final rule are economically justified under EPCA with regard to the added benefits achieved through reduced emissions of air pollutants and greenhouse gases.

TABLE V.42—CUMULATIVE EMISSIONS REDUCTION FOR COOLERS

	Trial standard level *			
	1	2	3	4
<b>Power Sector Emissions</b>				
CO <sub>2</sub> (million metric tons) .....	64.3	87.0	104.7	114.9
SO <sub>2</sub> (thousand tons) .....	38.7	53.1	63.0	69.1
NO <sub>x</sub> (thousand tons) .....	70.7	95.1	115.1	126.3
Hg (tons) .....	0.1	0.2	0.2	0.3
CH <sub>4</sub> (thousand tons) .....	5.6	7.6	9.0	9.9
N <sub>2</sub> O (thousand tons) .....	0.8	1.1	1.3	1.4
<b>Upstream Emissions</b>				
CO <sub>2</sub> (million metric tons) .....	3.6	4.8	5.9	6.4
SO <sub>2</sub> (thousand tons) .....	0.7	0.9	1.1	1.2
NO <sub>x</sub> (thousand tons) .....	51.7	68.7	84.2	92.5
Hg (tons) .....	0.0	0.0	0.0	0.0
CH <sub>4</sub> (thousand tons) .....	285.6	379.5	465.3	510.9
N <sub>2</sub> O (thousand tons) .....	0.0	0.0	0.1	0.1
<b>Total FFC Emissions</b>				
CO <sub>2</sub> (million metric tons) .....	67.9	91.8	110.6	121.3
SO <sub>2</sub> (thousand tons) .....	39.4	54.0	64.1	70.3
NO <sub>x</sub> (thousand tons) .....	122.4	163.9	199.4	218.8
Hg (tons) .....	0.1	0.2	0.2	0.3
CH <sub>4</sub> (thousand tons) .....	291.1	387.1	474.3	520.9
CH <sub>4</sub> (thousand tons CO <sub>2</sub> eq)** .....	8151.8	10839.3	13281.4	14583.8

TABLE V.42—CUMULATIVE EMISSIONS REDUCTION FOR COOLERS—Continued

	Trial standard level *			
	1	2	3	4
N <sub>2</sub> O (thousand tons) .....	0.8	1.1	1.3	1.5
N <sub>2</sub> O (thousand tons CO <sub>2</sub> eq)** .....	217.0	296.9	353.4	387.2

\* For TSL 2, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

\*\* CO<sub>2</sub>eq is the quantity of CO<sub>2</sub> that would have the same global warming potential (GWP).

TABLE V.43—CUMULATIVE EMISSIONS REDUCTION FOR COMBINATION COOLER REFRIGERATION PRODUCTS

	Trial standard level *			
	1	2	3	4
<b>Power Sector Emissions</b>				
CO <sub>2</sub> (million metric tons) .....	0.0483	0.4173	0.6941	0.9075
SO <sub>2</sub> (thousand tons) .....	0.0295	0.2501	0.4163	0.5440
NO <sub>x</sub> (thousand tons) .....	0.0528	0.4595	0.7640	0.9991
Hg (tons) .....	0.0001	0.0009	0.0015	0.0020
CH <sub>4</sub> (thousand tons) .....	0.0042	0.0359	0.0597	0.0781
N <sub>2</sub> O (thousand tons) .....	0.0006	0.0051	0.0085	0.0110
<b>Upstream Emissions</b>				
CO <sub>2</sub> (million metric tons) .....	0.0027	0.0235	0.0391	0.0512
SO <sub>2</sub> (thousand tons) .....	0.0005	0.0043	0.0072	0.0095
NO <sub>x</sub> (thousand tons) .....	0.0382	0.3377	0.5610	0.7341
Hg (tons) .....	0.000001	0.000009	0.000016	0.000021
CH <sub>4</sub> (thousand tons) .....	0.2107	1.8657	3.0996	4.0559
N <sub>2</sub> O (thousand tons) .....	0.00002	0.0002	0.0004	0.0005
<b>Total FFC Emissions</b>				
CO <sub>2</sub> (million metric tons) .....	0.051	0.441	0.733	0.959
SO <sub>2</sub> (thousand tons) .....	0.030	0.254	0.423	0.553
NO <sub>x</sub> (thousand tons) .....	0.091	0.797	1.325	1.733
Hg (tons) .....	0.0001	0.001	0.002	0.002
CH <sub>4</sub> (thousand tons) .....	0.215	1.902	3.159	4.134
CH <sub>4</sub> (thousand tons CO <sub>2</sub> eq)** .....	6.02	53.24	88.46	115.75
N <sub>2</sub> O (thousand tons) .....	0.001	0.005	0.009	0.012
N <sub>2</sub> O (thousand tons CO <sub>2</sub> eq)** .....	0.165	1.403	2.335	3.052

\* For TSL 1, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

\*\* CO<sub>2</sub>eq is the quantity of CO<sub>2</sub> that would have the same global warming potential (GWP).

As part of the analysis for this rule, DOE estimated monetary benefits likely to result from the reduced emissions of CO<sub>2</sub> and NO<sub>x</sub> that DOE estimated for each of the considered TSLs for MREFs. As discussed in section IV.L of this document, for CO<sub>2</sub>, DOE used the most recent values for the SCC developed by an interagency process. The four sets of SCC values for CO<sub>2</sub> emissions reductions in 2015 resulting from that process (expressed in 2015\$) are represented by \$12.4/metric ton (the average value from a distribution that

uses a 5-percent discount rate), \$40.6/metric ton (the average value from a distribution that uses a 3-percent discount rate), \$63.2/metric ton (the average value from a distribution that uses a 2.5-percent discount rate), and \$118/metric ton (the 95th-percentile value from a distribution that uses a 3-percent discount rate). The values for later years are higher due to increasing damages (public health, economic and environmental) as the projected magnitude of climate change increases.

Table V.44 and Table V.45 present the global value of CO<sub>2</sub> emissions reductions at each TSL. For each of the four cases, DOE calculated a present value of the stream of annual values using the same discount rate as was used in the studies upon which the dollar-per-ton values are based. DOE calculated domestic values as a range from 7 percent to 23 percent of the global values; these results are presented in chapter 14 of the direct final rule TSD.

TABLE V.44—ESTIMATES OF GLOBAL PRESENT VALUE OF CO<sub>2</sub> EMISSIONS REDUCTION FOR COOLERS

TSL **	SCC Case *			
	Million 2015\$			
	5% discount rate, average	3% discount rate, average	2.5% discount rate, average	3% discount rate, 95th percentile
<b>Power Sector Emissions</b>				
1 .....	453	2073	3292	6321
2 .....	644	2886	4561	8787
3 .....	737	3373	5358	10285
4 .....	805	3691	5865	11255
<b>Upstream Emissions</b>				
1 .....	25	115	183	351
2 .....	35	157	249	480
3 .....	41	187	298	572
4 .....	44	205	327	627
<b>Total FFC Emissions</b>				
1 .....	478	2189	3476	6673
2 .....	679	3044	4810	9266
3 .....	777	3561	5656	10856
4 .....	849	3897	6192	11882

\* For each of the four cases, the corresponding SCC value for emissions in 2015 is \$12.4, \$40.6, \$63.2, and \$118 per metric ton (2015\$). The values are for CO<sub>2</sub> only (i.e., not CO<sub>2</sub>eq of other greenhouse gases).

\*\* For TSL 2, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

TABLE V.45—ESTIMATES OF GLOBAL PRESENT VALUE OF CO<sub>2</sub> EMISSIONS REDUCTION FOR COMBINATION COOLER REFRIGERATION PRODUCTS

TSL **	SCC Case *			
	Million 2015\$			
	5% discount rate, average	3% discount rate, average	2.5% discount rate, average	3% discount rate, 95th percentile
<b>Power Sector Emissions</b>				
1 .....	0.36	1.60	2.54	4.89
2 .....	2.84	13.15	20.95	40.08
3 .....	4.75	21.96	34.97	66.95
4 .....	6.18	28.64	45.63	87.31
<b>Upstream Emissions</b>				
1 .....	0.02	0.09	0.14	0.27
2 .....	0.16	0.74	1.17	2.24
3 .....	0.26	1.23	1.96	3.74
4 .....	0.34	1.60	2.55	4.88
<b>Total FFC Emissions</b>				
1 .....	0.38	1.69	2.67	5.15
2 .....	2.99	13.88	22.13	42.32
3 .....	5.01	23.19	36.93	70.69
4 .....	6.53	30.24	48.18	92.19

\* For each of the four cases, the corresponding SCC value for emissions in 2015 is \$12.4, \$40.6, \$63.2, and \$118 per metric ton (2015\$). The values are for CO<sub>2</sub> only (i.e., not CO<sub>2</sub>eq of other greenhouse gases).

\*\* For TSL 1, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

DOE is well aware that scientific and economic knowledge about the contribution of CO<sub>2</sub> and other GHG emissions to changes in the future global climate and the potential

resulting damages to the world economy continues to evolve rapidly. Thus, any value placed on reduced CO<sub>2</sub> emissions in this rulemaking is subject to change. DOE, together with other Federal

agencies, will continue to review various methodologies for estimating the monetary value of reductions in CO<sub>2</sub> and other GHG emissions. This ongoing review will consider the comments on

this subject that are part of the public record for this and other rulemakings, as well as other methodological assumptions and issues. However, consistent with DOE's legal obligations, and taking into account the uncertainty involved with this particular issue, DOE has included in this rule the most recent

values and analyses resulting from the interagency review process.

DOE also estimated the cumulative monetary value of the economic benefits associated with NO<sub>x</sub> emissions reductions anticipated to result from the considered TSLs for MREFs. The dollar-per-ton value that DOE used is

discussed in section IV.L of this document. Table V.46 and Table V.47 present the cumulative present values for NO<sub>x</sub> emissions for each TSL, for coolers and combination cooler refrigeration products respectively, calculated using 7-percent and 3-percent discount rates.

TABLE V.46—ESTIMATES OF PRESENT VALUE OF NO<sub>x</sub> EMISSIONS REDUCTION FOR COOLERS

TSL *	Million 2015\$	
	3% discount rate	7% discount rate
<b>Power Sector Emissions</b>		
1 .....	133.86	54.53
2 .....	191.46	84.35
3 .....	217.63	88.51
4 .....	237.63	96.02
<b>Upstream Emissions</b>		
1 .....	95.75	38.02
2 .....	134.60	57.52
3 .....	155.70	61.73
4 .....	170.25	67.08
<b>Total FFC Emissions</b>		
1 .....	229.60	92.55
2 .....	326.06	141.86
3 .....	373.33	150.23
4 .....	407.87	163.10

\*For TSL 2, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

TABLE V.47—ESTIMATES OF PRESENT VALUE OF NO<sub>x</sub> EMISSIONS REDUCTION FOR COMBINATION COOLER REFRIGERATION PRODUCTS

TSL *	Million 2015\$	
	3% discount rate	7% discount rate
<b>Power Sector Emissions</b>		
1 .....	0.11	0.05
2 .....	0.84	0.33
3 .....	1.40	0.55
4 .....	1.82	0.72
<b>Upstream Emissions</b>		
1 .....	0.07	0.03
2 .....	0.60	0.23
3 .....	1.01	0.39
4 .....	1.31	0.50
<b>Total FFC Emissions</b>		
1 .....	0.18	0.08
2 .....	1.44	0.56
3 .....	2.40	0.94
4 .....	3.13	1.22

\*For TSL 1, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.



7. Other Factors

The Secretary of Energy, in determining whether a standard is economically justified, may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) In developing the direct final rule, DOE has considered the submission of the jointly-submitted Term Sheet #2 from the MREF Working Group and approved by ASRAC. In DOE's view, Term Sheet #2 sets forth a statement by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered equipment, States, and efficiency advocates) and contains recommendations with respect to energy conservation standards that are in accordance with 42 U.S.C.

6295(o), as required by EPCA's direct final rule provision. See 42 U.S.C. 6295(p)(4). DOE has encouraged the submission of agreements such as the one developed and submitted by the MREF Working Group as a way to bring diverse stakeholders together, to develop an independent and probative analysis useful in DOE standard setting, and to expedite the rulemaking process. DOE also believes that standard levels recommended in Term Sheet #2 may increase the likelihood for regulatory compliance, while decreasing the risk of litigation.

8. Summary of National Economic Impacts

The NPV of the monetized benefits associated with emissions reductions

can be viewed as a complement to the NPV of the consumer savings calculated for each TSL considered in this rulemaking. Table V.48 and Table V.49 present the NPV value that results from adding the estimates of the potential economic benefits resulting from reduced CO<sub>2</sub> and NO<sub>x</sub> emissions in each of four valuation scenarios to the NPV of consumer savings calculated for each TSL considered in this rulemaking for coolers and combination cooler refrigeration products, at both a 7-percent and 3-percent discount rate. The CO<sub>2</sub> values used in the columns of each table correspond to the four sets of SCC values discussed above.

TABLE V.48—NET PRESENT VALUE OF CONSUMER SAVINGS COMBINED WITH PRESENT VALUE OF MONETIZED BENEFITS FROM CO<sub>2</sub> AND NO<sub>x</sub> EMISSIONS REDUCTIONS FOR COOLERS

TSL *	Billion 2015\$			
	Consumer NPV at 3% discount rate added with:			
	SCC Case \$12.4/metric ton and 3% NO <sub>x</sub> Value	SCC Case \$40.6/metric ton and 3% NO <sub>x</sub> Value	SCC Case \$63.2/metric ton and 3% NO <sub>x</sub> Value	SCC Case \$118/metric ton and 3% NO <sub>x</sub> Value
1 .....	9.0	10.8	12.0	15.2
2 .....	12.0	14.4	16.2	20.6
3 .....	13.3	16.1	18.2	23.4
4 .....	8.1	11.1	13.4	19.1

TSL *	Billion 2015\$			
	Consumer NPV at 7% discount rate added with:			
	SCC Case \$12.4/metric ton and 7% NO <sub>x</sub> Value	SCC Case \$40.6/metric ton and 7% NO <sub>x</sub> Value	SCC Case \$63.2/metric ton and 7% NO <sub>x</sub> Value	SCC Case \$118/metric ton and 7% NO <sub>x</sub> Value
1 .....	4.0	5.7	7.0	10.2
2 .....	5.6	8.0	9.7	14.2
3 .....	5.7	8.5	10.6	15.8
4 .....	2.8	5.9	8.2	13.9

\*For TSL 2, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

TABLE V.49—NET PRESENT VALUE OF CONSUMER SAVINGS COMBINED WITH PRESENT VALUE OF MONETIZED BENEFITS FROM CO<sub>2</sub> AND NO<sub>x</sub> EMISSIONS REDUCTIONS FOR COMBINATION COOLER REFRIGERATION PRODUCTS

TSL *	Billion 2015\$			
	Consumer NPV at 3% discount rate added with:			
	SCC Case \$12.4/metric ton and 3% NO <sub>x</sub> Value	SCC Case \$40.6/metric ton and 3% NO <sub>x</sub> Value	SCC Case \$63.2/metric ton and 3% NO <sub>x</sub> Value	SCC Case \$118/metric ton and 3% NO <sub>x</sub> Value
1 .....	0.005	0.006	0.007	0.010
2 .....	0.039	0.050	0.058	0.078
3 .....	(0.050)	(0.032)	(0.018)	0.016
4 .....	(0.132)	(0.108)	(0.090)	(0.046)

TABLE V.49—NET PRESENT VALUE OF CONSUMER SAVINGS COMBINED WITH PRESENT VALUE OF MONETIZED BENEFITS FROM CO<sub>2</sub> AND NO<sub>x</sub> EMISSIONS REDUCTIONS FOR COMBINATION COOLER REFRIGERATION PRODUCTS—CONTINUED

TSL *	Billion 2015\$			
	Consumer NPV at 7% discount rate added with:			
	SCC Case \$12.4/metric ton and 7% NO <sub>x</sub> Value	SCC Case \$40.6/metric ton and 7% NO <sub>x</sub> Value	SCC Case \$63.2/metric ton and 7% NO <sub>x</sub> Value	SCC Case \$118/metric ton and 7% NO <sub>x</sub> Value
1 .....	0.002	0.003	0.004	0.007
2 .....	0.015	0.025	0.034	0.054
3 .....	(0.036)	(0.018)	(0.004)	0.029
4 .....	(0.083)	(0.059)	(0.041)	0.003

Parentheses indicate negative (–) values.

\* For TSL 1, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

In considering the above results, two issues are relevant. First, the national operating cost savings are domestic U.S. monetary savings that occur as a result of market transactions, while the value of CO<sub>2</sub> reductions is based on a global value. Second, the assessments of operating cost savings and the SCC are performed with different methods that use different time frames for analysis. The national operating cost savings is measured for the lifetime of products shipped in the applicable analysis period. Because CO<sub>2</sub> emissions have a very long residence time in the atmosphere,<sup>78</sup> the SCC values in future years reflect future climate-related impacts that continue beyond 2100.

9. Conclusion

When considering standards, the new or amended energy conservation standards that DOE adopts for any type (or class) of covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the seven statutory factors discussed previously. (42 U.S.C. 6295(o)(2)(B)(i)). The new or amended standard must also result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

For this direct final rule, DOE considered the impacts of new standards for MREFs at each TSL, beginning with the maximum

technologically feasible level, to determine whether that level was economically justified. Where the max-tech level was not justified, DOE then considered the next most efficient level and undertook the same evaluation until it reached the highest efficiency level that is both technologically feasible and economically justified and saves a significant amount of energy.

To aid the reader as DOE discusses the benefits and/or burdens of each TSL, tables in this section present a summary of the results of DOE’s quantitative analysis for each TSL. In addition to the quantitative results presented in the tables, DOE also considers other burdens and benefits that affect economic justification.

DOE also notes that the economics literature provides a wide-ranging discussion of how consumers trade off upfront costs and energy savings in the absence of government intervention. Much of this literature attempts to explain why consumers appear to undervalue energy efficiency improvements. There is evidence that consumers undervalue future energy savings as a result of: (1) A lack of information; (2) a lack of sufficient salience of the long-term or aggregate benefits; (3) a lack of sufficient savings to warrant delaying or altering purchases; (4) excessive focus on the short term, in the form of inconsistent weighting of future energy cost savings relative to available returns on other investments; (5) computational or other difficulties associated with the evaluation of relevant tradeoffs; and (6) a divergence in incentives (for example, between renters and owners, or builders and purchasers). Having less than perfect foresight and a high degree of uncertainty about the future, consumers may trade off these types of investments at a higher than expected rate between

current consumption and uncertain future energy cost savings.

In DOE’s current regulatory analysis, potential changes in the benefits and costs of a regulation due to changes in consumer purchase decisions are included in two ways. First, if consumers forego the purchase of a product in the standards case, this decreases sales for product manufacturers, and the impact on manufacturers attributed to lost revenue is included in the MIA. Second, DOE accounts for energy savings attributable only to products actually used by consumers in the standards case; if a regulatory option decreases the number of products purchased by consumers, this decreases the potential energy savings from an energy conservation standard. DOE provides estimates of shipments and changes in the volume of product purchases in chapter 9 of the direct final rule TSD. However, DOE’s current analysis does not explicitly control for heterogeneity in consumer preferences, preferences across subcategories of products or specific features, or consumer price sensitivity variation according to household income.<sup>79</sup>

While DOE is not prepared at present to provide a fuller quantifiable framework for estimating the benefits and costs of changes in consumer purchase decisions due to an energy conservation standard, DOE is committed to developing a framework that can support empirical quantitative tools for improved assessment of the consumer welfare impacts of appliance standards. DOE has posted a paper that discusses the issue of consumer welfare impacts of appliance energy conservation standards, and potential enhancements to the methodology by

<sup>78</sup> The atmospheric lifetime of CO<sub>2</sub> is estimated of the order of 30–95 years. Jacobson, MZ, “Correction to ‘Control of fossil-fuel particulate black carbon and organic matter, possibly the most effective method of slowing global warming.’” 110 *J. Geophys. Res.* D14105 (2005).

<sup>79</sup> P.C. Reiss and M.W. White, Household Electricity Demand, Revisited, *Review of Economic Studies* (2005) 72, 853–883.

which these impacts are defined and estimated in the regulatory process.<sup>80</sup> DOE welcomes comments on how to more fully assess the potential impact of energy conservation standards on consumer choice and how to quantify this impact in its regulatory analysis in future rulemakings.

a. Benefits and Burdens of TSLs Considered for Coolers

Table V.50 and Table V.51 summarize the quantitative impacts estimated for each TSL for coolers. The national impacts are measured over the lifetime of coolers purchased in the 30-year period that begins in the anticipated

year of compliance with new standards (2019–2048 for TSL 2, and 2021–2050 for the other TSLs). The energy savings, emissions reductions, and value of emissions reductions refer to full-fuel-cycle results. The efficiency levels contained in each TSL are described in section V.A of this document.

TABLE V.50—SUMMARY OF ANALYTICAL RESULTS FOR COOLERS: NATIONAL IMPACTS

Category	TSL 1*	TSL 2*	TSL 3*	TSL 4*
<b>Cumulative FFC National Energy Savings (quads)</b>				
Quads .....	1.13 .....	1.51 .....	1.84 .....	2.02.
<b>NPV of Consumer Costs and Benefits (2015\$ billion)</b>				
3% discount rate .....	8.34 .....	11.02 .....	12.19 .....	6.83.
7% discount rate .....	3.41 .....	4.78 .....	4.81 .....	1.81.
<b>Cumulative FFC Emissions Reduction (Total FFC Emissions)</b>				
CO <sub>2</sub> (million metric tons) .....	67.91 .....	91.76 .....	110.61 .....	121.30.
SO <sub>2</sub> (thousand tons) .....	39.38 .....	54.04 .....	64.13 .....	70.26.
NO <sub>x</sub> (thousand tons) .....	122.38 .....	163.86 .....	199.36 .....	218.79.
Hg (tons) .....	0.15 .....	0.20 .....	0.24 .....	0.26.
CH <sub>4</sub> (thousand tons) .....	291.14 .....	387.12 .....	474.33 .....	520.85.
CH <sub>4</sub> (thousand tons CO <sub>2</sub> eq)** .....	8151.79 .....	10839.31 .....	13281.37 .....	14583.83.
N <sub>2</sub> O (thousand tons) .....	0.82 .....	1.12 .....	1.33 .....	1.46.
N <sub>2</sub> O (thousand tons CO <sub>2</sub> eq)** .....	217.02 .....	296.92 .....	353.41 .....	387.24.
<b>Value of Emissions Reduction (Total FFC Emissions)</b>				
CO <sub>2</sub> (2015\$ billion) † .....	0.478 to 6.673 ....	0.679 to 9.266 ....	0.777 to 10.856 ..	0.849 to 11.882.
NO <sub>x</sub> —3% discount rate (2015\$ million) .....	229.6 to 523.5 ....	326.1 to 743.4 ....	373.3 to 851.2 ....	407.9 to 929.9.
NO <sub>x</sub> —7% discount rate (2015\$ million) .....	92.5 to 208.7 .....	141.9 to 319.9 ....	150.2 to 338.7 ....	163.1 to 367.8.

Parentheses indicate negative (–) values.

\* For TSL 2, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

\*\* CO<sub>2</sub>eq is the quantity of CO<sub>2</sub> that would have the same global warming potential (GWP).

† Range of the economic value of CO<sub>2</sub> reductions is based on estimates of the global benefit of reduced CO<sub>2</sub> emissions.

TABLE V.51—SUMMARY OF ANALYTICAL RESULTS FOR COOLERS: MANUFACTURER AND CONSUMER IMPACTS

Category	TSL 1*	TSL 2*	TSL 3*	TSL 4*
<b>Manufacturer Impacts</b>				
Industry NPV (2015\$ million) (No-new-standards case INPV = 263.3).	244.3 to 264.0 ....	208.5 to 253.3 ....	168.4 to 226.5 ....	110.5 to 283.8.
Industry NPV (% change) .....	–7.2 to 0.3 .....	–20.8 to –3.8 ...	–36.0 to –14.0	–58.0 to 7.8.
<b>Consumer Average LCC Savings (2015\$)</b>				
Freestanding Compact Coolers .....	279 .....	265 .....	288 .....	123.
Built-in Compact Coolers .....	n.a.** .....	28 .....	60 .....	(230).
Freestanding Coolers .....	648 .....	153 .....	240 .....	(121).
Built-in Coolers .....	n.a. ....	77 .....	187 .....	(254).
<b>Consumer Simple PBP (years)</b>				
Freestanding Compact Coolers .....	1.1 .....	1.4 .....	1.6 .....	3.5.
Built-in Compact Coolers .....	n.a. ....	4.6 .....	4.4 .....	14.8.
Freestanding Coolers .....	1.0 .....	1.8 .....	1.8 .....	4.8.
Built-in Coolers .....	n.a. ....	6.1 .....	4.7 .....	17.7.
<b>% of Consumers that Experience Net Cost</b>				
Freestanding Compact Coolers .....	6 .....	9 .....	12 .....	51.
Built-in Compact Coolers .....	0 .....	29 .....	27 .....	93.

<sup>80</sup> Alan Sanstad, *Notes on the Economics of Household Energy Consumption and Technology*

Choice. Lawrence Berkeley National Laboratory (2010) (Available online at: <http://>

[www1.eere.energy.gov/buildings/appliance\\_standards/pdfs/consumer\\_ee\\_theory.pdf](http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/consumer_ee_theory.pdf)).

TABLE V.51—SUMMARY OF ANALYTICAL RESULTS FOR COOLERS: MANUFACTURER AND CONSUMER IMPACTS—Continued

Category	TSL 1*	TSL 2*	TSL 3*	TSL 4*
Freestanding Coolers .....	0 .....	22 .....	9 .....	78.
Built-in Coolers .....	0 .....	22 .....	7 .....	86.

Parentheses indicate negative (–) values.

\*For TSL 2, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

\*\* Calculation of savings and PBP is not applicable (n.a.) for an efficiency level that is already met or exceeded in the MREF market.

DOE first considered TSL 4, which represents the max-tech efficiency levels. TSL 4 would save 2.02 quads of energy, an amount DOE considers significant. Under TSL 4, the NPV of consumer benefit would be \$1.81 billion using a discount rate of 7 percent, and \$6.83 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 4 are 121.3 Mt of CO<sub>2</sub>, 70.3 thousand tons of SO<sub>2</sub>, 218.8 thousand tons of NO<sub>x</sub>, 0.26 ton of Hg, 520.9 thousand tons of CH<sub>4</sub>, and 1.5 thousand tons of N<sub>2</sub>O. The estimated monetary value of the CO<sub>2</sub> emissions reduction at TSL 4 ranges from \$849 million to \$11,882 million.

At TSL 4, the average LCC savings range from –\$254 to \$123. The simple payback period ranges from 3.5 years to 17.7 years. The fraction of consumers experiencing a net LCC cost ranges from 51 percent to 93 percent.

At TSL 4, the projected change in INPV ranges from a decrease of \$152.8 million to an increase of \$20.5 million, which correspond to a decrease of 58.0 percent to an increase of 7.8 percent, respectively. Manufacturer feedback during confidential interviews indicated that all cooler segments are highly price sensitive, and therefore the lower bound of INPV impacts is more likely to occur. Additionally, at TSL 4, disproportionate impacts on the LVMs may be severe. This could have a direct impact on domestic manufacturing capacity and production employment in the cooler industry.

The Secretary concludes that at TSL 4 for coolers, the benefits of energy savings, positive NPV of consumer benefits, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the economic burden on some consumers, and the impacts on manufacturers, including the conversion costs and profit margin impacts that could result in a large reduction in INPV. Consequently, the Secretary has concluded that TSL 4 is not economically justified.

DOE then considered TSL 3, which would save an estimated 1.84 quads of energy, an amount DOE considers

significant. Under TSL 3, the NPV of consumer benefit would be \$4.81 billion using a discount rate of 7 percent, and \$12.19 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 3 are 110.6 Mt of CO<sub>2</sub>, 64.1 thousand tons of SO<sub>2</sub>, 199.4 thousand tons of NO<sub>x</sub>, 0.24 tons of Hg, 474.3 thousand tons of CH<sub>4</sub>, and 1.33 thousand tons of N<sub>2</sub>O. The estimated monetary value of the CO<sub>2</sub> emissions reduction at TSL 3 ranges from \$777 million to \$10,856 million.

At TSL 3, the average LCC savings range from \$60 to \$288. The simple payback period ranges from 1.6 years to 4.7 years. The fraction of consumers experiencing a net LCC cost ranges from 7 percent to 27 percent.

At TSL 3, the projected change in INPV ranges from a decrease of \$94.8 million to a decrease of \$36.8 million, which correspond to decreases of 36.0 percent and 14.0 percent, respectively. Manufacturer feedback from confidential interviews indicated that all cooler segments are highly price sensitive, and therefore the lower bound of INPV impacts is more likely to occur. Again, at TSL 3, disproportionate impacts on the LVMs may be severe. This could have a direct impact on domestic manufacturing capacity and production employment in the cooler industry.

The Secretary concludes that at TSL 3 for coolers, the benefits of energy savings, positive NPV of consumer benefits, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the impacts on manufacturers, including the conversion costs and profit margin impacts that could result in a large reduction in INPV. Consequently, the Secretary has concluded that TSL 3 is not economically justified.

DOE then considered TSL 2, which reflects the standard levels recommended by the MREF Working Group. TSL 2 would save an estimated 1.51 quads of energy, an amount DOE considers significant. Under TSL 2, the NPV of consumer benefit would be \$4.78 billion using a discount rate of 7

percent, and \$11.02 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 2 are 91.8 Mt of CO<sub>2</sub>, 54.0 thousand tons of SO<sub>2</sub>, 163.9 thousand tons of NO<sub>x</sub>, 0.20 tons of Hg, 387.1 thousand tons of CH<sub>4</sub>, and 1.12 thousand tons of N<sub>2</sub>O. The estimated monetary value of the CO<sub>2</sub> emissions reduction at TSL 2 ranges from \$679 million to \$9,266 million.

At TSL 2, the average LCC savings range from \$28 to \$265. The simple payback period ranges from 1.4 years to 6.1 years. The fraction of consumers experiencing a net LCC cost ranges from 9 percent to 29 percent.

At TSL 2, the projected change in INPV ranges from a decrease of \$54.8 million to a decrease of \$10.0 million, which represent decreases of 20.8 percent and 3.8 percent, respectively. Feedback from the LVMs indicated that TSL 2 would not impede their ability to maintain their current MREF product offerings.

After considering the analysis and weighing the benefits and burdens, DOE has determined that the recommended standards for coolers are in accordance with 42 U.S.C. 6295(o). Specifically, the Secretary has determined the benefits of energy savings, positive NPV of consumer benefits, emission reductions, the estimated monetary value of the emissions reductions, and positive average LCC savings would outweigh the negative impacts on some consumers and on manufacturers, including the conversion costs that could result in a reduction in INPV for manufacturers. Accordingly, the Secretary has concluded that TSL 2 would offer the maximum improvement in efficiency that is technologically feasible and economically justified, and would result in the significant conservation of energy.

Under the authority provided by 42 U.S.C. 6295(p)(4), DOE is issuing this direct final rule that establishes new energy conservation standards for coolers at TSL 2. The new energy conservation standards for coolers, which are expressed as maximum annual energy use, in kWh/yr, as a

function of AV, in ft<sup>3</sup>, are shown in Table V.52.

TABLE V.52—NEW ENERGY CONSERVATION STANDARDS FOR COOLERS

Product class	Maximum allowable AEU (kWh/yr)
Built-in Compact Built-in. Freestanding Compact. Freestanding.	7.88AV † + 155.8

† AV = Adjusted volume, in ft<sup>3</sup>, as calculated according to title 10 CFR part 430, subpart B, appendix A.

b. Benefits and Burdens of TSLs Considered for Combination Cooler Refrigeration Products

Table V.53 and Table V.54 summarize the quantitative impacts estimated for each TSL for combination cooler

refrigeration products. The national impacts are measured over the lifetime of products purchased in the 30-year period that begins in the anticipated year of compliance with new standards (2019–2048 for TSL 1, and 2021–2050

for the other TSLs). The energy savings, emissions reductions, and value of emissions reductions refer to FFC results. The efficiency levels contained in each TSL are described in section V.A of this document.

TABLE V.53—SUMMARY OF ANALYTICAL RESULTS FOR COMBINATION COOLER REFRIGERATION PRODUCT TSLs: NATIONAL IMPACTS

Category	TSL 1 *	TSL 2 *	TSL 3 *	TSL 4 *
<b>Cumulative FFC National Energy Savings (quads)</b>				
Quads	0.00084	0.007	0.012	0.016.
<b>NPV of Consumer Costs and Benefits (2015\$ billion)</b>				
3% discount rate	0.0045	0.035	(0.06)	(0.14).
7% discount rate	0.0017	0.011	(0.04)	(0.09).
<b>Cumulative FFC Emissions Reduction (Total FFC Emissions)</b>				
CO <sub>2</sub> (million metric tons)	0.05	0.44	0.73	0.96.
SO <sub>2</sub> (thousand tons)	0.03	0.25	0.42	0.55.
NO <sub>x</sub> (thousand tons)	0.09	0.80	1.32	1.73.
Hg (tons)	0.00	0.00	0.00	0.00.
CH <sub>4</sub> (thousand tons)	0.21	1.90	3.16	4.13.
CH <sub>4</sub> (thousand tons CO <sub>2</sub> eq) **	6.02	53.24	88.46	115.75.
N <sub>2</sub> O (thousand tons)	0.00	0.01	0.01	0.01.
N <sub>2</sub> O (thousand tons CO <sub>2</sub> eq) **	0.16	1.40	2.34	3.05.
<b>Value of Emissions Reduction (Total FFC Emissions)</b>				
CO <sub>2</sub> (2015\$ billion) †	0.000 to 0.005	0.003 to 0.042	0.005 to 0.071	0.007 to 0.092.
NO <sub>x</sub> —3% discount rate (2015\$ million)	0.2 to 0.4	1.4 to 3.3	2.4 to 5.5	3.1 to 7.1.
NO <sub>x</sub> —7% discount rate (2015\$ million)	0.1 to 0.2	0.6 to 1.3	0.9 to 2.1	1.2 to 2.7.

Parentheses indicate negative (–) values.

\* For TSL 1, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

\*\* CO<sub>2</sub>eq is the quantity of CO<sub>2</sub> that would have the same global warming potential (GWP).

† Range of the economic value of CO<sub>2</sub> reductions is based on estimates of the global benefit of reduced CO<sub>2</sub> emissions.

TABLE V.54—SUMMARY OF ANALYTICAL RESULTS FOR COMBINATION COOLER REFRIGERATION PRODUCT TSLs: MANUFACTURER AND CONSUMER IMPACTS

Category	TSL 1 *	TSL 2 *	TSL 3 *	TSL 4 *
<b>Manufacturer Impacts</b>				
Industry NPV (2015\$ million) (No-new-standards case INPV = 108.2).	107.4 to 107.6	103.7 to 107.5	101.6 to 117.7	100.1 to 128.5.
Industry NPV (% change)	–0.7 to –0.5	–4.1 to –0.6	–6.0 to 8.9	–7.5 to 18.8.
<b>Consumer Average LCC Savings (2015\$)</b>				
C–3A	n.a. **	58	53	(209).
C–3A–BI	n.a.	66	59	(237).

TABLE V.54—SUMMARY OF ANALYTICAL RESULTS FOR COMBINATION COOLER REFRIGERATION PRODUCT TSLs: MANUFACTURER AND CONSUMER IMPACTS—Continued

Category	TSL 1*	TSL 2*	TSL 3*	TSL 4*
C-9 .....	n.a. ....	89 .....	3 .....	(182).
C-9-BI .....	n.a. ....	102 .....	4 .....	(205).
C-13A .....	32 .....	17 .....	(123) .....	(194).
C-13A-BI .....	n.a. ....	8 .....	(151) .....	(232).
<b>Consumer Simple PBP (years)</b>				
C-3A .....	n.a. ....	4.1 .....	6.8 .....	25.3.
C-3A-BI .....	n.a. ....	4.1 .....	6.8 .....	25.4.
C-9 .....	n.a. ....	2.6 .....	12.1 .....	23.3.
C-9-BI .....	n.a. ....	2.6 .....	12.0 .....	23.2.
C-13A .....	4.3 .....	5.0 .....	13.3 .....	16.0.
C-13A-BI .....	n.a. ....	6.5 .....	21.6 .....	24.6.
<b>% of Consumers that Experience Net Cost</b>				
C-3A .....	0 .....	4 .....	26 .....	92.
C-3A-BI .....	0 .....	4 .....	26 .....	92.
C-9 .....	0 .....	0 .....	62 .....	90.
C-9-BI .....	0 .....	0 .....	63 .....	90.
C-13A .....	6 .....	44 .....	94 .....	96.
C-13A-BI .....	0 .....	49 .....	97 .....	98.

Parentheses indicate negative (–) values.

\* For TSL 1, the results are forecasted over the lifetime of products sold from 2019–2048. For the other TSLs, the results are forecasted over the lifetime of products sold from 2021–2050.

\*\* Calculation of savings and PBP is not applicable (n.a.) for an efficiency level that is already met or exceeded in the MREF market.

DOE first considered TSL 4, which represents the max-tech efficiency levels. TSL 4 would save 0.016 quads of energy, an amount DOE considers significant. Under TSL 4, the NPV of consumer benefit would be –\$0.09 billion using a discount rate of 7 percent, and –\$0.14 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 4 are 0.96 Mt of CO<sub>2</sub>, 0.55 thousand tons of SO<sub>2</sub>, 1.73 thousand tons of NO<sub>x</sub>, 0.0 ton of Hg, 4.13 thousand tons of CH<sub>4</sub>, and 0.01 thousand tons of N<sub>2</sub>O. The estimated monetary value of the CO<sub>2</sub> emissions reduction at TSL 4 ranges from \$7 million to \$92 million.

At TSL 4, the average LCC savings range from –\$237 to –\$182. The simple payback period ranges from 16.0 years to 25.4 years. The fraction of consumers experiencing a net LCC cost ranges from 90 percent to 98 percent.

At TSL 4, the projected change in INPV ranges from a decrease of \$8.1 million to an increase of \$20.3 million, which correspond to a decrease of 7.5 percent to an increase of 18.8 percent, respectively. Similar to coolers, manufacturer feedback from confidential interviews indicated that combination cooler refrigeration products are highly price sensitive, and therefore the lower bound of INPV impacts is more likely to occur. Additionally, in the context of new standards for coolers and other

cumulative regulatory burdens, at TSL 4, disproportionate impacts on domestic LVMS of combination cooler refrigeration products may be severe.

This could have a direct impact on the availability of certain niche combination cooler refrigeration products, as well as on competition, domestic manufacturing capacity, and production employment related to the combination cooler refrigeration product industry.

The Secretary concludes that at TSL 4 for combination cooler refrigeration products, the benefits of energy savings, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the negative NPV of consumer benefits, the economic burden on some consumers, and the disproportionate impacts on the LVMS, which could directly impact the availability of certain niche combination cooler products. Consequently, the Secretary has concluded that TSL 4 is not economically justified.

DOE then considered TSL 3, which would save an estimated 0.012 quads of energy, an amount DOE considers significant. Under TSL 3, the NPV of consumer benefit would be –\$0.04 billion using a discount rate of 7 percent, and –\$0.06 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 3 are 0.73 Mt of CO<sub>2</sub>, 0.42 thousand tons of SO<sub>2</sub>, 1.32 thousand tons of NO<sub>x</sub>, 0.00 tons of Hg, 3.16 thousand tons of CH<sub>4</sub>, and 0.01

thousand tons of N<sub>2</sub>O. The estimated monetary value of the CO<sub>2</sub> emissions reduction at TSL 3 ranges from \$5 million to \$71 million.

At TSL 3, the average LCC savings range from –\$151 to \$59. The simple payback period ranges from 6.8 years to 21.6 years. The fraction of consumers experiencing a net LCC cost ranges from 26 percent to 97 percent.

At TSL 3, the projected change in INPV ranges from a decrease of \$6.5 million to an increase of \$9.6 million, which represent a decrease of 6.0 percent and an increase of 8.9 percent, respectively. Again, manufacturers indicated that combination cooler refrigeration products are highly price sensitive, and therefore the lower bound of INPV impacts is more likely to occur. In the context of new standards for coolers and other cumulative regulatory burdens, at TSL 3, disproportionate impacts on domestic LVMS of combination cooler refrigeration products may be severe. This could have a direct impact on the availability of certain niche combination cooler refrigeration products, as well as on competition, domestic manufacturing capacity and production employment related to the combination cooler refrigeration product industry.

The Secretary concludes that at TSL 3 for combination cooler refrigeration products, the benefits of energy savings, emission reductions, and the estimated monetary value of the emissions

reductions would be outweighed by the negative NPV of consumer benefits and disproportionate impacts on the LVMs, which could directly impact the availability of certain niche combination cooler products. Consequently, the Secretary has concluded that TSL 3 is not economically justified.

DOE then considered TSL 2, which reflects the efficiency levels with maximum consumer NPV at seven percent discount rate. TSL 2 would save an estimated 0.007 quads of energy, an amount DOE considers significant. Under TSL 2, the NPV of consumer benefit would be \$0.011 billion using a discount rate of 7 percent, and \$0.035 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 2 are 0.44 Mt of CO<sub>2</sub>, 0.25 thousand tons of SO<sub>2</sub>, 0.8 thousand tons of NO<sub>x</sub>, 0.00 tons of Hg, 1.90 thousand tons of CH<sub>4</sub>, and 0.013 thousand tons of N<sub>2</sub>O. The estimated monetary value of the CO<sub>2</sub> emissions reduction at TSL 2 ranges from \$3 million to \$42 million.

At TSL 2, the average LCC savings range from \$8 to \$102. The simple payback period ranges from 2.6 years to 6.5 years. The fraction of consumers experiencing a net LCC cost ranges from zero percent to 49 percent.

At TSL 2, the projected change in INPV ranges from a decrease of \$4.4 million to a decrease of \$0.6 million, which represent decreases of 4.1 percent and 0.6 percent, respectively. Again, in the context of new standards for coolers and other cumulative regulatory burdens, at TSL 2, disproportionate impacts on domestic LVMs may be severe. This could have a direct impact on the availability of certain niche combination cooler refrigeration products, as well as on competition, domestic manufacturing capacity and production employment related to the

combination cooler refrigeration product industry.

The Secretary concludes that at TSL 2 for combination cooler refrigeration products, the benefits of energy savings, positive NPV of consumer benefits, emission reductions, and the estimated monetary value of the emissions reductions would again be outweighed by the disproportionate impacts on the domestic LVMs, which could directly impact the availability of certain niche combination cooler products. Consequently, the Secretary has concluded that TSL 2 is not economically justified.

DOE then considered TSL 1, which reflects the standard levels recommended by the MREF Working Group. TSL 1 would save an estimated 0.00084 quads of energy, an amount DOE considers significant. Under TSL 1, the NPV of consumer benefit would be \$0.0017 billion using a discount rate of 7 percent, and \$0.0045 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 1 are 0.05 Mt of CO<sub>2</sub>, 0.03 thousand tons of SO<sub>2</sub>, 0.09 thousand tons of NO<sub>x</sub>, 0.00 tons of Hg, 0.21 thousand tons of CH<sub>4</sub>, and 0.00 thousand tons of N<sub>2</sub>O. The estimated monetary value of the CO<sub>2</sub> emissions reduction at TSL 1 ranges from \$0 million to \$5 million.

At TSL 1, the combination cooler refrigeration products currently available on the market already meet or exceed the corresponding efficiency levels in all product classes except for C-13A. As a result, for five of the product classes, no consumers experience a net cost, and the LCC savings and simple payback period are not applicable. For product class C-13A, the average LCC savings is \$32, the simple payback period is 4.3 years, and the fraction of consumers experiencing a net LCC cost is 6 percent.

At TSL 1, the projected change in INPV ranges from a decrease of \$0.8 million to a decrease of \$0.5 million, which represent decreases of 0.7 percent and 0.5 percent, respectively. DOE estimated that all combination cooler refrigeration products manufactured domestically by LVMs currently meet the standard levels corresponding to TSL 1. Therefore, at TSL 1, DOE believes that domestic manufacturers will continue to offer the same combination cooler refrigeration products as those they currently offer.

After considering the analysis and weighing the benefits and burdens, DOE has determined that the recommended standards for combination cooler refrigeration products are in accordance with 42 U.S.C. 6295(o). Specifically, the Secretary has determined the benefits of energy savings, positive NPV of consumer benefits, emission reductions, the estimated monetary value of the emissions reductions, and positive average LCC savings would outweigh the negative impacts on some consumers and on manufacturers, including the conversion costs that could result in a reduction in INPV for manufacturers. Accordingly, the Secretary has concluded that TSL 1 would offer the maximum improvement in efficiency that is technologically feasible and economically justified, and would result in the significant conservation of energy.

Under the authority provided by 42 U.S.C. 6295(p)(4), DOE is issuing this direct final rule that establishes new energy conservation standards for combination cooler refrigeration products at TSL 1. The new energy conservation standards for combination cooler refrigeration products, which are expressed as maximum annual energy use, in kWh/yr, as a function of AV, in ft<sup>3</sup>, are shown in Table V.55.

TABLE V.55—NEW ENERGY CONSERVATION STANDARDS FOR COMBINATION COOLER REFRIGERATION PRODUCTS

Product class description	Product class designation	Maximum allowable AEU (kWh/yr)
Cooler with all-refrigerator—automatic defrost	C-3A	4.57AV † + 130.4
Built-in cooler with all-refrigerator—automatic defrost	C-3A-BI	5.19AV + 147.8
Cooler with upright freezers with automatic defrost without an automatic icemaker	C-9	5.58AV + 147.7
Built-in cooler with upright freezer with automatic defrost without an automatic icemaker	C-9-BI	6.38AV + 168.8
Cooler with upright freezer with automatic defrost with an automatic icemaker	C-9I	5.58AV + 231.7
Built-in cooler with upright freezer with automatic defrost with an automatic icemaker	C-9I-BI	6.38AV + 252.8
Compact cooler with all-refrigerator—automatic defrost	C-13A	5.93AV + 193.7
Built-in compact cooler with all-refrigerator—automatic defrost	C-13A-BI	6.52AV + 213.1

† AV = Adjusted volume, in ft<sup>3</sup>, as calculated according to title 10 CFR part 430, subpart B, appendix A.

c. Summary of Annualized Benefits and Costs of the Adopted Standards

The benefits and costs of the adopted standards can also be expressed in terms of annualized values. The annualized net benefit is the sum of: (1) The annualized national economic value (expressed in 2015\$) of the benefits from operating products that meet the adopted standards (consisting primarily of operating cost savings from using less energy, minus increases in product purchase costs, and (2) the annualized monetary value of the benefits of CO<sub>2</sub> and NO<sub>x</sub> emission reductions.<sup>81</sup>

Table V.56 shows the annualized values for MREFs under TSL 2 for coolers and TSL 1 for combination cooler refrigeration products, expressed in 2015\$. The results under the primary estimate are as follows. Using a 7-percent discount rate for benefits and costs other than CO<sub>2</sub> reduction, (for which DOE used a 3-percent discount rate along with the SCC series that has a value of \$40.6/t in 2015),<sup>82</sup> the estimated cost of the standards in this rule is \$153 million per year in increased equipment costs, while the estimated annual benefits are \$593 million in reduced equipment operating

costs, \$165 million in CO<sub>2</sub> reductions, and \$13.1 million in reduced NO<sub>x</sub> emissions. In this case, the net benefit amounts to \$619 million per year.

Using a 3-percent discount rate for all benefits and costs and the SCC series has a value of \$40.6/t in 2015, the estimated cost of the standards is \$157 million per year in increased equipment costs, while the estimated annual benefits are \$754 million in reduced operating costs, \$165 million in CO<sub>2</sub> reductions, and \$17.1 million in reduced NO<sub>x</sub> emissions. In this case, the net benefit amounts to \$779 million per year.

TABLE V.56—ANNUALIZED BENEFITS AND COSTS OF NEW STANDARDS FOR MREFS \*

	Discount rate (%)	Million 2015\$/year		
		Primary estimate	Low net benefits estimate	High net benefits estimate
<b>Benefits</b>				
Consumer Operating Cost Savings .....	7 .....	593 .....	545 .....	649.
	3 .....	754 .....	686 .....	839.
CO <sub>2</sub> Reduction (using mean SCC at 5% discount rate) ** ...	5 .....	49 .....	46 .....	53.
CO <sub>2</sub> Reduction (using mean SCC at 3% discount rate) ** ...	3 .....	165 .....	155 .....	179.
CO <sub>2</sub> Reduction (using mean SCC at 2.5% discount rate) **	2.5 .....	242 .....	227 .....	263.
CO <sub>2</sub> Reduction (using 95th percentile SCC at 3% discount rate) **.	3 .....	502 .....	471 .....	546.
NO <sub>x</sub> Reduction Value † .....	7 .....	13.1 .....	12.4 .....	31.6.
	3 .....	17.7 .....	16.6 .....	43.6.
Total Benefits †† .....	7% plus CO <sub>2</sub> range ...	655 to 1,108 .....	603 to 1,028 .....	733 to 1,226.
	7 .....	771 .....	712 .....	860.
	3% plus CO <sub>2</sub> range ...	820 to 1,273 .....	748 to 1,173 .....	935 to 1,428.
	3 .....	937 .....	857 .....	1,062.
<b>Costs</b>				
Consumer Incremental Product Costs ††† .....	7 .....	153 .....	145 .....	118.
	3 .....	157 .....	148 .....	116.
<b>Net Benefits</b>				
Total †† .....	7% plus CO <sub>2</sub> range ...	503 to 956 .....	459 to 884 .....	615 to 1,108.
	7 .....	619 .....	568 .....	742.
	3% plus CO <sub>2</sub> range ...	663 to 1,116 .....	601 to 1,026 .....	819 to 1,312.
	3 .....	779 .....	709 .....	946.

\* This table presents the annualized costs and benefits associated with MREFs shipped in 2019–2048. These results include benefits to consumers which accrue after 2048 from the MREFs purchased from 2019–2048. The incremental installed costs include incremental equipment cost as well as installation costs. The CO<sub>2</sub> reduction benefits are global benefits due to actions that occur nationally. The Primary, Low Benefits, and High Benefits Estimates utilize projections of energy prices and housing starts from the AEO 2015 Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental product costs reflect a constant price trend in the Primary Estimate and the Low Benefits Estimate, and a high decline rate in the High Benefits Estimate. The methods used to derive projected price trends are explained in section IV.F of this document. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

\*\* The CO<sub>2</sub> reduction benefits are calculated using 4 different sets of SCC values. The first three use the average SCC calculated using 5%, 3%, and 2.5% discount rates, respectively. The fourth represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. The SCC values are emission year specific. See section IV.L.1 of this document for more details.

<sup>81</sup> To convert the time-series of costs and benefits into annualized values, DOE calculated a present value in 2016, the year used for discounting the NPV of total consumer costs and savings. For the benefits, DOE calculated a present value associated with each year's shipments in the year in which the shipments occur (2020, 2030, etc.), and then

discounted the present value from each year to 2016. The calculation uses discount rates of 3 and 7 percent for all costs and benefits except for the value of CO<sub>2</sub> reductions, for which DOE used case-specific discount rates. Using the present value, DOE then calculated the fixed annual payment over

a 30-year period, starting in the compliance year that yields the same present value.

<sup>82</sup> DOE used a 3-percent discount rate because the SCC values for the series used in the calculation were derived using a 3-percent discount rate (see section IV.L of this document).



† DOE estimated the monetized value of NO<sub>x</sub> emissions reductions associated with electricity savings using benefit per ton estimates from the “Regulatory Impact Analysis for the Clean Power Plan Final Rule,” published in August 2015 by EPA’s Office of Air Quality Planning and Standards. (Available at [www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis](http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis).) See section IV.L of this document for further discussion. For the Primary Estimate and Low Net Benefits Estimate, DOE used a national benefit-per-ton estimate for NO<sub>x</sub> emitted from the Electric Generating Unit sector based on an estimate of premature mortality derived from the ACS study (Krewski *et al.* 2009). For DOE’s High Net Benefits Estimate, the benefit-per-ton estimates were based on the Six Cities study (Lepuele *et al.* 2011), which are nearly two-and-a-half times larger than those from the ACS study.

†† Total Benefits for both the 3% and 7% cases are presented using only the average SCC with 3-percent discount rate. In the rows labeled “7% plus CO<sub>2</sub> range” and “3% plus CO<sub>2</sub> range,” the operating cost and NO<sub>x</sub> benefits are calculated using the labeled discount rate, and those values are added to the full range of CO<sub>2</sub> values.

††† The value of consumer incremental product costs is lower in the low net benefits estimate than it is in the primary estimate because both estimates use the same price trend and there are fewer shipments in the low net benefits estimate. The value of consumer incremental product costs is lower in the high net benefits scenario than it is in the primary case because the high net benefits scenario uses a highly declining price trend that more than offsets the increase in shipments due to higher economic growth.

## VI. Procedural Issues and Regulatory Review

### A. Review Under Executive Orders 12866 and 13563

Section 1(b)(1) of Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51735 (Oct. 4, 1993), requires each agency to identify the problem that it intends to address, including, where applicable, the failures of private markets or public institutions that warrant new agency action, as well as to assess the significance of that problem. The problems that the adopted standards for MREFs are intended to address are as follows:

(1) Insufficient information and the high costs of gathering and analyzing relevant information leads some consumers to miss opportunities to make cost-effective investments in energy efficiency.

(2) In some cases the benefits of more efficient equipment are not realized due to misaligned incentives between purchasers and users. An example of such a case is when the equipment purchase decision is made by a building contractor or building owner who does not pay the energy costs, which is likely to result in the least costly equipment being purchased rather than more efficient alternatives that would benefit the users of that equipment.

(3) There are external benefits resulting from improved energy efficiency of MREFs that are not captured by the users of such equipment. These benefits include externalities related to public health, environmental protection and national energy security that are not reflected in energy prices, such as reduced emissions of air pollutants and greenhouse gases that impact human health and global warming. DOE attempts to qualify some of the external benefits through use of social cost of carbon values.

The Administrator of the Office of Information and Regulatory Affairs (“OIRA”) in the OMB has determined that the proposed regulatory action is a significant regulatory action under section (3)(f) of Executive Order 12866.

Accordingly, pursuant to section 6(a)(3)(B) of the Order, DOE has provided to OIRA: (i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and (ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate. DOE has included these documents in the rulemaking record.

In addition, the Administrator of OIRA has determined that the proposed regulatory action is an “economically” significant regulatory action under section (3)(f)(1) of Executive Order 12866. Accordingly, pursuant to section 6(a)(3)(C) of the Order, DOE has provided to OIRA an assessment, including the underlying analysis, of benefits and costs anticipated from the regulatory action, together with, to the extent feasible, a quantification of those costs; and an assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, and an explanation of why the planned regulatory action is preferable to the identified potential alternatives. These assessments can be found in the technical support document for this rulemaking.

DOE has also reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011. 76 FR 3281 (January 21, 2011). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into

account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, OIRA has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, DOE believes that this direct final rule is consistent with these principles, including the requirement that, to the extent permitted by law, benefits justify costs and that net benefits are maximized.

### B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (“IRFA”) for any rule that by law must be proposed for public comment and a final regulatory flexibility analysis (“FRFA”) for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities

and considers alternative ways of reducing negative effects. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site (<http://energy.gov/gc/office-general-counsel>). DOE reviewed this direct final rule and corresponding NOPR (published elsewhere in this **Federal Register**) pursuant to the Regulatory Flexibility Act and the procedures and policies discussed above. DOE has concluded that this rule would not have a significant impact on a substantial number of small entities. The factual basis for this certification is set forth below. DOE will consider any comments on the certification or economic impacts of the rule in determining whether to adopt the standards contained in this direct final rule.

For manufacturers of MREFs, the SBA has set a size threshold, which defines those entities classified as "small businesses" for the purposes of the statute. Manufacturers of MREFs have primary NAICS codes of 335222, "Household Refrigerator and Home Freezer Manufacturing" and 333415, "Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing." The SBA sets a threshold of 1,250 employees or less for an entity to be considered as a small business for both NAICS 335222 and NAICS 333415.

DOE conducted a market survey using available public information to identify potential small manufacturers. DOE first attempted to identify all potential MREF manufacturers by researching the CEC<sup>83</sup> and NRCAN<sup>84</sup> product databases, individual company Web sites, market research tools (e.g., Hoovers reports<sup>85</sup>), and information from the 2011 energy conservation standards rulemaking for residential refrigerators, refrigerator-freezers, and freezers. DOE also asked

stakeholders and industry representatives during manufacturer interviews and at DOE public meetings if they were aware of any other small manufacturers. DOE reviewed publicly-available data and contacted select companies, as necessary, to determine whether they met the SBA's definition of a small business manufacturer of covered MREFs. DOE screened out companies that do not offer products covered by this rulemaking, do not meet the definition of a "small business," or are foreign-owned.

The MREF industry in the United States is primarily an import industry. DOE estimated that less than 8 percent of coolers sold in the United States are produced domestically. The percentage of domestic production of the niche combination cooler refrigeration products is much larger (approximately 40 percent), although total shipments for the combination cooler refrigeration products segment equal only approximately 2 percent of cooler shipments in the United States. DOE estimates that there are approximately 48 entities involved in the sale and/or manufacture of MREFs sold in the U.S. market. Based on manufacturer interview feedback and publicly-available information, DOE determined that 46 of these entities either exceed the size thresholds defined by SBA or are completely foreign-owned and operated. DOE determined that the remaining two companies meet the SBA's definition of a "small business."

One of the two small, domestic businesses selling MREFs in the United States, accounting for an estimated 1 percent of MREF shipments, does not manufacture any of the MREFs covered by this rulemaking but instead outsources the manufacture of them to foreign OEMs. Because this business does not manufacture MREFs, DOE believes that this company would incur no fixed capital costs related to new energy conservation standards for MREFs. However, this entity may incur costs related to testing, certification, and marketing in order to comply with the standards adopted in this direct final rule. As discussed in section VII.B of the July 2016 Final Coverage Determination, DOE assumes that existing cooler models that are being sold in the United States have already been tested according to test methods similar to those established in the July 2016 Final Coverage Determination and would require only an adjustment of the calculated energy use. Using the costs of adjusting calculated energy use outlined in section VII.B of the July 2016 Final Coverage Determination, as well as an estimate of \$50,000 for updates to

product literature and marketing materials as a result of new MREF standards, DOE conservatively estimates that the small importer may incur approximately \$63,000 in product conversion costs in order to maintain its current MREF product offering. 81 FR at 46786–46787. DOE assumes these upfront costs will be spread over a 3-year period leading up to the compliance year. Accordingly, on an annual basis, the estimated upfront product conversion costs equate to less than 0.1 percent of this entity's annual revenues.

The second small, domestic business identified by DOE manufactures compact coolers. Based on DOE's research, this manufacturer accounts for less than 1 percent of MREF market share in the United States. The models produced and sold by this manufacturer correspond with an estimated four unique platforms with associated efficiencies at or just below (less efficient than) the standard efficiency levels for coolers adopted in this direct final rule. DOE expects that this manufacturer will likely be able to comply with the standards adopted in this direct final rule by making component changes within its existing products (i.e., a more efficient compressor, improved glass, or targeted integration of VIPs). DOE, therefore, determined that this manufacturer would likely not incur fixed capital costs. DOE estimated that this small manufacturer may incur approximately \$900,000 in upfront product conversion costs (related to research and development, testing, certification and marketing) in order to maintain its current product offering. DOE assumes these upfront costs will be spread over a 3-year period leading up to the compliance year. Accordingly, on an annual basis, the estimated upfront product conversion costs equate to roughly 8 percent of this manufacturer's annual revenues from its U.S. sales of MREFs. Overall annual sales figures for this manufacturer are not publicly-available. However, this manufacturer's product line also includes commercial bar and beverage equipment.

As discussed above, although the small manufacturer and small importer will incur some costs related to compliance with new MREF standards, the costs to these entities represent a small portion of their annual revenues. For this reason, DOE certifies that the standards for MREFs set forth in this direct final rule would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this

<sup>83</sup> CEC. *California Energy Commission Appliance Database*. Last Accessed December 14, 2015. <https://cacertappliances.energy.ca.gov/Pages/ApplianceSearch.aspx>.

<sup>84</sup> NRCAN. *Natural Resources Canada EnerGuide*. Last Accessed August 6, 2015. <http://oee.nrcan.gc.ca/pml-lmp/index.cfm?action=app.search-recherche&appliance=REFRIGERATORS>.

<sup>85</sup> Hoovers. [www.hoovers.com/](http://www.hoovers.com/).

rulemaking. DOE will transmit this certification to the SBA as required by 5 U.S.C. 605(b).

#### *C. Review Under the Paperwork Reduction Act*

DOE has determined that MREFs are a covered product under EPCA. 81 FR 46768 (July 18, 2016). Because MREFs are a covered product, manufacturers would need to certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for MREFs, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including MREFs. See generally 10 CFR part 429. The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (“PRA”). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

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

#### *D. Review Under the National Environmental Policy Act of 1969*

Pursuant to the National Environmental Policy Act (“NEPA”) of 1969, DOE has determined that the rule fits within the category of actions included in Categorical Exclusion (“CX”) B5.1 and otherwise meets the requirements for application of a CX. See 10 CFR part 1021, app. B, B5.1(b); 1021.410(b) and app. B, B(1)–(5). The rule fits within this category of actions because it is a rulemaking that establishes energy conservation standards for consumer products or industrial equipment, and for which none of the exceptions identified in CX B5.1(b) apply. Therefore, DOE has made a CX determination for this rulemaking, and DOE does not need to prepare an Environmental Assessment or Environmental Impact Statement for

this direct final rule. DOE’s CX determination for this direct final rule is available at <http://energy.gov/nepa/categorical-exclusion-cx-determinations-cx>.

#### *E. Review Under Executive Order 13132*

Executive Order 13132, “Federalism.” 64 FR 43255 (Aug. 10, 1999) imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this direct final rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this direct final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) Therefore, no further action is required by Executive Order 13132.

#### *F. Review Under Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. 61 FR 4729 (February 7, 1996). Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the

preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this direct final rule meets the relevant standards of Executive Order 12988.

#### *G. Review Under the Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (“UMRA”) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a “significant intergovernmental mandate,” and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE’s policy statement is also available at [http://energy.gov/sites/prod/files/gcprod/documents/umra\\_97.pdf](http://energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf).

DOE reviewed this rule and determined that it does not contain a Federal intergovernmental mandate, nor is it expected to require expenditures of \$100 million or more in any one year by the private sector. As a result, no further assessment or analysis is required under UMRA.

#### H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This direct final rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

#### I. Review Under Executive Order 12630

Pursuant to Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights" 53 FR 8859 (March 18, 1988), DOE has determined that this direct final rule will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

#### J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this direct final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

#### K. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on

energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that this regulatory action, which sets forth new energy conservation standards for MREFs, is not a significant energy action because the standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on this direct final rule.

#### L. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy, issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (January 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are "influential scientific information," which the Bulletin defines as "scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions." *Id* at FR 2667.

In response to OMB's Bulletin, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared a Peer Review Report pertaining to the energy conservation standards rulemaking analyses. Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The "Energy Conservation Standards Rulemaking Peer Review Report" dated February 2007 has been disseminated and is available at the following Web site: [www1.eere.energy.gov/buildings/appliance\\_standards/peer\\_review.html](http://www1.eere.energy.gov/buildings/appliance_standards/peer_review.html).

#### M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the direct final rule is a "major rule" as defined by 5 U.S.C. 804(2).

#### VII. Public Participation

DOE will accept comments, data, and information regarding this rule until the date provided in the **DATES** section at the beginning of this rule. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this rule.

DOE welcomes comments on any aspect of the analysis as described in this direct final rule. DOE is also interested in receiving comments and views of interested parties concerning the following issues:

1. Whether the standards outlined in this rulemaking would result in any lessening of utility for MREFs, including whether certain features would be eliminated from these products. See sections III.H.1.d and IV.2 of this rule.

2. The incremental manufacturer production costs DOE estimated at each efficiency level. See section IV.C of this rule.

3. DOE's method to estimate MREF shipments under the no-new-standards case and under potential energy conservation standards levels. See section IV.G of this rule.

4. The assumption that installation, maintenance, and repair costs do not vary for MREFs at higher efficiency levels. See section IV.F of this rule.

5. The manufacturer conversion costs (both product and capital) used in DOE's analysis. See section V.B.2.d this rule.

6. The cumulative regulatory burden to MREF manufacturers associated with the standards in this direct final rule and on the approach DOE used in evaluating cumulative regulatory burden, including the timeframes and regulatory dates evaluated. See section V.B.2.e of this rule.

*Submitting comments via [www.regulations.gov](http://www.regulations.gov).* The [www.regulations.gov](http://www.regulations.gov) Web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical

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

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

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

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

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

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery/courier, please provide all items on a

CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (faxes) will be accepted.

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

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

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

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person that would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

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

**VIII. Approval of the Office of the Secretary**

The Secretary of Energy has approved publication of this direct final rule.

**List of Subjects in 10 CFR Part 430**

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Reporting and recordkeeping requirements, Small businesses.

Issued in Washington, DC, on October 4, 2016.

**David J. Friedman,**

*Acting Assistant Secretary, Energy Efficiency and Renewable Energy.*

For the reasons set forth in the preamble, DOE amends part 430 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

**PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS**

■ 1. The authority citation for part 430 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Amend § 430.32 by adding paragraph (aa) to read as follows:

**§ 430.32 Energy and water conservation standards and their compliance dates.**

\* \* \* \* \*

(aa) *Miscellaneous refrigeration products.* The energy standards as determined by the equations of the following table(s) shall be rounded off to the nearest kWh per year. If the equation calculation is halfway between the nearest two kWh per year values, the standard shall be rounded up to the higher of these values.

(1) Coolers manufactured starting on October 28, 2019 shall have Annual Energy Use (AEU) no more than:

Product class	AEU (kWh/yr)
1. Built-in compact .....	7.88AV + 155.8
2. Built-in	
3. Freestanding compact	
4. Freestanding	

AV = Total adjusted volume, expressed in ft<sup>3</sup>, as calculated according to appendix A of subpart B of this part.

(2) Combination cooler refrigeration products manufactured starting on October 28, 2019 shall have Annual Energy Use (AEU) no more than:

Product class	AEU (kWh/yr)
C-3A. Cooler with all-refrigerator—automatic defrost .....	4.57AV + 130.4
C-3A-BI. Built-in cooler with all-refrigerator—automatic defrost .....	5.19AV + 147.8
C-9. Cooler with upright freezers with automatic defrost without an automatic icemaker .....	5.58AV + 147.7
C-9-BI. Built-in cooler with upright freezer with automatic defrost without an automatic icemaker .....	6.38AV + 168.8
C-9I. Cooler with upright freezer with automatic defrost with an automatic icemaker .....	5.58AV + 231.7
C-9I-BI. Built-in cooler with upright freezer with automatic defrost with an automatic icemaker .....	6.38AV + 252.8
C-13A. Compact cooler with all-refrigerator—automatic defrost .....	5.93AV + 193.7
C-13A-BI. Built-in compact cooler with all-refrigerator—automatic defrost .....	6.52AV + 213.1

AV = Total adjusted volume, expressed in ft<sup>3</sup>, as calculated according to appendix A of subpart B of this part.

[FR Doc. 2016-24759 Filed 10-27-16; 8:45 am]

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# FEDERAL REGISTER

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Part III

## Department of Commerce

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National Oceanic and Atmospheric Administration

50 CFR Part 660

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; 2017–2018 Biennial Specifications and Management Measures; Amendment 27; Proposed Rule

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 660**

[Docket No. 160808696–6696–01]

RIN 0648–BG17

**Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; 2017–2018 Biennial Specifications and Management Measures; Amendment 27**

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** This proposed rule would establish the 2017–2018 harvest specifications and management measures for groundfish taken in the U.S. exclusive economic zone off the coasts of Washington, Oregon, and California, consistent with the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the Pacific Coast Groundfish Fishery Management Plan (PCGFMP). This proposed rule would also revise the management measures that are intended to keep the total catch of each groundfish species or species complex within the harvest specifications. This action also includes regulations to implement Amendment 27 to the PCGFMP, which adds deacon rockfish to the PCGFMP, reclassifies big skate as an actively managed stock, add a new inseason management process for commercial and recreational in California, and makes several clarifications.

**DATES:** Comments must be received no later than November 28, 2016.

**ADDRESSES:** Submit your comments, identified by NOAA–NMFS–2016–0094, by either of the following methods:

- *Federal e-Rulemaking Portal:* Go to [www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-094](http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-094), click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to William Stelle, Regional Administrator, West Coast Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115–0070.

*Instructions:* NMFS may not consider comments if they are sent by any other method, to any other address or individual, or received after the

comment period ends. All comments received are a part of the public record and NMFS will post for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender is publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

**FOR FURTHER INFORMATION CONTACT:** Gretchen Hanshew, phone: 206–526–6147, fax: 206–526–6736, or email: [Gretchen.hanshew@noaa.gov](mailto:Gretchen.hanshew@noaa.gov).

**SUPPLEMENTARY INFORMATION:****Electronic Access**

This proposed rule is accessible via the Internet at the Office of the Federal Register Web site at

[http://www.access.gpo.gov/su\\_docs/aces/aces140.html](http://www.access.gpo.gov/su_docs/aces/aces140.html). Background information and documents are available at the NMFS West Coast Region Web site at <http://www.westcoast.fisheries.noaa.gov/fisheries/groundfish/index.html> and at the Pacific Fishery Management Council’s Web site at <http://www.pcouncil.org>.

**Executive Summary***Purpose of the Regulatory Action*

This proposed rule would implement the 2017–2018 harvest specifications and management measures for groundfish species taken in the U.S. exclusive economic zone off the coasts of Washington, Oregon, and California, implement harvest specifications consistent with default harvest control rules, and implement Amendment 27 to the PCGFMP. The purpose of the proposed action is to conserve and manage Pacific Coast groundfish fishery resources to prevent overfishing, to rebuild overfished stocks, to ensure conservation, to facilitate long-term protection of essential fish habitats (EFH), and to realize the full potential of the Nation’s fishery resources. This action proposes harvest specifications for 2017–2018 consistent with existing or revised default harvest control rules for all stocks, and establishes management measures designed to keep catch within the appropriate limits. The harvest specifications are set consistent with the optimum yield (OY) harvest management framework described in Chapter 4 of the PCGFMP. The proposed rule would also implement Amendment 27 to the PCGFMP. Amendment 27 adds deacon rockfish to the PCGFMP, reclassifies big skate as “in the fishery,”

adds a new inseason management process for California fisheries, and makes several clarifications. This rule is authorized by 16 U.S.C. 1854 and 1855 and by the PCGFMP.

*Major Provisions*

This proposed rule contains two types of major provisions. The first are the harvest specifications (overfishing limits (OFLs), acceptable biological catches (ABCs), and annual catch limits (ACLs)), and the second are management measures designed to keep fishing mortality within the ACLs. The harvest specifications (OFLs, ABCs, and ACLs) in this rule have been developed through a rigorous scientific review and decision making process, which is described later in this proposed rule.

In summary, the OFL is the maximum sustainable yield (MSY) harvest level and is an estimate of the catch level above which overfishing is occurring. OFLs are based on recommendations by the Pacific Fishery Management Council’s (Council) Scientific and Statistical Committee (SSC) as the best scientific information available. The ABC is an annual catch specification that is the stock or stock complex’s OFL reduced by an amount associated with scientific uncertainty. The SSC-recommended method for incorporating scientific uncertainty is referred to as the P star-sigma approach and is discussed in detail in the proposed and final rules for the 2011–2012 (75 FR 67810, November 3, 2010; 76 FR 27508, May 11, 2011) and 2013–2014 (77 FR 67974, November 12, 2012; 78 FR 580, January 3, 2013) biennial harvest specifications and management measures. The ACL is a harvest specification set equal to or below the ABC. The ACLs are decided in a manner to achieve OY from the fishery, which is the amount of fish that will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems. The ACLs are based on consideration of conservation objectives, socio-economic concerns, management uncertainty, and other factors. All known sources of fishing and scientific research catch are counted against the ACL.

This proposed rule includes ACLs for the five overfished species managed under the PCGFMP. For the 2017–2018 biennium darkblotched rockfish and Pacific ocean perch (POP) have rebuilding plan changes to their Harvest Control Rules, while maintaining the current target year for rebuilding ( $T_{TARGET}$ ).  $T_{TARGET}$  is the year by which the stock can be rebuilt as soon as



possible, taking into account the status and biology of the stock, the needs of fishing communities, and the interaction of the stock of fish within the marine ecosystem. For darkblotched rockfish, a new assessment indicates the stock will be rebuilt during 2015, with a stock status above MSY in 2016 and beyond. Therefore, this rule proposes to establish harvest specifications for darkblotched rockfish in 2017–2018 based on the default harvest control rules for healthy stocks. Under this harvest control rule, the stock is anticipated to rebuild 10 years earlier than the  $T_{TARGET}$  of 2025. For POP, new information is available regarding the needs of fishing communities that rely on revenue from fisheries on healthy stocks that take POP incidentally. Changes to the harvest control rule are necessary to meet the needs of communities. Accordingly, the rebuilding plan would be revised, setting a constant catch ACL for 2017–2018, followed in 2019 and beyond by harvest specifications derived from the SPR harvest rate in the current rebuilding plan (86.4 percent). Under this harvest control rule, the stock is anticipated to rebuild by the  $T_{TARGET}$  in the current rebuilding plan of 2051. The remaining overfished species are making adequate progress towards rebuilding. Therefore, this rule proposes to establish harvest specifications consistent with the existing rebuilding plan provisions for those species.

This rulemaking also proposes to implement Amendment 27 to the PCGFMP. Amendment 27 consists of five components that would: (1) Reclassify big skate from an ecosystem component species to “in the fishery,” (2) add deacon rockfish to the list of species in the PCGFMP, (3) establish a new inseason management process in California for black, canary, and yelloweye rockfishes, (4) make updates to clarify several stock assessment descriptions, and (5) update several sections of the PCGFMP because canary rockfish and petrale sole are rebuilt. The Notice of Availability for Amendment 27 to the PCGFMP published on September 30, 2016 (81 FR 67287) and is available for public comment (see **ADDRESSES**). The public comment period on the Notice of Availability closes on November 29, 2016.

In order to keep mortality of the species managed under the PCGFMP within the ACLs the Council also recommended management measures. Generally speaking, management measures are intended to rebuild overfished species, prevent ACLs from being exceeded, and allow for the harvest of healthy stocks. Management

measures include time and area restrictions, gear restrictions, trip or bag limits, size limits, and other management tools. Management measures may vary by fishing sector because different fishing sectors require different types of management to control catch. Most of the management measures the Council recommended for 2017–2018 were slight variations to existing management measures, and do not represent a change from current management practices. These types of changes include changes to trip limits, bag limits, closed areas, etc. Additionally, several new management measures were recommended by the Council including: Changes to flatfish retention in the Oregon recreational fishery, creation of a new inseason process for changes to recreational and commercial fisheries in California outside of a Council meeting, changes to petrale sole and starry flounder season in the California recreational fishery, and management measures resulting from reclassifying big skate as “in the fishery.”

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## I. Background

The Pacific Coast Groundfish fishery is managed under the PCGFMP. The PCGFMP was prepared by the Council, approved on July 30, 1984, and has been amended numerous times. Regulations at 50 CFR part 660, subparts C through

G, implement the provisions of the PCGFMP.

The PCGFMP requires the harvest specifications and management measures for groundfish to be set at least biennially. This proposed rule is based on the Council’s final recommendations that were made at its June 2016 meeting as well as harvest specifications for some stocks adopted at the Council’s November 2015 and April 2016 meetings.

### A. Specification and Management Measure Development Process

The process for setting the 2017–2018 harvest specifications began in 2014 with the preparation of stock assessments. A stock assessment is the scientific and statistical process where the status of a fish population or subpopulation (stock) is assessed in terms of population size, reproductive status, fishing mortality, and sustainability. In the terms of the PCGFMP, stock assessments generally provide: (1) An estimate of the current biomass (reproductive potential); (2) an  $F_{MSY}$  or proxy (a default harvest rate for the fishing mortality rate that is expected to achieve the maximum sustainable yield), translated into exploitation rate; (3) an estimate of the biomass that produces the maximum sustainable yield ( $B_{MSY}$ ); and, (4) a precision estimate (e.g., confidence interval) for current biomass. Stock assessments, including data moderate assessments, are reviewed by the Council’s stock assessment review panel (STAR panel). The STAR panel is designed to review the technical merits of stock assessments and is responsible for determining if a stock assessment document is sufficiently complete. Finally, the SSC reviews the stock assessment and STAR panel reports and makes recommendations to the Council. In addition to full stock assessments, stock assessment updates that run new data through existing models without changing the model are also prepared.

When spawning stock biomass falls below the minimum stock size threshold (MSST), a stock is declared overfished and a rebuilding plan must be developed that determines the strategy for rebuilding the stock to  $B_{MSY}$  in the shortest time possible, while considering needs of fishing communities and other factors (16 U.S.C. 1854(e)). The current MSST reference point for assessed flatfish stocks is 12.5 percent of initial biomass or  $B_{12.5\%}$ . For all other assessed groundfish stocks, the current MSST reference point is 25 percent of initial biomass or  $B_{25\%}$ . The following overfished groundfish stocks would be

managed under rebuilding plans in 2017–2018: Bocaccio south of 40°10' N. lat.; cowcod south of 40°10' N. lat.; darkblotched rockfish; POP; and yelloweye rockfish.

For overfished stocks, in addition to any stock assessments or stock assessment updates, rebuilding analyses may also be prepared. The rebuilding analysis is used to project the future status of the overfished resource under a variety of alternative harvest strategies and to determine the probability of recovering to  $B_{MSY}$  or its proxy within a specified time-frame.

The Council considered new stock assessments, stock assessment updates, rebuilding analysis for POP, public comment, and advice from its advisory bodies over the course of six Council meetings during development of its recommendations for the 2017–2018 harvest specifications and management measures. At each Council meeting between June 2015 and June 2016, the Council made a series of decisions and recommendations that were, in some cases, refined after further analysis and discussion. Detailed information, including the supporting documentation the Council considered at each meeting is available at the Council's Web site, [www.pcouncil.org](http://www.pcouncil.org).

The 2017–2018 biennial management cycle was the first cycle following PCGFMP Amendment 24, which established default harvest control rules and included an Environmental Impact Statement (EIS). The EIS described the ongoing implementation of the PCGFMP and default harvest control rules, along with ten year projections for harvest specifications and a range of management measures. Therefore, a draft Environmental Assessment (EA) identifying the preferred alternative new management measures and other decision points that were not described in the 2015 EIS is posted on the NMFS WCR along with this proposed rule. At the Council's June 2016, meeting, following public comment and Council consideration, the Council made its final recommendations for the 2017–2018 harvest specifications and management measures as well as for Amendment 27 to the PCGFMP.

#### *B. Amendment 24—Default Harvest Specifications & Management Measures Clarifications*

This biennial cycle is the first since the implementation of Amendment 24, which established default harvest control rules for most stocks and evaluated ten year projections for harvest specifications and routinely adjusted management measures (80 FR 12567, March 10, 2015). This resulted in

a streamlined decision making process for the 2017–2018 biennial cycle. The use of default harvest control rules and their addition to the PCGFMP was intended to simplify the Council's harvest specifications process and acknowledge that the Council generally maintains the policy choices from the previous biennium to determine the harvest specifications for the next biennium. Under Amendment 24, the harvest control rules used to determine the previous biennium's harvest specifications (*i.e.*, OFLs, ABCs, and ACLs) would automatically be applied to the best scientific information available to determine the future biennium's harvest specifications. NMFS would implement harvest specifications based on the default harvest control rules unless the Council makes a different recommendation. Therefore, this rule implements the default harvest specifications, consistent with Amendment 24, for most stocks and discusses departures from the defaults.

In addition to the use of defaults to simplify the harvest specifications process, Amendment 24 made changes to the description of the type of management measures that may be addressed through the biennial process. Under Amendment 24, management measures that may be implemented during the biennial process include: (1) Measures that will be classified as routine for future biennial cycles; (2) adjustments to current management measures that are already classified as routine; and (3) new management measures not previously analyzed. This was intended to simplify the management measures proposed through each biennial cycle.

Information regarding the OFLs, ABCs, and ACLs proposed for groundfish stocks and stock complexes in 2017–2018 is presented below, followed by a discussion of the proposed management measures for commercial and recreational groundfish fisheries.

#### **II. Amendment 27 to the PCGFMP**

Amendment 27 consists of 5 components: (1) Reclassify big skate from an ecosystem component species to "in the fishery," (2) add deacon rockfish to the list of species in the PCGFMP, (3) establish a new inseason management process in California for black, canary, and yelloweye rockfish, (4) make updates to clarify several stock assessment descriptions, and (5) update several sections to reflect the rebuilt status of canary rockfish and petrale sole.

#### *A. Reclassify Big Skate as "in the Fishery"*

Amendment 24 to PCGFMP classified several species, including big skate, as ecosystem component species. The information available during development of Amendment 24 indicated that big skate was not targeted and had only small amounts of landings. However, a majority of the unspecified skate landed in the Shorebased IFQ Program is now known to be big skate. According to National Standard Guideline 1, a stock may be classified as an ecosystem component species if it is not determined to be (1) a target species or target stock; (2) subject to overfishing, approaching overfished, or overfished; (3) likely to become subject to overfishing or overfished, according to the best available information, in the absence of conservation and management measures; and (4) generally retained for sale or personal use. Such large landings indicate big skate are being targeted and therefore generally retained for sale, and can no longer be considered an ecosystem species. Therefore, Amendment 27 reclassifies big skate as "in the fishery," and this rule proposes species specific harvest specifications.

#### *B. New California Inseason Process*

The objective of any inseason management system is to be responsive to the needs of fishing participants while keeping catch within the established harvest specifications. The scope and magnitude of options available to address management issues is highly dependent on the amount of time between when an issue is identified and when corrective action(s) can be implemented. The summer months tend to be the busiest times for both the commercial and recreational fisheries in California, and mortality tends to accumulate more quickly during these times. The Council meets in June and September of each year. If an action is not warranted based on information available at the June meeting, there is a lag of up to four months before additional inseason actions can be implemented. Because fisheries are ongoing during this time, overages identified at the September meeting tend to be of a higher magnitude requiring more severe corrective actions (*e.g.*, closing a fishery). Therefore, a new inseason process was developed for only black rockfish, canary rockfish, and yelloweye rockfish, and only in California. This system would allow NMFS to take inseason action outside of a Council meeting when a Federal harvest

specification for one of these species is projected to be attained or had been attained prior to the start of the next scheduled Council meeting. Allowing NMFS to take inseason action outside of a Council meeting can reduce the severity of management actions and thus reduce negative economic impacts to the fleets and to the coastal communities which depend on the revenues generated from these fisheries. Similar inseason management processes were not explored for Washington or Oregon, because they have rapid inseason management processes sufficient for their inseason management needs.

### C. Updates to the PCGFMP

Minor edits in Amendment 27 clarify the applicability of several stock assessment procedures and categories that were inadvertently omitted when Amendment 23 modified the PCGFMP consistent with the revised National Standard Guidelines in 2011.

### D. Updates Based on New Science for Deacon Rockfish, Canary Rockfish, and Petrale Sole

Deacon rockfish (*Sebastes diaconus*) was recently described and adopted as a new *Sebastes* species by the American Fisheries Society based on evidence of the presence of two genetically distinct cryptic species in central California: Deacon rockfish and blue rockfish. Deacon rockfish is therefore acknowledged as a PCGFMP species that is “in the fishery,” based on the PCGFMP provision stating, “The category “rockfish” includes all genera and species of the family Scorpaenidae, even if not listed, that occur in the Washington, Oregon, and California area. The Scorpaenidae genera are *Sebastes*, *Scorpaena*, *Sebastolobus*, and *Scorpaenodes*.”

Finally, canary rockfish and petrale sole were declared rebuilt on August 4, 2015; therefore, all references to them as overfished stocks must be updated. The Notice of Availability for the PCGFMP Amendment 27 was published on September 30, 2016 (81 FR 67287).

## III. Harvest Specifications

The PCGFMP requires the Council to set harvest specifications and management measures for groundfish at least biennially. This proposed rule would set 2017–2018 harvest specifications and management measures for all of the 90 plus groundfish species or species groups managed under the PCGFMP, except for Pacific whiting. Pacific whiting harvest specifications are established annually

through a separate bilateral process with Canada.

### A. Proposed OFLs for 2017 and 2018

#### Introduction

This section describes the proposed OFLs for overfished species managed under rebuilding plans, non-overfished species managed with individual species-specific harvest specifications, and species managed within stock complexes.

The OFLs for groundfish species with stock assessments are derived by applying the  $F_{MSY}$  harvest rate proxy to the current estimated biomass.  $F_{X\%}$  harvest rates are the rates of fishing mortality that will reduce the female spawning biomass per recruit (SPR) to X percent of its unfished level. A rate of  $F_{40\%}$  is a more aggressive harvest rate than  $F_{45\%}$  or  $F_{50\%}$ .

For 2017–2018, the Council maintained a policy of using a default harvest rate as a proxy for the fishing mortality rate that is expected to achieve the maximum sustainable yield ( $F_{MSY}$ ). A proxy is used because there is insufficient information for most Pacific Coast groundfish stocks to estimate species-specific  $F_{MSY}$  values. Taxon-specific proxy fishing mortality rates are used due to perceived differences in the productivity among different taxa of groundfish. A lower value is used for stocks with relatively high resilience to fishing while higher values are used for less resilient stocks with low productivity. In 2017–2018, the following default harvest rate proxies, based on the SSC's recommendations, were used:  $F_{30\%}$  for flatfish,  $F_{40\%}$  for Pacific whiting,  $F_{50\%}$  for rockfish (including longspine and shortspine thornyheads),  $F_{50\%}$  for elasmobranchs, and  $F_{45\%}$  for other groundfish such as sablefish and lingcod.

For the 2017–2018 biennial specification process, seven full stock assessments and three stock assessment updates were prepared. Full stock assessments, those that consider the appropriateness of the assessment model and that revise the model as necessary, were prepared for the following stocks: Black rockfish, bocaccio south of 40°10' N. lat., canary rockfish, China rockfish, darkblotched rockfish, kelp greenling between 46°16' N. lat. and 42° N. lat., and widow rockfish. A stock assessment update, which runs new data through an existing model, was prepared for chilipepper rockfish south of 42° N. lat., petrale sole, and sablefish. Updated projections from existing models, where actual catches for recent years replaced assumed catches for those same years in

the model, were also prepared for arrowtooth flounder, blue rockfish south of 42° N. lat., greenspotted rockfish, Dover sole, lingcod, POP, and yelloweye rockfish.

Each new stock assessment includes a base model and two alternative models. The alternative models are developed from the base model by bracketing the dominant dimension of uncertainty (e.g., stock-recruitment steepness, natural mortality rate, survey catchability, recent year-class strength, weights on conflicting catch per unit effort series, etc.) and are intended to be a means of expressing uncertainty within the model by showing the contrast in management implications. Once a base model has been bracketed on either side by alternative model scenarios, capturing the overall degree of uncertainty in the assessment, a two-way decision table analysis (states-of-nature versus management action) is used to present the repercussions of uncertainty to decision makers. As noted above, the SSC makes recommendations to the Council on the appropriateness of using the different stock assessments for management purposes, after which the Council considers adoption of the stock assessments, use of the stock assessments for the development of rebuilding analyses, and the OFLs resulting from the base model runs of the stock assessments.

For individually managed species that did not have new stock assessments or update assessments prepared, the Council recommended OFLs derived from applying the  $F_{MSY}$  harvest rate proxy to the estimated exploitable biomass from the most recent stock assessment or update, the results of rudimentary stock assessments, or the historical landings data approved by the Council for use in setting harvest specifications. These stocks include: Arrowtooth flounder, big skate, blackgill rockfish, cabezon (off California), cabezon (off Oregon), California scorpionfish, cowcod, Dover sole, lingcod north and south of 42° N. lat., longnose skate, Pacific cod, shortbelly rockfish, shortspine thornyhead, spiny dogfish, splitnose rockfish, and yellowtail rockfish. Proposed OFLs for these species can be found in Tables 1a and 2a to subpart C.

There are currently eight stock complexes used to manage groundfish stocks pursuant to the PCGFMP. These stock complexes are: (1) Minor Nearshore Rockfish north; (2) Minor Nearshore Rockfish south; (3) Minor Shelf Rockfish north; (4) Minor Shelf Rockfish south (5) Minor Slope Rockfish north; (6) Minor Slope Rockfish south;

(7) Other Flatfish; and (8) Other Fish. Stock complexes are used to manage the harvest of many of the unassessed groundfish stocks.

The proposed OFLs for stock complexes are the sum of the OFL contributions for the component stocks, when known. For the 2017–2018 biennial specification process—similar to 2011–2012, 2013–2014, and 2015–2016—Depletion-Corrected Average Catch (DCAC), Depletion-Based Stock Reduction Analysis (DB–SRA), or other SSC-endorsed methodologies were used to determine the OFL contributions made by category three species (data

limited species). In general, OFL contribution estimates should not vary from year to year for the category three stocks; the OFL contributions for unassessed component stocks that remain in the eight stock complexes are the same in 2017–2018 as in 2015–2016 and 2013–2014.

The proposed OFLs for each complex can also be found in tables 1a and 2a of this proposed rule. In addition to OFL contributions derived by DCAC, DB–SRA, or other SSC approved estimates, OFL contributions for the following stocks were determined by applying the  $F_{MSY}$  harvest rate proxy to the estimated

exploitable biomass from the most recent stock assessment for chilipepper rockfish.

A summary table below describes the scientific basis for the proposed OFLs for stocks with new or updated stock assessments, Minor Slope Rockfish complex south of 40°10' N. lat., and big skate. In addition, a detailed description of the scientific basis for all of the SSC-recommended OFLs proposed in this rule are included in the Stock Assessment and Fishery Evaluation (SAFE) document for 2016.

TABLE 1—SCIENTIFIC BASIS FOR PROPOSED OFLs FOR STOCKS WITH NEW OR UPDATED STOCK ASSESSMENTS, MINOR SLOPE ROCKFISH COMPLEX SOUTH OF 40°10' N. LAT. AND BIG SKATE

Stock	2017 OFL	2018 OFL	Basis	
BOCACCIO S. of 40°10' N. lat.	2,139	2,013	New/Updated Assessment ..	Projected using a 50% SPR from the 2015 full stock assessment with a 7.4% reduction to subtract the portion of the assessed stock north of 40° 10' N. lat.
DARKBLOTCHED ROCK-FISH.	671	683	New/Updated Assessment ..	Projected using a 50% SPR from the 2015 full assessment.
Big skate .....	541	541	Reclassification from EC species.	Trawl survey biomass * M calculated in 2014 for 2015 and beyond.
Black rockfish (CA) .....	349	347	New/Updated Assessment ..	Projected using a 50% SPR from the 2015 full assessment.
Black rockfish (OR) .....	577	570	New/Updated Assessment ..	Projected using a 50% SPR from the 2015 full assessment.
Black rockfish (WA) .....	319	315	New/Updated Assessment ..	Projected using a 50% SPR from the 2015 full assessment.
Canary rockfish .....	1,793	1,596	New/Updated Assessment ..	Projected using a 50% SPR from the 2015 full assessment.
Chilipepper S. of 40°10' N. lat.	2,727	2,623	New/Updated Assessment ..	Projected using a 50% SPR from the 2015 full assessment. The portion of the coastwide stock south of 40° 10' N. lat. (93%) is based on average historical landings.
Petrale Sole .....	3,280	3,152	New/Updated Assessment ..	Projected using a 30% SPR from the 2015 full assessment.
Sablefish (coastwide) .....	8,050	8,329	New/Updated Assessment ..	Projected using a 45% SPR from the 2015 full assessment.
Widow rockfish .....	14,130	13,237	New/Updated Assessment ..	Projected using a 50% SPR from the 2015 full assessment.
Minor Shelf Rockfish complex north.	2,303	2,302	No change .....	Sum of OFL contributions of component stocks in the complex.
Chilipepper N. of 40°10' N. lat.	205	197	New/Updated Assessment ..	Projected using a 50% SPR from the 2015 full assessment. The portio of the coastwide stock north of 40° 10' N. lat. (7%) is based on average historical landings.
Minor Slope Rockfish complex south.	827	829	No change .....	Sum of OFL contributions of component stocks in the complex.
Blackgill S. of 40°10' N. lat <sup>a</sup>	143	146	No change .....	Projected using 50% SPR from the 2011 full assessment. Contributes to the complex OFL in 2017 and 2018.
Other Fish .....	537	501	No change .....	Sum of OFL contributions of component stocks in the complex.
Kelp greenling (OR) <sup>a</sup> .....	239	203	New/Updated Assessment ..	Projected using a 45% SPR from the 2015 full assessment.

<sup>a</sup> Values for this stock contribute to the OFL of the complex and are not specified in regulation.

Pacific Ocean Perch (*Sebastes alutus*)

POP was last assessed in 2011. For this cycle, the 2011 rebuilding analysis was updated with actual catches for 2011–2014. The POP OFLs of 964 mt for 2017 and 984 mt for 2018 are based on the  $F_{MSY}$  harvest rate proxy of  $F_{50\%}$  as applied to the estimated exploitable

biomass from the 2011 stock assessment. The OFLs for POP were endorsed by the SSC after the June 2016 Council meeting, during a public webinar on August 2, 2016.

Big Skate (*Raja binoculata*)

Big skate was one of several species that NMFS and the Council designated as ecosystem component species beginning in 2015, as described in the proposed and final rules for the 2015–2016 biennial harvest specifications and management measures (80 FR 687,

January 6, 2015, and 80 FR 12567, March 10, 2015). As described above in “Amendment 27 to the PCGFMP,” big skate is proposed to be classified as “in the fishery,” added to the list of species in the PCGFMP, and managed with species-specific harvest specifications. Big skate is proposed to have species-specific OFLs in 2017–2018 of 541 mt each year, based on an estimate of abundance from the recurring bottom trawl survey.

Blackgill Rockfish (*Sebastes melanostomus*) and Minor Slope Rockfish Complex (S. of 40°10' N. Lat.)

The Minor Slope Rockfish south complex is comprised of: Aurora rockfish (*Sebastes aurora*), bank rockfish (*S. rufus*), blackgill rockfish (*S. melanostomus*), blackspotted rockfish (*S. melanostictus*), Pacific ocean perch (*S. alutus*), redbanded rockfish (*S. babcocki*), roughey rockfish (*S. aleutianus*), sharpchin rockfish (*S. zacentrus*), shortraker rockfish (*S. borealis*), sunset rockfish (*S. crocotulus*) and yellowmouth rockfish (*S. reedi*). No changes are proposed to the species composition of the complexes, and there are no proposed changes to the calculation of the complex OFL.

Blackgill rockfish south was assessed in 2011. Blackgill rockfish contributes 143 mt in 2017 and 146 mt for 2018 to the Minor Slope Rockfish south OFL. The 2017 and 2018 OFL contributions are based on the  $F_{MSY}$  harvest rate proxy of  $F_{50\%}$  as applied to the estimated exploitable biomass from the 2011 stock assessment.

**B. Proposed ABCs for 2017 and 2018**

Introduction The ABC is the stock or stock complex’s OFL reduced by an amount associated with scientific uncertainty. The SSC-recommended P star-Sigma approach determines the amount by which the OFL is reduced to establish the ABC. Under this approach, the SSC recommends a sigma ( $\sigma$ ) value. The  $\sigma$  value is generally based on the scientific uncertainty in the biomass estimates generated from stock assessments. After the SSC determines the appropriate  $\sigma$  value, the Council chooses a P star ( $P^*$ ) based on its chosen level of risk aversion considering the scientific uncertainties. As the  $P^*$  value is reduced, the probability of the ABC

being greater than the “true” OFL becomes lower. In combination, the  $P^*$  and  $\sigma$  values determine the amount by which the OFL will be reduced to establish the SSC-endorsed ABC.

Since 2011, the SSC has quantified major sources of scientific uncertainty in the estimate of OFL and generally recommended a  $\sigma$  value of 0.36 for category one stocks, a  $\sigma$  value of 0.72 for category two stocks, and a  $\sigma$  value of 1.44 for category three stocks. For category two and three stocks, there is typically greater scientific uncertainty in the estimate of OFL because the stock assessments have less data to inform them. Therefore, the scientific uncertainty buffer is generally greater than that recommended for stocks with quantitative stock assessments. Assuming the same  $P^*$  is applied, a larger  $\sigma$  value results in a larger reduction from the OFL. For 2017–2018, the Council continued the general policy of using the SSC-recommended  $\sigma$  values for each species category. However, an exception to the general  $\sigma$  values assigned to each category was made by the SSC for kelp greenling (off Oregon) and aurora rockfish as described below.

Two stocks in 2017–2018 have unique sigma values calculated because the proxy sigma values are not deemed the best available by the SSC. Kelp greenling was assessed in 2015. A unique sigma of 0.44 was calculated for kelp greenling (off Oregon) because the variance in estimated spawning biomass was greater than the 0.36 sigma used as a proxy for other category 1 stocks. For the same reason, a unique sigma value for aurora rockfish of 0.39 has been used to calculate the ABC since 2015 and will continue to be used in 2017–2018.

The PCGFMP specifies that the upper limit of  $P^*$  will be 0.45. A  $P^*$  of 0.5 equates to no additional reduction for scientific uncertainty beyond the sigma value reduction. A lower  $P^*$  is more risk averse than a higher value, meaning that the probability of the ABC being greater than the “true” OFL is lower. For 2017–2018, the Council largely maintained the  $P^*$  policies it established for the 2011–2012, 2013–2014, and 2015–2016 bienniums. The Council recommended using  $P^*$  values of 0.45 for all individually managed category one species, except sablefish, as was done in

2015–2016. Combining the category one  $\sigma$  value of 0.36 with the  $P^*$  value of 0.45 results in a reduction of 4.4 percent from the OFL when deriving the ABC. For category two and three stocks, the Council’s general policy was to use a  $P^*$  of 0.4, with a few exceptions. The Council recommended a  $P^*$  of 0.45 for all of the stocks managed in the Minor Rockfish complexes and the Other Fish complex, as was done in 2015–2016. When combined with the  $\sigma$  values of 0.72 and 1.44 for category two and three stocks, a  $P^*$  value of 0.40 corresponds to 16.7 percent and 30.6 percent reductions, respectively. The Council recommended using  $P^*$  values of 0.40 for all individually managed category two and three species, except those described below. The Council recommended a  $P^*$  of 0.45 for big skate, California scorpionfish south of 40°10' N. lat., cowcod, English sole, and yellowtail rockfish south of 40°10' N. lat., as was done in 2015–2016 because there was no new scientific information indicating a change in  $P^*$  value was warranted. The Council also maintained the  $P^*$  of 0.45 for the Minor Rockfish complexes and the Other Fish complex, that been used since 2011. For 2017–2018 the Council recommended a  $P^*$  of 0.45 for big skate and black rockfish off Oregon. The  $P^*$  recommendations for 2017–2018 that deviated from the Council’s general policies are described here and are shown in the table below.

Additional information about the  $\sigma$  values used for different species categories as well as the  $P^*$ -  $\sigma$  approach can be found in the proposed and final rules from the 2011–2012 biennium (75 FR 67810, November 3, 2010; 76 FR 27508, May 11, 2011) and the 2013–2014 biennium (77 FR 67974, November 14, 2012; 78 FR 580, January 3, 2013). Those rules also include a discussion of the  $P^*$  values used in combination with the  $\sigma$  values. Tables 1a and 2a of this proposed rule present the harvest specifications for each stock and stock complex, including the proposed ABCs, while the footnotes to these tables describe how the proposed specifications were derived. Below is a summary table showing stocks for which the  $P^*$ -  $\sigma$  approach deviated from the policies that the SSC and Council generally apply, as explained above.

TABLE 2—DESCRIPTION OF THE  $P^*$ -  $\sigma$  POLICIES AND ABCs FOR 2017–2018

Stock	Category	Sigma	$P^*$	2017 ABC	2018 ABC
COWCOD S. of 40°10' N. lat.	2&3 .....	Based on stock assessment category <sup>a</sup> .	$P^*$ of 0.45 was maintained .....	63	64

TABLE 2—DESCRIPTION OF THE P\*- σ POLICIES AND ABCS FOR 2017–2018—Continued

Stock	Category	Sigma	P*	2017 ABC	2018 ABC
Big skate .....	2 .....	Based on stock assessment category <sup>a</sup> .	P* of 0.45 was maintained, as it had when it was managed in the Other Fish complex.	494	494
Black Rockfish (OR) ....	2 .....	Based on stock assessment category <sup>a</sup> .	The 2016 P* of 0.45 was maintained. The stock assessment moved from a category 1 to a category 2.	527	520
California scorpionfish S. of 40°10' N.	2 .....	Based on stock assessment category <sup>a</sup> .	The 2016 P* of 0.45 was maintained; the stock assessment category was downgraded because of the age of the assessment.	264	254
English Sole .....	2 .....	Based on stock assessment category <sup>a</sup> .	P* of 0.45 was chosen because the stock is healthy and underutilized.	9,964	7,537
Sablefish (coastwide) ..	1 .....	Based on stock assessment category <sup>a</sup> .	More precautionary P* of 0.40 was chosen because the stock is in the precautionary zone, highly utilized, and of large economic importance.	7,350	7,604
Yellowtail rockfish N. of 40°10' N. lat.	2 .....	Based on stock assessment category <sup>a</sup> .	P* of 0.45 was chosen because the stock is healthy and underutilized.	6,196	6,002
Minor Nearshore Rockfish North.	Mix .....	Based on stock assessment category <sup>a</sup> .	P* of 0.45 was maintained	105	105
Minor Shelf Rockfish North.	Mix .....	Based on stock assessment category <sup>a</sup> .		2,049	2,048
Minor Slope Rockfish North.	Mix .....	Based on stock assessment category <sup>a</sup> except for aurora rockfish.		1,755	1,754
<i>Aurora rockfish</i> <sup>b</sup> ...	1 .....	Unique sigma = 0.39 .....		17	17
Minor Nearshore Rockfish South.	Mix .....	Based on stock assessment category <sup>a</sup> .		1,166	1,180
Minor Shelf Rockfish South.	Mix .....	Based on stock assessment category <sup>a</sup> .	P* of 0.45 was maintained .....	1,624	1,625
Minor Slope Rockfish South.	Mix .....	Based on stock assessment category <sup>a</sup> except for aurora rockfish.		718	719
<i>Aurora rockfish</i> <sup>b</sup> ...	1 .....	Unique sigma = 0.39 .....		71	71
Other Fish .....	Mix .....	Based on stock assessment category <sup>a</sup> except for kelp greenling off Oregon.	P* of 0.45 was maintained .....	474	441
<i>Kelp greenling (OR)</i> <sup>b</sup> .	1 .....	Unique sigma = 0.44 .....	0.45 .....	226	192

<sup>a</sup> Unless otherwise specified, category 1 stocks have a sigma value of 0.36; category 2 stocks have a sigma of 0.72; category 3 stocks have a sigma of 1.44.

<sup>b</sup> Values for this stock contribute to the ABC of the complex and are not specified in regulation.

C. Proposed ACLs for 2017 and 2018

Introduction

ACLs are specified for each stock and stock complex that is “in the fishery.” An ACL is a harvest specification set equal to or below the ABC to address conservation objectives, socioeconomic concerns, management uncertainty, or other factors necessary to meet management objectives. Under PCGFMP Amendment 24, the Council set up default harvest control rules, which established default policies that would be applied to the best available scientific information to set ACLs each biennial cycle, unless the Council has reasons to diverge from that harvest control rule. A complete description of the default harvest control rules for

setting ACLs is described in the proposed and final rule for the 2015–2016 harvest specifications and management measures and PCGFMP Amendment 24 (80 FR 687, January 6, 2015; 80 FR 12567, March 10, 2015). That discussion includes a description of the harvest policies applied to stocks based on their depletion level (*i.e.*, healthy, precautionary, overfished) and other factors. Under the PCGFMP, the Council may recommend setting the ACL at a different level than what the default harvest control rules specify as long as the ACL does not exceed the ABC and complies with the requirements of the MSA. For many of the species or stock complexes “in the fishery,” the Council chose to maintain the default harvest control rules from

the previous biennial cycle. A summary table of the proposed ACL policies for 2017–2018 is presented below. The following sections discuss proposed ACLs where the Council’s recommended ACLs were established based on something other than the default harvest control rule.

Many groundfish stocks are managed with species-specific harvest specifications. Often these species have been assessed and their stock status is known, or individual management of the stock is recommended to address conservation objectives, socioeconomic concerns, management uncertainty, or other factors necessary to meet management objectives. The default harvest control rule for stocks above MSY is to set the ACL equal to the ABC.

The default harvest control rule for stocks below MSY but above the overfished threshold is to take a precautionary reduction to set the ACL below the ABC (also called 40–10 or 25–5 reductions), as described in the proposed and final rules for the 2015–2016 biennium (80 FR 687, January 6, 2015; 80 FR 12567, March 10, 2015).

Stocks may be grouped into complexes for various reasons, including: When stocks in a multispecies fishery cannot be targeted independent of one another and MSY cannot be defined on a stock-by-stock basis, when there is insufficient data to measure the stocks' status, or when it is not feasible for fishermen to distinguish individual stocks among their catch. Most groundfish species managed in a stock complex are data-poor stocks without full stock assessments. All of the ACLs for stock complexes are less than or equal to the summed ABC contributions of each component stock in each complex as described in the following paragraphs. Generally, default harvest control rules are based on stock status. According to the framework in the PCGFMP, when the species composition of a stock complex is revised, the default harvest control rule will still be based on status of the stocks that remain in the complex.

When a stock has been declared overfished, a rebuilding plan must be developed and the stock must be managed in accordance with the rebuilding plan (*i.e.*, the default harvest control rule for overfished species is to set the ACL based on the rebuilding plan). The following overfished groundfish stocks would be managed under rebuilding plans in 2017 and beyond: bocaccio south of 40°10' N. lat.; cowcod south of 40°10' N. lat.; darkblotched rockfish; POP; and yelloweye rockfish. Changes to rebuilding plans for darkblotched rockfish and POP are proposed, as described below. The remaining overfished species have proposed ACLs based on their current rebuilding plans, described at § 660.40 and in Appendix F of the PCGFMP. The proposed rules for the 2011–2012 (75 FR 67810, November 3, 2010) and 2013–2014 (77 FR 67974, November 14, 2012) harvest specifications, and management measures contain extensive discussions on the management approach used for overfished species, which are not repeated here. Further, the SAFE document posted on the Council's Web site at <http://www.pcouncil.org/groundfish/safe-documents/> contains a detailed description of each overfished species, its status and management, as well as how rebuilding analyses are

conducted. Finally, Appendix F to the PCGFMP contains the most recent rebuilding plan parameters as well as a history of each overfished species and can be found at <http://www.pcouncil.org/groundfish/fisherymanagement-plan/>.

New for the 2017–2018 biennium, the Council proposed the creation of an emergency buffer. The buffer is specific amounts of yield that are deducted from the ACLs for canary rockfish, darkblotched rockfish, and POP, to account for unforeseen catch events. The buffer approach is described below in “Deductions from the ACLs.” This new management measure would set the fishery harvest guideline, the catch amount from which the allocations are based, on the amount after the buffer is subtracted from the ACL. The result is an amount of yield for these three species that is unallocated at the start of the year, but is held in reserve as a buffer, and can be distributed to fisheries in need after an unforeseen catch event occurs inseason.

#### Darkblotched Rockfish (*S. crameri*)

Darkblotched rockfish was declared overfished in 2000. From 2011 through 2016 the darkblotched rockfish rebuilding plan has been based on an annual SPR harvest rate of 64.9 percent with a target year to rebuild the stock to  $B_{MSY}$  of 2025. Additional discussion regarding the establishment of this rebuilding plan can be found in the proposed and final rules for the 2011–2012 biennial period (75 FR 67810, November 3, 2010; 76 FR 27508, May 11, 2011) and is not repeated here. The 2013 assessment indicated that darkblotched rockfish was at 36 percent of its unfished biomass, and was projected to be rebuilt in 2015. The Council did not change the rebuilding plan at that time, and prioritized a new darkblotched rockfish assessment for 2015. The 2015 assessment indicated that darkblotched rockfish is at 39 percent of unfished biomass, and is projected to be rebuilt during 2015. Under any harvest level less than or equal to the OFL in 2015 and beyond, and under all of the harvest alternatives considered by the Council for 2017 and beyond, the stock is projected to be rebuilt by the start of 2016 and not fall below  $B_{40\%}$  in the next 10 years. All of the alternatives result in a  $T_{TARGET}$  that is 10 years earlier than the current rebuilding plan.

The Council considered two alternative harvest control rules. The first was 406 mt and 409 mt in 2017–2018, which are the ACLs that result from applying the default harvest control rule of an SPR harvest rate of

64.9 percent. This is the same harvest control rule that was applied in 2016. The default harvest control rule results in an ACL higher than the 2016 ACL of 356 mt due to the more optimistic stock assessment results. Because the Pacific whiting fisheries have been constrained by the catch of darkblotched rockfish in recent years, the Pacific whiting sectors are expected to be constrained under this alternative. The at-sea Pacific whiting fleets have been managed with an allocation for darkblotched rockfish for several years, such that attainment of that allocation results in automatic closure of the fishery, and have taken extensive measures to keep incidental catch rates low. The shorebased Pacific whiting fleets have been managed with individual fishing quota (IFQ) for darkblotched rockfish for several years, and have also made efforts to keep incidental catch low. Despite this, unexpected darkblotched rockfish catch events, where several tons of darkblotched rockfish have been incidentally taken in single hauls, have continued to occur in the Pacific whiting fishery. As the darkblotched rockfish stock rebuilds, avoiding such events is increasingly more difficult. With 406–409 mt ACLs there is a higher likelihood that such an event would result in the closure of one or more of the at-sea fishery coops or a shorebased vessel reaching its vessel limit and be forced to cease fishing in the IFQ fishery.

The second ACL alternative was 641 mt and 653 mt in 2017 and 2018, respectively, and results from applying the default harvest control rule for healthy stocks (setting the ACL equal to the ABC) for calculating the 2017–2018 ACLs for darkblotched rockfish because the stock is anticipated to be rebuilt by 2016. This harvest control rule results in higher ACLs of 641 mt and 653 mt in 2017 and 2018, respectively. The higher ACL alternative may provide additional opportunities for some sectors of the fishery. It is less likely that Pacific whiting sectors would be closed before harvesting their Pacific whiting allocations under this alternative. Setting the ACL equal to the ABC, darkblotched rockfish is still projected to remain healthy (depletion above 40 percent) over the next ten years. The Council recommended applying the default harvest control rule for healthy stocks for calculating the 2017–2018 ACLs for darkblotched rockfish: setting the ACL equal to the ABC. Under this harvest control rule, setting the ACL equal to the ABC, darkblotched rockfish is projected to remain healthy (depletion above 40 percent) over the



next ten years. As described above in the “Introduction” to this section, the Council also proposed to set an amount of darkblotched yield aside from the ACL as a buffer that will be available for distribution through routine inseason action, see “Deductions from the ACLs” below for details on the buffer approach.

Though the 2015 assessment indicates that the stock will be rebuilt by the start of 2016 regardless of the harvest control rule chosen for 2017–2018 and beyond, the Council chose not to modify the  $T_{TARGET}$  of 2025 because of uncertainty in the assessment. There is uncertainty in the assessment because of the model’s sensitivity to catch trends in the NMFS trawl survey, assumptions of steepness, and assumption of natural mortality. Sensitivity in the model means that projections in stock status can vary widely if the assumed steepness or natural mortality are revised. However, the SSC has endorsed the 2015 darkblotched rockfish assessment as the best available science and has recommended that the next darkblotched assessment be an update assessment, where model parameters like steepness and natural mortality are held constant from the full assessment. In the past, the SSC has also recommended against changing the  $T_{TARGET}$  as stocks rebuild, because it can result in repeated changes to rebuilding plans that are driven primarily by model sensitivity and not by true changes in stock status. Therefore, the Council chose not to change the  $T_{TARGET}$  in the rebuilding plan.

This harvest control rule meets the requirements to rebuild as quickly as possible, taking into account the needs of fishing communities and other relevant factors, as the stock is estimated to already be rebuilt. This is 10 years ahead of the  $T_{TARGET}$  in the current rebuilding plan of 2025. The change in the harvest control rule is also anticipated to better meet the needs of fishing communities because a higher ACL and resulting trawl allocation (this species is predominately caught in trawl fisheries) could help mitigate negative impacts to communities if encounters with darkblotched rockfish continue to increase as the stock rebuilds. A higher darkblotched rockfish ACL may increase access to other co-occurring target stocks, increasing landings of groundfish, which would benefit coastal communities.

#### Pacific Ocean Perch (*S. alutus*)

POP was declared overfished in 1999. Since 2007, the Council has recommended ACLs for POP based on an SPR harvest rate of 86.4 percent. The rebuilding analysis for POP was last

updated in the 2013–2014 biennial process based on the 2011 stock assessment and rebuilding analysis. The detailed description and rationale for the current rebuilding plan parameters, an SPR harvest rate of 86.4 percent and a  $T_{TARGET}$  of 2051, is described in the 2013–2014 Harvest Specifications and Management Measures proposed rule (77 FR 67974, November 14, 2016). The SPR harvest rate of 86.4 percent and a  $T_{TARGET}$  of 2051 is the default harvest control rule for POP.

The 2011 rebuilding analysis projected ACLs for 2017–2018 under the default harvest control rule. However, that rebuilding analysis assumed that mortality of POP from 2011 and beyond would be equal to the ACL each year. Harvest of POP has been well below the ACL in recent years. Therefore, the 2011 rebuilding analysis for POP was updated using 2011–2014 actual catches, resulting in updated projected ACLs for 2017–2018. The updated ACLs for 2017–2018 were slightly higher than the 2017–2018 ACLs in the original 2011 rebuilding plan because actual removals were lower than those assumed in the original 2011 rebuilding analysis.

The 2017–2018 ACLs, after applying the default harvest control rule (*i.e.*, based on the SPR harvest rate of 86.4 percent, with a  $T_{TARGET}$  of 2051), are 171 mt and 176 mt in 2017 and 2018, respectively. The updated 2011 rebuilding plan showed a small increase in the projected ACLs for 2017–2018 from those predicted in the original 2011 rebuilding plan (169 mt and 173 mt for 2017 and 2018, respectively). In addition to the ACLs described above, the Council considered two ACL alternatives for 2017–2018 that would temporarily modify the rebuilding plan, set higher ACLs in 2017, or both 2017 and 2018, and return to lower ACLs based on the SPR harvest rate of 86.4 percent, with a  $T_{TARGET}$  of 2051 in 2019 and beyond. The alternative ACLs considered by the Council included: (1) 388 mt in 2017 and an ACL based on the default harvest control rule in 2018 (175 mt) and beyond; and (2) 281 mt constant catch amounts in 2017 and 2018 and an ACL based on the default harvest control rule in 2019 and beyond. All of the alternatives correspond to a median time to rebuild of 2051. The alternatives that modify the harvest control rule result in a less than one percent decrease in the probability of rebuilding by  $T_{TARGET}$ .

The Council considered this range of POP ACL alternatives to examine the effects of varying POP mortality on the “needs of fishing communities” and the POP rebuilding trajectory. All of the

alternatives would maintain the SPR harvest rate as the default harvest control rule in 2019 and beyond, and consider varying the level of harvest in 2017 and 2018 under different harvest control rules. Generally, larger POP ACL alternatives would allow targeting opportunities on midwater non-whiting trawl fisheries and harvest of available Pacific whiting. POP is a slow growing rockfish species that is primarily taken in the trawl fisheries. Generally, lower POP ACL alternatives would reduce flexibility of trawl vessels to fish deeper when targeting Pacific whiting and non-whiting species on slope fishing grounds north of 40°10′ N. lat. POP has been one of the limiting factors for harvest opportunities of Pacific whiting in recent years. At the June 2016 meeting, the Council considered updated fishery information regarding harvest of POP in at-sea Pacific whiting fisheries and requests from industry for higher amounts of POP to be made available to their sectors to allow continued harvest of available Pacific whiting. Low rebuilding ACLs, rigidity in the allocation scheme, and unpredictable and sudden large incidents of POP bycatch in the Pacific whiting fisheries have resulted in POP limiting access to Pacific whiting, whose harvest benefits coastal communities.

The Council recommended a temporary revision to the rebuilding strategy for POP, with a constant catch ACL of 281 mt in 2017 and 2018, returning to an SPR harvest rate of 86.4 percent in 2019 and beyond. This is an increase of 105–110 mt from the ACLs under the default harvest control rule. The  $T_{TARGET}$  is maintained at 2051, which is the median time to rebuild and is eight years longer than  $T_{F=0}$ . As described above in the “Introduction” to this section, the Council also proposed to set an amount of POP yield aside from the ACL as a buffer that will be available for distribution through routine inseason action, see “Deductions from the ACLs” below for details on the buffer approach. Total catch mortality of POP is projected to be considerably less than the Council-recommended 281 mt constant catch ACLs in 2017 and 2018. The constant catch ACLs of 281 mt, combined with the deduction from the ACL further described below in “Deductions from the ACLs,” will keep harvest to a level that is less than the annual ACL and continue to maintain the stocks rebuilding trajectory, while reducing the likelihood of inseason restrictions to fisheries that catch POP and while targeting co-occurring healthy stocks.



The Council's new harvest control rule for POP will reduce the risk of earlier-than-anticipated closures of such fisheries due to unforeseen catch events. Those early closures would inhibit harvest of available Pacific whiting, whose revenue is important to coastal communities.

**Big Skate**

As described in the sections above regarding OFLs and ABCs, big skate is proposed to be considered "in the fishery," and no longer considered an ecosystem component species. The stock will be managed with species-

specific harvest specifications. The ACL is based on the default harvest control rule for healthy stocks.

**Blackgill Rockfish ACL/HG and Future Changes to Allocations**

Blackgill rockfish south is in the Minor Slope Rockfish South complex and contributes to the harvest specifications of that complex in 2017 and 2018. Blackgill rockfish will have a harvest guideline each year that is equal to its ACL contribution to the complex. No changes to the species composition of Minor Slope Rockfish South allocations are proposed at this time.

The Council took final action on Amendment 26 to the PCGFMP which would make changes to management of blackgill rockfish. However, this amendment has not been implemented at this time and therefore this rule continues to manage blackgill as part of the Minor Slope South complex. If a future action considers changes to the species composition of the Minor Slope Rockfish South complex and allocations for blackgill rockfish, those changes would be implemented in that rule and are not discussed further here.

**TABLE 3—SUMMARY OF ACL POLICIES**

Stock	2016		2017	2018	2017–2018	
	ACL (mt)	Policy	ACL (mt)	ACL (mt)	Policy	Summary of policy change
BOCACCI S. of 40°10' N. lat.	362	SPR = 77.7% .....	790	741	SPR = 77.7% .....	New 2015 assessment. No change in policy.
COWCOD S. of 40°10' N. lat.	10	SPR = 82.7% (F = 0.007); ACT = 4 mt.	10	10	SPR = 82.7% (F = 0.007); ACT = 4 mt.	No change.
DARKBLOTCHED ROCK-FISH.	346	SPR = 64.9% .....	641	653	ACL = ABC (P* = 0.45) ..	New 2015 assessment. Stock is projected to be rebuilt by 2015 under any harvest level, therefore the default harvest control rule of ACL = ABC, with a P* = 0.45 was applied because it is projected to be a healthy, category 1 stock.
PACIFIC OCEAN PERCH	164	SPR = 86.4% .....	281	281	Constant catch strategy for 2017–2018; SPR = 86.4% for 2019 and beyond.	Two-year ACL increase to meet the needs of communities, while still rebuilding as quickly as possible, by the Target specified in the current rebuilding plan.
YELLOW EYE ROCKFISH Arrowtooth flounder .....	19 5,328	SPR = 76.0% .....	20 13,804	20 13,743	SPR = 76.0% .....	No charge. No charge.
Big skate .....	Ecosystem component species; no harvest specifications		494	494	ACL = ABC (P* = 0.45) ..	Species added to the FMP. Applied default harvest control rule of ACL = ABC, with a P* = 0.45 because it is a healthy stock.
Black rockfish (CA) .....	.....		334	332	ACL = ABC (P* = 0.45) ..	New 2015 assessment. Applied default harvest control rule of ACL = ABC, with a P* = 0.45 because this is a healthy, category 1 stock.
Black rockfish (OR) .....	1,000	Constant catch strategy	527	520	ACL = ABC (P* = 0.45) ..	New 2015 assessment. Applied default harvest control rule of ACL = ABC, with a P* = 0.45 because this is a healthy, category 1 stock.
Black rockfish (WA) .....	404	ACL = ABC (P* = 0.45) ..	305	301	ACL = ABC (P* = 0.45) ..	New 2015 assessment. No change in policy.
Cabezon (CA) .....	151	ACL = ABC (P* = 0.45) ..	150	149	40–10 rule applied (P* = 0.45).	No change.
Cabezon (OR) .....	47	ACL = ABC (P* = 0.45) ..	47	47	ACL = ABC (P* = 0.45) ..	No change.
California scorpionfish S. of 40°10' N. lat.	111	ACL = ABC (P* = 0.45) ..	150	150	ACL = ABC (P* = 0.45) ..	No change.
Canary rockfish .....	125	SPR = 88.7% .....	1,714	1,526	ACL = ABC (P* = 0.45) ..	New 2015 assessment. Applied default harvest control rule of ACL = ABC, with a P* = 0.45 because this is a healthy, category 1 stock.
Chilipepper S. of 40°10' N. lat.	1,619	ACL = ABC (P* = 0.45) ..	2,607	2,507	ACL = ABC (P* = 0.45) ..	New 2015 assessment. No change.
Dover sole .....	50,000	Constant catch strategy	50,000	50,000	Constant catch strategy	No change.
English sole .....	7,204	ACL = ABC (P* = 0.45) ..	9,964	7,537	ACL = ABC (P* = 0.45) ..	No change.
Lingcod N. of 40°10' N. lat	2,719	ACL = ABC (P* = 0.45) ..	3,333	3,110	ACL = ABC (P* = 0.45) ..	No change.
Lingcod S. of 40°10' N. lat	946	ACL = ABC (P* = 0.4) ....	1,251	1,144	ACL = ABC (P* = 0.4) ....	No change.
Longnose skate .....	2,000	Constant catch strategy	2,000	2,000	Constant catch strategy	No change.
Longspine thornyhead N. of 34°27' N. lat.	3,015	ACL = 76% of coastwide ABC (P* = 0.40).	2,894	2,747	ACL = 76% of coastwide ABC (P* = 0.40).	No change.
Pacific Cod .....	1,600	ACL = 50% of OFL .....	1,600	1,600	ACL = 50% of OFL .....	No change.
Petrals Sole .....	2,910	25–5 rule applied to the ABC (P* = 0.45).	3,136	3,013	ACL = ABC (P* = 0.45) ..	New 2015 assessment. Applied default harvest control rule of ACL = ABC, with a P* = 0.45 because this is a healthy, category 1 stock.
Sablefish N. of 36° N. lat ..	5,241	40–10 rule applied to 73.6% of coastwide ABC (P* = 0.40).	6,041	6,299	40–10 rule applied to 84.9% of coastwide ABC (P* = 0.40).	New 2015 assessment and updated north/south apportionment. No change.
Sablefish S. of 36° N. lat ..	1,880	40–10 rule applied to 26.4% of coastwide ABC (P* = 0.40).	1,075	1,120	40-10 rule applied to 15.1% of coastwide ABC (P* = 0.40).	New 2015 assessment and updated north/south apportionment. No change.
Shortbelly rockfish .....	500	Constant catch strategy	500	500	Constant catch strategy	No change.
Shortspine thornyhead N. of 34°27' N. lat.	1,726	ACL = 65.4% of coastwide ABC (P* = 0.40).	1,713	1,698	ACL = 65.4% of coastwide ABC (P* = 0.40).	No change.

TABLE 3—SUMMARY OF ACL POLICIES—Continued

Stock	2016		2017	2018	2017–2018	
	ACL (mt)	Policy	ACL (mt)	ACL (mt)	Policy	Summary of policy change
Shortspine thornyhead S. of 34°27' N. lat.	913	ACL = 34.6% of coastwide ABC (P* = 0.40).	906	898	ACL = 34.6% of coastwide ABC (P* = 0.40).	No change.
Spiny dogfish .....	2,085	ACL = ABC (P* = 0.40) ..	2,094	2,083	ACL = ABC (P* = 0.40) ..	No change.
Splitnose rockfish S. of 40°10' N. lat.	1,746	ACL = ABC (P* = 0.45) ..	1,760	1,761	ACL = ABC (P* = 0.45) ..	No change.
Starry flounder .....	1,539	ACL = ABC (P* = 0.40) ..	1,282	1,282	ACL = ABC (P* = 0.40) ..	No change.
Widow rockfish .....	2,000	Constant catch strategy	13,508	12,655	ACL = ABC (P* = 0.45) ..	New 2015 assessment. Applied default harvest control rule of ACL = ABC, with a P* = 0.45 because this is a healthy, category 1 stock.
Yellowtail N. of 40°10' N. lat.	6,344	ACL = ABC (P* = 0.45) ..	6,196	6,002	ACL = ABC (P* = 0.45) ..	No change.
Minor Nearshore Rockfish north.	69	ACL = ABC (P* = 0.45); 40–10 adj. ACL contrib. for blue RF in CA and China RF.	105	105	ACL = ABC (P* = 0.45); 40–10 adj. ACL contrib. for blue RF in CA.	New 2015 China RF assessment. No change.
Minor Shelf Rockfish north	1,952	ACL = ABC (P* = 0.45); 40–10 adj. ACL contrib. for greenspotted RF in CA.	2,049	2,047	ACL = ABC (P* = 0.45); 40–10 adj. ACL contrib. for greenspotted RF in CA.	New 2015 chilipepper assessment. No change.
Minor Slope Rockfish north.	1,706	ACL = ABC (P* = 0.45) ..	1,755	1,754	ACL = ABC (P* = 0.45) ..	No change.
Minor Nearshore Rockfish south.	1,006	ACL = ABC (P* = 0.45); 40–10 adj. ACL contrib. for blue RF N of 34°27' N. lat..	1,163	1,179	ACL = ABC (P* = 0.45); 40–10 adj. ACL contrib. for blue RF N of 34°27' N. lat. and China RF.	New 2015 China RF assessment. No change.
Minor Shelf Rockfish south	1,625	ACL = ABC (P* = 0.45); 40–10 adj. ACL contrib. for greenspotted RF in CA.	1,623	1,624	ACL = ABC (P* = 0.45); 40–10 adj. ACL contrib. for greenspotted RF in CA.	New 2015 chilipepper assessment. No change.
Minor Slope Rockfish south.	695	ACL = ABC (P* = 0.45); 40–10 adj. ACL contrib. for blackgill RF.	707	709	ACL = ABC (P* = 0.45); 40–10 adj. ACL contrib. for blackgill RF.	No change.
Other Flatfish .....	7,243	ACL = ABC (P* = 0.4) ....	8,510	7,281	ACL = ABC (P* = 0.4) ....	No change.
Other Fish .....	243	ACLs = ABCs (ABC contribution from only selected stocks in the complex; for all those species P* = 0.45).	474	441	ACLs = ABCs (P* = 0.45)	New 2015 kelp greenling (off Oregon) assessment. All species in the complex contribute to the harvest specifications.

**IV. Management Measures**

New management measures being proposed for the 2017–2018 biennial cycle would work in combination with current management measures to control fishing. This management structure should ensure that the catch of overfished groundfish species does not exceed the rebuilding ACLs while allowing harvest of healthier groundfish stocks to occur to the extent possible. Routine management measures are used to modify fishing behavior during the fishing year. Routine management measures for the commercial fisheries include trip and cumulative landing limits, time/area closures, size limits, and gear restrictions. Routine management measures for the recreational fisheries include bag limits, size limits, gear restrictions, fish dressing requirements, and time/area closures. The groundfish fishery is managed with a variety of other regulatory requirements that are not routinely adjusted, many of which are not changed through this rulemaking, and are found at 50 CFR part 660,

subparts C through G. The regulations at 50 CFR part 660, subparts C through G, include, but are not limited to, long-term harvest allocations, recordkeeping and reporting requirements, monitoring requirements, license limitation programs, and essential fish habitat (EFH) protection measures. The routine management measures, specified at 50 CFR 660.60(c), in combination with the entire collection of groundfish regulations, are used to manage the Pacific Coast groundfish fishery during the biennium to achieve harvest guidelines, quotas, or allocations, that result from the harvest specifications identified in this proposed rule, while protecting overfished and depleted stocks.

In addition to changes to routine management measures, this section describes biennial fishery allocations and set-asides, and new management measures proposed for 2017–2018 including: creation of a new off-the-top deduction for canary rockfish, POP, and darkblotched rockfish to address unforeseen catch events (the buffer),

classification of big skate in the PCGFMP, flatfish retention during seasonal depth closures in Oregon, a new inseason process for California recreational and commercial fisheries, and petrale sole and starry flounder retention in the California recreational fishery.

The management measures being proposed reflect the Council's recommendations from its June 2016 meeting, as transmitted to NMFS. At its June 2016 meeting, the Council recommended the creation of a buffer for canary rockfish, POP, and darkblotched rockfish, that would be included in the final rule for this action; therefore NMFS is specifically seeking public comment on that item.

This rule also proposes changes to recreational regulations in Washington and Oregon to allow flatfish retention during days open to Pacific halibut fishing. This would make groundfish regulations consistent with past modifications to the Council's Pacific Halibut Catch Sharing Plan.

### A. Deductions From the ACLs

Before allocations are made to groundfish fisheries, deductions are made from ACLs to set aside fish for certain types of activities, also called “off-the-top deductions.” The deductions from the ACL have been associated with four distinct sources of groundfish mortality. The sources of groundfish mortality accounted for are: harvest in Pacific Coast treaty Indian tribal fisheries; harvest in scientific research activities; harvest in non-groundfish fisheries; and harvest that occurs under exempted fishing permits (EFPs). For 2017–2018, a new category of deductions from the ACL is proposed to account for unforeseen catch events for three species (canary rockfish, POP, and darkblotched rockfish), also called the buffer. All the deductions from the ACL, including the proposed amount for unforeseen catch events, are described at § 660.55(b) and specified in the footnotes to Tables 1a and 2a to subpart C. Under current regulations, modifications to these amounts is permitted through routine inseason action. In order to keep the public informed about these changes, any movement of fish from the deductions from the ACL to other fisheries will be announced in the **Federal Register**.

#### The Buffer

At its June 2016 meeting the Council recommended the addition of a new off-the-top deduction to account for unforeseen catch events in any sector, also known as a buffer, and specifically established buffer amounts for canary rockfish, POP, and darkblotched rockfish.

Currently, off-the-top deductions may be distributed to any sector through routine inseason after the Council has made the appropriate considerations. It is NMFS’s interpretation that the Council intended to apply the current inseason distribution procedures and Council considerations to the buffer amounts (*i.e.*, the Council did not intend to create new criteria for distributing the buffer). Also, NMFS interprets the Council’s intent was not to apportion the buffer simply because allocations of bycatch species are lower or allocations of target species are higher than in previous years; rather, any distribution would be based on demonstrated need. Consistent with the Council’s recommendation that the buffer be used to account for unforeseen catch events, this proposed rule provides that any buffer amounts could only be distributed due to an unforeseen catch event. Further, any distribution must go to a sector that has demonstrated a need

for receiving such a distribution not for the sole purpose of extending a fishery before a need is demonstrated.

Therefore, this rule proposes that any buffer amounts would be available for distribution through routine inseason action and, when making any distribution decisions on the buffer through an inseason action, the Council would consider the existing allocation framework criteria and objectives to maintain or extend fishing and marketing opportunities as stated in the PCGFMP, while taking into account the best available fishery information on sector needs.

This means NMFS does not see a way to apportion the buffer prior to a fishery starting. It is anticipated that in that situation, sectors would use currently available inseason tools to prosecute their fishery.

#### Other Buffer Considerations

For each of these three species, the buffer approach and the choice of ACLs are linked because the ACLs recommended by the Council in June 2016 and proposed in this rule are higher than the ACLs the Council preliminarily recommended at their April meeting. The increased ACLs are proposed to accommodate the buffer amounts. For canary and darkblotched the Council recommended ACLs based the default harvest control rule for healthy stocks, and for POP the Council recommended a constant catch ACL of 281 mt in 2017 and 2018. For a more detailed discussion of the ACLs for POP and darkblotched rockfish, see the “Proposed ACLs for 2017 and 2018” section above.

Under the buffer approach, for darkblotched rockfish and POP all sectors would receive lower allocations than if the entire ACL were allocated. For canary rockfish, the nontrawl allocation is not reduced with the buffer because the nontrawl allocation was held constant. In other words, there is potential foregone yield by most sectors (either through targeting or increased access to bycatch) by establishing the buffer. The forgone yield by implementing the buffer could be considered the price for addressing uncertainty in the assessment and projected catches while achieving conservation goals and objectives and providing stability in management of the fishery, as envisioned in the PCGFMP and under MSA. Overall, however, the forgone yield is expected to be inconsequential since historic ACL attainment for these species has been low. From 2011–2014, on average 42 percent of the canary ACLs were

attained, 41 percent of the darkblotched ACLs, and 35 percent of the POP ACLs.

Another consideration for the buffer is the accumulation limits in the IFQ fishery. Accumulation limits in the IFQ program limit the amount of quota share (QS) that a person, individually or collectively, may own or control (*i.e.* QS control limits), and set limits on the amount of quota pounds (QP) that a vessel may catch or hold in its vessel account during the year (*i.e.* annual vessel limits). Identical to the current off-the-top deductions, any buffer amount that is apportioned to the Shorebased IFQ Program would change allocations, and therefore would also affect the individual amounts associated with the QS and QP accumulation limits. Relative to QS, there would be no change in the percentage that applies for the QS accumulation limits; the existing percentage would be applying to a larger poundage that may result in a higher poundage at the individual level.

Relative to QP, in the Shorebased IFQ Program a limited amount of surplus QP in a vessel account may be carried over from one year to the next, and a deficit in a vessel account in one year may be covered with QP from a subsequent year, up to a carryover limit. QP made available to the Shorebased IFQ Program from the buffer amounts, will not count towards calculations for carryover, consistent with the current procedures of off-the-top deductions. The Pacific whiting final rule (77 FR 28497, May 15, 2012, comment 15) addressed this issue in the context of reapportionment of Pacific whiting to the Shorebased IFQ Program. Any release of additional QP resulting from deductions from the ACL is similar to reapportionment of Pacific whiting in that both may be added to the shorebased trawl allocation during the year but were not part of the annual allocation. Because reapportionment of Pacific whiting is not included in the calculation for the carryover limit in the Shorebased IFQ Program, and because release of additional QP is a similar provision, NMFS proposes that that release of additional QP resulting from redistribution of any buffer amounts would also not count toward the carryover limit. Current regulations at § 660.140(e)(5) state that these additional amounts do not count toward calculation of the carryover limit. No changes to the regulations at § 660.140(e)(5)(ii) regarding deficit carryover are proposed. Therefore, if a vessel has already opted out of the fishery, it would not have the option of covering its deficit with the additional QP that were released from the buffer. Also, current regulations at § 660.140(e)(5)(i) are not proposed to be

changed, and state that surplus carryover QP or IBQ pounds are deposited straight into vessel accounts and do not change the shorebased trawl allocation.

#### *B. Biennial Fishery Allocations*

Two-year trawl and nontrawl allocations are decided during the biennial process for those species without long-term allocations or species where the long-term allocation is suspended because the species was declared overfished. For all species, except sablefish north of 36° N. lat., allocations for the trawl and nontrawl sectors are calculated from the fishery harvest guideline. The fishery harvest guideline is the tonnage that remains after subtracting from the ACL harvest in Tribal fisheries, scientific research activities, non-groundfish fisheries, some activities conducted under exempted fishing permits, and the yield to account for unforeseen catch events. The two-year allocations and recreational harvest guidelines are designed to accommodate anticipated mortality in each sector as well as to accommodate variability and uncertainty in those estimates of mortality. Allocations described below are specified in the harvest specification tables appended to 50 CFR part 660, subpart C.

#### *Bocaccio*

The following are the Council's recommended allocations for bocaccio in 2017: Limited entry trawl, 302.4 mt; limited entry and open access non-nearshore fixed gears, 144.3 mt; limited entry and open access nearshore fixed gear, 1.8 mt; and California recreational 326.1 mt. The following are the Council's recommended allocations for bocaccio in 2018: Limited entry trawl, 283.3 mt; limited entry and open access non-nearshore fixed gears, 135.1 mt; Limited entry and open access nearshore fixed gear, 1.7 mt; California recreational 305.5 mt. These allocations are anticipated to accommodate estimates of mortality of bocaccio, by sector, in 2017–2018 and maintain a similar allocation scheme as in 2016.

#### *Canary Rockfish*

Since the last biennium canary rockfish has been declared rebuilt and continues to be allocated biennially. The following are the Council's recommended allocations for canary rockfish in 2017: Shorebased IFQ Program, 1014.1 mt; at-sea sectors of the Pacific whiting fishery, 46 mt (catcher/processor (C/P), 16 mt; and mothership (MS), 30 mt); limited entry and open access non-nearshore fixed gears, 46.5

mt; limited entry and open access nearshore fixed gear, 100 mt; Washington recreational, 50 mt; Oregon recreational, 75 mt; and California recreational, 135 mt. The following are the Council's recommended allocations for canary rockfish in 2018: Shorebased IFQ Program, 1,014.1 mt; at-sea sectors of the Pacific whiting fishery, 46 mt (C/P, 16 mt; and MS, 30 mt); limited entry and open access non-nearshore fixed gears, 46.5 mt; limited entry and open access nearshore fixed gear, 100 mt; Washington recreational, 50 mt; Oregon recreational, 75 mt; and California recreational, 135 mt. These allocations are anticipated to accommodate estimates of mortality of canary rockfish, by sector, in 2017–2018 and address the newly rebuilt status.

#### *Cowcod*

For 2017–2018, the Council recommended setting a cowcod ACT at 4 mt, and having it function as a fishery harvest guideline similar to the 2015–2016 biennium; it is the amount that would be allocated across groundfish fisheries. The cowcod allocation is proposed to be 36 percent (1.4 mt) trawl and 64 percent (2.6 mt) nontrawl for 2017–2018. NMFS anticipates the proposed allocation structure will keep catch below the 2017–2018 cowcod ACTs without having to make changes to fishery management measures and maintains the same allocation scheme as in 2016.

#### *Petrale Sole*

Petrale sole was declared rebuilt since the last biennium and is an Amendment 21 allocated species. Therefore, this rule proposes allocations of 95 percent trawl and 5 percent nontrawl. For petrale sole, 2,745.3 mt is allocated to Shorebased IFQ Program and 144.8 mt is allocated to the nontrawl fishery in 2017. For 2018, 2,628.5 mt is allocated to the Shorebased IFQ Program and 138.6 mt is allocated to the nontrawl fishery.

#### *Yelloweye Rockfish*

The Council recommended that the fishery HG be divided into trawl and nontrawl allocations as follows: 1.10 mt to trawl and 13.1 mt to nontrawl in 2017; and 1.1 mt to trawl and 12.9 mt to nontrawl in 2018. The following are the Council's recommended HGs for yelloweye rockfish in 2017: Limited entry and open access non-nearshore fixed gears, 0.8; limited entry and open access nearshore fixed gear, 2.1; Washington recreational, 3.3; Oregon recreational 3 mt; and California recreational 3.9 mt. The following are the Council's recommended HGs for yelloweye rockfish in 2018: Limited

entry trawl, 1.1 mt; limited entry and open access non-nearshore fixed gears, 0.7; limited entry and open access nearshore fixed gear, 2; Washington recreational, 3.3; Oregon recreational 3 mt; and California recreational 3.9 mt. These allocations are anticipated to accommodate estimates of mortality of yelloweye by sector in 2017–2018, and maintain the same allocation scheme that was in place for yelloweye rockfish in 2016.

#### *Black Rockfish off Oregon and California*

Washington, Oregon, and California will have state-specific HGs for black rockfish in 2017–2018. This is a change from 2015–2016 where the Oregon-California federal fishery HG was combined. For 2017, the harvest guidelines are: Washington 287 mt, Oregon 526.4, California 333 mt. For 2018, the harvest guidelines are as follows: Washington 283 mt, Oregon 519.4 mt, and California 331 mt.

#### *Longnose Skate*

The Council recommended a two-year trawl and nontrawl HG for longnose skate of 90 percent to the trawl fishery and 10 percent to the nontrawl fishery. The allocation percentages reflect historical catch of longnose skate between the two sectors. This maintains the same allocation scheme that was in place for longnose skate in 2016. Therefore the 2017–2018 trawl allocations are 1,667.7 mt and 185.3 mt nontrawl.

#### *Minor Nearshore Rockfish*

California will continue to have a state-specific harvest guideline for blue/deacon rockfish. Amendment 27 would add deacon rockfish to the PCGFMP and this rule proposes to apply current regulations for blue rockfish to blue/deacon as recent information indicates that catch histories of deacon and blue rockfish are conflated since they were not distinguished until recently. The blue rockfish harvest guideline for the area south of 42° N. latitude is the sum of three components: (1) The assessed stock's contribution to the Minor Nearshore Rockfish complex ABC (south of 40°10' N. lat.), (2) the contribution for the unassessed portion south of Point Conception, and (3) the contribution to the Nearshore Rockfish complex ABC for the area between 40°10' N. lat. and 42° N. lat. For 2017 and 2018, this results in a 305 and 311 mt HG, respectively, for blue/deacon rockfish south of 42° N. lat.

Harvest specifications for Minor Nearshore Rockfish north of 40°10' N. lat. are increased from the 69 mt in

2015–2016 to 103.2 mt in 2017–2018. The states intend to manage catch using state-specific harvest guidelines: 16.9 mt for Washington; 46.1 mt for Oregon, and 40.2 mt for California north of 40°10' N. lat. However, instead of implementing state specific harvest guidelines in Federal regulations, the state Council representatives from Oregon and Washington committed to heightened inseason communication regarding catches of species managed in the complex relative to the harvest guidelines consistent with the current state coordinated management. California will have a Federal harvest guideline for this complex from 42° N. lat. to 40°10' N. lat. to facilitate inseason action if needed, and has committed to increased catch reporting at Council meetings. In California, the HG of 40.2 mt would be specified in Federal regulation and apply only in the area between 40°10' N. lat. and 42° N. lat. California, through the Council, could propose changes through Federal regulations. Under state management, landed component species within the Minor Nearshore Rockfish complex must be sorted to species. Because the states may also take inseason action independent of NMFS, the proposed action is not anticipated to result in exceeding the complex ACL in 2017–2018.

Although the Minor Nearshore Rockfish North ACL attainment has been high in recent years, reaching 100 percent in 2011, management measures have prevented the ACL from being exceeded. State nearshore management plans and policies mitigate the risk of overfishing. State HGs and a federal HG for Minor Nearshore Rockfish in the area between 40°10' and 42° N. lat. under the proposed action will reduce the risk of exceeding the complex ACL.

#### Minor Shelf Rockfish

Allocations for Minor Shelf Rockfish are recommended by the Council each biennial cycle. For Minor Shelf Rockfish north of 40°10' N. lat., 1,183.1 mt (60.2 percent of the fishery harvest guideline) is allocated to the trawl fishery and 782.1 mt (39.8 percent of the fishery harvest guideline) is allocated to the nontrawl fishery for 2017. For Minor Shelf Rockfish south of 40°10' N. lat., 192.2 mt (12.2 percent of the fishery harvest guideline) is allocated to the trawl fishery and 1,383.6 mt (87.8 percent of the fishery harvest guideline) is allocated to the nontrawl fishery for 2017. For 2018, the same percentages are applied resulting in allocations of 1,181.8 mt to the trawl fishery and 781.4 mt to the nontrawl fishery north of 40°10' N. lat., and 192.37 mt to the trawl

fishery and 1,384.4 mt to the nontrawl fishery south of 40°10' N. lat. This maintains the same allocation percentages as were in place for the Minor Shelf Rockfish complexes since 2011.

#### Minor Slope Rockfish

Minor Slope Rockfish were allocated between the trawl and nontrawl fisheries in PCGFMP Amendment 21. This action applies those Amendment 21 allocation percentages to the updated 2017–2018 fishery harvest guidelines. Blackgill rockfish in California was assessed in 2011 and has continued to be managed within the Minor Slope Rockfish complex, but with a species-specific HG south of 40°10' N. lat. beginning in 2013. For 2017–2018 the Council recommended a blackgill rockfish harvest guideline equal to the ABC contribution for the portion of the stock south of 40°10' N. lat., reduced by the 40–10 adjustment because the stock is in the precautionary zone. South of 40°10' N. lat., the blackgill rockfish harvest guideline is 120.2 mt in 2017 and 122.4 mt in 2018.

#### C. Modifications to the Boundaries Defining Rockfish Conservation Areas (RCAs)

RCAs are large area closures intended to reduce the catch of a species or species complex by restricting fishing activity at specific depths. The boundaries for RCAs are defined by straight lines connecting a series of latitude and longitude coordinates that approximate depth contours. A set of coordinates define lines that approximate various depth contours. These sets of coordinates, or lines, in and of themselves, are not gear or fishery specific, but are used in combination to define an area. That area may then be described with fishing restrictions implemented for a specific gear and/or fishery.

For the 2017–2018 cycle, changes to refine selected coordinates are being proposed for: 30 fm, 40 fm, and 150 fm in California. The changes to the coordinates around Noon Day rock in California are proposed to address an area where the current RCA is not enforceable because it is too small. The other changes are proposed to more accurately define the depth contours.

#### D. Sorting Requirements Resulting From Big Skate Designation to “in the Fishery”

In the non-whiting groundfish fishery, catch is sorted to species or species group in order to account for catch against the various harvest specifications and management

measures that are specific to those species or species groups. Except for vessels participating in the Pacific whiting fishery (see § 660.130(d)(2)(ii) and (d)(3)), groundfish regulations require that species or species groups with a trip limit, size limit, scientific sorting designation, quota, harvest guideline, ACT, or ACL, be sorted (see § 660.12(a)(8)). Therefore, this rule proposes to modify the trawl sorting requirements so that big skate is required to be sorted coastwide by all trawl fisheries.

#### E. New Inseason Process for Commercial and Recreational Fisheries in California

The new inseason process in California is described above in the “Amendment 27 to the PCGFMP” section.

#### F. Limited Entry Trawl

##### Limited Entry Trawl Fishery

The Council recommended several changes to trawl management measures for the 2017–2018 biennium. Generally, management measures in the trawl fishery apply to the portions of the limited entry trawl fishery described here. As stated above in the “Sorting Requirements Resulting from Big Skate Designation to “in the Fishery”” section, sorting requirements are proposed. Other changes to management measures in the limited entry trawl fishery are described in the sections that follow.

##### Incidental Trip Limits for IFQ Vessels

For vessels fishing in the Shorebased IFQ Program, with either groundfish trawl gear or nontrawl gears, the following incidentally caught species are managed with trip limits: Minor nearshore rockfish north and south, black rockfish, cabezon (46°16' to 40°10' N. lat. and south of 40°10' N. lat.), spiny dogfish, shortbelly rockfish, big skate, Pacific whiting, and the Other Fish complex. No changes to trip limits in the IFQ fishery are proposed for the start of the 2017–2018 biennium; however, changes to trip limits are considered a routine measure under § 660.60(c) and may be implemented or adjusted, if determined necessary, through inseason action. Proposed regulations clarify that midwater gear is allowed for vessels targeting non-whiting during the dates of the primary Pacific whiting fishery, and that midwater gear can be used in the RCA when targeting non-whiting.

##### RCA Configurations for Vessels Using Trawl Gear

Based on analysis of West Coast Groundfish Observer Data and vessel logbook data, the boundaries of the

RCA were developed to prohibit groundfish fishing within a range of depths where encounters with overfished species were most likely to occur. The lines that approximate depth contours are defined by latitude and longitude coordinates and may be used to define any of the depth-based area closures, primarily RCAs. The choice of which depth-based line(s) to use to define the RCA boundaries varies by season, latitude, and gear group. Boundaries for limited entry trawl vessels are different from those for the limited entry fixed-gear and open access gears. The trawl RCAs apply to vessels fishing with groundfish trawl gear. The nontrawl RCAs apply to the limited entry fixed-gear and open access gears other than non-groundfish trawl. The non-groundfish trawl RCAs are fishery-specific.

For 2017–2018, the Council recommended modifying the trawl RCA in the area north of Cape Alava (48°10' N. lat.). Specifically, the trawl RCA seaward boundary is proposed to be changed from 150 fm and 200 fm modified to 150 fm and the shoreward boundary will be changed from shore to 100 fm. The proposed RCA configuration will be consistent with the RCA currently south of Cape Alava to 45°46' N. lat.

#### *G. Limited Entry Fixed Gear and Open Access Nontrawl Fishery*

Management measures for the limited entry fixed gear (LEFG) and open access (OA) nontrawl fisheries tend to be similar because the majority of participants in both fisheries use hook-and-line gear. Management measures, including area restrictions and trip limits in these nontrawl fisheries, are generally designed to allow harvest of target species while keeping catch of overfished species low. For 2017–2018, changes to management measures include: Changes to sablefish trip limits based on changes to the sharing percentages between limited entry and open access, changes to trip limits for minor nearshore shelf, bocaccio, yellowtail rockfish, minor nearshore rockfish, canary rockfish, deeper nearshore rockfish, a change to the seaward boundary of the nontrawl RCA from 40°10' N. lat. to 34°27' N. lat., and a change to the shoreward boundary south of 34°27' N. lat.

#### *Nontrawl RCA*

The nontrawl RCA applies to vessels that take, retain, possess, or land groundfish using nontrawl gears, unless they are incidental fisheries that are exempt from the nontrawl RCA (*e.g.*, the pink shrimp non-groundfish trawl

fishery). The seaward and shoreward boundaries of the nontrawl RCAs vary along the coast, and are divided at various commonly used geographic coordinates, defined in § 660.11, subpart C. In 2009, the shoreward boundary of the nontrawl RCA was established based on fishery information indicating that fishing in some areas in the nontrawl fishery have higher yelloweye rockfish bycatch than in others, and the RCA boundaries were adjusted to reduce mortality of yelloweye rockfish in these areas.

The nontrawl RCA boundaries proposed for 2017–2018 are the same as those in place for the nontrawl fisheries in 2015–2016, except for the seaward boundary from 40°10' N. lat. to 34°27' N. lat., which is proposed to be shifted from 150 fm to 125 fm, and the shoreward boundary south of 34°27' N. lat., which is proposed to be shifted from 60 fm to 75 fm. This management measure would affect nearshore and shelf rockfish species in California south of 40°10' N. lat. Modifications to the shoreward RCA boundary will allow access to deeper nearshore species (blue, brown, copper, olive rockfishes) and shelf rockfish species (chilipepper, greenblotched, Mexican, vermilion). Modifications to the seaward RCA will allow access to shelf rockfish species and sablefish. These changes are expected to increase catch of chilipepper and other healthy shelf rockfish species by allowing access to depths in which they are more prevalent. The nontrawl fisheries are currently managed with cumulative trip limits, and any increases in catch are expected to remain within allowable harvest limits.

#### *Nontrawl Fishery Trip Limits*

Trip limits proposed for the nontrawl fisheries in 2017–2018 are similar to those that applied to these fisheries since 2011. To help achieve, but not exceed, the allocations of sablefish in the limited entry fixed gear and open access fisheries, changes to trip limits are proposed. Changes are also proposed in the limited entry and open access fixed gear fisheries for yellowtail rockfish, Minor Shelf Rockfish between 40°10' N. lat. and 34°27' N. lat., canary rockfish, bocaccio south of 40°10' N. lat., and Minor Nearshore Rockfish and black rockfish south of 40°10' N. lat. Proposed 2015–2016 trip limits for these changes are specified in Table 2 (North), Table 2 (South) to subpart E and in Table 3 (North) and Table 3 (South) to subpart F.

#### *Primary Sablefish Fishery Tier Limits*

Some limited entry fixed gear permits are endorsed to receive annual sablefish quota, or “tier limits,” and vessels registered with one, two, or up to three of these permits may participate in the primary sablefish fishery, described at § 660.231. Tier limits proposed for the limited entry fixed gear primary sablefish fleet are higher in 2017–2018, reflecting the higher sablefish harvest specifications. The proposed tier limits are as follows: Tier 1 at 51,947 lb (23,562 kg), Tier 2 at 23,612 lb (10,710 kg), and Tier 3 at 13,493 lb (6,120 kg). In 2018, Tier 1 at 54,179 lb (24,575 kg), Tier 2 at 24,627 lb (11,170 kg), and Tier 3 at 14,072 lb (6,382 kg).

#### *Yellowtail Rockfish North of 40°10' N. Lat.*

This rule proposes establishing stock-specific yellowtail rockfish trip limits in both limited entry and open access fixed gear fisheries north of 40°10' N. lat. by removing yellowtail rockfish from the combined trip limits for Minor Shelf Rockfish, shortbelly rockfish, and widow rockfish. NMFS is soliciting comments on this interpretation because, while the Council's yellowtail rockfish trip limit recommendation was clear, the removal of yellowtail rockfish from the combined trip limit was not explicit in the Council's discussion. This change is proposed because of the increase in and rebuilt status of widow rockfish (which co-occurs with yellowtail rockfish) and would increase the yellowtail rockfish trip limit from a combined limit with several other species of 200 lb/month to 500 lb/month, just for yellowtail rockfish.

#### *Minor Shelf Rockfish Between 40°10' N. lat.–34°27' N. Lat.*

Specifications for the complex are established for the area south of 40°10' N. lat., however the changes proposed in this rule are only for the area between 40°10' N. lat. and 34°27' N. lat. This increase is intended to provide greater access to a small number of commercial vessels in this area. This rule proposes increases to trip limits in the open access fixed gear fisheries due to the projected low attainment of the species managed in this complex. The 2016 nontrawl allocation of 1,383 mt is unchanged from 2015.

#### *Canary Rockfish*

This rule proposes to allow canary retention in both limited entry and open access fixed gear fisheries by establishing trip limits for the limited entry fishery at 300 lb/2 months and for the open access fishery at 150 lb/2 months. These trip limits are proposed

because canary rockfish was declared rebuilt. The Council recommended these trip limits to allow retention of the majority of incidental catch.

Bocaccio South of 40°10' N. Lat.

This rule proposes to remove bocaccio from the Minor Shelf Rockfish aggregate trip limits for limited entry and open access fixed gear between 40°10' N. lat. and 34°27' N. lat. and establish stock-specific trip limits for bocaccio to reduce discarding as the stock continues to rebuild and encounters increase.

Minor Nearshore Rockfish & Black Rockfish South of 40°10' N. Lat.

This rule proposes modifications to the existing Minor Nearshore Rockfish and black rockfish trip limits for limited entry and open access fixed gear fisheries and modifications to the area split for deeper nearshore rockfish. For deeper nearshore rockfish, one trip limit is proposed for the entire area south of 40°10' N. lat. These changes are proposed due to the rebuilt status of canary rockfish, which is caught in nearshore fishery, and the low attainment of the complex ACL, which has averaged 10 percent or less over the last decade.

#### H. Recreational Fisheries

This section describes the recreational fisheries management measures proposed for 2017–2018. Most of the changes to recreational management measures are modifications to existing measures. Changes to recreational management measures are discussed below for each state and include: (1) Modifications of recreational season structures, closed areas, and bag limits; (2) removal of the 1 canary rockfish sub-bag limit and 10 inch (25 cm) kelp greenling size restriction in Oregon; (3) creation of potential expansion areas for the Stonewall Bank YRCA in Oregon; (4) addition of a one canary rockfish sub-bag limit in Marine Areas 1 and 2 in Washington; (5) reduction of the lingcod closed area in Washington; (6) removal of prohibition on canary rockfish retention in California; and (7) changes to petrale sole and starry flounder management measures in California.

Recreational fisheries management measures are designed to limit catch of overfished species and provide fishing opportunity for anglers targeting nearshore groundfish species. Overfished species that are taken in recreational fisheries include bocaccio, cowcod, and yelloweye rockfish. Because sport fisheries are more concentrated in nearshore waters, the 2017–2018 recreational fishery management measures are intended to

constrain catch of nearshore species such as Minor Nearshore Rockfish, black rockfish, blue rockfish, and cabezon. These protections are particularly important for fisheries off California, where the majority of West Coast recreational fishing occurs. Depth restrictions and groundfish conservation areas (GCAs) are the primary tools used to keep overfished species impacts under the prescribed harvest levels for the California recreational fishery.

Washington, Oregon, and California each proposed, and the Council recommended, different combinations of seasons, bag limits, area closures, and size limits, to best fit the requirements to rebuild overfished species found in their regions, and the needs and constraints of their particular recreational fisheries.

Recreational fisheries management measures for Washington, Oregon, and California in 2017–2018 are proposed to be similar to the recreational fishery management measures that were in place during 2015–2016. Recreational fisheries off Oregon, and Washington are limited by the need to reduce yelloweye rockfish impacts. Changes to recreational fishery management measures off Washington, Oregon, and California are in response to: Updated fishery and modeling information in a manner that allows increased harvest of underutilized healthy stocks while keeping impacts to overfished species within their rebuilding ACLs. The following sections describe the recreational management measures proposed in each state.

#### Washington

Off Washington, recreational fishing for groundfish and Pacific halibut, as proposed, will continue to be prohibited inside the North Coast Recreational YRCA, a C-shaped closed area off the northern Washington coast, the South Coast Recreational YRCA, and the Westport Offshore YRCA. Coordinates for YRCAs are defined at § 660.70. Similar to 2016, this proposed rule includes the Washington State lingcod recreational fishing closure area off Washington Marine Areas 1 and 2, a portion of which are closed to lingcod fishing, except on days that the Pacific halibut fishery is open. However, for 2017–2018, the southern boundary of this lingcod area closure would be shifted five miles north (from 46°28' N. lat. to 46°33' N. lat.) to allow additional access to deepwater lingcod areas without expected increases in yelloweye rockfish catches. The aggregate groundfish bag limits off Washington will continue to be 12 fish. The rockfish and lingcod sub-limits will be similar to

2015–2016 sub-limits. For rockfish, NMFS proposes a 10 rockfish sub-limit with no retention of canary or yelloweye rockfish except in Marine Areas 1 and 2 where there will be a one canary rockfish sub-limit (with a new option to expand and increase canary rockfish retention inseason). For lingcod, NMFS proposes a two lingcod sub-limit, with the lingcod minimum size of 22 inches (56 cm). NMFS proposes cabezon restrictions will remain as in 2016.

Changes to the Washington recreational fishery Marine Areas 1–4 for groundfish season dates are proposed for 2017–2018, shortening the season by five months. The recreational groundfish fishery would open the second Saturday in March, and close the third Saturday in October. This is not expected to result in significant changes because very little fishing effort occurs in Marine Areas 1–4 from October through February. The primary purpose of the change is to cap groundfish fishing effort at current levels, and minimize additional effort that could potentially develop in the future. Lingcod seasons are proposed to be the same dates as the recreational groundfish season described above for Marine Areas 1–3, and open April 15 through October 15 in Marine Area 4. The depth restrictions (*i.e.* recreational RCA) for recreational fishing off Washington is proposed to be the same as in 2016.

One change to the restrictions on groundfish retention during the Pacific halibut season is proposed for 2017–2018. This rule proposes to allow flatfish retention in the Columbia River area along with Pacific halibut when halibut are onboard. This change comes from a 2014 change to the Council's Pacific Halibut Catch Sharing Plan, and was inadvertently omitted from the 2015–2016 groundfish regulations. Starting in Washington Marine Area 1, when the nearshore incidental halibut fishery is open, taking, retaining, possessing or landing incidental Pacific halibut on groundfish trips are allowed only in the nearshore area on days not open to all-depth Pacific halibut fisheries in the area shoreward of the boundary line approximating the 30 fm (55 m) depth contour extending from Leadbetter Point, Washington, to the Washington-Oregon border, and from there, connecting to the boundary line approximating the 40 fm (73 m) depth contour in Oregon. The nearshore incidental Pacific halibut fishery will remain open Monday through Wednesday following the opening of the early season all-depth fishery, until the nearshore Pacific halibut allocation is taken.



## Oregon

Oregon recreational fisheries in 2017–2018 would operate under the same season structures and GCAs as 2015–2016. This rule also proposes to define, but not implement, two options for expansion of the Stonewall Bank YRCA, available for inseason implementation. Aggregate bag limits and size limits in Oregon recreational fisheries remain the same as in 2015–2016: Three lingcod per day, with a minimum size of 22 inches (56 cm); 25 flatfish per day, excluding Pacific halibut; and a marine fish aggregate bag limit of 10 fish per day, where cabezon have a minimum size of 16 inches (41 cm). However, the marine fish bag limit is proposed to be modified for 2017–2018, removing the kelp greenling size restriction and the one fish sub-bag limit for canary rockfish. The seasonal one fish sub-bag limit for cabezon was removed in 2015–2016 to allow ODFW increased flexibility for initiating inseason changes. Cabezon is proposed to have no sub-bag limit throughout 2017–2018.

One change to groundfish retention during the Pacific halibut season is proposed for 2017–2018. This rule proposes to add “other flatfish species” to the list of incidental species allowed to be landed with Pacific halibut. Taking, retaining, possessing or landing incidental halibut on groundfish trips will be allowed only in the Columbia River nearshore area on days not open to all-depth Pacific halibut fisheries in the area shoreward of the boundary line approximating the 30 fm (55 m) depth contour extending from Leadbetter Point, Washington to the Washington-Oregon border, and from there, connecting to the boundary line approximating the 40 fm (73 m) depth contour in Oregon. The nearshore incidental Pacific halibut fishery will continue to be open Monday through Wednesday following the opening of the early season all-depth fishery, until the nearshore Pacific halibut allocation is taken.

## California

For 2017–2018, recreational fisheries off California will continue to be managed as five separate areas, to reduce complexity while retaining flexibility in minimizing impacts on overfished stocks. Season and area closures differ between California regions to better prevent incidental catch of overfished species according to where those species occur and where fishing effort is greatest, while providing as much fishing opportunity as possible.

Compared to the 2016 season structure, the Northern and Mendocino

Management Areas would be extended by two and a half months, through December 31. Allowable fishing depths would be increased in the Northern Management Area from 20 fm to 30 fm during May 1 through October 31. Due to high yelloweye rockfish encounters in the Mendocino Management Area, the depth restriction will remain at 20 fathoms from May 1 through October 31. However, from November through December, the depth restriction would be eliminated in both the Northern and Mendocino Management Areas; fishing would be permissible at all depths. Allowable fishing depths would also be increased in the San Francisco and Central Management Areas by 10 fathoms to 40 and 50 fathoms, respectively. Due to projected cowcod impacts, the season structure in the Southern Management Area would remain the same as in 2016. Similarly, the California scorpionfish season will remain the same as in 2016 (*i.e.* closed September through December), except for the opening date in the Mendocino area will be changed to May 1 instead of May 15.

Size, bag, and sub-bag limits would remain the same as 2016 except for black rockfish, bocaccio, canary rockfish, and lingcod. To keep within allowable limits, the black rockfish sub-bag limit would be reduced from five to three fish within the 10 fish aggregate RCG complex bag limit. For bocaccio, the sub-bag limit of three fish within the 10 fish aggregate RCG complex bag limit would be eliminated to reduce discarding; anglers would be able to retain up to 10 bocaccio. For canary rockfish, due to newly rebuilt status, retention would be allowed with a sub-bag limit of one fish within the 10 fish aggregate RCG complex bag limit. Finally, for lingcod, the bag limit would be reduced from three fish to two fish.

## New Inseason Process

As described above in the “Amendment 27 to the PCGFMP” section, this rule proposes a new inseason process for fisheries that occur in the waters off California and for which there are California-specific federal harvest limits. This new system would allow NMFS to take inseason action for black, canary, and yelloweye rockfish, outside of a Council meeting. This would be similar to the current inseason process, except that it will allow for action to be taken during the summer months when the majority of catch accrues and absent Council action.

## Exempt Petrale Sole and Starry Flounder From Season and Depth Restrictions

This rule proposes to remove petrale sole and starry flounder from the recreational season and depth restrictions; anglers could retain petrale sole and starry flounder year round, without depth constraint. Petrale sole and starry flounder are commonly encountered while anglers are pursuing other species which have different seasons and/or allowable depth (*e.g.*, Pacific halibut) or open year round without depth constraint (*e.g.*, Pacific sanddab). As a result, this management measure would reduce regulatory discarding.

## I. Tribal Fisheries

Tribes implement management measures for Tribal fisheries both separately and cooperatively with those management measures that are described in the Federal regulations. The Tribes may adjust their Tribal fishery management measures, inseason, to stay within the overall harvest targets and estimated impacts to overfished species. Trip limits are the primary management measure that the Tribes specify in Federal regulations at § 660.50, subpart C. Continued from previous cycles, the Tribes proposed trip limit management in Tribal fisheries during 2017–2018 for several species, including several rockfish species and species groups. For rockfish species, Tribal regulations will continue to require full retention of all overfished rockfish species and marketable non-overfished rockfish species. No changes to trip limits are proposed for the Tribal fisheries from those that were in place in 2016. Proposed sablefish Tribal set-asides would be set at 10 percent of the Monterey through Vancouver area ACL minus 1.5 percent (reduced from 1.6 percent in 2016) to account for estimated discard mortality. The percentage reduction is based on a sablefish discard model output that can vary with changes in size of discarded fish. Widow rockfish are proposed to be managed by Tribal regulation to stay within the annual 440,000 lb (200 mt) Tribal catch limit. Trip limits for Dover sole, English sole, and other flatfish and arrowtooth flounder will be established through Tribal regulation only. Trip limits are proposed to be adjusted inseason to stay within the overall harvest targets and overfished species limits. This proposal would be a change from the 2016 limits of 110,000 lbs per two months for Dover sole, English sole and other flatfish, and 150,000 lbs per two months for arrowtooth flounder.



The Tribes will continue to develop management measures, including depth, area, and time restrictions, in the directed Tribal Pacific halibut fishery in order to minimize incidental catch of yelloweye rockfish. Tribal fishing regulations, as recommended by the Tribes and the Council, and adopted as proposed by NMFS, are in Federal regulations at § 660.50, subpart C.

#### V. Classification

Pursuant to section 304 (b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule and Amendment 27 to the PCGFMP are consistent with the Pacific Coast Groundfish Fishery Management Plan, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment. In making its final determination, NMFS will take into account the complete record, including the data, views, and comments received during the comment period.

NMFS prepared an EA for this action and Amendment 27 that discusses the impact on the environment as a result of some of the components of this rule. The full suite of alternatives analyzed by the Council can be found on the Council's Web site at [www.pcouncil.org](http://www.pcouncil.org). This EA does not contain all the alternatives because an EIS was prepared for the 2015–2016 biennial harvest specifications and management measures and is available from NMFS (see **ADDRESSES**). This EIS examined the harvest specifications and management measures for 2015–2016 and ten year projections for routinely adjusted harvest specifications and management measures. The ten year projections were produced to evaluate the impacts of the ongoing implementation of harvest specifications and management measures and to evaluate the impacts of the routine adjustments that are the main component of each biennial cycle. Therefore, the EA for the 2017–2018 cycle tiers from the 2015–2016 EIS and focuses on the harvest specifications and management measures that were not within the scope of the ten year projections in the 2015–2016 EIS. A copy of the EA is available from NMFS (see **ADDRESSES**). This action also announces a public comment period on the EA.

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA) (5 U.S.C. 603). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is

being considered, and the legal basis for this action is contained in the **SUMMARY** section and at the beginning of the **SUPPLEMENTARY INFORMATION** section of the preamble. A summary of the analysis follows. A copy of this analysis is available from NMFS (see **ADDRESSES**).

The RFA (5 U.S.C. 601 *et seq.*) requires government agencies to assess the effects that regulatory alternatives would have on small entities, defined as any business/organization independently owned and operated, not dominant in its field of operation (including its affiliates). A small *harvesting business* has combined annual receipts of \$11 million<sup>1</sup> or less for all affiliated operations worldwide.

A small *fish-processing business* is one that employs 750 or fewer persons for all affiliated operations worldwide. NMFS is applying this standard to catcher/processors for the purposes of this rulemaking, because these vessels earn the majority of their revenue from selling processed fish.

For *marinas and charter/party boats*, a small business is one that has annual receipts not in excess of \$7.5 million. A *wholesale business* servicing the fishing industry is a small business if it employs 100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide.

For the purposes of this rulemaking, a *nonprofit organization* is determined to be “not dominant in its field of operation” if it is considered small under one of the following SBA size standards: *environmental, conservation, or professional organizations* are considered small if they have combined annual receipts of \$15 million or less, and *other organizations* are considered small if they have combined annual receipts of \$7.5 million or less. The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000.

<sup>1</sup> On December 29, 2015, the National Marine Fisheries Service (NMFS) issued a final rule establishing a small business size standard of \$11 million in annual gross receipts for all businesses primarily engaged in the commercial fishing industry (NAICS 11411) for Regulatory Flexibility Act (RFA) compliance purposes only (80 FR 81194, December 29, 2015). The \$11 million standard became effective on July 1, 2016, and after that date it is to be used in all NMFS rules subject to the RFA. Id. at 81194. This NMFS rule is to be used in place of the U.S. Small Business Administration's (SBA) current standards of \$20.5 million, \$5.5 million, and \$7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry, respectively.

When an agency proposes regulations, the RFA requires the agency to prepare and make available for public comment an IRFA that describes the impact on small businesses, non-profit enterprises, local governments, and other small entities. The IRFA is to aid the agency in considering all reasonable regulatory alternatives that would minimize the economic impact on affected small entities.

#### Description and Estimate of the Number of Small Entities to Which the Rule Applies, and Estimate of Economic Impacts by Entity Size and Industry

This proposed rule will regulate businesses that participate in the groundfish fishery. This rule directly affects limited entry fixed gear permit holders, trawl quota share (QS) holders and Pacific whiting catch history endorsed permit holders (which include shorebased whiting processors), tribal vessels, charterboat vessels, and open access vessels. QS holders are directly affected as their QS are affected by the ACLs. Vessels that fish under the trawl rationalization program receive their quota pounds from the QS holders, and thus are indirectly affected. Similarly, MS processors are indirectly affected as they receive the fish they process from limited entry permits that are endorsed with Pacific whiting catch history assignments.

To determine the number of small entities potentially affected by this rule, NMFS reviewed analyses of fish ticket data and limited entry permit data, information on charterboat, tribal, and open access fleets, available cost-earnings data developed by NWFSC, and responses associated with the permitting process for the Trawl Rationalization Program where applicants were asked if they considered themselves a small business based on SBA definitions. This rule will regulate businesses that harvest groundfish.

#### Charter Operations

There were 355 active Commercial Passenger Fishing Vessels (charter) engaged in groundfish fishing in California in 2014. In 2014, an estimated 189 charter boats targeted groundfish in Oregon and Washington. All 544 of these vessels and associated small businesses are likely to be impacted by changes in recreational harvest levels for groundfish.

#### Commercial Vessels and Shorebased Buyers

With limited access to data for all the affiliated business operations for vessels and buyers, particularly in the open

access and fixed gear fisheries, NMFS estimates the type of impacted vessels and buyer entities based solely on West Coast ex-vessel revenue. This may be an underestimate of the number of large-entities in the fishery, as many vessels and buyers may be affiliated, and may have income from non-West Coast sources (particularly Alaska).

Open access vessels are not federally permitted so counts based on landings can provide an estimate of the affected. The DEIS Analysis for the 2013–14 Pacific Groundfish Harvest Specifications and Management Measures contained the following

assessment, which is deemed as containing reasonable estimates for this rule, as these fisheries have not changed significantly in recent years. In 2011, 682 directed open access vessels fished while 284 incidental open access vessels fished for a total of 966 vessels. Over the 2005–2010 period, 1,583 different directed open access vessels fished, and 837 different incidental open access vessels fished, for a total of 2,420 different vessels. The four tribal fleets sum to a total of 54 longline vessels, 5 Pacific whiting trawlers, and 5 non-whiting trawlers, for an overall

total of 64 vessels. Available information on average revenue per vessel suggests that all the entities in these groups can be considered small.

It is expected that a total of 873 catcher vessels (CVs), 227 buyer, 9 C/P and 6 MS entities will be impacted by this rule, for a total of 1,115, if commercial groundfish participation in 2017–2018 follows similar patterns to the last full year data are available for (2015), and counting only those vessels and buyers who had at least \$1,000 worth of groundfish sales or purchases in 2015.

GROUNDFISH EX-VESSEL REVENUES BY FISHERY

		N	West coast total groundfish revenue (\$)	Average groundfish revenue
LE Trawl .....	C/P .....	9	\$99,180,000 (2014 wholesale) .....	\$11,020,000 (2014 wholesale).
	MS .....	5	\$46,385,000 (2014 wholesale) .....	\$9,277,000 (2014 wholesale).
	CV .....	83	\$30,832,277 (2015 ex-vessel) .....	\$371,473 (2015 ex-vessel).
	MS/CV .....	19	\$17,300,000 (2014 ex-vessel) .....	\$910,536.31 (2014 ex-vessel).
	Buyers .....	16	\$137,600,000 (2014 wholesale) ...	\$8,600,000 (2014 wholesale).
LE Fixed Gear .....	Primary .....	89	\$8,357,122 (2015 ex-vessel) .....	\$93,900 (2015 ex-vessel).
	DTL .....	152	\$16,623,889 (2015 ex-vessel) .....	\$109,368 (2015 ex-vessel).
	Buyers .....	108	N/A .....	N/A.
OA .....	CV .....	831	\$7,281,894 (2015 ex-vessel) .....	\$8,763 (2015 ex-vessel).
	Buyers .....	307	N/A .....	N/A.
Research .....	CV .....	4	\$174,394 (2015 ex-vessel) .....	\$43,599 (2015 ex-vessel).
Tribal .....	CV .....	198	\$4,933,911 (2015 ex-vessel) .....	\$24,918 (2015 ex-vessel).
	Buyers .....	19	N/A .....	N/A.

Revenues reported from 2015 obtained from the Pacific Fisheries Information Network (PacFIN); those from 2014 obtained from 2016 Economic Data Collection Reports.

Limited Entry Permit Owners

As part of the permitting process for the trawl rationalization program or for participating in nontrawl limited entry

permit fisheries, applicants were asked if they considered themselves a small business. NMFS reviewed the ownership and affiliation relationships of QS permit holders, vessel account holders, catcher processor permits, MS processing, and first receiver/shore processor permits. As of August 1, 2016, Dock Street Brokers has West Coast

limited entry trawl endorsed permits for sale for \$60,000 for a 46.1' permit, and two 43' West Coast longline permits for \$135,000–\$140,000. QS may be valued anywhere from tens of thousands to millions of dollars, depending on the species and amount owned, although not enough sales have occurred yet to be able to confidently estimate their value.

LIMITED ENTRY PERMIT-OWNER ENTITIES BY SMALL BUSINESS SELF-DESIGNATION

	Permit type	Small business designation		Total
		Small	Large	
LE Trawl .....	C/P .....	0	10	10
	MS .....	4	2	6
	CV .....	142	21	163
	FR .....	36	8	44
	QS .....	N/A	N/A	173
LE Fixed Gear .....	Primary .....	159	3	162
	DTL .....	52	8	60

If permit ownership in 2017–2018 follows similar patterns to the last full year (data are available for 2015), it is expected that a total of 312 permit owning entities will be impacted by this rule. An estimated 222 of these entities own both permits and vessels, and 16 of

the first receiver permit holding companies actually received groundfish, and are thus included in the table above.

Accounting for joint vessel and permit ownership in the limited entry fisheries to the extent possible, an estimated

1,189 commercial entities and 544 charter entities will be impacted by this rule; 16 of these entities are considered large, and the remaining 1,717 are small. As some of these entities are likely owned by the same parent companies,

this number is likely an overestimate of the true value.

There are no reporting and recordkeeping requirements associated with this action. There are no relevant Federal rules that may duplicate, overlap, or conflict with this action.

#### A Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

There are no significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any of the significant economic impact of the proposed rule on small entities.

#### Considered but Rejected Measures

A summary of the three measures that were analyzed but were excluded from the preferred alternative, and rationale for excluding them in the preferred alternative, are summarized below.

#### Manage Starry Flounder in the Other Flatfish Complex

The most recent assessment of starry flounder does not contain an OFL or ABC projection beyond 2016. At the 2015 mop-up Stock Assessment Review (STAR) Panel, it was recommended that 2016 harvest specifications be carried forward for 2017 and 2018, and starry flounder be changed from a Category 2 to a Category 3 stock. The STAR panel questioned whether starry flounder should continue to be managed as a stand-alone stock or would be better included in the Other Flatfish complex.

The proposal to manage starry flounder in the Other Flatfish complex turned out to be more complicated than anticipated, due to a mismatch between the Amendment 21 allocations of starry flounder and the Other Flatfish complex. The Other Flatfish complex is allocated 90 percent to trawl and 10 percent to nontrawl, while starry flounder is allocated 50 percent to trawl and nontrawl.

Annual catches of starry flounder in 2012–2014 were 1–2 percent of the ACL, therefore there would be little risk that the mortality would exceed the stock-specific harvest specifications whether it is managed in a complex or with stock-specific harvest specifications. The Council rejected the proposal to manage starry flounder within the Other Flatfish complex since there were no conservation issues with status quo management. Further, initial scoping of the measure indicated there would be a high workload to reconfigure allocations and QS.

During discussions, California Department of Fish and Wildlife (CDFW) mentioned that some anglers would like the opportunity to retain starry flounder year-round, while current regulations do not provide for such an allowance. In 2016, starry flounder is restricted to the same months and depths as the groundfish season; however, species in the Other Flatfish complex are allowed to be targeted and retained year round. If starry flounder were included in the Other Flatfish complex, they would then be allowed to be targeted and retained year round in the California recreational fishery. In order to facilitate year round starry flounder fishing, the Council added starry flounder to the new management measure analysis for allowing petrale sole year round and all depths in the California recreational fishery.

#### Transfer of Shorebased Quota Pounds (QP) to the MS Sector

This management measure would allow limited transfer of canary rockfish, darkblotched rockfish, POP, and widow rockfish quota pounds from the shorebased IFQ sector to MS Coops. The measure is intended to reduce the risk of the mothership sector not attaining their whiting allocation, based on the incidental catch of these species. The Council excluded the measure from the preferred alternative based on the complexities of the analysis, implementation challenges, and other matters raised by NMFS. Additionally, the Council is considering a measure outside of the harvest specifications and management measures process that proposes to change the Amendment 21 allocations and management (from quota to set-asides) for darkblotched rockfish and POP for both the MS and C/P sectors (75 FR 78344, December 15, 2010).

#### Overfished Species Hotspot Closures in California

Nine new area closures in California were analyzed to mitigate increases in overfished species impacts, which may occur as a result of the proposed 2017–2018 California recreational season structures. The proposed season structures allow access to deeper depths than what has been allowed in nearly a decade. As such, there is uncertainty in angler behavior and the model projections for overfished species. If catch was tracking higher than anticipated, the overfished species hotspot closures could be implemented to reduce catch.

The Council excluded the overfished species hotspot closures from the

preferred alternative based on changes in outreach, inseason tracking and management, current fishery performance, and other matters raised by CDFW. The Council decision to exclude this measure was also related to the management measure that would grant NMFS authority to change routine management measures in the recreational and commercial fisheries based upon attainment or projected attainment of a Federal harvest limit for black rockfish, canary rockfish, and yelloweye rockfish. That is, the ability to control catch inseason would increase with the ability to take action outside a Council meeting. As such, the hotspot closures may no longer be needed.

#### Regulatory Flexibility Act Determination of a Significant Impact

The Regulatory Flexibility Act (RFA) requires Federal agencies to conduct an analysis of the impact of the proposed rule on small entities. The IRFA that NMFS prepared (and noted above) estimates that 1,717 charter small entities are potentially impacted by this proposed rule and concludes that this action is not anticipated to have a substantial or significant economic impact on those small entities. We are requesting comments on this conclusion.

NMFS issued Biological Opinions under the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*) on August 10, 1990, November 26, 1991, August 28, 1992, September 27, 1993, May 14, 1996, and December 15, 1999, pertaining to the effects of the PCGFMP fisheries on Chinook salmon (Puget Sound, Snake River spring/summer, Snake River fall, upper Columbia River spring, lower Columbia River, upper Willamette River, Sacramento River winter, Central Valley spring, California coastal), coho salmon (Central California coastal, southern Oregon/northern California coastal), chum salmon (Hood Canal summer, Columbia River), sockeye salmon (Snake River, Ozette Lake), and steelhead (upper, middle and lower Columbia River, Snake River Basin, upper Willamette River, central California coast, California Central Valley, south/central California, northern California, southern California). These biological opinions have concluded that implementation of the PCGFMP is not expected to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS, or result in the destruction or adverse modification of critical habitat.

NMFS issued a Supplemental Biological Opinion on March 11, 2006,

concluding that neither the higher observed bycatch of Chinook salmon in the 2005 Pacific whiting fishery nor new data regarding salmon bycatch in the groundfish bottom trawl fishery required a reconsideration of its prior “no jeopardy” conclusion. NMFS also reaffirmed its prior determination that implementation of the PCGFMP is not likely to jeopardize the continued existence of any of the affected evolutionarily significant units. Lower Columbia River coho salmon (70 FR 37160, June 28, 2005) and Oregon Coastal coho salmon (73 FR 7816, February 11, 2008) were recently relisted as threatened under the ESA. The 1999 biological opinion concluded that the bycatch of salmonids in the Pacific whiting fishery were almost entirely Chinook salmon, with little or no bycatch of coho salmon, chum salmon, sockeye salmon, and steelhead.

NMFS has reinitiated section 7 consultation on the PCGFMP with respect to its effects on listed salmonids. In the event the consultation identifies either reasonable and prudent alternatives to address jeopardy concerns or reasonable and prudent measures to minimize incidental take, NMFS would exercise necessary authorities, in coordination to the extent possible with the Council, to put such additional alternatives or measures into place.

On December 7, 2012, NMFS completed a biological opinion concluding that the groundfish fishery is not likely to jeopardize non-salmonid marine species including listed eulachon, green sturgeon, humpback whales, Steller sea lions, and leatherback sea turtles. The opinion also concludes that the fishery is not likely to adversely modify critical habitat for green sturgeon and leatherback sea turtles. An analysis included in the same document as the opinion concludes that the fishery is not likely to adversely affect green sea turtles, olive ridley sea turtles, loggerhead sea turtles, sei whales, North Pacific right whales, blue whales, fin whales, sperm whales, Southern Resident killer whales, Guadalupe fur seals, or the critical habitat for Steller sea lions.

At the Council’s June 2015 meeting, new estimates of eulachon take from fishing activity under the PCGFMP indicated that the incidental take statement in the 2012 biological opinion was exceeded in 2011 and 2013. The increased bycatch may be due to increased eulachon abundance. In light of the new fishery and abundance information, NMFS has reinitiated consultation on eulachon. In the event the consultation identifies either

reasonable and prudent alternatives to address jeopardy concerns, or reasonable and prudent measures to minimize incidental take, NMFS would coordinate with the Council to put additional alternatives or measures into place, as required.

On November 21, 2012, the U.S. Fish and Wildlife Service (FWS) issued a biological opinion concluding that the groundfish fishery will not jeopardize the continued existence of the short-tailed albatross. The FWS also concurred that the fishery is not likely to adversely affect the marbled murrelet, California least tern, southern sea otter, bull trout, or bull trout critical habitat. NMFS reinitiated section 7 consultation on the Pacific Coast Groundfish FMP with respect to its effects on short-tailed albatross. In accordance with sections 7(a)(2) and 7(d) of the ESA, NMFS determines that this action will not jeopardize listed species, would not adversely modify any designated critical habitat, and will not result in any irreversible or irretrievable commitment of resources that would have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures.

This proposed rule would not alter the effects on marine mammals over what has already been considered for the fishery. West Coast pot fisheries for sablefish are considered Category II fisheries under the MMPA’s List of Fisheries, indicating occasional interactions. All other West Coast groundfish fisheries, including the trawl fishery, are considered Category III fisheries under the MMPA, indicating a remote likelihood of or no known serious injuries or mortalities to marine mammals. On February 27, 2012, NMFS published notice that the incidental taking of Steller sea lions in the West Coast groundfish fisheries is addressed in NMFS’ December 29, 2010 Negligible Impact Determination (NID), and this fishery has been added to the list of fisheries authorized to take Steller sea lions (77 FR 11493, February 27, 2012). NMFS is currently working on the process leading to any necessary authorization of incidental taking under MMPA section 101(a)(5)(E) (16 U.S.C. 1371(a)(5)(E)).

Pursuant to Executive Order 13175, this proposed rule was developed after meaningful consultation and collaboration with tribal officials from the area covered by the PCGFMP. Under the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council must be a representative of an Indian tribe with federally recognized fishing rights from the area of the Council’s jurisdiction. In

addition, regulations implementing the PCGFMP establish a procedure by which the tribes with treaty fishing rights in the area covered by the PCGFMP request new allocations or regulations specific to the tribes, in writing, before the first of the two meetings at which the Council considers groundfish management measures. The regulations at 50 CFR 660.324(d) further state, “the Secretary will develop tribal allocations and regulations under this paragraph in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.” The tribal management measures in this proposed rule have been developed following these procedures. The tribal representative on the Council made a motion to adopt the non-whiting tribal management measures, which was passed by the Council. Those management measures, which were developed and proposed by the tribes, are included in this proposed rule.

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

#### List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: October 18, 2016.

**Samuel D. Rauch III,**

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

For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

#### PART 660—FISHERIES OFF WEST COAST STATES

- 1. The authority citation for part 660 continues to read as follows:

**Authority:** 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 773 *et seq.*, and 16 U.S.C. 7001 *et seq.*

- 2. In § 660.11 in the definition of “Groundfish,” paragraphs (7)(i)(A) and (7)(i)(B)(2) are revised to read as follows:

##### § 660.11 General definitions.

\* \* \* \* \*  
(7) \* \* \*  
(i) \* \* \*

(A) *North of 40°10' N. lat.:* Black and yellow rockfish, *S. chrysomelas*; blue rockfish, *S. mystinus*; brown rockfish, *S. auriculatus*; calico rockfish, *S. dalli*; China rockfish, *S. nebulosus*; copper rockfish, *S. caurinus*; deacon rockfish, *S. diaconus*, gopher rockfish, *S. carnatus*; grass rockfish, *S. rastrelliger*; kelp rockfish, *S. atrovirens*; olive rockfish, *S. serranoides*; quillback rockfish, *S. maliger*; treefish, *S. serriceps*.

(B) \* \* \*

(2) *Deeper nearshore rockfish* consists of black rockfish, *S. melanops*; blue rockfish, *S. mystinus*; brown rockfish, *S. auriculatus*; calico rockfish, *S. dalli*; copper rockfish, *S. caurinus*; deacon rockfish, *S. diaconus*; olive rockfish, *S. serranoides*; quillback rockfish, *S. maliger*; treefish, *S. serriceps*.

\* \* \* \* \*

■ 3. Section 660.40 is revised to read as follows:

#### § 660.40 Overfished species rebuilding plans.

For each overfished groundfish stock with an approved rebuilding plan, this section contains the standards to be used to establish annual or biennial ACLs, specifically the target date for rebuilding the stock to its MSY level and the harvest control rule to be used to rebuild the stock. The harvest control rule may be expressed as a “Spawning Potential Ratio” or “SPR” harvest rate.

(a) *Bocaccio*. Bocaccio south of 40°10' N. latitude was declared overfished in 1999. The target year for rebuilding the bocaccio stock south of 40°10' N. latitude to  $B_{MSY}$  is 2022. The harvest control rule to be used to rebuild the southern bocaccio stock is an annual SPR harvest rate of 77.7 percent.

(b) *Cowcod*. Cowcod was declared overfished in 2000. The target year for rebuilding the cowcod stock south of 40°10' N. lat. to  $B_{MSY}$  is 2020. The harvest control rule to be used to rebuild the cowcod stock is an annual SPR harvest rate of 82.7 percent.

(c) *Darkblotched rockfish*. Darkblotched rockfish was declared overfished in 2000. The target year for rebuilding the darkblotched rockfish stock to  $B_{MSY}$  is 2025. The harvest control rule is  $ACL = ABC (P^* = 0.45)$ .

(d) *Pacific ocean perch (POP)*. POP was declared overfished in 1999. The target year for rebuilding the POP stock to  $B_{MSY}$  is 2051. The harvest control rule to be used to rebuild the POP stock in 2017 and 2018 is a constant catch ACL of 281 mt per year. In 2019 and thereafter the harvest control rule to be used to rebuild POP is an annual SPR harvest rate of 86.4 percent.

(e) *Yelloweye rockfish*. Yelloweye rockfish was declared overfished in 2002. The target year for rebuilding the yelloweye rockfish stock to  $B_{MSY}$  is 2074. The harvest control rule to be used to rebuild the yelloweye rockfish stock is an annual SPR harvest rate of 76.0 percent.

■ 4. In § 660.50, revise paragraphs (f)(2)(ii), (f)(3), add paragraph (f)(9), and revise paragraph (g) to read as follows:

#### § 660.50 Pacific Coast treaty Indian fisheries.

\* \* \* \* \*

(f) \* \* \*

(2) \* \* \*

(ii) The tribal allocation is 604 mt in 2017 and 630 mt in 2018 per year. This allocation is, for each year, 10 percent of the Monterey through Vancouver area (North of 36° N. lat.) ACL. The tribal allocation is reduced by 1.5 percent for estimated discard mortality.

(3) *Lingcod*. Lingcod taken in the treaty fisheries are subject to a harvest guideline of 250 mt.

\* \* \* \* \*

(9) *Widow rockfish*. Widow rockfish taken in the directed tribal midwater trawl fisheries are subject to a catch limit of 200 mt for the entire fleet, per year.

(g) *Pacific Coast treaty Indian fisheries management measures*. Trip limits for certain species were recommended by the tribes and the Council and are specified here.

(1) *Rockfish*. The tribes will require full retention of all overfished rockfish species and all other marketable rockfish species during treaty fisheries.

(2) *Yelloweye rockfish* are subject to a 100-lb (45-kg) trip limit.

(3) *Other rockfish*—(i) *Minor nearshore rockfish*. Minor nearshore rockfish are subject to a 300-lb (136-kg) trip limit per species or species group, or to the non-tribal limited entry trip limit for those species if those limits are less restrictive than 300 lb (136 kg) per trip. Limited entry trip limits for waters off Washington are specified in Table 1 (North) to subpart D, and Table 2 (North) to subpart E of this part.

(ii) *Minor shelf rockfish and minor slope rockfish*. Redstripe rockfish are subject to an 800 lb (363 kg) trip limit. Minor shelf (excluding redstripe rockfish), and minor slope rockfish groups are subject to a 300 lb (136 kg) trip limit per species or species group, or to the non-tribal limited entry fixed gear trip limit for those species if those limits are less restrictive than 300 lb (136 kg) per trip. Limited entry fixed gear trip limits are specified in Table 2 (North) to subpart E of this part.

(iii) *Other rockfish*. All other rockfish, not listed specifically in paragraph (g) of this section, are subject to a 300 lb (136 kg) trip limit per species or species group, or to the non-tribal limited entry trip limit for those species if those limits are less restrictive than 300 lb (136 kg) per trip. Limited entry trip limits for waters off Washington are specified in Table 1 (North) to subpart D, and Table 2 (North) to subpart E of this part.

(4) *Pacific whiting*. Tribal whiting processed at-sea by non-tribal vessels,

must be transferred within the tribal U&A from a member of a Pacific Coast treaty Indian tribe fishing under this section.

(5) *Groundfish without a tribal allocation*. Makah tribal members may use midwater trawl gear to take and retain groundfish for which there is no tribal allocation and will be subject to the trip landing and frequency and size limits applicable to the limited entry fishery.

(6) *EFH*. Measures implemented to minimize adverse impacts to groundfish EFH, as described in § 660.12 of this subpart, do not apply to tribal fisheries in their U&A fishing areas described at § 660.4, subpart A.

(7) *Small footrope trawl gear*. Makah tribal members fishing in the bottom trawl fishery may use only small footrope (less than or equal to 8 inches (20.3 cm)) bottom trawl gear.

■ 5. In § 660.55, revise paragraph (b) introductory text to read as follows:

#### § 660.55 Allocations.

\* \* \* \* \*

(b) *Fishery harvest guidelines and reductions made prior to fishery allocations*. Prior to the setting of fishery allocations, the TAC, ACL, or ACT when specified, is reduced by the Pacific Coast treaty Indian Tribal harvest (allocations, set-asides, and estimated harvest under regulations at § 660.50); projected scientific research catch of all groundfish species, estimates of fishing mortality in non-groundfish fisheries; and, as necessary, deductions to account for unforeseen catch events and deductions for EFPs. Deductions are listed in the footnotes of Tables 1a and 2a of subpart C of this part. The remaining amount after these deductions is the fishery harvest guideline or quota. (Note: recreational estimates are not deducted here.)

\* \* \* \* \*

■ 6. In § 660.60, paragraphs (c)(1)(i) and (c)(3)(ii) are revised and paragraph (c)(4) is added to read as follows:

#### § 660.60 Specifications and management measures.

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) *Trip landing and frequency limits, size limits, all gear*. Trip landing and frequency limits have been designated as routine for the following species or species groups: Widow rockfish, canary rockfish, yellowtail rockfish, Pacific ocean perch, yelloweye rockfish, black rockfish, blue/deacon rockfish, splitnose rockfish, blackgill rockfish in the area south of 40°10' N. lat., chilipepper, bocaccio, cowcod, Minor Nearshore

Rockfish or shallow and deeper Minor Nearshore Rockfish, shelf or Minor Shelf Rockfish, and Minor Slope Rockfish; Dover sole, sablefish, shortspine thornyheads, and longspine thornyheads; petrale sole, rex sole, arrowtooth flounder, Pacific sanddabs, big skate, and the Other Flatfish complex, which is composed of those species plus any other flatfish species listed at § 660.11; Pacific whiting; lingcod; Pacific cod; spiny dogfish; longnose skate; cabezon in Oregon and California and "Other Fish" as defined at § 660.11. In addition to the species and species groups listed above, sub-limits or aggregate limits may be specified, specific to the Shorebased IFQ Program, for the following species: Big skate, California skate, California scorpionfish, leopard shark, soupfin shark, finescale codling, Pacific rattail (grenadier), ratfish, kelp greenling, shortbelly rockfish, and cabezon in Washington. Size limits have been designated as routine for sablefish and lingcod. Trip landing and frequency limits and size limits for species with those limits designated as routine may be imposed or adjusted on a biennial or more frequent basis for the purpose of keeping landings within the harvest levels announced by NMFS, and for the other purposes given in paragraphs (c)(1)(i)(A) and (B) of this section.

\* \* \* \* \*

(3) \* \* \*

(ii) *Non-tribal deductions from the ACL.* Changes to the non-tribal amounts deducted from the TAC, ACLs, or ACT when specified, described at § 660.55(b)(2) through (4) and specified in the footnotes to Tables 1a through 1c, and 2a through 2c, to subpart C, have been designated as routine to make fish that would otherwise go unharvested available to other fisheries during the fishing year. Adjustments may be made to provide additional harvest opportunities in groundfish fisheries when catch in scientific research activities, non-groundfish fisheries, and EFPs are lower than the amounts that were initially deducted off the TAC, ACL, or ACT when specified, during the biennial specifications or to allocate yield from the deduction to account for unforeseen catch events to groundfish fisheries. When recommending adjustments to the non-tribal deductions, the Council shall consider the allocation framework criteria outlined in the PCGFMP and the objectives to maintain or extend fishing and marketing opportunities taking into account the best available fishery information on sector needs.

(4) *Inseason action for canary rockfish, yelloweye rockfish, and black rockfish in California State-Specific Federal Harvest Limits outside of a Council meeting.* The Regional Administrator, NMFS West Coast Region, after consultation with the Chairman of the Pacific Fishery Management Council and the Fishery Director of the California Department of Fish and Wildlife, or their designees, is authorized to modify the following designated routine management measures for canary rockfish, yelloweye rockfish, and black rockfish off the coast of California. For black rockfish in commercial fisheries trip landing and frequency limits; and depth based management measures. For black, canary, and yelloweye rockfish in recreational fisheries bag limits; time/area closures; depth based management. Any modifications may be made only after NMFS has determined that a California state-specific federal harvest limit for canary rockfish, yelloweye rockfish, or black rockfish, is attained or projected to be attained prior to the first day of the next Council meeting. Any modifications may only be used to restrict catch of canary rockfish, yelloweye rockfish, or black rockfish off the coast of California.

\* \* \* \* \*

■ 7. In § 660.70, paragraphs (g) through (p) are redesignated as (i) through (r), and new paragraphs (g) and (h) are added to read as follows:

**§ 660.70 Groundfish conservation areas.**

\* \* \* \* \*

(g) *Stonewall Bank Yelloweye Rockfish Conservation Area, Expansion 1.*

The Stonewall Bank Yelloweye Rockfish Conservation Area (YRCA) Expansion 1 is an area off central Oregon, near Stonewall Bank, intended to protect yelloweye rockfish. The Stonewall Bank YRCA Expansion 1 is defined by straight lines connecting the following specific latitude and longitude coordinates in the order listed:

- (1) 44°41.76' N. lat.; 124°30.02' W. long.;
- (2) 44°41.73' N. lat.; 124°21.60' W. long.;
- (3) 44°25.25' N. lat.; 124°16.94' W. long.;
- (4) 44°25.29' N. lat.; 124°30.14' W. long.;
- (5) 44°41.76' N. lat.; 124°30.02' W. long.; and connecting back to 44°41.76' N. lat.; 124°30.02' W. long.

(h) *Stonewall Bank Yelloweye Rockfish Conservation Area, Expansion 2.*

The Stonewall Bank Yelloweye Rockfish Conservation Area (YRCA) Expansion 2 is an area off central

Oregon, near Stonewall Bank, intended to protect yelloweye rockfish. The Stonewall Bank YRCA Expansion 2 is defined by straight lines connecting the following specific latitude and longitude coordinates in the order listed:

- (1) 44°38.54' N. lat.; 124°27.41' W. long.;
- (2) 44°38.54' N. lat.; 124°23.86' W. long.;
- (3) 44°27.13' N. lat.; 124°21.50' W. long.;
- (4) 44°27.13' N. lat.; 124°26.89' W. long.;
- (5) 44°31.30' N. lat.; 124°28.35' W. long.; and connecting back to 44°38.54' N. lat.; 124°27.41' W. long.

\* \* \* \* \*

- 8. Amend § 660.71 as follows:
- a. Redesignate paragraphs (e)(143) through (332) as paragraphs (e)(147) through (336), respectively and redesignate paragraphs (e)(140) through (142) as paragraphs (e)(141) through (143), respectively;
  - b. Add new paragraphs (e)(140) and (e)(144) through (146);
  - c. Redesignate paragraphs (k)(128) through (214) as paragraphs (k)(130) through (216), respectively and redesignate paragraphs (k)(120) through (127) as paragraphs (k)(121) through (128), respectively;
  - d. Add new paragraphs (k)(120) and (129);
  - e. Revise newly redesignated paragraphs (e)(168) and (k)(128) to read as follows:

**§ 660.71 Latitude/longitude coordinates defining the 10-fm (18-m) through 40-fm (73-m) depth contours.**

\* \* \* \* \*

- (e) \* \* \*
- (140) 39°37.50' N. lat., 123°49.20' W. long.;
- \* \* \* \* \*
- (144) 39°13.00' N. lat., 123°47.65' W. long.;
- (145) 39°11.06' N. lat., 123°47.16' W. long.;
- (146) 39°10.35' N. lat., 123°46.75' W. long.;

\* \* \* \* \*

- (168) 37°39.85' N. lat., 122°49.90' W. long.;
- \* \* \* \* \*
- (k) \* \* \*
- (120) 38°30.57' N. lat., 123°18.60' W. long.;
- \* \* \* \* \*
- (128) 37°48.22' N. lat., 123°10.62' W. long.;
- (129) 37°47.53' N. lat., 123°11.54' W. long.;
- \* \* \* \* \*

■ 9. In § 660.72, paragraph (a)(107) is revised to read as follows:

**§ 660.72 Latitude/longitude coordinates defining the 50 fm (91 m) through 75 fm (137 m) depth contours.**

\* \* \* \* \*  
 (a) \* \* \*  
 (107) 37°45.57' N. lat., 123°9.46' W. long.;

■ 10. In § 660.73, redesignate paragraphs (h)(248) through (309) as

(h)(252) through (313), respectively, and add new paragraphs (h)(248) through (251); to read as follows:

**§ 660.73 Latitude/longitude coordinates defining the 100 fm (183 m) through 150 fm (274 m) depth contours.**

\* \* \* \* \*  
 (h) \* \* \*  
 (248) 36°47.60' N. lat., 121°58.88' W. long.;

(249) 36°48.24' N. lat., 121°51.40' W. long.;

(250) 36°45.84' N. lat., 121°57.21' W. long.;

(251) 36°45.77' N. lat., 121°57.61' W. long.;

\* \* \* \* \*  
 ■ 11a. Tables 1a through 1d to part 660, subpart C, are revised to read as follows:

**TABLE 1a TO PART 660, SUBPART C—2017, SPECIFICATIONS OF OFL, ABC, ACL, ACT AND FISHERY HARVEST GUIDELINES**  
 [Weights in metric tons]

Species	Area	OFL	ABC	ACL <sup>a</sup>	Fishery HG <sup>b</sup>
BOCACIO <sup>c</sup>	S. of 40°10' N. lat	2,139	2,044	790	775
COWCOD <sup>d</sup>	S. of 40°10' N. lat	70	63	10	8
DARKBLOTCHED ROCKFISH <sup>e</sup>	Coastwide	671	641	641	564
PACIFIC OCEAN PERCH <sup>f</sup>	N. of 40°10' N. lat	964	922	281	232
YELLOW EYE ROCKFISH <sup>g</sup>	Coastwide	57	47	20	15
Arrowtooth flounder <sup>h</sup>	Coastwide	16,571	13,804	13,804	11,706
Big skate <sup>i</sup>	Coastwide	541	494	494	437
Black rockfish <sup>j</sup>	California (South of 42° N. lat.)	349	334	334	333
Black rockfish <sup>k</sup>	Oregon (Between 46°16' N. lat. and 42° N. lat.)	577	527	527	526
Black rockfish <sup>l</sup>	Washington (N. of 46°16' N. lat.)	319	305	305	287
Blackgill rockfish <sup>m</sup>	S. of 40°10' N. lat	NA	NA	NA	NA
Cabazon <sup>n</sup>	California (South of 42° N. lat.)	157	150	150	150
Cabazon <sup>o</sup>	Oregon (Between 46°16' N. lat. and 42° N. lat.)	49	47	47	47
California scorpionfish <sup>p</sup>	S. of 34°27' N. lat	289	264	150	148
Canary rockfish <sup>q</sup>	Coastwide	1,793	1,714	1,714	1,467
Chilipepper <sup>r</sup>	S. of 40°10' N. lat	2,727	2,607	2,607	2,561
Dover sole <sup>s</sup>	Coastwide	89,702	85,755	50,000	48,406
English sole <sup>t</sup>	Coastwide	10,914	9,964	9,964	9,751
Lingcod <sup>u</sup>	N. of 40°10' N. lat	3,549	3,333	3,333	3,055
Lingcod <sup>v</sup>	S. of 40°10' N. lat	1,502	1,251	1,251	1,242
Longnose skate <sup>w</sup>	Coastwide	2,556	2,444	2,000	1,853
Longspine thornyhead <sup>x</sup>	Coastwide	4,571	3,808	NA	NA
Longspine thornyhead	N. of 34°27' N. lat	NA	NA	2,894	2,847
Longspine thornyhead	S. of 34°27' N. lat	NA	NA	914	911
Pacific cod <sup>y</sup>	Coastwide	3,200	2,221	1,600	1,091
Pacific whiting <sup>z</sup>	Coastwide	( <sup>z</sup> )	( <sup>z</sup> )	( <sup>z</sup> )	( <sup>z</sup> )
Petrale sole <sup>aa</sup>	Coastwide	3,280	3,136	3,136	2,895
Sablefish	Coastwide	8,050	7,350	NA	NA
Sablefish <sup>bb</sup>	N. of 36° N. lat	NA	NA	6,041	See Table 1c
Sablefish <sup>cc</sup>	S. of 36° N. lat	NA	NA	1,075	1,070
Shortbelly rockfish <sup>dd</sup>	Coastwide	6,950	5,789	500	489
Shortspine thornyhead <sup>ee</sup>	Coastwide	3,144	2,619	NA	NA
Shortspine thornyhead	N. of 34°27' N. lat	NA	NA	1,713	1,654
Shortspine thornyhead	S. of 34°27' N. lat	NA	NA	906	864
Spiny dogfish <sup>ff</sup>	Coastwide	2,514	2,094	2,094	1,756
Splitnose rockfish <sup>gg</sup>	S. of 40°10' N. lat	1,841	1,760	1,760	1,749
Starry flounder <sup>hh</sup>	Coastwide	1,847	1,282	1,282	1,272
Widow rockfish <sup>ii</sup>	Coastwide	14,130	13,508	13,508	13,290
Yellowtail rockfish <sup>jj</sup>	N. of 40°10' N. lat	6,786	6,196	6,196	5,166
Minor Nearshore Rockfish <sup>kk</sup>	N. of 40°10' N. lat	118	105	105	103
Minor Shelf Rockfish <sup>ll</sup>	N. of 40°10' N. lat	2,303	2,049	2,049	1,965
Minor Slope Rockfish <sup>mmm</sup>	N. of 40°10' N. lat	1,897	1,755	1,755	1,690
Minor Nearshore Rockfish <sup>nn</sup>	S. of 40°10' N. lat	1,329	1,166	1,163	1,159
Minor Shelf Rockfish <sup>oo</sup>	S. of 40°10' N. lat	1,917	1,624	1,623	1,576
Minor Slope Rockfish <sup>pp</sup>	S. of 40°10' N. lat	827	718	707	687
Other Flatfish <sup>qq</sup>	Coastwide	11,165	8,510	8,510	8,306
Other Fish <sup>rr</sup>	Coastwide	537	474	474	474

<sup>a</sup> Annual catch limits (ACLs), annual catch targets (ACTs) and harvest guidelines (HG) are specified as total catch values.

<sup>b</sup> Fishery harvest guidelines means the harvest guideline or quota after subtracting Pacific Coast treaty Indian tribes allocations and projected catch, projected research catch, deductions for fishing mortality in non-groundfish fisheries, and deductions for EFPs from the ACL or ACT.



<sup>e</sup>Bocaccio. A stock assessment was conducted in 2015 for the bocaccio stock between the U.S.-Mexico border and Cape Blanco. The stock is managed with stock-specific harvest specifications south of 40°10' N. lat. and within the Minor Shelf Rockfish complex north of 40°10' N. lat. A historical catch distribution of approximately 7.4 percent was used to apportion the assessed stock to the area north of 40°10' N. lat. The bocaccio stock was estimated to be at 36.8 percent of its unfished biomass in 2015. The OFL of 2,139 mt is projected in the 2015 stock assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 2,044 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The 790 mt ACL is based on the current rebuilding plan with a target year to rebuild of 2022 and an SPR harvest rate of 77.7 percent. 15.4 mt is deducted from the ACL to accommodate the incidental open access fishery (0.8 mt), EFP catch (10 mt) and research catch (4.6 mt), resulting in a fishery HG of 774.6 mt. The California recreational fishery has an HG of 326.1 mt.

<sup>d</sup>Cowcod. A stock assessment for the Conception Area was conducted in 2013 and the stock was estimated to be at 33.9 percent of its unfished biomass in 2013. The Conception Area OFL of 58 mt is projected in the 2013 rebuilding analysis using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The OFL contribution of 12 mt for the unassessed portion of the stock in the Monterey area is based on depletion-based stock reduction analysis. The OFLs for the Monterey and Conception areas were summed to derive the south of 40°10' N. lat. OFL of 70 mt. The ABC for the area south of 40°10' N. lat. is 63 mt. The assessed portion of the stock in the Conception Area is considered category 2, with a Conception area contribution to the ABC of 53 mt, which is an 8.7 percent reduction from the Conception area OFL ( $\sigma = 0.72/P^* = 0.45$ ). The unassessed portion of the stock in the Monterey area is considered a category 3 stock, with a contribution to the ABC of 10 mt, which is a 16.6 percent reduction from the Monterey area OFL ( $\sigma = 1.44/P^* = 0.45$ ). A single ACL of 10 mt is being set for both areas combined. The ACL of 10 mt is based on the rebuilding plan with a target year to rebuild of 2020 and an SPR harvest rate of 82.7 percent, which is equivalent to an exploitation rate (catch over age 11+ biomass) of 0.007. 2 mt is deducted from the ACL to accommodate the incidental open access fishery (less than 0.1 mt), EFP fishing (less than 0.1 mt) and research activity (2 mt), resulting in a fishery HG of 8 mt. Any additional mortality in research activities will be deducted from the ACL. A single ACT of 4 mt is being set for both areas combined.

<sup>c</sup>Darkblotched rockfish. A 2015 stock assessment estimated the stock to be at 39 percent of its unfished biomass in 2015. The OFL of 671 mt is projected in the 2015 stock assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 641 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC, as the stock is projected to be above its target biomass of  $B_{40\%}$  in 2017. 77.3 mt is deducted from the ACL to accommodate the Tribal fishery (0.2 mt), the incidental open access fishery (24.5 mt), EFP catch (0.1 mt), research catch (2.5 mt) and an additional deduction for unforeseen catch events (50 mt), resulting in a fishery HG of 563.8 mt.

<sup>f</sup>Pacific ocean perch. A stock assessment was conducted in 2011 and the stock was estimated to be at 19.1 percent of its unfished biomass in 2011. The OFL of 964 mt for the area north of 40°10' N. lat. is based on an updated catch-only projection of the 2011 rebuilding analysis using an  $F_{50\%}$   $F_{MSY}$  proxy. The ABC of 922 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is based on the current rebuilding plan with a target year to rebuild of 2051 and a constant catch amount of 281 mt in 2017 and 2018, followed in 2019 and beyond by ACLs based on an SPR harvest rate of 86.4 percent. 49.4 mt is deducted from the ACL to accommodate the Tribal fishery (9.2 mt), the incidental open access fishery (10 mt), research catch (5.2 mt) and an additional deduction for unforeseen catch events (25 mt), resulting in a fishery HG of 231.6 mt.

<sup>g</sup>Yelloweye rockfish. A stock assessment update was conducted in 2011. The stock was estimated to be at 21.4 percent of its unfished biomass in 2011. The 57 mt coastwide OFL is based on a catch-only update of the 2011 stock assessment, assuming actual catches since 2011 and using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 47 mt is a 16.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.40$ ) because it is a category 2 stock. The 20 mt ACL is based on the current rebuilding plan with a target year to rebuild of 2074 and an SPR harvest rate of 76.0 percent. 5.4 mt is deducted from the ACL to accommodate the Tribal fishery (2.3 mt), the incidental open access fishery (0.4 mt), EFP catch (less than 0.1 mt) and research catch (2.7 mt), resulting in a fishery HG of 14.6 mt. Recreational HGs are: 3.3 mt (Washington); 3 mt (Oregon); and 3.9 mt (California).

<sup>h</sup>Arrowtooth flounder. The arrowtooth flounder stock was last assessed in 2007 and was estimated to be at 79 percent of its unfished biomass in 2007. The OFL of 16,571 mt is derived from a catch-only update of the 2007 stock assessment assuming actual catches since 2007 and using an  $F_{30\%}$   $F_{MSY}$  proxy. The ABC of 13,804 mt is a 16.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.40$ ) because it is a category 2 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{25\%}$ . 2,098.1 mt is deducted from the ACL to accommodate the Tribal fishery (2,041 mt), the incidental open access fishery (40.8 mt), and research catch (16.4 mt), resulting in a fishery HG of 11,705.9 mt.

<sup>i</sup>Big skate. The OFL of 541 mt is based on an estimate of trawl survey biomass and natural mortality. The ABC of 494 mt is an 8.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.45$ ) as it is a category 2 stock. The ACL is set equal to the ABC. 57.4 mt is deducted from the ACL to accommodate the Tribal fishery (15 mt), the incidental open access fishery (38.4 mt), and research catch (4 mt), resulting in a fishery HG of 436.6 mt.

<sup>j</sup>Black rockfish (California). A 2015 stock assessment estimated the stock to be at 33 percent of its unfished biomass in 2015. The OFL of 349 mt is projected in the 2015 stock assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 334 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC because the stock is projected to be above its target biomass of  $B_{40\%}$  in 2017. 1 mt is deducted from the ACL to accommodate EFP catch (1 mt), resulting in a fishery HG of 333 mt.

<sup>k</sup>Black rockfish (Oregon). A 2015 stock assessment estimated the stock to be at 60 percent of its unfished biomass in 2015. The OFL of 577 mt is projected in the 2015 stock assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 527 mt is an 8.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.45$ ) because it is a category 2 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 0.6 mt is deducted from the ACL to accommodate the incidental open access fishery (0.6 mt), resulting in a fishery HG of 526.4 mt.

<sup>l</sup>Black rockfish (Washington). A 2015 stock assessment estimated the stock to be at 43 percent of its unfished biomass in 2015. The OFL of 319 mt is projected in the 2015 stock assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 305 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 18 mt is deducted from the ACL to accommodate the Tribal fishery, resulting in a fishery HG of 287 mt.

<sup>m</sup>Blackgill rockfish. Blackgill rockfish contributes to the harvest specifications for the Minor Slope Rockfish South complex. See footnote/pp.

<sup>n</sup>Cabezon (California). A cabezon stock assessment was conducted in 2009. The cabezon spawning biomass in waters off California was estimated to be at 48.3 percent of its unfished biomass in 2009. The OFL of 157 mt is calculated using an  $F_{MSY}$  proxy of  $F_{45\%}$ . The ABC of 150 mt is based on a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 0.3 mt is deducted from the ACL to accommodate the incidental open access fishery, resulting in a fishery HG of 149.7 mt.

<sup>o</sup>Cabezon (Oregon). A cabezon stock assessment was conducted in 2009. The cabezon spawning biomass in waters off Oregon was estimated to be at 52 percent of its unfished biomass in 2009. The OFL of 49 mt is calculated using an  $F_{MSY}$  proxy of  $F_{45\%}$ . The ABC of 47 mt is based on a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 species. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . There are no deductions from the ACL so the fishery HG is also equal to the ACL of 47 mt.

<sup>p</sup>California scorpionfish. A California scorpionfish assessment was conducted in 2005 and was estimated to be at 79.8 percent of its unfished biomass in 2005. The OFL of 289 mt is based on projections from a catch-only update of the 2005 assessment assuming actual catches since 2005 and using an  $F_{MSY}$  harvest rate proxy of  $F_{50\%}$ . The ABC of 264 mt is an 8.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.45$ ) because it is a category 2 stock. The ACL is set at a constant catch amount of 150 mt. 2.2 mt is deducted from the ACL to accommodate the incidental open access fishery (2 mt) and research catch (0.2 mt), resulting in a fishery HG of 147.8 mt. An ACT of 111 mt is established.

<sup>q</sup>Canary rockfish. A stock assessment was conducted in 2015 and the stock was estimated to be at 55.5 percent of its unfished biomass coastwide in 2015. The coastwide OFL of 1,793 mt is projected in the 2015 assessment using an  $F_{MSY}$  harvest rate proxy of  $F_{50\%}$ . The ABC of 1,714 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 247 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), the incidental open access fishery (1.2 mt), EFP catch (1 mt), research catch (7.2 mt), and an additional deduction for unforeseen catch events (188 mt), resulting in a fishery HG of 1,466.6 mt. Recreational HGs are: 50 mt (Washington); 75 mt (Oregon); and 135 mt (California).



<sup>r</sup>Chilipepper. A coastwide update assessment of the chilipepper stock was conducted in 2015 and estimated to be at 64 percent of its unfished biomass in 2015. Chilipepper are managed with stock-specific harvest specifications south of 40°10' N. lat. and within the Minor Shelf Rockfish complex north of 40°10' N. lat. Projected OFLs are stratified north and south of 40°10' N. lat. based on the average historical assessed area catch, which is 93 percent for the area south of 40°10' N. lat. and 7 percent for the area north of 40°10' N. lat. The OFL of 2,727 mt for the area south of 40°10' N. lat. is projected in the 2015 assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 2,607 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 45.9 mt is deducted from the ACL to accommodate the incidental open access fishery (5 mt), EFP fishing (30 mt), and research catch (10.9 mt), resulting in a fishery HG of 2,561.1 mt.

<sup>s</sup>Dover sole. A 2011 Dover sole assessment estimated the stock to be at 83.7 percent of its unfished biomass in 2011. The OFL of 89,702 mt is based on an updated catch-only projection from the 2011 stock assessment assuming actual catches since 2011 and using an  $F_{MSY}$  proxy of  $F_{30\%}$ . The ABC of 85,755 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL could be set equal to the ABC because the stock is above its target biomass of  $B_{25\%}$ . However, the ACL of 50,000 mt is set at a level below the ABC and higher than the maximum historical landed catch. 1,593.7 mt is deducted from the ACL to accommodate the Tribal fishery (1,497 mt), the incidental open access fishery (54.8 mt), and research catch (41.9 mt), resulting in a fishery HG of 48,406.3 mt.

<sup>t</sup>English sole. A 2013 stock assessment was conducted, which estimated the stock to be at 88 percent of its unfished biomass in 2013. The OFL of 10,914 mt is projected in the 2013 assessment using an  $F_{MSY}$  proxy of  $F_{30\%}$ . The ABC of 9,964 mt is an 8.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.45$ ) because it is a category 2 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{25\%}$ . 212.8 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), the incidental open access fishery (7.0 mt) and research catch (5.8 mt), resulting in a fishery HG of 9,751.2 mt.

<sup>u</sup>Lingcod north. The 2009 lingcod assessment modeled two populations north and south of the California-Oregon border (42° N. lat.). Both populations were healthy with stock depletion estimated at 62 and 74 percent for the north and south, respectively in 2009. The OFL is based on an updated catch-only projection from the 2009 assessment assuming actual catches since 2009 and using an  $F_{MSY}$  proxy of  $F_{45\%}$ . The OFL is apportioned north of 40°10' N. lat. by adding 48% of the OFL from California, resulting in an OFL of 3,549 mt for the area north of 40°10' N. lat. The ABC of 3,333 mt is based on a 4.4 percent reduction ( $\sigma = 0.36/P^* = 0.45$ ) from the OFL contribution for the area north of 42° N. lat. because it is a category 1 stock, and an 8.7 percent reduction ( $\sigma = 0.72/P^* = 0.45$ ) from the OFL contribution for the area between 42° N. lat. and 40°10' N. lat. because it is a category 2 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 278.2 mt is deducted from the ACL for the Tribal fishery (250 mt), the incidental open access fishery (16 mt), EFP catch (0.5 mt) and research catch (11.7 mt), resulting in a fishery HG of 3,054.8 mt.

<sup>v</sup>Lingcod south. The 2009 lingcod assessment modeled two populations north and south of the California-Oregon border (42° N. lat.). Both populations were healthy with stock depletion estimated at 62 and 74 percent for the north and south, respectively in 2009. The OFL is based on an updated catch-only projection of the 2009 stock assessment assuming actual catches since 2009 using an  $F_{MSY}$  proxy of  $F_{45\%}$ . The OFL is apportioned by subtracting 48% of the California OFL, resulting in an OFL of 1,502 mt for the area south of 40°10' N. lat. The ABC of 1,251 mt is based on a 16.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.40$ ) because it is a category 2 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 9 mt is deducted from the ACL to accommodate the incidental open access fishery (6.9 mt), EFP fishing (1 mt), and research catch (1.1 mt), resulting in a fishery HG of 1,242 mt.

<sup>w</sup>Longnose skate. A stock assessment was conducted in 2007 and the stock was estimated to be at 66 percent of its unfished biomass. The OFL of 2,556 mt is derived from the 2007 stock assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 2,444 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL of 2,000 mt is a fixed harvest level that provides greater access to the stock and is less than the ABC. 147 mt is deducted from the ACL to accommodate the Tribal fishery (130 mt), incidental open access fishery (3.8 mt), and research catch (13.2 mt), resulting in a fishery HG of 1,853 mt.

<sup>x</sup>Longspine thornyhead. A 2013 longspine thornyhead coastwide stock assessment estimated the stock to be at 75 percent of its unfished biomass in 2013. A coastwide OFL of 4,571 mt is projected in the 2013 stock assessment using an  $F_{50\%}$   $F_{MSY}$  proxy. The coastwide ABC of 3,808 mt is a 16.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.40$ ) because it is a category 2 stock. For the portion of the stock that is north of 34°27' N. lat., the ACL is 2,894 mt, and is 76 percent of the coastwide ABC based on the average swept-area biomass estimates (2003–2012) from the NMFS NWFSC trawl survey. 46.8 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), the incidental open access fishery (3.3 mt), and research catch (13.5 mt), resulting in a fishery HG of 2,847.2 mt. For that portion of the stock south of 34°27' N. lat. the ACL is 914 mt and is 24 percent of the coastwide ABC based on the average swept-area biomass estimates (2003–2012) from the NMFS NWFSC trawl survey. 3.2 mt is deducted from the ACL to accommodate the incidental open access fishery (1.8 mt), and research catch (1.4 mt), resulting in a fishery HG of 910.8 mt.

<sup>y</sup>Pacific cod. The 3,200 mt OFL is based on the maximum level of historic landings. The ABC of 2,221 mt is a 30.6 percent reduction from the OFL ( $\sigma = 1.44/P^* = 0.40$ ) because it is a category 3 stock. The 1,600 mt ACL is the OFL reduced by 50 percent as a precautionary adjustment. 509 mt is deducted from the ACL to accommodate the Tribal fishery (500 mt), research catch (7 mt), and the incidental open access fishery (2 mt), resulting in a fishery HG of 1,091 mt.

<sup>z</sup>Pacific whiting. Pacific whiting. Pacific whiting are assessed annually. The final specifications will be determined consistent with the U.S.-Canada Pacific Whiting Agreement and will be announced after the Council's April 2017 meeting.

<sup>aa</sup>Petrale sole. A 2015 stock assessment update was conducted, which estimated the stock to be at 31 percent of its unfished biomass in 2015. The OFL of 3,280 mt is projected in the 2015 assessment using an  $F_{MSY}$  proxy of  $F_{30\%}$ . The ABC of 3,136 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{25\%}$ . 240.9 mt is deducted from the ACL to accommodate the Tribal fishery (220 mt), the incidental open access fishery (3.2 mt) and research catch (17.7 mt), resulting in a fishery HG of 2,895.1 mt.

<sup>bb</sup>Sablefish north. A coastwide sablefish stock assessment update was conducted in 2015. The coastwide sablefish biomass was estimated to be at 33 percent of its unfished biomass in 2015. The coastwide OFL of 8,050 mt is projected in the 2015 stock assessment using an  $F_{MSY}$  proxy of  $F_{45\%}$ . The ABC of 7,350 mt is an 8.7 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.40$ ). The 40–10 adjustment is applied to the ABC to derive a coastwide ACL value because the stock is in the precautionary zone. This coastwide ACL value is not specified in regulations. The coastwide ACL value is apportioned north and south of 36° N. lat., using the 2003–2014 average estimated swept area biomass from the NMFS NWFSC trawl survey, with 84.9 percent apportioned north of 36° N. lat. and 15.1 percent apportioned south of 36° N. lat. The northern ACL is 6,041 mt and is reduced by 604 mt for the Tribal allocation (10 percent of the ACL north of 36° N. lat.). The 604 mt Tribal allocation is reduced by 1.5 percent to account for discard mortality. Detailed sablefish allocations are shown in Table 1c.

<sup>cc</sup>Sablefish south. The ACL for the area south of 36° N. lat. is 1,075 mt (15.1 percent of the calculated coastwide ACL value). 5 mt is deducted from the ACL to accommodate the incidental open access fishery (2 mt) and research catch (3 mt), resulting in a fishery HG of 1,070 mt.

<sup>dd</sup>Shortbelly rockfish. A non-quantitative shortbelly rockfish assessment was conducted in 2007. The spawning stock biomass of shortbelly rockfish was estimated to be 67 percent of its unfished biomass in 2005. The OFL of 6,950 mt is based on the estimated MSY in the 2007 stock assessment. The ABC of 5,789 mt is a 16.7 percent reduction of the OFL ( $\sigma = 0.72/P^* = 0.40$ ) because it is a category 2 stock. The 500 mt ACL is set to accommodate incidental catch when fishing for co-occurring healthy stocks and in recognition of the stock's importance as a forage species in the California Current ecosystem. 10.9 mt is deducted from the ACL to accommodate the incidental open access fishery (8.9 mt) and research catch (2 mt), resulting in a fishery HG of 489.1 mt.

<sup>ee</sup>Shortspine thornyhead. A 2013 coastwide shortspine thornyhead stock assessment estimated the stock to be at 74.2 percent of its unfished biomass in 2013. A coastwide OFL of 3,144 mt is projected in the 2013 stock assessment using an  $F_{50\%}$   $F_{MSY}$  proxy. The coastwide ABC of 2,619 mt is a 16.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.40$ ) because it is a category 2 stock. For the portion of the stock that is north of 34°27' N. lat., the ACL is 1,713 mt. The northern ACL is 65.4 percent of the coastwide ABC based on the average swept-area biomass estimates (2003–2012) from the NMFS NWFSC trawl survey. 59 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), the incidental open access fishery (1.8 mt), and research catch (7.2 mt), resulting in a fishery HG of 1,654 mt for the area north of 34°27' N. lat. For that portion of the stock south of 34°27' N. lat. the ACL is 906 mt. The southern ACL is 34.6 percent of the coastwide ABC based on the average swept-area biomass estimates (2003–2012) from the NMFS NWFSC trawl survey. 42.3 mt is deducted from the ACL to accommodate the incidental open access fishery (41.3 mt) and research catch (1 mt), resulting in a fishery HG of 863.7 mt for the area south of 34°27' N. lat.

<sup>ff</sup> Spiny dogfish. A coastwide spiny dogfish stock assessment was conducted in 2011. The coastwide spiny dogfish biomass was estimated to be at 63 percent of its unfished biomass in 2011. The coastwide OFL of 2,514 mt is derived from the 2011 assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The coastwide ABC of 2,094 mt is a 16.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.40$ ) because it is a category 2 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 338 mt is deducted from the ACL to accommodate the Tribal fishery (275 mt), the incidental open access fishery (49.5 mt), EFP catch (1 mt), and research catch (12.5 mt), resulting in a fishery HG of 1,756 mt.

<sup>gg</sup> Splitnose rockfish. A coastwide splitnose rockfish assessment was conducted in 2009 that estimated the stock to be at 66 percent of its unfished biomass in 2009. Splitnose rockfish in the north is managed in the Minor Slope Rockfish complex and with stock-specific harvest specifications south of 40°10' N. lat. The coastwide OFL is projected in the 2009 assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The coastwide OFL is apportioned north and south of 40°10' N. lat. based on the average 1916–2008 assessed area catch, resulting in 64.2 percent of the coastwide OFL apportioned south of 40°10' N. lat., and 35.8 percent apportioned for the contribution of splitnose rockfish to the northern Minor Slope Rockfish complex. The southern OFL of 1,841 mt results from the apportionment described above. The southern ABC of 1,760 mt is a 4.4 percent reduction from the southern OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC because the stock is estimated to be above its target biomass of  $B_{40\%}$ . 10.7 mt is deducted from the ACL to accommodate the incidental open access fishery (0.2 mt), research catch (9 mt) and EFP catch (1.5 mt), resulting in a fishery HG of 1,749.3 mt.

<sup>hh</sup> Starry flounder. The stock was assessed in 2005 and was estimated to be above 40 percent of its unfished biomass in 2005 (44 percent in Washington and Oregon, and 62 percent in California). The coastwide OFL of 1,847 mt is set equal to the 2016 OFL, which was derived from the 2005 assessment using an  $F_{MSY}$  proxy of  $F_{30\%}$ . The ABC of 1,282 mt is a 30.6 percent reduction from the OFL ( $\sigma = 1.44/P^* = 0.40$ ) because it is a category 3 stock. The ACL is set equal to the ABC because the stock was estimated to be above its target biomass of  $B_{25\%}$  in 2017. 10.3 mt is deducted from the ACL to accommodate the Tribal fishery (2 mt), and the incidental open access fishery (8.3 mt), resulting in a fishery HG of 1,271.7 mt.

<sup>ii</sup> Widow rockfish. The widow rockfish stock was assessed in 2015 and was estimated to be at 75 percent of its unfished biomass in 2015. The OFL of 14,130 mt is projected in the 2015 stock assessment using the  $F_{50\%}$   $F_{MSY}$  proxy. The ABC of 13,508 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 217.7 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), the incidental open access fishery (0.5 mt), EFP catch (9 mt) and research catch (8.2 mt), resulting in a fishery HG of 13,290.3 mt.

<sup>jj</sup> Yellowtail rockfish. A 2013 yellowtail rockfish stock assessment was conducted for the portion of the population north of 40°10' N. lat. The estimated stock depletion was 67 percent of its unfished biomass in 2013. The OFL of 6,786 mt is projected in the 2013 stock assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 6,196 mt is an 8.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.45$ ) because it is a category 2 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 1,030 mt is deducted from the ACL to accommodate the Tribal fishery (1,000 mt), the incidental open access fishery (3.4 mt), EFP catch (10 mt) and research catch (16.6 mt), resulting in a fishery HG of 5,166.1 mt.

<sup>kk</sup> Minor Nearshore Rockfish north. The OFL for Minor Nearshore Rockfish north of 40°10' N. lat. of 118 mt is the sum of the OFL contributions for the component species managed in the complex. The ABCs for the minor rockfish complexes are based on a sigma value of 0.72 for category 2 stocks (blue/deacon rockfish in California, brown rockfish, China rockfish, and copper rockfish) and a sigma value of 1.44 for category 3 stocks (all others) with a  $P^*$  of 0.45. The resulting ABC of 105 mt is the summed contribution of the ABCs for the component species. The ACL of 105 mt is the sum of contributing ABCs of healthy assessed stocks and unassessed stocks, plus the ACL contributions for blue/deacon rockfish in California where the 40–10 adjustment was applied to the ABC contribution for this stock because it is in the precautionary zone. 1.8 mt is deducted from the ACL to accommodate the Tribal fishery (1.5 mt) and the incidental open access fishery (0.3 mt), resulting in a fishery HG of 103.2 mt. Between 40°10' N. lat. and 42° N. lat. the Minor Nearshore Rockfish complex north has a harvest guideline of 40.2 mt. Blue/deacon rockfish south of 42° N. lat. has a stock-specific HG, described in footnote <sup>mm</sup>.

<sup>ll</sup> Minor Shelf Rockfish north. The OFL for Minor Shelf Rockfish north of 40°10' N. lat. of 2,303 mt is the sum of the OFL contributions for the component species within the complex. The ABCs for the minor rockfish complexes are based on a sigma value of 0.36 for a category 1 stock (chilipepper), a sigma value of 0.72 for category 2 stocks (greenspotted rockfish between 40°10' and 42° N. lat. and greenstriped rockfish), and a sigma value of 1.44 for category 3 stocks (all others) with a  $P^*$  of 0.45. The resulting ABC of 2,049 mt is the summed contribution of the ABCs for the component species. The ACL of 2,049 mt is the sum of contributing ABCs of healthy assessed stocks and unassessed stocks, plus the ACL contribution of greenspotted rockfish in California where the 40–10 adjustment was applied to the ABC contribution for this stock because it is in the precautionary zone. 83.8 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), the incidental open access fishery (26 mt), EFP catch (3 mt), and research catch (24.8 mt), resulting in a fishery HG of 1,965.2 mt.

<sup>mmm</sup> Minor Slope Rockfish north. The OFL for Minor Slope Rockfish north of 40°10' N. lat. of 1,897 mt is the sum of the OFL contributions for the component species within the complex. The ABCs for the Minor Slope Rockfish complexes are based on a sigma value of 0.39 for aurora rockfish, a sigma value of 0.36 for the other category 1 stock (splitnose rockfish), a sigma value of 0.72 for category 2 stocks (rougheye rockfish, blackspotted rockfish, and sharpchin rockfish), and a sigma value of 1.44 for category 3 stocks (all others) with a  $P^*$  of 0.45. A unique sigma of 0.39 was calculated for aurora rockfish because the variance in estimated spawning biomass was greater than the 0.36 used as a proxy for other category 1 stocks. The resulting ABC of 1,755 mt is the summed contribution of the ABCs for the component species. The ACL is set equal to the ABC because all the assessed component stocks (*i.e.*, rougheye rockfish, blackspotted rockfish, sharpchin rockfish, and splitnose rockfish) are above the target biomass of  $B_{40\%}$ . 65.1 mt is deducted from the ACL to accommodate the Tribal fishery (36 mt), the incidental open access fishery (18.6 mt), EFP catch (1 mt), and research catch (9.5 mt), resulting in a fishery HG of 1,689.9 mt.

<sup>nn</sup> Minor Nearshore Rockfish south. The OFL for the Minor Nearshore Rockfish complex south of 40°10' N. lat. of 1,329 mt is the sum of the OFL contributions for the component species within the complex. The ABC for the southern Minor Nearshore Rockfish complex is based on a sigma value of 0.72 for category 2 stocks (*i.e.*, blue/deacon rockfish north of 34°27' N. lat., brown rockfish, China rockfish, and copper rockfish) and a sigma value of 1.44 for category 3 stocks (all others) with a  $P^*$  of 0.45. The resulting ABC of 1,166 mt is the summed contribution of the ABCs for the component species. The ACL of 1,163 mt is the sum of the contributing ABCs of healthy assessed stocks and unassessed stocks, plus the ACL contribution for blue/deacon rockfish north of 34°27' N. lat. and China rockfish where the 40–10 adjustment was applied to the ABC contributions for these two stocks because they are in the precautionary zone. 4.1 mt is deducted from the ACL to accommodate the incidental open access fishery (1.4 mt) and research catch (2.7 mt), resulting in a fishery HG of 1,158.9 mt. Blue/deacon rockfish south of 42° N. lat. has a stock-specific HG set equal to the 40–10-adjusted ACL for the portion of the stock north of 34°27' N. lat. (243.7 mt) plus the ABC contribution for the unassessed portion of the stock south of 34°27' N. lat. (60.8 mt). The California (*i.e.* south of 42° N. lat.) blue/deacon rockfish HG is 304.5 mt.

<sup>oo</sup> Minor Shelf Rockfish south. The OFL for the Minor Shelf Rockfish complex south of 40°10' N. lat. of 1,917 mt is the sum of the OFL contributions for the component species within the complex. The ABC for the southern Minor Shelf Rockfish complex is based on a sigma value of 0.72 for category 2 stocks (greenspotted and greenstriped rockfish) and a sigma value of 1.44 for category 3 stocks (all others) with a  $P^*$  of 0.45. The resulting ABC of 1,624 mt is the summed contribution of the ABCs for the component species. The ACL of 1,623 mt is the sum of contributing ABCs of healthy assessed stocks and unassessed stocks, plus the ACL contribution of greenspotted rockfish in California where the 40–10 adjustment was applied to the ABC contribution for this stock because it is in the precautionary zone. 47.2 mt is deducted from the ACL to accommodate the incidental open access fishery (8.6 mt), EFP catch (30 mt), and research catch (8.6 mt), resulting in a fishery HG of 1,575.8 mt.

<sup>pp</sup> Minor Slope Rockfish south. The OFL of 827 mt is the sum of the OFL contributions for the component species within the complex. The ABC for the southern Minor Slope Rockfish complex is based on a sigma value of 0.39 for aurora rockfish, a sigma value of 0.72 for category 2 stocks (blackgill rockfish, rougheye rockfish, blackspotted rockfish, and sharpchin rockfish) and a sigma value of 1.44 for category 3 stocks (all others) with a P\* of 0.45. A unique sigma of 0.39 was calculated for aurora rockfish because the variance in estimated biomass was greater than the 0.36 used as a proxy for other category 1 stocks. The resulting ABC of 718 mt is the summed contribution of the ABCs for the component species. The ACL of 707 mt is the sum of the contributing ABCs of healthy assessed stocks and unassessed stocks, plus the ACL contribution of blackgill rockfish where the 40–10 adjustment was applied to the ABC contribution for this stock because it is in the precautionary zone. 20.2 mt is deducted from the ACL to accommodate the incidental open access fishery (17.2 mt), EFP catch (1 mt), and research catch (2 mt), resulting in a fishery HG of 686.8 mt. Blackgill rockfish has a stock-specific HG for the entire groundfish fishery south of 40°10' N lat. set equal to the species' contribution to the 40–10-adjusted ACL. Harvest of blackgill rockfish in all groundfish fisheries counts against this HG of 120.2 mt. Nontrawl fisheries are subject to a blackgill rockfish HG of 44.5 mt.

<sup>qq</sup> Other Flatfish. The Other Flatfish complex is comprised of flatfish species managed in the PCGFMP that are not managed with stock-specific OFLs/ABCs/ACLs. Most of the species in the Other Flatfish complex are unassessed and include: Butter sole, curlfin sole, flathead sole, Pacific sanddab, rock sole, sand sole, and rex sole. The Other Flatfish OFL of 11,165 mt is based on the sum of the OFL contributions of the component stocks. The ABC of 8,510 mt is based on a sigma value of 0.72 for a category 2 stock (rex sole) and a sigma value of 1.44 for category 3 stocks (all others) with a P\* of 0.40. The ACL is set equal to the ABC. The ACL is set equal to the ABC because all of the assessed stocks (*i.e.*, Pacific sanddabs and rex sole) were above their target biomass of B<sub>25%</sub>. 204 mt is deducted from the ACL to accommodate the Tribal fishery (60 mt), the incidental open access fishery (125 mt), and research catch (19 mt), resulting in a fishery HG of 8,306 mt.

<sup>rr</sup> Other Fish. The Other Fish complex is comprised of kelp greenling coastwide, cabezon off Washington, and leopard shark coastwide. The 2015 assessment for the kelp greenling stock off of Oregon projected an estimated depletion of 80 percent in 2015. All other stocks are unassessed. The OFL of 537 mt is the sum of the OFL contributions for kelp greenling coastwide, cabezon off Washington, and leopard shark coastwide. The ABC for the Other Fish complex is based on a sigma value of 0.44 for kelp greenling off Oregon and a sigma value of 1.44 for category 3 stocks (all others) with a P\* of 0.45. A unique sigma of 0.44 was calculated for kelp greenling off Oregon because the variance in estimated spawning biomass was greater than the 0.36 sigma used as a proxy for other category 1 stocks. The resulting ABC of 474 mt is the summed contribution of the ABCs for the component species. The ACL is set equal to the ABC because all of the assessed stocks (kelp greenling off Oregon) were above their target biomass of B<sub>40%</sub>. There are no deductions from the ACL so the fishery HG is equal to the ACL of 474 mt.

TABLE 1b TO PART 660, SUBPART C—2017, ALLOCATIONS BY SPECIES OR SPECIES GROUP  
(Weight in metric tons)

Species	Area	Fishery HG or ACT	Trawl		Non-trawl	
			Percent	Mt	Percent	Mt
BOCACIO <sup>a</sup>	S. of 40°10' N. lat	774.6	39	302.4	61	472.2
COWCOD <sup>a,b</sup>	S. of 40°10' N. lat	4.0	36	1.4	64	2.6
DARKBLOTCHED ROCKFISH <sup>c</sup>	Coastwide	563.8	95	535.6	5	28.2
PACIFIC OCEAN PERCH <sup>c</sup>	N. of 40°10' N. lat	231.6	95	220.0	5	11.6
YELLOWEYE ROCKFISH <sup>a</sup>	Coastwide	14.6	NA	1.1	NA	13.1
Arrowtooth flounder	Coastwide	11,705.9	95	11,120.6	5	585.3
Big skate <sup>a</sup>	Coastwide	436.6	95	414.8	5	21.8
Canary rockfish <sup>a,d</sup>	Coastwide	1,466.6	NA	1,060.1	NA	406.5
Chilipepper	S. of 40°10' N. lat	2,561.1	75	1,920.8	25	640.3
Dover sole	Coastwide	48,406.3	95	45,986.0	5	2,420.3
English sole	Coastwide	9,751.2	95	9,263.6	5	487.6
Lingcod	N. of 40°10' N. lat	3,054.8	45	1,374.7	55	1,680.2
Lingcod	S. of 40°10' N. lat	1,242.0	45	558.9	55	683.1
Longnose skate <sup>a</sup>	Coastwide	1,853.0	90	1,667.7	10	185.3
Longspine thornyhead	N. of 34°27' N. lat	2,847.2	95	2,704.8	5	142.4
Pacific cod	Coastwide	1,091.0	95	1,036.4	5	54.5
Pacific whiting	Coastwide	TBD	100	TBD	0	TBD
Petrale sole	Coastwide	2,895.1	95	2,750.3	5	144.8
Sablefish	N. of 36° N. lat	NA	See Table 1c			
Sablefish	S. of 36° N. lat	1,070.0	42	449.4	58	620.6
Shortspine thornyhead	N. of 34°27' N. lat	1,654.0	95	1,571.3	5	82.7
Shortspine thornyhead	S. of 34°27' N. lat	863.7	NA	50.0	NA	813.7
Splitnose rockfish	S. of 40°10' N. lat	1,749.3	95	1,661.8	5	87.5
Starry flounder	Coastwide	1,271.7	50	635.9	50	635.9
Widow rockfish <sup>f</sup>	Coastwide	13,290.3	91	12,094.2	9	1,196.1
Yellowtail rockfish	N. of 40°10' N. lat	5,166.1	88	4,546.1	12	619.9
Minor Shelf Rockfish <sup>a</sup>	N. of 40°10' N. lat	1,965.2	60	1,183.1	40	782.1
Minor Slope Rockfish	N. of 40°10' N. lat	1,689.9	81	1,368.8	19	321.1
Minor Shelf Rockfish <sup>a</sup>	S. of 40°10' N. lat	1,575.8	12	192.2	88	1,383.6
Minor Slope Rockfish	S. of 40°10' N. lat	686.8	63	432.7	37	254.1
Other Flatfish	Coastwide	8,306.0	90	7,475.4	10	830.6

<sup>a</sup> Allocations decided through the biennial specification process.

<sup>b</sup> The cowcod fishery harvest guideline is further reduced to an ACT of 4.0 mt.

<sup>c</sup> Consistent with regulations at § 660.55(c), 9 percent (48.2 mt) of the total trawl allocation for darkblotched rockfish is allocated to the Pacific whiting fishery, as follows: 20.2 mt for the Shorebased IFQ Program, 11.6 mt for the MS sector, and 16.4 mt for the C/P sector. The tonnage calculated here for the Pacific whiting IFQ fishery contributes to the total shorebased trawl allocation, which is found at § 660.140(d)(1)(ii)(D).

<sup>d</sup> Canary rockfish is allocated approximately 72 percent to trawl and 28 percent to non-trawl. 46 mt of the total trawl allocation of canary rockfish is allocated to the MS and C/P sectors, as follows: 30 mt for the MS sector, and 16 mt for the C/P sector.

<sup>e</sup> Consistent with regulations at § 660.55(c), 17 percent (37.4 mt) of the total trawl allocation for POP is allocated to the Pacific whiting fishery, as follows: 15.7 mt for the Shorebased IFQ Program, 9.0 mt for the MS sector, and 12.7 mt for the C/P sector. The tonnage calculated here for the Pacific whiting IFQ fishery contributes to the total shorebased trawl allocation, which is found at § 660.140(d)(1)(ii)(D).

<sup>1</sup> Consistent with regulations at § 660.55(c), 10 percent (1,209.4 mt) of the total trawl allocation for widow rockfish is allocated to the whiting fisheries, as follows: 508.0 mt for the shorebased IFQ fishery, 290.3 mt for the mothership fishery, and 411.2 mt for the catcher/processor fishery. The tonnage calculated here for the whiting portion of the shorebased IFQ fishery contributes to the total shorebased trawl allocation, which is found at § 660.140(d)(1)(ii)(D).

TABLE 1c. TO PART 660, SUBPART C—SABLEFISH NORTH OF 36° N. LAT. ALLOCATIONS, 2017

Year	ACL	Set-asides		Recreational estimate	EFP	Commercial HG	Limited entry HG		Open access HG	
		Tribal <sup>a</sup>	Research				Percent	mt	Percent	mt <sup>b</sup>
2017 .....	6,041	604	26	6.1	1	5,404	90.6	4,896	9.4	508
Year	LE All	Limited entry trawl <sup>c</sup>				Limited entry fixed gear <sup>d</sup>				
		All trawl	At-sea whiting	Shorebased IFQ	All FG	Primary		DTL		
2017 .....	4,896	2,840	50	2,790	2,056	1,748		308		

<sup>a</sup> The tribal allocation is further reduced by 1.5 percent for discard mortality resulting in 595 mt in 2017.

<sup>b</sup> The open access HG is taken by the incidental OA fishery and the directed OA fishery.

<sup>c</sup> The trawl allocation is 58 percent of the limited entry HG.

<sup>d</sup> The limited entry fixed gear allocation is 42 percent of the limited entry HG.

TABLE 1d. TO PART 660, SUBPART C—AT-SEA WHITING FISHERY ANNUAL SET-ASIDES, 2017

Species or species complex	Area	Set aside (mt)
BOCACCIO .....	S. of 40°10' N. lat .....	NA.
COWCOD .....	S. of 40°10' N. lat .....	NA.
DARKBLOTCHED ROCKFISH <sup>a</sup> .....	Coastwide .....	Allocation.
PACIFIC OCEAN PERCH <sup>a</sup> .....	N. of 40°10' N. lat .....	Allocation.
YELLOWEYE ROCKFISH .....	Coastwide .....	0.
Arrowtooth flounder .....	Coastwide .....	70.
Canary rockfish <sup>a</sup> .....	Coastwide .....	Allocation.
Chilipepper .....	S. of 40°10' N. lat .....	NA.
Dover sole .....	Coastwide .....	5.
English sole .....	Coastwide .....	5.
Lingcod .....	N. of 40°10' N. lat .....	15.
Lingcod .....	S. of 40°10' N. lat .....	NA.
Longnose skate .....	Coastwide .....	5.
Longspine thornyhead .....	N. of 34°27' N. lat .....	5.
Longspine thornyhead .....	S. of 34°27' N. lat .....	NA.
Minor Nearshore Rockfish .....	N. of 40°10' N. lat .....	NA.
Minor Nearshore Rockfish .....	S. of 40°10' N. lat .....	NA.
Minor Shelf Rockfish .....	N. of 40°10' N. lat .....	35.
Minor Shelf Rockfish .....	S. of 40°10' N. lat .....	NA.
Minor Slope Rockfish .....	N. of 40°10' N. lat .....	100.
Minor Slope Rockfish .....	S. of 40°10' N. lat .....	NA.
Other Fish .....	Coastwide .....	NA.
Other Flatfish .....	Coastwide .....	20.
Pacific cod .....	Coastwide .....	5.
Pacific Halibut <sup>b</sup> .....	Coastwide .....	10.
Pacific Whiting .....	Coastwide .....	Allocation.
Petrale sole .....	Coastwide .....	5.
Sablefish .....	N. of 36° N. lat .....	50.
Sablefish .....	S. of 36° N. lat .....	NA.
Shortspine thornyhead .....	N. of 34°27' N. lat .....	20.
Shortspine thornyhead .....	S. of 34°27' N. lat .....	NA.
Starry flounder .....	Coastwide .....	5.
Widow Rockfish <sup>a</sup> .....	Coastwide .....	Allocation.
Yellowtail rockfish .....	N. of 40°10' N. lat .....	300.

<sup>a</sup> See Table 1.b., to Subpart C, for the at-sea whiting allocations for these species.

<sup>b</sup> As stated in § 660.55 (m), the Pacific halibut set-aside is 10 mt, to accommodate bycatch in the at-sea Pacific whiting fisheries and in the shorebased trawl sector south of 40°10' N. lat. (estimated to be approximately 5 mt each).

\* \* \* \* \*

■ 11b. Tables 2a through 2d to part 660, subpart C, are revised to read as follows:

TABLE 2a TO PART 660, SUBPART C—2018, AND BEYOND, SPECIFICATIONS OF OFL, ABC, ACL, ACT AND FISHERY HARVEST GUIDELINES  
[Weights in metric tons]

Species	Area	OFL	ABC	ACL <sup>a</sup>	Fishery HG <sup>b</sup>
BOCACCIO <sup>c</sup>	S. of 40°10' N. lat	2,013	1,924	741	726
COWCOD <sup>d</sup>	S. of 40°10' N. lat	71	64	10	8
DARKBLOTCHED ROCKFISH <sup>e</sup>	Coastwide	683	653	653	576
PACIFIC OCEAN PERCH <sup>f</sup>	N. of 40°10' N. lat	984	941	281	232
YELLOWEYE ROCKFISH <sup>g</sup>	Coastwide	58	48	20	14
Arrowtooth flounder <sup>h</sup>	Coastwide	16,498	13,743	13,743	11,645
Big skate <sup>i</sup>	Coastwide	541	494	494	437
Black rockfish <sup>j</sup>	California (South of 42° N. lat.)	347	332	332	331
Black rockfish <sup>k</sup>	Oregon (Between 46°16' N. lat. and 42° N. lat.)	570	520	520	519
Black rockfish <sup>l</sup>	Washington (N. of 46°16' N. lat.)	315	301	301	283
Blackgill rockfish <sup>m</sup>	S. of 40°10' N. lat	NA	NA	NA	NA
Cabazon <sup>n</sup>	California (South of 42° N. lat.)	156	149	149	149
Cabazon <sup>o</sup>	Oregon (Between 46°16' N. lat. and 42° N. lat.)	49	47	47	47
California scorpionfish <sup>p</sup>	S. of 34°27' N. lat	278	254	150	148
Canary rockfish <sup>q</sup>	Coastwide	1,596	1,526	1,526	1,467
Chilipepper <sup>r</sup>	S. of 40°10' N. lat	2,623	2,507	2,507	2,461
Dover sole <sup>s</sup>	Coastwide	90,282	86,310	50,000	48,406
English sole <sup>t</sup>	Coastwide	8,255	7,537	7,537	7,324
Lingcod <sup>u</sup>	N. of 40°10' N. lat	3,310	3,110	3,110	2,832
Lingcod <sup>v</sup>	S. of 40°10' N. lat	1,373	1,144	1,144	1,135
Longnose skate <sup>w</sup>	Coastwide	2,526	2,415	2,000	1,853
Longspine thornyhead <sup>x</sup>	Coastwide	4,339	3,614	NA	NA
Longspine thornyhead	N. of 34°27' N. lat	NA	NA	2,747	2,700
Longspine thornyhead	S. of 34°27' N. lat	NA	NA	867	864
Pacific cod <sup>y</sup>	Coastwide	3,200	2,221	1,600	1,091
Pacific whiting <sup>z</sup>	Coastwide	( <sup>z</sup> )	( <sup>z</sup> )	( <sup>z</sup> )	( <sup>z</sup> )
Petrale sole <sup>aa</sup>	Coastwide	3,152	3,013	3,013	2,772
Sablefish	Coastwide	8,329	7,604	NA	NA
Sablefish <sup>bb</sup>	N. of 36° N. lat	NA	NA	6,299	See Table 1c
Sablefish <sup>cc</sup>	S. of 36° N. lat	NA	NA	1,120	1,115
Shortbelly rockfish <sup>dd</sup>	Coastwide	6,950	5,789	500	489
Shortspine thornyhead <sup>ee</sup>	Coastwide	3,116	2,596	NA	NA
Shortspine thornyhead	N. of 34°27' N. lat	NA	NA	1,698	1,639
Shortspine thornyhead	S. of 34°27' N. lat	NA	NA	898	856
Spiny dogfish <sup>ff</sup>	Coastwide	2,500	2,083	2,083	1,745
Splitnose rockfish <sup>gg</sup>	S. of 40°10' N. lat	1,842	1,761	1,761	1,750
Starry flounder <sup>hh</sup>	Coastwide	1,847	1,282	1,282	1,272
Widow rockfish <sup>ii</sup>	Coastwide	13,237	12,655	12,655	12,437
Yellowtail rockfish <sup>jj</sup>	N. of 40°10' N. lat	6,574	6,002	6,002	4,972
Minor Nearshore Rockfish <sup>kk</sup>	N. of 40°10' N. lat	119	105	105	103
Minor Shelf Rockfish <sup>ll</sup>	N. of 40°10' N. lat	2,302	2,048	2,047	1,963
Minor Slope Rockfish <sup>mm</sup>	N. of 40°10' N. lat	1,896	1,754	1,754	1,689
Minor Nearshore Rockfish <sup>nn</sup>	S. of 40°10' N. lat	1,344	1,180	1,179	1,175
Minor Shelf Rockfish <sup>oo</sup>	S. of 40°10' N. lat	1,918	1,625	1,624	1,577
Minor Slope Rockfish <sup>pp</sup>	S. of 40°10' N. lat	829	719	709	689
Other Flatfish <sup>qq</sup>	Coastwide	9,690	7,281	7,281	7,077
Other Fish <sup>rr</sup>	Coastwide	501	441	441	441

<sup>a</sup> Annual catch limits (ACLs), annual catch targets (ACTs) and harvest guidelines (HGs) are specified as total catch values.

<sup>b</sup> Fishery harvest guidelines means the harvest guideline or quota after subtracting Pacific Coast treaty Indian tribes allocations and projected catch, projected research catch, deductions for fishing mortality in non-groundfish fisheries, and deductions for EFPs from the ACL or ACT.

<sup>c</sup> Bocaccio. A stock assessment was conducted in 2015 for the bocaccio stock between the U.S.-Mexico border and Cape Blanco. The stock is managed with stock-specific harvest specifications south of 40°10' N. lat. and within the Minor Shelf Rockfish complex north of 40°10' N. lat. A historical catch distribution of approximately 7.4 percent was used to apportion the assessed stock to the area north of 40°10' N. lat. The bocaccio stock was estimated to be at 36.8 percent of its unfished biomass in 2015. The OFL of 2,013 mt is projected in the 2015 stock assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 1,924 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The 741 mt ACL is based on the current rebuilding plan with a target year to rebuild of 2022 and an SPR harvest rate of 77.7 percent. 15.4 mt is deducted from the ACL to accommodate the incidental open access fishery (0.8 mt), EFP catch (10 mt) and research catch (4.6 mt), resulting in a fishery HG of 725.6 mt. The California recreational fishery has an HG of 305.5 mt.

<sup>d</sup>Cowcod. A stock assessment for the Conception Area was conducted in 2013 and the stock was estimated to be at 33.9 percent of its unfished biomass in 2013. The Conception Area OFL of 59 mt is projected in the 2013 rebuilding analysis using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The OFL contribution of 12 mt for the unassessed portion of the stock in the Monterey area is based on depletion-based stock reduction analysis. The OFLs for the Monterey and Conception areas were summed to derive the south of 40°10' N. lat. OFL of 71 mt. The ABC for the area south of 40°10' N. lat. is 64 mt. The assessed portion of the stock in the Conception Area is considered category 2, with a Conception area contribution to the ABC of 54 mt, which is an 8.7 percent reduction from the Conception area OFL ( $\sigma = 0.72/P^* = 0.45$ ). The unassessed portion of the stock in the Monterey area is considered a category 3 stock, with a contribution to the ABC of 10 mt, which is a 16.6 percent reduction from the Monterey area OFL ( $\sigma = 1.44/P^* = 0.45$ ). A single ACL of 10 mt is being set for both areas combined. The ACL of 10 mt is based on the rebuilding plan with a target year to rebuild of 2020 and an SPR harvest rate of 82.7 percent, which is equivalent to an exploitation rate (catch over age 11+ biomass) of 0.007. 2 mt is deducted from the ACL to accommodate the incidental open access fishery (less than 0.1 mt), EFP fishing (less than 0.1 mt) and research activity (2 mt), resulting in a fishery HG of 8 mt. Any additional mortality in research activities will be deducted from the ACL. A single ACT of 4 mt is being set for both areas combined.

<sup>e</sup>Darkblotched rockfish. A 2015 stock assessment estimated the stock to be at 39 percent of its unfished biomass in 2015. The OFL of 683 mt is projected in the 2015 stock assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 653 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC, as the stock is projected to be above its target biomass of  $B_{40\%}$  in 2017. 77.3 mt is deducted from the ACL to accommodate the Tribal fishery (0.2 mt), the incidental open access fishery (24.5 mt), EFP catch (0.1 mt), research catch (2.5 mt) and an additional deduction for unforeseen catch events (50 mt), resulting in a fishery HG of 575.8 mt.

<sup>f</sup>Pacific ocean perch. A stock assessment was conducted in 2011 and the stock was estimated to be at 19.1 percent of its unfished biomass in 2011. The OFL of 984 mt for the area north of 40°10' N. lat. is based on an updated catch-only projection of the 2011 rebuilding analysis using an  $F_{50\%}$   $F_{MSY}$  proxy. The ABC of 941 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) as it is a category 1 stock. The ACL is based on the current rebuilding plan with a target year to rebuild of 2051 and a constant catch amount of 281 mt in 2017 and 2018, followed in 2019 and beyond by ACLs based on an SPR harvest rate of 86.4 percent. 49.4 mt is deducted from the ACL to accommodate the Tribal fishery (9.2 mt), the incidental open access fishery (10 mt), research catch (5.2 mt) and an additional deduction for unforeseen catch events (25 mt), resulting in a fishery HG of 231.6 mt.

<sup>g</sup>Yelloweye rockfish. A stock assessment update was conducted in 2011. The stock was estimated to be at 21.4 percent of its unfished biomass in 2011. The 58 mt coastwide OFL is based on a catch-only update of the 2011 stock assessment, assuming actual catches since 2011 and using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 48 mt is a 16.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.40$ ) as it is a category 2 stock. The 20 mt ACL is based on the current rebuilding plan with a target year to rebuild of 2074 and an SPR harvest rate of 76.0 percent. 6 mt is deducted from the ACL to accommodate the Tribal fishery (2.3 mt), the incidental open access fishery (0.4 mt), EFP catch (less than 0.1 mt) and research catch (3.27 mt) resulting in a fishery HG of 14 mt. Recreational HGs are: 3.3 mt (Washington); 3 mt (Oregon); and 3.9 mt (California).

<sup>h</sup>Arrowtooth flounder. The arrowtooth flounder stock was last assessed in 2007 and was estimated to be at 79 percent of its unfished biomass in 2007. The OFL of 16,498 mt is derived from a catch-only update of the 2007 assessment assuming actual catches since 2007 and using an  $F_{30\%}$   $F_{MSY}$  proxy. The ABC of 13,743 mt is a 16.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.40$ ) as it is a category 2 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{25\%}$ . 2,098.1 mt is deducted from the ACL to accommodate the Tribal fishery (2,041 mt), the incidental open access fishery (40.8 mt), and research catch (16.4 mt), resulting in a fishery HG of 11,644.9 mt.

<sup>i</sup>Big skate. The OFL of 541 mt is based on an estimate of trawl survey biomass and natural mortality. The ABC of 494 mt is a 8.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.45$ ) as it is a category 2 stock. The ACL is set equal to the ABC. 57.4 mt is deducted from the ACL to accommodate the Tribal fishery (15 mt), the incidental open access fishery (38.4 mt), and research catch (4 mt), resulting in a fishery HG of 436.6 mt.

<sup>j</sup>Black rockfish (California). A 2015 stock assessment estimated the stock to be at 33 percent of its unfished biomass in 2015. The OFL of 347 mt is projected in the 2015 stock assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 332 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC because the stock is projected to be above its target biomass of  $B_{40\%}$  in 2018. 1 mt is deducted from the ACL for EFP catch, resulting in a fishery HG of 331 mt.

<sup>k</sup>Black rockfish (Oregon). A 2015 stock assessment estimated the stock to be at 60 percent of its unfished biomass in 2015. The OFL of 570 mt is projected in the 2015 stock assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 520 mt is an 8.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.45$ ) because it is a category 2 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 0.6 mt is deducted from the ACL to accommodate the incidental open access fishery, resulting in a fishery HG of 519.4 mt.

<sup>l</sup>Black rockfish (Washington). A 2015 stock assessment estimated the stock to be at 43 percent of its unfished biomass in 2015. The OFL of 315 mt is projected in the 2015 stock assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 301 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 18 mt is deducted from the ACL to accommodate the Tribal fishery, resulting in a fishery HG of 283 mt.

<sup>m</sup>Blackgill rockfish. Blackgill rockfish contributes to the harvest specifications for the Minor Slope Rockfish South complex. See footnote pp.

<sup>n</sup>Cabezon (California). A cabezon stock assessment was conducted in 2009. The cabezon spawning biomass in waters off California was estimated to be at 48.3 percent of its unfished biomass in 2009. The OFL of 156 mt is calculated using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 149 mt is based on a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 0.3 mt is deducted from the ACL to accommodate the incidental open access fishery (0.3 mt), resulting in a fishery HG of 148.7 mt.

<sup>o</sup>Cabezon (Oregon). A cabezon stock assessment was conducted in 2009. The cabezon spawning biomass in waters off Oregon was estimated to be at 52 percent of its unfished biomass in 2009. The OFL of 49 mt is calculated using an  $F_{MSY}$  proxy of  $F_{45\%}$ . The ABC of 47 mt is based on a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 species. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . There are no deductions from the ACL so the fishery HG is also equal to the ACL of 47 mt.

<sup>p</sup>California scorpionfish. A California scorpionfish assessment was conducted in 2005 and was estimated to be at 79.8 percent of its unfished biomass in 2005. The OFL of 278 mt is based on projections from a catch-only update of the 2005 assessment assuming actual catches since 2005 and using an  $F_{MSY}$  harvest rate proxy of  $F_{50\%}$ . The ABC of 254 mt is an 8.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.45$ ) because it is a category 2 stock. The ACL is set at a constant catch amount of 150 mt. 2.2 mt is deducted from the ACL to accommodate the incidental open access fishery (2 mt) and research catch (0.2 mt), resulting in a fishery HG of 147.8 mt. An ACT of 111 mt is established.

<sup>q</sup>Canary rockfish. A stock assessment was conducted in 2015 and the stock was estimated to be at 55.5 percent of its unfished biomass coastwide in 2015. The coastwide OFL of 1,596 mt is projected in the 2015 assessment using an  $F_{MSY}$  harvest rate proxy of  $F_{50\%}$ . The ABC of 1,526 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) as it is a category 1 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 59.4 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), the incidental open access fishery (1.2 mt), EFP catch (1 mt) and research catch (7.2 mt) resulting in a fishery HG of 1,466.6 mt. Recreational HGs are: 50 mt (Washington); 75 mt (Oregon); and 135 mt (California).

<sup>r</sup>Chilipepper. A coastwide update assessment of the chilipepper stock was conducted in 2015 and estimated to be at 64 percent of its unfished biomass in 2015. Chilipepper are managed with stock-specific harvest specifications south of 40°10' N. lat. and within the Minor Shelf Rockfish complex north of 40°10' N. lat. Projected OFLs are stratified north and south of 40°10' N. lat. based on the average historical assessed area catch, which is 93 percent for the area south of 40°10' N. lat. and 7 percent for the area north of 40°10' N. lat. The OFL of 2,623 mt for the area south of 40°10' N. lat. is projected in the 2015 assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 2,507 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 45.9 mt is deducted from the ACL to accommodate the incidental open access fishery (5 mt), EFP fishing (30 mt), and research catch (10.9 mt), resulting in a fishery HG of 2,461.1 mt.

<sup>s</sup>Dover sole. A 2011 Dover sole assessment estimated the stock to be at 83.7 percent of its unfished biomass in 2011. The OFL of 90,282 mt is based on an updated catch-only projection from the 2011 stock assessment assuming actual catches since 2011 and using an  $F_{MSY}$  proxy of  $F_{30\%}$ . The ABC of 86,310 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL could be set equal to the ABC because the stock is above its target biomass of  $B_{25\%}$ . However, the ACL of 50,000 mt is set at a level below the ABC and higher than the maximum historical landed catch. 1,593.7 mt is deducted from the ACL to accommodate the Tribal fishery (1,497 mt), the incidental open access fishery (54.8 mt), and research catch (41.9 mt), resulting in a fishery HG of 48,406.3 mt.

<sup>1</sup>English sole. A 2013 stock assessment was conducted, which estimated the stock to be at 88 percent of its unfished biomass in 2013. The OFL of 8,255 mt is projected in the 2013 assessment using an  $F_{MSY}$  proxy of  $F_{30\%}$ . The ABC of 7,537 mt is an 8.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.45$ ) because it is a category 2 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{25\%}$ . 212.8 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), the incidental open access fishery (7 mt) and research catch (5.8 mt), resulting in a fishery HG of 7,324.2 mt.

<sup>u</sup>Lingcod north. The 2009 lingcod assessment modeled two populations north and south of the California-Oregon border (42° N. lat.). Both populations were healthy with stock depletion estimated at 62 and 74 percent for the north and south, respectively in 2009. The OFL is based on an updated catch-only projection from the 2009 assessment assuming actual catches since 2009 and using an  $F_{MSY}$  proxy of  $F_{45\%}$ . The OFL is apportioned by adding 48% of the OFL from California, resulting in an OFL of 3,310 mt for the area north of 40°10' N. lat. The ABC of 3,110 mt is based on a 4.4 percent reduction ( $\sigma = 0.36/P^* = 0.45$ ) from the OFL contribution for the area north of 42° N. lat. because it is a category 1 stock, and an 8.7 percent reduction ( $\sigma = 0.72/P^* = 0.45$ ) from the OFL contribution for the area between 42° N. lat. and 40°10' N. lat. because it is a category 2 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 278.2 mt is deducted from the ACL for the Tribal fishery (250 mt), the incidental open access fishery (16 mt), EFP catch (0.5 mt) and research catch (11.7 mt), resulting in a fishery HG of 2,831.8 mt.

<sup>v</sup>Lingcod south. The 2009 lingcod assessment modeled two populations north and south of the California-Oregon border (42° N. lat.). Both populations were healthy with stock depletion estimated at 62 and 74 percent for the north and south, respectively in 2009. The OFL is based on an updated catch-only projection of the 2009 stock assessment assuming actual catches since 2009 and using an  $F_{MSY}$  proxy of  $F_{45\%}$ . The OFL is apportioned by subtracting 48% of the California OFL, resulting in an OFL of 1,373 mt for the area south of 40°10' N. lat. The ABC of 1,144 mt is based on a 16.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.40$ ) because it is a category 2 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 9 mt is deducted from the ACL to accommodate the incidental open access fishery (6.9 mt), EFP fishing (1 mt), and research catch (1.1 mt), resulting in a fishery HG of 1,135 mt.

<sup>w</sup>Longnose skate. A stock assessment was conducted in 2007 and the stock was estimated to be at 66 percent of its unfished biomass. The OFL of 2,526 mt is derived from the 2007 stock assessment using an  $F_{MSY}$  proxy of  $F_{30\%}$ . The ABC of 2,415 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL of 2,000 mt is a fixed harvest level that provides greater access to the stock and is less than the ABC. 147 mt is deducted from the ACL to accommodate the Tribal fishery (130 mt), incidental open access fishery (3.8 mt), and research catch (13.2 mt), resulting in a fishery HG of 1,853 mt.

<sup>x</sup>Longspine thornyhead. A 2013 longspine thornyhead coastwide stock assessment estimated the stock to be at 75 percent of its unfished biomass in 2013. A coastwide OFL of 4,339 mt is projected in the 2013 stock assessment using an  $F_{50\%}$   $F_{MSY}$  proxy. The coastwide ABC of 3,614 mt is a 16.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.40$ ) because it is a category 2 stock. For the portion of the stock that is north of 34°27' N. lat., the ACL is 2,747 mt, and is 76 percent of the coastwide ABC based on the average swept-area biomass estimates (2003–2012) from the NMFS NWFSC trawl survey. 46.8 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), the incidental open access fishery (3.3 mt), and research catch (13.5 mt), resulting in a fishery HG of 2,700.2 mt. For that portion of the stock south of 34°27' N. lat. the ACL is 867 mt and is 24 percent of the coastwide ABC based on the average swept-area biomass estimates (2003–2012) from the NMFS NWFSC trawl survey. 3.2 mt is deducted from the ACL to accommodate the incidental open access fishery (1.8 mt), and research catch (1.4 mt), resulting in a fishery HG of 863.8 mt.

<sup>y</sup>Pacific cod. The 3,200 mt OFL is based on the maximum level of historic landings. The ABC of 2,221 mt is a 30.6 percent reduction from the OFL ( $\sigma = 1.44/P^* = 0.40$ ) as it is a category 3 stock. The 1,600 mt ACL is the OFL reduced by 50 percent as a precautionary adjustment. 509 mt is deducted from the ACL to accommodate the Tribal fishery (500 mt), research catch (7 mt), and the incidental open access fishery (2 mt), resulting in a fishery HG of 1,091 mt.

<sup>z</sup>Pacific whiting. Pacific whiting are assessed annually. The final specifications will be determined consistent with the U.S.-Canada Pacific Whiting Agreement and will be announced after the Council's April 2018 meeting.

<sup>aa</sup>Petrale sole. A 2015 stock assessment update was conducted, which estimated the stock to be at 31 percent of its unfished biomass in 2015. The OFL of 3,152 mt is projected in the 2015 assessment using an  $F_{MSY}$  proxy of  $F_{30\%}$ . The ABC of 3,013 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{25\%}$ . 240.9 mt is deducted from the ACL to accommodate the Tribal fishery (220 mt), the incidental open access fishery (3.2 mt) and research catch (17.7 mt), resulting in a fishery HG of 2,772.1 mt.

<sup>bb</sup>Sablefish north. A coastwide sablefish stock assessment update was conducted in 2015. The coastwide sablefish biomass was estimated to be at 33 percent of its unfished biomass in 2015. The coastwide OFL of 8,329 mt is projected in the 2015 stock assessment using an  $F_{MSY}$  proxy of  $F_{45\%}$ . The ABC of 7,604 mt is an 8.7 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.40$ ). The 40–10 adjustment is applied to the ABC to derive a coastwide ACL value because the stock is in the precautionary zone. This coastwide ACL value is not specified in regulations. The coastwide ACL value is apportioned north and south of 36° N. lat., using the 2003–2014 average estimated swept area biomass from the NMFS NWFSC trawl survey, with 84.9 percent apportioned north of 36° N. lat. and 15.1 percent apportioned south of 36° N. lat. The northern ACL is 6,299 mt and is reduced by 630 mt for the Tribal allocation (10 percent of the ACL north of 36° N. lat.). The 630 mt Tribal allocation is reduced by 1.5 percent to account for discard mortality. Detailed sablefish allocations are shown in Table 1c.

<sup>cc</sup>Sablefish south. The ACL for the area south of 36° N. lat. is 1,120 mt (15.1 percent of the calculated coastwide ACL value). 5 mt is deducted from the ACL to accommodate the incidental open access fishery (2 mt) and research catch (3 mt), resulting in a fishery HG of 1,115 mt.

<sup>dd</sup>Shortbelly rockfish. A non-quantitative shortbelly rockfish assessment was conducted in 2007. The spawning stock biomass of shortbelly rockfish was estimated to be 67 percent of its unfished biomass in 2005. The OFL of 6,950 mt is based on the estimated MSY in the 2007 stock assessment. The ABC of 5,789 mt is a 16.7 percent reduction of the OFL ( $\sigma = 0.72/P^* = 0.40$ ) because it is a category 2 stock. The 500 mt ACL is set to accommodate incidental catch when fishing for co-occurring healthy stocks and in recognition of the stock's importance as a forage species in the California Current ecosystem. 10.9 mt is deducted from the ACL to accommodate the incidental open access fishery (8.9 mt) and research catch (2 mt), resulting in a fishery HG of 489.1 mt.

<sup>ee</sup>Shortspine thornyhead. A 2013 coastwide shortspine thornyhead stock assessment estimated the stock to be at 74.2 percent of its unfished biomass in 2013. A coastwide OFL of 3,116 mt is projected in the 2013 stock assessment using an  $F_{50\%}$   $F_{MSY}$  proxy. The coastwide ABC of 2,596 mt is a 16.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.40$ ) because it is a category 2 stock. For the portion of the stock that is north of 34°27' N. lat., the ACL is 1,698 mt. The northern ACL is 65.4 percent of the coastwide ABC based on the average swept-area biomass estimates (2003–2012) from the NMFS NWFSC trawl survey. 59 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), the incidental open access fishery (1.8 mt), and research catch (7.2 mt), resulting in a fishery HG of 1,639 mt for the area north of 34°27' N. lat. For that portion of the stock south of 34°27' N. lat. the ACL is 898 mt. The southern ACL is 34.6 percent of the coastwide ABC based on the average swept-area biomass estimates (2003–2012) from the NMFS NWFSC trawl survey. 42.3 mt is deducted from the ACL to accommodate the incidental open access fishery (41.3 mt) and research catch (1 mt), resulting in a fishery HG of 855.7 mt for the area south of 34°27' N. lat.

<sup>ff</sup>Spiny dogfish. A coastwide spiny dogfish stock assessment was conducted in 2011. The coastwide spiny dogfish biomass was estimated to be at 63 percent of its unfished biomass in 2011. The coastwide OFL of 2,500 mt is derived from the 2011 assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The coastwide ABC of 2,083 mt is a 16.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.40$ ) because it is a category 2 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 338 mt is deducted from the ACL to accommodate the Tribal fishery (275 mt), the incidental open access fishery (49.5 mt), EFP catch (1 mt), and research catch (12.5 mt), resulting in a fishery HG of 1,745 mt.

<sup>gg</sup>Splitnose rockfish. A coastwide splitnose rockfish assessment was conducted in 2009 that estimated the stock to be at 66 percent of its unfished biomass in 2009. Splitnose rockfish in the north is managed in the Minor Slope Rockfish complex and with stock-specific harvest specifications south of 40°10' N. lat. The coastwide OFL is projected in the 2009 assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The coastwide OFL is apportioned north and south of 40°10' N. lat. based on the average 1916–2008 assessed area catch resulting in 64.2 percent of the coastwide OFL apportioned south of 40°10' N. lat., and 35.8 percent apportioned for the contribution of splitnose rockfish to the northern Minor Slope Rockfish complex. The southern OFL of 1,842 mt results from the apportionment described above. The southern ABC of 1,761 mt is a 4.4 percent reduction from the southern OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC because the stock is estimated to be above its target biomass of  $B_{40\%}$ . 10.7 mt is deducted from the ACL to accommodate the incidental open access fishery (0.2 mt), research catch (9 mt) and EFP catch (1.5 mt), resulting in a fishery HG of 1,750.3 mt.



<sup>hh</sup>Starry flounder. The stock was assessed in 2005 and was estimated to be above 40 percent of its unfished biomass in 2005 (44 percent in Washington and Oregon, and 62 percent in California). The coastwide OFL of 1,847 mt is set equal to the 2016 OFL, which was derived from the 2005 assessment using an  $F_{MSY}$  proxy of  $F_{30\%}$ . The ABC of 1,282 mt is a 30.6 percent reduction from the OFL ( $\sigma = 1.44/P^* = 0.40$ ) because it is a category 3 stock. The ACL is set equal to the ABC because the stock was estimated to be above its target biomass of  $B_{25\%}$  in 2018. 10.3 mt is deducted from the ACL to accommodate the Tribal fishery (2 mt), and the incidental open access fishery (8.3 mt), resulting in a fishery HG of 1,271.7 mt.

<sup>ii</sup>Widow rockfish. The widow rockfish stock was assessed in 2015 and was estimated to be at 75 percent of its unfished biomass in 2015. The OFL of 13,237 mt is projected in the 2015 stock assessment using the  $F_{50\%}$   $F_{MSY}$  proxy. The ABC of 12,655 mt is a 4.4 percent reduction from the OFL ( $\sigma = 0.36/P^* = 0.45$ ) because it is a category 1 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 217.7 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), the incidental open access fishery (0.5 mt), EFP catch (9 mt) and research catch (8.2 mt), resulting in a fishery HG of 12,437.3 mt.

<sup>jj</sup>Yellowtail rockfish. A 2013 yellowtail rockfish stock assessment was conducted for the portion of the population north of 40°10' N. lat. The estimated stock depletion is 67 percent of its unfished biomass in 2013. The OFL of 6,574 mt is projected in the 2013 stock assessment using an  $F_{MSY}$  proxy of  $F_{50\%}$ . The ABC of 6,002 mt is an 8.7 percent reduction from the OFL ( $\sigma = 0.72/P^* = 0.45$ ) because it is a category 2 stock. The ACL is set equal to the ABC because the stock is above its target biomass of  $B_{40\%}$ . 1,030 mt is deducted from the ACL to accommodate the Tribal fishery (1,000 mt), the incidental open access fishery (3.4 mt), EFP catch (10 mt) and research catch (16.6 mt), resulting in a fishery HG of 4,972.1 mt.

<sup>kk</sup>Minor Nearshore Rockfish north. The OFL for Minor Nearshore Rockfish north of 40°10' N. lat. of 119 mt is the sum of the OFL contributions for the component species managed in the complex. The ABCs for the minor rockfish complexes are based on a sigma value of 0.72 for category 2 stocks (blue/deacon rockfish in California, brown rockfish, China rockfish, and copper rockfish) and a sigma value of 1.44 for category 3 stocks (all others) with a  $P^*$  of 0.45. The resulting ABC of 105 mt is the summed contribution of the ABCs for the component species. The ACL of 105 mt is the sum of contributing ABCs. 1.8 mt is deducted from the ACL to accommodate the Tribal fishery (1.5 mt), and the incidental open access fishery (0.3 mt), resulting in a fishery HG of 103.2 mt. Between 40°10' N. lat. and 42° N. lat. the Minor Nearshore Rockfish complex north has a harvest guideline of 40.2 mt. Blue/deacon rockfish south of 42° N. lat. has a species-specific HG, described in footnote pp.

<sup>ll</sup>Minor Shelf Rockfish north. The OFL for Minor Shelf Rockfish north of 40°10' N. lat. of 2,302 mt is the sum of the OFL contributions for the component species within the complex. The ABCs for the minor rockfish complexes are based on a sigma value of 0.36 for a category 1 stock (chilipepper), a sigma value of 0.72 for category 2 stocks (greenspotted rockfish between 40°10' and 42° N. lat. and greenstriped rockfish) and a sigma value of 1.44 for category 3 stocks (all others) with a  $P^*$  of 0.45. The resulting ABC of 2,048 mt is the summed contribution of the ABCs for the component species. The ACL of 2,047 mt is the sum of contributing ABCs of healthy assessed stocks and unassessed stocks, plus the ACL contribution of greenspotted rockfish in California where the 40–10 adjustment was applied to the ABC contribution for this stock because it is in the precautionary zone. 83.8 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), the incidental open access fishery (26 mt), EFP catch (3 mt), and research catch (24.8 mt), resulting in a fishery HG of 1,963.2 mt.

<sup>mm</sup>Minor Slope Rockfish north. The OFL for Minor Slope Rockfish north of 40°10' N. lat. of 1,896 mt is the sum of the OFL contributions for the component species within the complex. The ABCs for the Minor Slope Rockfish complexes are based on a sigma value of 0.39 for aurora rockfish, a sigma value of 0.36 for the other category 1 stock (splitnose rockfish), a sigma value of 0.72 for category 2 stocks (rougeye rockfish, blackspotted rockfish, and sharpchin rockfish), and a sigma value of 1.44 for category 3 stocks (all others) with a  $P^*$  of 0.45. A unique sigma of 0.39 was calculated for aurora rockfish because the variance in estimated spawning biomass was greater than the 0.36 used as a proxy for other category 1 stocks. The resulting ABC of 1,754 mt is the summed contribution of the ABCs for the component species. The ACL is set equal to the ABC because all the assessed component stocks (rougeye rockfish, blackspotted rockfish, sharpchin rockfish, and splitnose rockfish) are above the target biomass of  $B_{40\%}$ . 65.1 mt is deducted from the ACL to accommodate the Tribal fishery (36 mt), the incidental open access fishery (18.6 mt), EFP catch (1 mt), and research catch (9.5 mt), resulting in a fishery HG of 1,688.9 mt.

<sup>nn</sup>Minor Nearshore Rockfish south. The OFL for the Minor Nearshore Rockfish complex south of 40°10' N. lat. of 1,344 mt is the sum of the OFL contributions for the component species within the complex. The ABC for the southern Minor Nearshore Rockfish complex is based on a sigma value of 0.72 for category 2 stocks (blue/deacon rockfish north of 34°27' N. lat., brown rockfish, China rockfish, and copper rockfish) and a sigma value of 1.44 for category 3 stocks (all others) with a  $P^*$  of 0.45. The resulting ABC of 1,180 mt is the summed contribution of the ABCs for the component species. The ACL of 1,179 mt is the sum of the contributing ABCs of healthy assessed stocks and unassessed stocks, plus the ACL contribution for China rockfish where the 40–10 adjustment was applied to the ABC contribution for this stock because it is in the precautionary zone. 4.1 mt is deducted from the ACL to accommodate the incidental open access fishery (1.4 mt) and research catch (2.7 mt), resulting in a fishery HG of 1,174.9 mt. Blue/deacon rockfish south of 42° N. lat. has a species-specific HG set equal to the 40–10-adjusted ACL for the portion of the stock north of 34°27' N. lat. (250.3 mt) plus the ABC contribution for the unassessed portion of the stock south of 34°27' N. lat. (60.8 mt). The California (*i.e.*, south of 42° N. lat.) blue/deacon rockfish HG is 311.1 mt.

<sup>oo</sup>Minor Shelf Rockfish south. The OFL for the Minor Shelf Rockfish complex south of 40°10' N. lat. of 1,918 mt is the sum of the OFL contributions for the component species within the complex. The ABC for the southern Minor Shelf Rockfish complex is based on a sigma value of 0.72 for category 2 stocks (*i.e.*, greenspotted and greenstriped rockfish) and a sigma value of 1.44 for category 3 stocks (all others) with a  $P^*$  of 0.45. The resulting ABC of 1,625 mt is the summed contribution of the ABCs for the component species. The ACL of 1,624 mt is the sum of contributing ABCs of healthy assessed stocks and unassessed stocks, plus the ACL contribution of greenspotted rockfish in California where the 40–10 adjustment was applied to the ABC contribution for this stock because it is in the precautionary zone. 47.2 mt is deducted from the ACL to accommodate the incidental open access fishery (8.6 mt), EFP catch (30 mt), and research catch (8.6 mt), resulting in a fishery HG of 1,576.8 mt.

<sup>pp</sup>Minor Slope Rockfish south. The OFL of 829 mt is the sum of the OFL contributions for the component species within the complex. The ABC for the southern Minor Slope Rockfish complex is based on a sigma value of 0.39 for aurora rockfish, a sigma value of 0.72 for category 2 stocks (blackgill rockfish, rougeye rockfish, blackspotted rockfish, and sharpchin rockfish) and a sigma value of 1.44 for category 3 stocks (all others) with a  $P^*$  of 0.45. A unique sigma of 0.39 was calculated for aurora rockfish because the variance in estimated biomass was greater than the 0.36 used as a proxy for other category 1 stocks. The resulting ABC of 719 mt is the summed contribution of the ABCs for the component species. The ACL of 709 mt is the sum of the contributing ABCs of healthy assessed stocks and unassessed stocks, plus the ACL contribution of blackgill rockfish where the 40–10 adjustment was applied to the ABC contribution for this stock because it is in the precautionary zone. 20.2 mt is deducted from the ACL to accommodate the incidental open access fishery (17.2 mt), EFP catch (1 mt), and research catch (2 mt), resulting in a fishery HG of 688.8 mt. Blackgill rockfish has a stock-specific HG for the entire groundfish fishery south of 40°10' N. lat. set equal to the species' contribution to the 40–10-adjusted ACL. Harvest of blackgill rockfish in all groundfish fisheries counts against this HG of 122.4 mt. Nontrawl fisheries are subject to a blackgill rockfish HG of 45.3 mt.

<sup>qq</sup>Other Flatfish. The Other Flatfish complex is comprised of flatfish species managed in the PCGFMP that are not managed with species-specific OFLs/ABCs/ACLs. Most of the species in the Other Flatfish complex are unassessed and include: Butter sole, curfin sole, flathead sole, Pacific sanddab, rock sole, sand sole, and rex sole. The Other Flatfish OFL of 9,690 mt is based on the sum of the OFL contributions of the component stocks. The ABC of 7,281 mt is based on a sigma value of 0.72 for a category 2 stock (rex sole) and a sigma value of 1.44 for category 3 stocks (all others) with a  $P^*$  of 0.40. The ACL is set equal to the ABC. The ACL is set equal to the ABC because all of the assessed stocks (*i.e.*, Pacific sanddabs and rex sole) were above their target biomass of  $B_{35\%}$ . 204 mt is deducted from the ACL to accommodate the Tribal fishery (60 mt), the incidental open access fishery (125 mt), and research catch (19 mt), resulting in a fishery HG of 7,077 mt.

<sup>rr</sup>Other Fish. The Other Fish complex is comprised of kelp greenling coastwide, cabezon off Washington, and leopard shark coastwide. The 2015 assessment for the kelp greenling stock off of Oregon projected an estimated depletion of 80 percent. All other stocks are unassessed. The OFL of 501 mt is the sum of the OFL contributions for kelp greenling coastwide, cabezon off Washington, and leopard shark coastwide. The ABC for the Other Fish complex is based on a sigma value of 0.44 for kelp greenling off Oregon and a sigma value of 1.44 for category 3 stocks (all others) with a  $P^*$  of 0.45. A unique sigma of 0.44 was calculated for kelp greenling off Oregon because the variance in estimated spawning biomass was greater than the 0.36 sigma used as a proxy for other category 1 stocks. The resulting ABC of 441 mt is the summed contribution of the ABCs for the component species. The ACL is set equal to the ABC because all of the assessed stocks (kelp greenling off Oregon) were above their target biomass of  $B_{40\%}$ . There are no deductions from the ACL so the fishery HG is equal to the ACL of 441 mt.



TABLE 2b TO PART 660, SUBPART C—2018, AND BEYOND, ALLOCATIONS BY SPECIES OR SPECIES GROUP  
[Weight in metric tons]

Species	Area	Fishery HG or ACT	Trawl		Non-trawl	
			Percent	Mt	Percent	Mt
BOCACCIO <sup>a</sup>	S. of 40°10' N. lat	725.6	39	283.3	61	442.3
COWCOD <sup>a,b</sup>	S. of 40°10' N. lat	4.0	36	1.4	64	2.6
DARKBLOTCHED ROCKFISH <sup>c</sup>	Coastwide	575.8	95	547.0	5	28.8
PACIFIC OCEAN PERCH <sup>d</sup>	N. of 40°10' N. lat	231.6	95	220.0	5	11.6
YELLOW EYE ROCKFISH <sup>a</sup>	Coastwide	14.0	NA	1.1	NA	12.9
Arrowtooth flounder	Coastwide	11,644.9	95	11,062.6	5	582.2
Big skate <sup>a</sup>	Coastwide	436.6	95	414.8	5	21.8
Canary rockfish <sup>a,e</sup>	Coastwide	1,466.6	NA	1,060.1	NA	406.5
Chilipepper	S. of 40°10' N. lat	2,461.1	75	1,845.8	25	615.3
Dover sole	Coastwide	48,406.3	95	45,986.0	5	2,420.3
English sole	Coastwide	7,324.3	95	6,958.0	5	366.2
Lingcod	N. of 40°10' N. lat	2,831.8	45	1,274.3	55	1,557.5
Lingcod	S. of 40°10' N. lat	1,135.0	45	510.8	55	624.3
Longnose skate <sup>a</sup>	Coastwide	1,853.0	90	1,667.7	10	185.3
Longspine thornyhead	N. of 34°27' N. lat	2,700.2	95	2,565.2	5	135.0
Pacific cod	Coastwide	1,091.0	95	1,036.4	5	54.5
Pacific whiting	Coastwide	TBD	100	TBD	0	TBD
Petrale sole	Coastwide	2,772.1	95	2,633.5	5	138.6
Sablefish	N. of 36° N. lat	NA	See Table 2c			
Sablefish	S. of 36° N. lat	1,115.0	42	468.3	58	646.7
Shortspine thornyhead	N. of 34°27' N. lat	1,639.0	95	1,557.0	5	81.9
Shortspine thornyhead	S. of 34°27' N. lat	855.7	NA	50.0	NA	805.7
Splitnose rockfish	S. of 40°10' N. lat	1,750.3	95	1,662.8	5	87.5
Starry flounder	Coastwide	1,271.7	50	635.9	50	635.9
Widow rockfish <sup>f</sup>	Coastwide	12,437.3	91	11,317.9	9	1,119.4
Yellowtail rockfish	N. of 40°10' N. lat	4,972.1	88	4,375.4	12	596.6
Minor Shelf Rockfish <sup>a</sup>	N. of 40°10' N. lat	1,963.2	60	1,181.8	40	781.4
Minor Slope Rockfish	N. of 40°10' N. lat	1,688.9	81	1,368.0	19	320.9
Minor Shelf Rockfish <sup>a</sup>	S. of 40°10' N. lat	1,576.8	12	192.37	88	1,384.4
Minor Slope Rockfish	S. of 40°10' N. lat	688.8	63	433.9	37	254.9
Other Flatfish	Coastwide	7,077.0	90	6,369.3	10	707.7

<sup>a</sup> Allocations decided through the biennial specification process.

<sup>b</sup> The cowcod fishery harvest guideline is further reduced to an ACT of 4.0 mt.

<sup>c</sup> Consistent with regulations at § 660.55(c), 9 percent (49.2 mt) of the total trawl allocation for darkblotched rockfish is allocated to the Pacific whiting fishery, as follows: 20.7 mt for the Shorebased IFQ Program, 11.8 mt for the MS sector, and 16.7 mt for the C/P sector. The tonnage calculated here for the Pacific whiting IFQ fishery contributes to the total shorebased trawl allocation, which is found at § 660.140(d)(1)(ii)(D).

<sup>d</sup> Consistent with regulations at § 660.55(c), 17 percent (37.4 mt) of the total trawl allocation for POP is allocated to the Pacific whiting fishery, as follows: 15.7 mt for the Shorebased IFQ Program, 9.0 mt for the MS sector, and 12.7 mt for the C/P sector. The tonnage calculated here for the Pacific whiting IFQ fishery contributes to the total shorebased trawl allocation, which is found at § 660.140(d)(1)(ii)(D).

<sup>e</sup> Canary rockfish is allocated approximately 72 percent to trawl and 28 percent to non-trawl. 46 mt of the total trawl allocation of canary rockfish is allocated to the MS and C/P sectors, as follows: 30 mt for the MS sector, and 16 mt for the C/P sector.

<sup>f</sup> Consistent with regulations at § 660.55(c), 10 percent (1,131.8 mt) of the total trawl allocation for widow rockfish is allocated to the Pacific whiting fishery, as follows: 475.4 mt for the Shorebased IFQ Program, 271.6 mt for the MS sector, and 348.8 mt for the C/P sector. The tonnage calculated here for the Pacific whiting IFQ fishery contributes to the total shorebased trawl allocation, which is found at § 660.140(d)(1)(ii)(D).

TABLE 2c TO PART 660, SUBPART C—SABLEFISH NORTH OF 36° N. LAT. ALLOCATIONS, 2018 AND BEYOND

Year	ACL	Set-asides		Recreational estimate	EFP	Commercial HG	Limited entry HG		Open access HG	
		Tribal <sup>a</sup>	Research				Percent	mt	Percent	mt <sup>b</sup>
2018	6,299	630	26	6.1	1	5,636	90.6	5,106	9.4	530
Year	LE All	Limited entry trawl <sup>c</sup>				Limited entry fixed gear <sup>d</sup>				
		All trawl	At-sea whiting	Shorebased IFQ	All FG	Primary		DTL		
2018	5,106	2,961	50	2,911	2,145	1,823		322		

<sup>a</sup> The tribal allocation is further reduced by 1.5 percent for discard mortality resulting in 620 mt in 2018.

<sup>b</sup> The open access HG is taken by the incidental OA fishery and the directed OA fishery.

<sup>c</sup> The trawl allocation is 58 percent of the limited entry HG.

<sup>d</sup> The limited entry fixed gear allocation is 42 percent of the limited entry HG.

TABLE 2d. TO PART 660, SUBPART C—AT-SEA WHITING FISHERY ANNUAL SET-ASIDES, 2018 AND BEYOND

Species or species complex	Area	Set aside (mt)
BOCACCIO	S. of 40°10 N. lat	NA
COWCOD	S. of 40°10 N. lat	NA
DARK BLOTCHED ROCKFISH <sup>a</sup>	Coastwide	Allocation.
PACIFIC OCEAN PERCH <sup>a</sup>	N. of 40°10 N. lat	Allocation.
YELLOW EYE ROCKFISH	Coastwide	0
Arrowtooth flounder	Coastwide	70
Canary rockfish <sup>a</sup>	Coastwide	Allocation.
Chilipepper	S. of 40°10 N. lat	NA
Dover sole	Coastwide	5
English sole	Coastwide	5
Lingcod	N. of 40°10 N. lat	15
Lingcod	S. of 40°10 N. lat	NA
Longnose skate	Coastwide	5
Longspine thornyhead	N. of 34°27 N. lat	5
Longspine thornyhead	S. of 34°27 N. lat	NA
Minor Nearshore Rockfish	N. of 40°10 N. lat	NA
Minor Nearshore Rockfish	S. of 40°10 N. lat	NA
Minor Shelf Rockfish	N. of 40°10 N. lat	35
Minor Shelf Rockfish	S. of 40°10 N. lat	NA
Minor Slope Rockfish	N. of 40°10 N. lat	100
Minor Slope Rockfish	S. of 40°10 N. lat	NA
Other Fish	Coastwide	NA
Other Flatfish	Coastwide	20
Pacific cod	Coastwide	5
Pacific Halibut <sup>b</sup>	Coastwide	10
Pacific Whiting	Coastwide	Allocation.
Petrals sole	Coastwide	5
Sablefish	N. of 36°10 N. lat	50
Sablefish	S. of 36°10 N. lat	NA
Shortspine thornyhead	N. of 34°27 N. lat	20
Shortspine thornyhead	S. of 34°27 N. lat	NA
Starry flounder	Coastwide	5
Widow Rockfish <sup>a</sup>	Coastwide	Allocation.
Yellowtail rockfish	N. of 40°10 N. lat	300

<sup>a</sup> See Table 1.b., to subpart C, for the at-sea whiting allocations for these species.

<sup>b</sup> As stated in § 660.55(m), the Pacific halibut set-aside is 10 mt, to accommodate bycatch in the at-sea Pacific whiting fisheries and in the shorebased trawl sector south of 40°10 N. lat. (estimated to be approximately 5 mt each).

\* \* \* \* \*

■ 12. In § 660.130, paragraph (d)(1)(i) is revised to read as follows:

**§ 660.130 Trawl fishery-management measures.**

- \* \* \* \* \*
- (d) \* \* \*
- (1) \* \* \*
- (i) *Coastwide*. Widow rockfish, canary rockfish, darkblotched rockfish, yelloweye rockfish, shortbelly rockfish,

black rockfish, blue/deacon rockfish, minor nearshore rockfish, minor shelf rockfish, minor slope rockfish, shorttraker rockfish, rougheye/blackspotted rockfish, shortspine and longspine thornyhead, Dover sole, arrowtooth flounder, petrale sole, starry flounder, English sole, other flatfish, lingcod, sablefish, Pacific cod, spiny dogfish, other fish, longnose skate, Pacific whiting, and big skate.

\* \* \* \* \*

■ 13. In § 660.140, paragraphs (d)(1)(ii)(D) and (e)(4)(i) are revised to read as follows:

**§ 660.140 Shorebased IFQ Program.**

- \* \* \* \* \*
- (d) \* \* \*
- (1) \* \* \*
- (ii) \* \* \*

(D) For the trawl fishery, NMFS will issue QP based on the following shorebased trawl allocations:

IFQ species	Area	2017 Shorebased trawl allocation (mt)	2018 Shorebased trawl allocation (mt)
Arrowtooth flounder	Coastwide	11,050.6	10,992.6
BOCACCIO	South of 40°10' N. lat	302.4	283.3
Canary rockfish	Coastwide	1,014.1	1,014.1
Chilipepper	South of 40°10' N. lat	1,920.8	1,845.8
COWCOD	South of 40°10' N. lat	1.40	1.40
DARKBLOTCHED ROCKFISH	Coastwide	507.6	518.4
Dover sole	Coastwide	45,981.0	45,981.0
English sole	Coastwide	9,258.6	6,953.0
Lingcod	North of 40°10' N. lat	1,359.7	1,259.32
Lingcod	South of 40°10' N. lat	558.9	510.75
Longspine thornyhead	North of 34°27' N. lat	2,699.8	2,560.2

IFQ species	Area	2017 Shorebased trawl allocation (mt)	2018 Shorebased trawl allocation (mt)
Minor Shelf Rockfish complex	North of 40°10' N. lat	1,148.1	1,146.8
Minor Shelf Rockfish complex	South of 40°10' N. lat	192.2	192.4
Minor Slope Rockfish complex	North of 40°10' N. lat	1,268.8	1,268.0
Minor Slope Rockfish complex	South of 40°10' N. lat	432.7	433.9
Other Flatfish complex	Coastwide	7,455.4	6,349.3
Pacific cod	Coastwide	1,031.4	1,031.4
PACIFIC OCEAN PERCH	North of 40°10' N. lat	198.3	198.3
Pacific whiting	Coastwide	2,745.3	2,628.5
Petrale sole	Coastwide	2,789.6	2,912.1
Sablefish	North of 36° N. lat	449.4	468.3
Sablefish	South of 36° N. lat	1551.3	1,537.0
Shortspine thornyhead	North of 34°27' N. lat	50.0	50.0
Shortspine thornyhead	South of 34°27' N. lat	1661.8	1,662.8
Splitnose rockfish	South of 40°10' N. lat	630.9	630.9
Starry flounder	Coastwide	11,392.7	10,661.5
Widow rockfish	Coastwide	1.10	1.10
YELLOWEYE ROCKFISH	Coastwide	4,246.1	4,075.4
Yellowtail rockfish	North of 40°10' N. lat		

\* \* \* \* \*

(e) \* \* \*

(4) \* \* \*

(i) *Vessel limits.* For each IFQ species or species group specified in this paragraph, vessel accounts may not have QP or IBQ pounds in excess of the

QP vessel limit (annual limit) in any year, and, for species covered by unused QP vessel limits (daily limit), may not have QP or IBQ pounds in excess of the unused QP vessel limit at any time. The QP vessel limit (annual limit) is calculated as all QPs transferred in

minus all QPs transferred out of the vessel account. The unused QP vessel limits (daily limit) is calculated as unused available QPs plus any pending outgoing transfer of QPs. Vessel limits are as follows:

Species category	QP vessel limit (annual limit) (in percent)	Unused QP vessel limit (daily limit) (in percent)
Arrowtooth flounder	20	
Bocaccio S. of 40°10' N. lat	15.4	13.2
Canary rockfish	10	
Chilipepper S. of 40°10' N. lat	15	
Cowcod S. of 40°10' N. lat	17.7	17.7
Darkblotched rockfish	6.8	4.5
Dover sole	3.9	
English sole	7.5	
Lingcod:		
N. of 40°10' N. lat	5.3	
S. of 40°10' N. lat	13.3	
Longspine thornyhead:		
N. of 34°27' N. lat	9	
Minor Shelf Rockfish complex:		
N. of 40°10' N. lat	7.5	
S. of 40°10' N. lat	13.5	
Minor Slope Rockfish complex:		
N. of 40°10' N. lat	7.5	
S. of 40°10' N. lat	9	
Other flatfish complex	15	
Pacific cod	20	
Pacific halibut (IBQ) N. of 40°10' N. lat	14.4	5.4
Pacific ocean perch N. of 40°10' N. lat	6	4
Pacific whiting (shoreside)	15	
Petrale sole	4.5	
Sablefish:		
N. of 36° N. lat. (Monterey north)	4.5	
S. of 36° N. lat. (Conception area)	15	
Shortspine thornyhead:		
N. of 34°27' N. lat	9	
S. of 34°27' N. lat	9	
Splitnose rockfish S. of 40°10' N. lat	15	
Starry flounder	20	
Widow rockfish	8.5	5.1
Yelloweye rockfish	11.4	5.7
Yellowtail rockfish N. of 40°10' N. lat	7.5	
Non-whiting groundfish species	3.2	

\* \* \* \* \*

■ 14. Tables 1 (North) and 1 (South) to part 660, subpart D, are revised to read as follows:

**Table 1 (North) to Part 660, Subpart D—Limited Entry Trawl Rockfish Conservation Areas and Landing Allowances for Non-IFQ Species and Pacific Whiting North of 40°10' N. Lat.**

Table 1 (North) to Part 660, Subpart D -- Limited Entry Trawl Rockfish Conservation Areas and Landing Allowances for non-IFQ Species and Pacific Whiting North of 40°10' N. Lat.								
This table describes Rockfish Conservation Areas for vessels using groundfish trawl gear. This table describes incidental landing allowances for vessels registered to a Federal limited entry trawl permit and using groundfish trawl or groundfish non-trawl gears to harvest individual fishing quota (IFQ) species.								
Other Limits and Requirements Apply -- Read § 660.10 - § 660.399 before using this table						08/17/2016		
	JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC		
<b>Rockfish Conservation Area (RCA)<sup>1/</sup>:</b>								
1	North of 45°46' N. lat.		100 fm line <sup>1/</sup> - 150 fm line <sup>1/</sup>					
2	45°46' N. lat. - 40°10' N. lat.		100 fm line <sup>1/</sup> - modified <sup>2/</sup> 200 fm line <sup>1/</sup>					
<p>Selective flatfish trawl gear is required shoreward of the RCA; all bottom trawl gear (large footrope, selective flatfish trawl, and small footrope trawl gear) is permitted seaward of the RCA. Large footrope and small footrope trawl gears (except for selective flatfish trawl gear) are prohibited shoreward of the RCA. Midwater trawl gear is permitted for vessels targeting whiting and non-whiting during the days open to the primary whiting season.</p> <p><b>Vessels fishing groundfish trawl quota pounds with groundfish non-trawl gears, under gear switching provisions at § 660.140, are subject to the limited entry groundfish trawl fishery landing allowances in this table, regardless of the type of fishing gear used. Vessels fishing groundfish trawl quota pounds with groundfish non-trawl gears, under gear switching provisions at § 660.140, are subject to the limited entry fixed gear non-trawl RCA, as described in Tables 2 (North) and 2 (South) to Part 660, Subpart E.</b></p>								
See § 660.60, § 660.130, and § 660.140 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.70-660.74 and §§ 660.76-660.79 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).								
State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.								
3	<b>Minor Nearshore Rockfish &amp; Black rockfish</b>		300 lb/ month					
4	<b>Whiting<sup>3/</sup></b>							
5	midwater trawl		Before the primary whiting season: CLOSED. -- During the primary season: mid-water trawl permitted in the RCA. See §660.131 for season and trip limit details. -- After the primary whiting season: CLOSED.					
6	large & small footrope gear		Before the primary whiting season: 20,000 lb/trip. -- During the primary season: 10,000 lb/trip. -- After the primary whiting season: 10,000 lb/trip.					
7	<b>Cabezon<sup>4/</sup></b>							
8	North of 46°16' N. lat.		Unlimited					
9	46°16' N. lat. - 40°10' N. lat.		50 lb/ month					
10	<b>Shortbelly rockfish</b>		Unlimited					
11	<b>Spiny dogfish</b>		60,000 lb/ month					
12	<b>Big skate</b>		5,000 lb/ 2 months	25,000 lb/ 2 months	30,000 lb/ 2 months	35,000 lb/ 2 months	10,000 lb/ 2 months	5,000 lb/ 2 months
13	<b>Longnose skate</b>		Unlimited					
14	<b>Other Fish<sup>4/</sup></b>		Unlimited					
1/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours, and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to the RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.								
2/ The "modified" fathom lines are modified to exclude certain petrale sole areas from the RCA.								
3/ As specified at §660.131(d), when fishing in the Eureka Area, no more than 10,000 lb of whiting may be taken and retained, possessed, or landed by a vessel that, at any time during the fishing trip, fished in the fishery management area shoreward of 100 fm contour.								
4/ "Other Fish" are defined at § 660.11 and include kelp greenling, leopard shark, and cabezon in Washington								
<b>To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.</b>								

TABLE 1 (North)

**Table 1 (South) to Part 660, Subpart D—Limited Entry Trawl Rockfish Conservation Areas and Landing Allowances for Non-IFQ Species and Pacific Whiting South of 40°10' N. Lat.**

Table 1 (South) to Part 660, Subpart D -- Limited Entry Trawl Rockfish Conservation Areas and Landing Allowances for non-IFQ Species and Pacific Whiting South of 40°10' N. Lat.							
This table describes Rockfish Conservation Areas for vessels using groundfish trawl gear. This table describes incidental landing allowances for vessels registered to a Federal limited entry trawl permit and using groundfish trawl or groundfish non-trawl gears to harvest individual fishing quota (IFQ) species.							
Other Limits and Requirements Apply -- Read § 660.10 - § 660.399 before using this table							08/17/2016
	JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC	
<b>Rockfish Conservation Area (RCA)<sup>1/</sup>:</b>							
1	South of 40°10' N. lat.		100 fm line <sup>1/</sup> - 150 fm line <sup>1/ 2/</sup>				
Small footrope trawl gear is required shoreward of the RCA; all trawl gear (large footrope, selective flatfish trawl, midwater trawl, and small footrope trawl gear) is permitted seaward of the RCA. Large footrope trawl gear and midwater trawl gear are prohibited shoreward of the RCA. <b>Vessels fishing groundfish trawl quota pounds with groundfish non-trawl gears, under gear switching provisions at § 660.140, are subject to the limited entry groundfish trawl fishery landing allowances in this table, regardless of the type of fishing gear used. Vessels fishing groundfish trawl quota pounds with groundfish non-trawl gears, under gear switching provisions at § 660.140, are subject to the limited entry fixed gear non-trawl RCA, as described in Tables 2 (North) and 2 (South) to Part 660, Subpart E.</b>							
See § 660.60, § 660.130, and § 660.140 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.70-660.74 and §§ 660.76-660.79 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).							
State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.							
2	<b>Longspine thornyhead</b>						
3	South of 34°27' N. lat.		24,000 lb/ 2 months				
4	<b>Minor Nearshore Rockfish &amp; Black rockfish</b>		300 lb/ month				
5	<b>Whiting</b>						
6	midwater trawl		Before the primary whiting season: CLOSED. -- During the primary season: mid-water trawl permitted in the RCA. See §660.131 for season and trip limit details. -- After the primary whiting season: CLOSED.				
7	large & small footrope gear		Before the primary whiting season: 20,000 lb/trip. -- During the primary season: 10,000 lb/trip. -- After the primary whiting season: 10,000 lb/trip.				
8	<b>Cabezon</b>		50 lb/ month				
9	<b>Shortbelly rockfish</b>		Unlimited				
10	<b>Spiny dogfish</b>		60,000 lb/ month				
11	<b>Big skate</b>	5,000 lb/ 2 months	25,000 lb/ 2 months	30,000 lb/ 2 months	35,000 lb/ 2 months	10,000 lb/ 2 months	5,000 lb/ 2 months
12	<b>Longnose skate</b>		Unlimited				
13	<b>California scorpionfish</b>		Unlimited				
14	<b>Other Fish<sup>3/</sup></b>		Unlimited				
1/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours, and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to the RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.							
2/ South of 34°27' N. lat., the RCA is 100 fm line - 150 fm line along the mainland coast; shoreline - 150 fm line around islands.							
3/ "Other Fish" are defined at § 660.11 and include kelp greenling, leopard shark, and cabezon in Washington							
<b>To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.</b>							

TABLE 1 (South)

■ 15. In § 660.230, paragraph (c)(2)(i) is revised to read as follows:

**§ 660.230 Fixed gear fishery-management measures.**  
 \* \* \* \* \*  
 (c) \* \* \*

(2) \* \* \*

(i) *Coastwide*—widow rockfish, canary rockfish, darkblotched rockfish, yelloweye rockfish, shortbelly rockfish,

black rockfish, blue/deacon rockfish, minor nearshore rockfish, minor shelf rockfish, minor slope rockfish, shortraker rockfish, rougheye/blackspotted rockfish, shortspine and longspine thornyhead, Dover sole, arrowtooth flounder, petrale sole, starry flounder, English sole, other flatfish, lingcod, sablefish, Pacific cod, spiny dogfish, other fish, longnose skate, big skate, and Pacific whiting;

\* \* \* \* \*

■ 16. In § 660.231, paragraph (b)(3)(i) is revised to read as follows:

**§ 660.231 Limited entry fixed gear sablefish primary fishery.**

\* \* \* \* \*

(b) \* \* \* \*

(3) \* \* \*

(i) A vessel participating in the primary season will be constrained by the sablefish cumulative limit

associated with each of the permits registered for use with that vessel. During the primary season, each vessel authorized to fish in that season under paragraph (a) of this section may take, retain, possess, and land sablefish, up to the cumulative limits for each of the permits registered for use with that vessel (*i.e.*, stacked permits). If multiple limited entry permits with sablefish endorsements are registered for use with a single vessel, that vessel may land up to the total of all cumulative limits announced in this paragraph for the tiers for those permits, except as limited by paragraph (b)(3)(ii) of this section. Up to 3 permits may be registered for use with a single vessel during the primary season; thus, a single vessel may not take and retain, possess or land more than 3 primary season sablefish cumulative limits in any one year. A vessel registered for use with multiple

limited entry permits is subject to per vessel limits for species other than sablefish, and to per vessel limits when participating in the daily trip limit fishery for sablefish under § 660.232. In 2017, the following annual limits are in effect: Tier 1 at 51,947 lb (23,562 kg), Tier 2 at 23,612 lb (10,710 kg), and Tier 3 at 13,493 lb (6,120 kg). In 2018 and beyond, the following annual limits are in effect: Tier 1 at 54,179 lb (24,575 kg), Tier 2 at 24,627 lb (11,170 kg), and Tier 3 at 14,072 lb (6,382 kg).

\* \* \* \* \*

■ 17. Tables 2 (North) and 2 (South) to part 660, subpart E, are revised to read as follows:

**Table 2 (North) to Part 660, Subpart E—Non-Trawl Rockfish Conservation Areas and Trip Limits for Limited Entry Fixed Gear North of 40°10' N. Lat.**

**Table 2 (North) to Part 660, Subpart E -- Non-Trawl Rockfish Conservation Areas and Trip Limits for Limited Entry Fixed Gear North of 40°10' N. lat.**

Other limits and requirements apply -- Read §§660.10 through 660.399 before using this table							8/17/16
		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
<b>Rockfish Conservation Area (RCA)<sup>1/</sup>:</b>							
1	North of 46°16' N. lat.	shoreline - 100 fm line <sup>1/</sup>					
2	46°16' N. lat. - 42°00' N. lat.	30 fm line <sup>1/</sup> - 100 fm line <sup>1/</sup>					
3	42°00' N. lat. - 40°10' N. lat.	30 fm line <sup>1/</sup> - 100 fm line <sup>1/</sup>					
See §§660.60 and 660.230 for additional gear, trip limit and conservation area requirements and restrictions. See §§660.70-660.74 and §§660.76-660.79 for conservation area descriptions and coordinates (including RCAs, YRCAs, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).							
State trip limits and seasons may be more restrictive than Federal trip limits or seasons, particularly in waters off Oregon and California.							
4	Minor Slope Rockfish <sup>2/</sup> & Darkblotched rockfish	4,000 lb/ 2 months					
5	Pacific ocean perch	1,800 lb/ 2 months					
6	Sablefish	1,125 lb/week, not to exceed 3,375 lb/ 2 months					
7	Longspine thornyhead	10,000 lb/ 2 months					
8	Shortspine thornyhead	2,000 lb/ 2 months			2,500 lb/ 2 months		
9							
10	Dover sole, arrowtooth flounder, petrale sole, English sole, starry flounder, Other Flatfish <sup>3/</sup>	5,000 lb/ month					
11		South of 42° N. lat., when fishing for "other flatfish," vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 0.44 in (11 mm) point to shank, and up to two 1 lb (0.45 kg) weights per line, are not subject to the RCAs.					
12							
13							
14							
15	Whiting	10,000 lb/ trip					
16	Minor Shelf Rockfish <sup>2/</sup> , Shortbelly, & Widow rockfish	200 lb/ month					
17	Yellowtail rockfish	1,000 lb/ month					
18	Canary rockfish	300 lb/ 2 months					
19	Yelloweye rockfish	CLOSED					
20	Minor Nearshore Rockfish & Black rockfish						
21	North of 42°00' N. lat.	5,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black rockfish or blue/deacon rockfish <sup>4/</sup>					
22	42°00' N. lat. - 40°10' N. lat.	7,000 lb/ 2 months, of which no more than 1,200 lb of which may be species other than black rockfish					
23	Lingcod <sup>5/</sup>	200 lb/2 months		1,200 lb/ 2 months			600 lb/ month
24	Pacific cod	1,000 lb/ 2 months					
25	Spiny dogfish	200,000 lb/ 2 months		150,000 lb/ 2 months		100,000 lb/ 2 months	
26	Longnose skate	Unlimited					
27	Other Fish <sup>6/</sup> & Cabezon in Oregon and California	Unlimited					

TABLE 2 (North)

1/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours (with the exception of the 20-fm depth contour boundary south of 42° N. lat.), and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.

2/ Bocaccio, chilipepper and cowcod are included in the trip limits for Minor Shelf Rockfish and splitnose rockfish is included in the trip limits for Minor Slope Rockfish.

3/ "Other flatfish" are defined at § 660.11 and include butter sole, curfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.

4/ For black rockfish north of Cape Alava (48°09.50' N. lat.), and between Destruction Is. (47°40' N. lat.) and Leadbetter Pnt. (46°38.17' N. lat.), there is an additional limit of 100 lb or 30 percent by weight of all fish on board, whichever is greater, per vessel, per fishing trip.

5/ The minimum size limit for lingcod is 22 inches (56 cm) total length North of 42° N. lat. and 24 inches (61 cm) total length South of 42° N. lat.

6/ "Other Fish" are defined at § 660.11 and include kelp greenling, leopard shark, and cabezon in Washington.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram

**Table 2 (South) to Part 660, Subpart E -- Non-Trawl Rockfish Conservation Areas and Trip Limits for Limited Entry Fixed Gear South of 40°10' N. lat.**

Other limits and requirements apply -- Read §§660.10 through 660.399 before using this table							8/17/2016	
		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC	
<b>Rockfish Conservation Area (RCA)<sup>1/</sup>:</b>								
1	40°10' N. lat. - 34°27' N. lat.	30 fm line <sup>1/</sup> - 125 fm line <sup>1/</sup>						
2	South of 34°27' N. lat.	75 fm line <sup>1/</sup> - 150 fm line <sup>1/</sup> (also applies around islands)						
<b>See §§660.60 and 660.230 for additional gear, trip limit and conservation area requirements and restrictions. See §§660.70-660.74 and §§660.76-660.79 for conservation area descriptions and coordinates (including RCAs, YRCAs, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).</b>								
State trip limits and seasons may be more restrictive than Federal trip limits or seasons, particularly in waters off Oregon and California.								
3	<b>Minor Slope rockfish<sup>2/</sup> &amp; Darkblotched rockfish</b>	40,000 lb/ 2 months, of which no more than 1,375 lb may be blackgill rockfish			40,000 lb/ 2 months, of which no more than 1,600 lb may be blackgill rockfish			
4	<b>Splitnose rockfish</b>	40,000 lb/ 2 months						
5	<b>Sablefish</b>							
6	40°10' N. lat. - 36°00' N. lat.	1,125 lb/week, not to exceed 3,375 lb/ 2 months						
7	South of 36°00' N. lat.	1,700 lb/ week						
8	<b>Longspine thornyhead</b>	10,000 lb/ 2 months						
9	<b>Shortspine thornyhead</b>							
10	40°10' N. lat. - 34°27' N. lat.	2,000 lb/ 2 months			2,500 lb/ 2 months			
11	South of 34°27' N. lat.	3,000 lb/ 2 months						
12								
13	<b>Dover sole, arrowtooth flounder, petrale sole, English sole, starry flounder, Other Flatfish<sup>3/</sup></b>	5,000 lb/ month						
14		South of 42° N. lat., when fishing for "other flatfish," vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 0.44 in (11 mm) point to shank, and up to two 1 lb (0.45 kg) weights per line, are not subject to the RCAs.						
15								
16								
17	<b>Whiting</b>	10,000 lb/ trip						
19	<b>Minor Shelf Rockfish<sup>2/</sup>, Shortbelly rockfish, Widow rockfish (including Chilipepper between 40°10' - 34°27' N. lat.)</b>							
20	40°10' N. lat. - 34°27' N. lat.	Minor shelf rockfish, shortbelly, widow rockfish, & chilipepper: 2,500 lb/ 2 months, of which no more than 500 lb may be any species other than chilipepper.						
21	South of 34°27' N. lat.	4,000 lb/ 2 months	CLOSED	4,000 lb/ 2 months				
22	<b>Chilipepper</b>							
23	40°10' N. lat. - 34°27' N. lat.	Chilipepper included under minor shelf rockfish, shortbelly and widow rockfish limits - - See above						
24	South of 34°27' N. lat.	2,000 lb/ 2 months, this opportunity only available seaward of the non-trawl RCA						
25	<b>Canary rockfish</b>	300 lb/ 2 months						
26	<b>Yelloweye rockfish</b>	CLOSED						
27	<b>Cowcod</b>	CLOSED						
28	<b>Bronzespotted rockfish</b>	CLOSED						
29	<b>Bocaccio</b>							
30	40°10' N. lat. - 34°27' N. lat.	1,000 lb/ 2 months						
31	South of 34°27' N. lat.	1,500 lb/ 2 months	CLOSED	1,500 lb/ 2 months				
32	<b>Minor Nearshore Rockfish &amp; Black rockfish</b>							
33	Shallow nearshore	1,200 lb/ 2 months	CLOSED	1,200 lb/ 2 months				
34	Deeper nearshore	1,000 lb/ 2 months	CLOSED	1,000 lb/ 2 months				
35	<b>California Scorpionfish</b>	1,500 lb/ 2 months	CLOSED	1,500 lb/ 2 months				
36	<b>Lingcod<sup>4/</sup></b>	200 lb/ 2 months	CLOSED	800 lb/ 2 months			400 lb/ month	200 lb/ month
37	<b>Pacific cod</b>	1,000 lb/ 2 months						
38	<b>Spiny dogfish</b>	200,000 lb/ 2 months		150,000 lb/ 2 months	100,000 lb/ 2 months			
39	<b>Longnose skate</b>	Unlimited						
40	<b>Other Fish<sup>5/</sup> &amp; Cabezon</b>	Unlimited						

TABLE 2 (South)



1/	The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours (with the exception of the 20-fm depth contour boundary south of 42° N. lat.), and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.
2/	POP is included in the trip limits for Minor Slope Rockfish. Blackgill rockfish have a species specific trip sub-limit within the Minor Slope Rockfish cumulative limit. Yellowtail rockfish are included in the trip limits for Minor Shelf Rockfish. Bronzespotted rockfish have a species specific trip limit.
3/	"Other Flatfish" are defined at § 660.11 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.
4/	The commercial minimum size limit for lingcod is 24 inches (61 cm) total length South of 42° N. lat.
5/	"Other Fish" are defined at § 660.11 and include kelp greenling, leopard shark, and cabezon in Washington.
<b>To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.</b>	

■ 18. In § 660.330, paragraph (c)(2)(i) is revised to read as follows:

**§ 660.330 Open access fishery—management measures.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(i) *Coastwide*—widow rockfish, canary rockfish, darkblotched rockfish, yelloweye rockfish, shortbelly rockfish,

black rockfish, blue/deacon rockfish, minor nearshore rockfish, minor shelf rockfish, minor slope rockfish, shorttraker rockfish, rougheye/blackspotted rockfish, shortspine and longspine thornyhead, Dover sole, arrowtooth flounder, petrale sole, starry flounder, English sole, other flatfish, lingcod, sablefish, Pacific cod, spiny dogfish, longnose skate, other fish,

Pacific whiting, big skate, and Pacific sanddabs;

\* \* \* \* \*

■ 19. Tables 3 (North) and 3 (South) to part 660, subpart F, are revised to read as follows:

**Table 3 (North) to Part 660, Subpart F—Non-Trawl Rockfish Conservation Areas and Trip Limits for Open Access Gears North of 40°10' N. Lat.**

**Table 3 (North) to Part 660, Subpart F -- Non-Trawl Rockfish Conservation Areas and Trip Limits for Open Access Gears North of 40°10' N. lat.**

Other limits and requirements apply -- Read §§660.10 through 660.399 before using this table		08/17/2016					
Rockfish Conservation Area (RCA) <sup>1/</sup> :		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
1	North of 46°16' N. lat.	shoreline - 100 fm line <sup>1/</sup>					
2	46°16' N. lat. - 42°00' N. lat.	30 fm line <sup>1/</sup> - 100 fm line <sup>1/</sup>					
3	42°00' N. lat. - 40°10' N. lat.	30 fm line <sup>1/</sup> - 100 fm line <sup>1/</sup>					
See §§660.60, 660.330 and 660.333 for additional gear, trip limit and conservation area requirements and restrictions. See §§660.70-660.74 and §§660.76-660.79 for conservation area descriptions and coordinates (including RCAs, YRCAs, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).							
State trip limits and seasons may be more restrictive than Federal trip limits or seasons, particularly in waters off Oregon and California.							
4	Minor Slope Rockfish <sup>2/</sup> & Darkblotched rockfish	Per trip, no more than 25% of weight of the sablefish landed					
5	Pacific ocean perch	100 lb/ month					
6	Sablefish	300 lb/ day, or 1 landing per week of up to 1,200 lb, not to exceed 2,400 lb/ 2 months					
7	Shortpine thornyheads and longspine thornyheads	CLOSED					
8	Dover sole, arrowtooth flounder, petrale sole, English sole, starry flounder, Other Flatfish <sup>3/</sup>	3,000 lb/ month, no more than 300 lb of which may be species other than Pacific sanddabs.					
9		South of 42° N. lat., when fishing for "Other Flatfish," vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 0.44 in (11 mm) point to shank, and up to two 1 lb (0.45 kg) weights per line are not subject to the RCAs.					
10							
11							
12							
13	Whiting	300 lb/ month					
15	Minor Shelf Rockfish <sup>2/</sup> , Shortbelly rockfish, & Widow rockfish	200 lb/ month					
16	Yellowtail rockfish	500 lb/ month					
17	Canary rockfish	150 lb/ 2 months					
18	Yelloweye rockfish	CLOSED					
19	Minor Nearshore Rockfish & Black rockfish						
20	North of 42°00' N. lat.	5,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black rockfish					
21	42°00' N. lat. - 40°10' N. lat.	7,000 lb/ 2 months, of which no more than 1,200 lb of which may be species other than black rockfish					
22	Lingcod <sup>5/</sup>	100 lb/ month	600 lb/ month				100 lb/ month
23	Pacific cod	1,000 lb/ 2 months					
24	Spiny dogfish	200,000 lb/ 2 months	150,000 lb/ 2 months	100,000 lb/ 2 months			
25	Longnose skate	Unlimited					
26	Other Fish <sup>6/</sup> & Cabezon in Oregon and California	Unlimited					
27	<b>SALMON TROLL</b> (subject to RCAs when retaining all species of groundfish, except for yellowtail rockfish and lingcod, as described below)						
28	North	Salmon trollers may retain and land up to 1 lb of yellowtail rockfish for every 2 lbs of salmon landed, with a cumulative limit of 200 lb/month, both within and outside of the RCA. This limit is within the 200 lb per month combined limit for minor shelf rockfish, widow rockfish and yellowtail rockfish, and not in addition to that limit. Salmon trollers may retain and land up to 1 lingcod per 15 Chinook per trip, plus 1 lingcod per trip, up to a trip limit of 10 lingcod, on a trip where any fishing occurs within the RCA. This limit only applies during times when lingcod retention is allowed, and is not "CLOSED." This limit is within the per month limit for lingcod described in the table above, and not in addition to that limit. All groundfish species are subject to the open access limits, seasons, size limits and RCA restrictions listed in the table above, unless otherwise stated here.					
29	<b>PINK SHRIMP NON-GROUNDFISH TRAWL</b> (not subject to RCAs)						
30	North	Effective April 1 - October 31: Groundfish: 500 lb/day, multiplied by the number of days of the trip, not to exceed 1,500 lb/trip. The following sublimits also apply and are counted toward the overall 500 lb/day and 1,500 lb/trip groundfish limits: lingcod 300 lb/month (minimum 24 inch size limit); sablefish 2,000 lb/month; canary, thornyheads and yelloweye rockfish are PROHIBITED. All other groundfish species taken are managed under the overall 500 lb/day and 1,500 lb/trip groundfish limits. Landings of these species count toward the per day and per trip groundfish limits and do not have species-specific limits. The amount of groundfish landed may not exceed the amount of pink shrimp landed.					

TABLE 3 (North)

1/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours (with the exception of the 20-fm depth contour boundary south of 42° N. lat.), and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.
2/ Bocaccio, chilipepper and cowcod rockfishes are included in the trip limits for Minor Shelf Rockfish. Splitnose rockfish is included in the trip limits for Minor Slope Rockfish.
3/ "Other flatfish" are defined at § 660.11 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.
4/ For black rockfish north of Cape Alava (48°09.50' N. lat.), and between Destruction Is. (47°40' N. lat.) and Leadbetter Pnt. (46°38.17' N. lat.), there is an additional limit of 100 lbs or 30 percent by weight of all fish on board, whichever is greater, per vessel, per fishing trip.
5/ The minimum size limit for lingcod is 22 inches (56 cm) total length North of 42° N. lat. and 24 inches (61 cm) total length South of 42° N. lat.
6/ "Other fish" are defined at § 660.11 and include kelp greenling, leopard shark, and cabezon in Washington.
<b>To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.</b>

**Table 3 (South) to Part 660, Subpart F—  
Non-Trawl Rockfish Conservation  
Areas and Trip Limits for Open Access  
Gears South of 40°10' N. Lat.**

**Table 3 (South) to Part 660, Subpart F -- Non-Trawl Rockfish Conservation Areas and Trip Limits for Open Access Gears South of 40°10' N. lat.**

Other limits and requirements apply -- Read §§660.10 through 660.399 before using this table

08/17/2017

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
<b>Rockfish Conservation Area (RCA)<sup>1/</sup>:</b>							
1	40°10' N. lat. - 34°27' N. lat.	30 fm line <sup>4/</sup> - 125 fm line <sup>4/</sup>					
2	South of 34°27' N. lat.	75 fm line <sup>4/</sup> - 150 fm line <sup>4/</sup> (also applies around islands)					
<p><b>See §§660.60 and 660.230 for additional gear, trip limit and conservation area requirements and restrictions. See §§660.70-660.74 and §§660.76-660.79 for conservation area descriptions and coordinates (including RCAs, YRCAs, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).</b></p> <p>State trip limits and seasons may be more restrictive than Federal trip limits or seasons, particularly in waters off Oregon and California.</p>							
3	<b>Minor Slope Rockfish<sup>2/</sup> &amp; Darkblotched rockfish</b>	10,000 lb/ 2 months, of which no more than 475 lb may be blackgill rockfish			10,000 lb/ 2 months, of which no more than 550 lb may be blackgill rockfish		
4	<b>Splitnose rockfish</b>	200 lb/ month					
5	<b>Sablefish</b>						
6	40°10' N. lat. - 36°00' N. lat.	300 lb/ day, or 1 landing per week of up to 1,200 lb, not to exceed 2,400 lb/ 2 months					
7	South of 36°00' N. lat.	300 lb/ day, or 1 landing per week of up to 1,600 lb, not to exceed 3,200 lb/ 2 months					
8	<b>Shortpine thornyheads and longspine thornyheads</b>						
9	40°10' N. lat. - 34°27' N. lat.	CLOSED					
10	South of 34°27' N. lat.	50 lb/ day, no more than 1,000 lb/ 2 months					
11		3,000 lb/ month, no more than 300 lb of which may be species other than Pacific sanddabs.					
12	<b>Dover sole, arrowtooth flounder, petrale sole, English sole, starry flounder, Other Flatfish<sup>3/</sup></b>	South of 42° N. lat., when fishing for "other flatfish," vessels using hook-and-line gear with no more than 12 hooks per line, using hooks no larger than "Number 2" hooks, which measure 0.44 in (11 mm) point to shank, and up to two 1 lb (0.45 kg) weights per line are not subject to the RCAs.					
13							
14							
15							
16		300 lb/ month					
17	<b>Whiting</b>	300 lb/ month					
18	<b>Minor Shelf Rockfish<sup>2/</sup>, Shortbelly, Widow rockfish and Chilipepper</b>						
19	40°10' N. lat. - 34°27' N. lat.	400 lb/ 2 months	CLOSED	400 lb/ 2 months			
20	South of 34°27' N. lat.	1500 lb/ 2 months		1500 lb/ 2 months			
21	<b>Canary rockfish</b>	150 lb/ 2 months					
22	<b>Yelloweye rockfish</b>	CLOSED					
23	<b>Cowcod</b>	CLOSED					
24	<b>Bronzespotted rockfish</b>	CLOSED					
25	<b>Bocaccio</b>	500 lb/ 2 months	CLOSED	500 lb/ 2 months			
26	<b>Minor Nearshore Rockfish &amp; Black rockfish</b>						
27	Shallow nearshore	1,200 lb/ 2 months	CLOSED	1,200 lb/ 2 months			
28	Deeper nearshore	1,000 lb/ 2 months	CLOSED	1,000 lb/ 2 months			
29	California scorpionfish	1,500 lb/ 2 months	CLOSED	1,500 lb/ 2 months			
30	<b>Lingcod<sup>4/</sup></b>	100 lb/ month	CLOSED	400 lb/ month			100 lb/ month
31	<b>Pacific cod</b>	1,000 lb/ 2 months					
32	<b>Spiny dogfish</b>	200,000 lb/ 2 months	150,000 lb/ 2 months	100,000 lb/ 2 months			
33	<b>Longnose skate</b>	Unlimited					
34	<b>Other Fish<sup>5/</sup> &amp; Cabezon</b>	Unlimited					

TABLE 3 (South)

Table 3 (South). Continued

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
35	<b>RIDGEBACK PRAWN AND, SOUTH OF 38°57.50' N. LAT., CA HALIBUT AND SEA CUCUMBER NON-GROUNDFISH TRAWL</b>						
36	<b>NON-GROUNDFISH TRAWL Rockfish Conservation Area (RCA) for CA Halibut, Sea Cucumber &amp; Ridgeback Prawn:</b>						
37	40° 10' N. lat. - 38° 00' N. lat.	100 fm line <sup>1/</sup> - 200 fm line <sup>1/</sup>	100 fm line <sup>1/</sup> - 150 fm line <sup>1/</sup>				100 fm line <sup>1/</sup> - 200 fm line <sup>1/</sup>
38	38° 00' N. lat. - 34° 27' N. lat.	100 fm line <sup>1/</sup> - 150 fm line <sup>1/</sup>					
37	South of 34° 27' N. lat.	100 fm line <sup>1/</sup> - 150 fm line <sup>1/</sup> along the mainland coast; shoreline - 150 fm line <sup>1/</sup> around islands					
39		Groundfish: 300 lb/trip. Species-specific limits described in the table above also apply and are counted toward the 300 lb groundfish per trip limit. The amount of groundfish landed may not exceed the amount of the target species landed, except that the amount of spiny dogfish landed may exceed the amount of target species landed. Spiny dogfish are limited by the 300 lb/trip overall groundfish limit. The daily trip limits for sablefish coastwide and thornyheads south of Pt. Conception and the overall groundfish "per trip" limit may not be multiplied by the number of days of the trip. Vessels participating in the California halibut fishery south of 38°57.50' N. lat. are allowed to (1) land up to 100 lb/day of groundfish without the ratio requirement, provided that at least one California halibut is landed and (2) land up to 3,000 lb/month of flatfish, no more than 300 lb of which may be species other than Pacific sanddabs, sand sole, starry flounder, rock sole, curffin sole, or California scorpionfish (California scorpionfish is also subject to the trip limits and closures in line 31).					
40	<b>PINK SHRIMP NON-GROUNDFISH TRAWL GEAR (not subject to RCAs)</b>						
41	South	Effective April 1 - October 31: Groundfish: 500 lb/day, multiplied by the number of days of the trip, not to exceed 1,500 lb/trip. The following sublimits also apply and are counted toward the overall 500 lb/day and 1,500 lb/trip groundfish limits: lingcod 300 lb/ month (minimum 24 inch size limit); sablefish 2,000 lb/ month; canary rockfish, thornyheads and yelloweye rockfish are PROHIBITED. All other groundfish species taken are managed under the overall 500 lb/day and 1,500 lb/trip groundfish limits. Landings of all groundfish species count toward the per day, per trip or other species-specific sublimits described here and the species-specific limits described in the table above do not apply. The amount of groundfish landed may not exceed the amount of pink shrimp landed.					

1/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours (with the exception of the 20-fm depth contour boundary south of 42° N. lat.), and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.

2/ POP is included in the trip limits for minor slope rockfish. Blackgill rockfish have a species specific trip sub-limit within the minor slope rockfish cumulative limits. Yellowtail rockfish is included in the trip limits for minor shelf rockfish. Bronzespotted rockfish have a species specific trip limit.

3/ "Other flatfish" are defined at § 660.11 and include butter sole, curffin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.

4/ The commercial minimum size limit for lingcod is 24 inches (61 cm) total length South of 42° N. lat.

5/ "Other fish" are defined at § 660.11 and includes kelp greenling, leopard shark, and cabezon in Washington.

**To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.**

TABLE 3 (South) cont'd

■ 20. In § 660.360, paragraphs (c)(1) introductory text, (c)(1)(i)(D)(3), (c)(1)(ii), (c)(1)(iv)(A) and (B), (c)(2)(i)(A) and (B), (c)(2)(iii)(A) and (D), (c)(3) introductory text, (c)(3)(i)(A), (c)(3)(ii)(A)(1) through (4), (c)(3)(ii)(B), (c)(3)(iii)(A)(1) through (5), (c)(3)(iii)(B), (c)(3)(iv), and (c)(3)(v)(A)(1) are revised to read as follows:

**§ 660.360 Recreational fishery—management measures.**

\* \* \* \* \*

(c) \* \* \*

(1) *Washington*. For each person engaged in recreational fishing off the coast of Washington, the groundfish bag limit is 12 groundfish per day, including rockfish, cabezon and lingcod. Within the groundfish bag limit, there are sublimits for rockfish, lingcod, and cabezon outlined in paragraph (c)(1)(i)(D) of this section. The recreational groundfish fishery will open the second Saturday in March through the third Saturday in October for all species in all areas except lingcod in Marine Area 4 as described in paragraph (c)(1)(iv) of this

section. In the Pacific halibut fisheries, retention of groundfish is governed in part by annual management measures for Pacific halibut fisheries, which are published in the **Federal Register**. The following seasons, closed areas, sublimits and size limits apply:

(i) \* \* \*  
(D) \* \* \*

(3) Between Leadbetter Point (46°38.17' N. lat.) and the Columbia River (Marine Area 1), when Pacific halibut are onboard the vessel, no groundfish may be taken and retained, possessed or landed, except sablefish, flatfish species (except halibut), and Pacific cod from May 1 through September 30. Except that taking, retaining, possessing or landing incidental halibut with groundfish on board is allowed in the nearshore area on days not open to all-depth Pacific halibut fisheries in the area shoreward of the boundary line approximating the 30 fathom (55 m) depth contour extending from Leadbetter Point, WA (46°38.17' N. lat., 124°15.88' W. long.) to the Columbia River (46°16.00' N. lat.,

124°15.88' W. long.) and from there, connecting to the boundary line approximating the 40 fathom (73 m) depth contour in Oregon. Nearshore season days are established in the annual management measures for Pacific halibut fisheries, which are published in the **Federal Register** and are announced on the NMFS halibut hotline, 1-800-662-9825. Between Leadbetter Point (46°38.17' N. lat. 124°21.00' W. long) and 46° 33.00' N. Lat. 124°21.00' W. Long., recreational fishing for lingcod is prohibited year round seaward of a straight line connecting all of the following points in the order stated: 46°38.17' N. lat., 124°21.00' W. long.; and 46° 33.00' N. Lat., 124°21.00' W. long.

(ii) *Rockfish*. In areas of the EEZ seaward of Washington that are open to recreational groundfish fishing, there is a 10 rockfish per day bag limit. In Marine Areas 1 and 2 there is a 1 fish sub-bag limit per day for canary rockfish. Taking and retaining canary rockfish is prohibited in Marine Areas 3 and 4. Taking and retaining yelloweye

rockfish is prohibited in all Marine areas.

\* \* \* \* \*

(iv) \* \* \*

(A) Between the U.S./Canada border and 48°10' N. lat. (Cape Alava) (Washington Marine Area 4), recreational fishing for lingcod is open, for 2017 and 2018, from April 16 through October 15. Lingcod may be no smaller than 22 inches (61 cm) total length.

(B) Between 48°10' N. lat. (Cape Alava) and 46°16' N. lat. (Columbia River) (Washington Marine Areas 1–3), recreational fishing for lingcod is open for 2017 from March 11 through October 21, and for 2018 from March 10 through October 20. Lingcod may be no smaller than 22 inches (56 cm) total length.

(2) \* \* \*

(i) \* \* \*

(A) *Stonewall Bank yelloweye rockfish conservation area*. Recreational fishing for groundfish and halibut is prohibited within the Stonewall Bank YRCA. It is unlawful for recreational fishing vessels to take and retain, possess, or land groundfish taken with recreational gear within the Stonewall Bank YRCA. A vessel fishing in the Stonewall Bank YRCA may not be in possession of any groundfish. Recreational vessels may transit through the Stonewall Bank YRCA with or without groundfish on board. The Stonewall Bank YRCA, and two possible expansions that are available through inseason adjustment, are defined by latitude and longitude coordinates specified at § 660.70, subpart C.

(B) *Recreational rockfish conservation area*. Fishing for groundfish with recreational gear is prohibited within the recreational RCA, a type of closed area or GCA. It is unlawful to take and retain, possess, or land groundfish taken with recreational gear within the recreational RCA. A vessel fishing in the recreational RCA may not be in possession of any groundfish. [For example, if a vessel fishes in the recreational salmon fishery within the RCA, the vessel cannot be in possession of groundfish while in the RCA. The vessel may, however, on the same trip fish for and retain groundfish shoreward of the RCA on the return trip to port.] Off Oregon, from April 1 through September 30, recreational fishing for groundfish is prohibited seaward of a recreational RCA boundary line approximating the 40 fm (73 m) depth contour, except that fishing for flatfish (other than Pacific halibut) is allowed seaward of the 40 fm (73 m) depth contour when recreational fishing for groundfish is permitted. Coordinates for

the boundary line approximating the 40 fm (73 m) depth contour are listed at § 660.71.

\* \* \* \* \*

(iii) \* \* \*

(A) *Marine fish*. The bag limit is 10 marine fish per day, which includes rockfish, kelp greenling, cabezon and other groundfish species. The bag limit of marine fish excludes Pacific halibut, salmonids, tuna, perch species, sturgeon, sanddabs, flatfish, lingcod, striped bass, hybrid bass, offshore pelagic species and baitfish (herring, smelt, anchovies and sardines). The minimum size for cabezon retained in the Oregon recreational fishery is 16 in (41 cm) total length.

(D) *In the Pacific halibut fisheries*. Retention of groundfish is governed in part by annual management measures for Pacific halibut fisheries, which are published in the **Federal Register**. Between the Columbia River and Humbug Mountain, during days open to the “all-depth” sport halibut fisheries, when Pacific halibut are onboard the vessel, no groundfish may be taken and retained, possessed or landed, except sablefish, Pacific cod, and other species of flatfish (sole, flounder, sanddab). “All-depth” season days are established in the annual management measures for Pacific halibut fisheries, which are published in the **Federal Register** and are announced on the NMFS Pacific halibut hotline, 1–800–662–9825.

\* \* \* \* \*

(3) *California*. Seaward of California, California law provides that, in times and areas when the recreational fishery is open, there is a 20 fish bag limit for all species of finfish, within which no more than 10 fish of any one species may be taken or possessed by any one person. [Note: There are some exceptions to this rule. The following groundfish species are not subject to a bag limit: Petrale sole, Pacific sanddab and starry flounder.] For groundfish species not specifically mentioned in this paragraph, fishers are subject to the overall 20-fish bag limit for all species of finfish and the depth restrictions at paragraph (c)(3)(i) of this section. Recreational spearfishing for all federally-managed groundfish, is exempt from closed areas and seasons, consistent with Title 14 of the California Code of Regulations. This exemption applies only to recreational vessels and divers provided no other fishing gear, except spearfishing gear, is on board the vessel. California state law may provide regulations similar to Federal regulations for the following state-managed species: Ocean whitefish,

California sheephead, and all greenlings of the genus *Hexagrammos*. Kelp greenling is the only federally-managed greenling. Retention of cowcod, yelloweye rockfish, and bronzespotted rockfish, is prohibited in the recreational fishery seaward of California all year in all areas. Retention of species or species groups for which the season is closed is prohibited in the recreational fishery seaward of California all year in all areas, unless otherwise authorized in this section. For each person engaged in recreational fishing in the EEZ seaward of California, the following closed areas, seasons, bag limits, and size limits apply:

(i) \* \* \*

(A) *Recreational rockfish conservation areas*. The recreational RCAs are areas that are closed to recreational fishing for groundfish. Fishing for groundfish with recreational gear is prohibited within the recreational RCA, except that recreational fishing for “other flatfish,” petrale sole, and starry flounder is permitted within the recreational RCA as specified in paragraph (c)(3)(iv) of this section. It is unlawful to take and retain, possess, or land groundfish taken with recreational gear within the recreational RCA, unless otherwise authorized in this section. A vessel fishing in the recreational RCA may not be in possession of any species prohibited by the restrictions that apply within the recreational RCA. [For example, if a vessel fishes in the recreational salmon fishery within the RCA, the vessel cannot be in possession of rockfish while in the RCA. The vessel may, however, on the same trip fish for and retain rockfish shoreward of the RCA on the return trip to port.] If the season is closed for a species or species group, fishing for that species or species group is prohibited both within the recreational RCA and shoreward of the recreational RCA, unless otherwise authorized in this section.

(1) Between 42° N. lat. (California/Oregon border) and 40°10' N. lat. (Northern Management Area), recreational fishing for all groundfish (except petrale sole, starry flounder, and “other flatfish” as specified in paragraph (c)(3)(iv) of this section) is prohibited seaward of the 30 fm (55 m) depth contour along the mainland coast and along islands and offshore seamounts from May 1 through October 31 (shoreward of 30 fm is open); is open at all depths from November 1 through December 31; and is closed entirely from January 1 through April 30.

(2) Between 40°10' N. lat. and 38°57.50' N. lat. (Mendocino Management Area), recreational fishing for all groundfish (except petrale sole,

starry flounder, and “other flatfish” as specified in paragraph (c)(3)(iv) of this section) is prohibited seaward of the 20 fm (37 m) depth contour along the mainland coast and along islands and offshore seamounts from May 1 through October 31 (shoreward of 20 fm is open), is open at all depths from November 1 through December 31, and is closed entirely from January 1 through April 30.

(3) Between 38°57.50' N. lat. and 37°11' N. lat. (San Francisco Management Area), recreational fishing for all groundfish (except petrale sole, starry flounder, and “other flatfish” as specified in paragraph (c)(3)(iv) of this section) is prohibited seaward of the boundary line approximating the 40 fm (73 m) depth contour along the mainland coast and along islands and offshore seamounts from April 15 through December 31; and is closed entirely from January 1 through April 14. Closures around Cordell Banks (see paragraph (c)(3)(i)(C) of this section) also apply in this area. Coordinates for the boundary line approximating the 40 fm (73 m) depth contour are listed in § 660.71.

(4) Between 37°11' N. lat. and 34°27' N. lat. (Central Management Area), recreational fishing for all groundfish (except petrale sole, starry flounder, and “other flatfish” as specified in paragraph (c)(3)(iv) of this section) is prohibited seaward of a boundary line approximating the 50 fm (91 m) depth contour along the mainland coast and along islands and offshore seamounts from April 1 through December 31; and is closed entirely from January 1 through March 31 (*i.e.*, prohibited seaward of the shoreline). Coordinates for the boundary line approximating the 50 fm (91 m) depth contour are specified in § 660.72.

(5) South of 34°27' N. lat. (Southern Management Area), recreational fishing for all groundfish (except California scorpionfish as specified below in this paragraph and in paragraph (c)(3)(v) of this section and “other flatfish,” petrale sole, and starry flounder, as specified in paragraph (c)(3)(iv) of this section) is prohibited seaward of a boundary line approximating the 60 fm (109.7 m)

depth contour from March 1 through December 31 along the mainland coast and along islands and offshore seamounts, except in the CCAs where fishing is prohibited seaward of the 20 fm (37 m) depth contour when the fishing season is open (see paragraph (c)(3)(i)(B) of this section). Recreational fishing for all groundfish (except California scorpionfish, “other flatfish,” petrale sole, and starry flounder) is closed entirely from January 1 through February 28 (*i.e.*, prohibited seaward of the shoreline). When the California scorpionfish fishing season is open, recreational fishing for California scorpionfish south of 34°27' N. lat. is prohibited seaward of a boundary line approximating the 60 fm (109.7 m) depth contour, except in the CCAs where fishing is prohibited seaward of the 20 fm (37 m) depth contour.

\* \* \* \* \*

(ii) \* \* \*

(A) \* \* \*

(1) Between 42° N. lat. (California/Oregon border) and 40°10' N. lat. (North Management Area), recreational fishing for the RCG complex is open from May 1 through December 31 (*i.e.*, it's closed from January 1 through April 30).

(2) Between 40°10' N. lat. and 38°57.50' N. lat. (Mendocino Management Area), recreational fishing for the RCG Complex is open from May 1 through October December 31 (*i.e.*, it's closed from January 1 through April 30).

(3) Between 38°57.50' N. lat. and 37°11' N. lat. (San Francisco Management Area), recreational fishing for the RCG complex is open from April 15 through December 31 (*i.e.*, it's closed from January 1 through April 14).

(4) Between 37°11' N. lat. and 34°27' N. lat. (Central Management Area), recreational fishing for the RCG complex is open from April 1 through December 31 (*i.e.*, it's closed from January 1 through March 31).

\* \* \* \* \*

(B) *Bag limits, hook limits.* In times and areas when the recreational season for the RCG Complex is open, there is a limit of 2 hooks and 1 line when fishing for the RCG complex and lingcod. The bag limit is 10 RCG Complex fish per day coastwide.

Retention of yelloweye rockfish, bronzespotted rockfish, and cowcod is prohibited. Within the 10 RCG Complex fish per day limit, no more than 3 may be black rockfish, no more than 3 may be cabezon, and no more than 1 may be canary rockfish. Multi-day limits are authorized by a valid permit issued by California and must not exceed the daily limit multiplied by the number of days in the fishing trip.

\* \* \* \* \*

(iii) \* \* \*

(A) \* \* \*

(1) Between 42° N. lat. (California/Oregon border) and 40°10' N. lat. (Northern Management Area), recreational fishing for lingcod is open from May 1 through December 31 (*i.e.*, it's closed from January 1 through April 30).

(2) Between 40°10' N. lat. and 38°57.50' N. lat. (Mendocino Management Area), recreational fishing for lingcod is open from May 1 through December 31 (*i.e.*, it's closed from January 1 through April 30).

(3) Between 38°57.50' N. lat. and 37°11' N. lat. (San Francisco Management Area), recreational fishing for lingcod is open from April 15 through December 31 (*i.e.*, it's closed from January 1 through April 14).

(4) Between 37°11' N. lat. and 34°27' N. lat. (Central Management Area), recreational fishing for lingcod is open from April 1 through December 31 (*i.e.*, it's closed from January 1 through March 31).

(5) South of 34°27' N. lat. (Southern Management Area), recreational fishing for lingcod is open from March 1 through December 31 (*i.e.*, it's closed from January 1 through February 28).

(B) *Bag limits, hook limits.* In times and areas when the recreational season for lingcod is open, there is a limit of 2 hooks and 1 line when fishing for lingcod. The bag limit is 2 lingcod per day. Multi-day limits are authorized by a valid permit issued by California and must not exceed the daily limit multiplied by the number of days in the fishing trip.

\* \* \* \* \*

(iv) "Other flatfish," *petrale sole*, and *starry flounder*. Coastwide off California, recreational fishing for "other flatfish," *petrale sole*, and *starry flounder*, is permitted both shoreward of and within the closed areas described in paragraph (c)(3)(i) of this section. "Other flatfish" are defined at § 660.11, subpart C, and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole. Recreational fishing for "other flatfish," *petrale sole*, and *starry*

*flounder*, is permitted within the closed areas. *Petrale sole*, *starry flounder*, and "Other flatfish," except Pacific sanddab, are subject to the overall 20-fish bag limit for all species of finfish, of which there may be no more than 10 fish of any one species. There is no season restriction or size limit for "other flatfish," *petrale sole*, and *starry flounder* however, it is prohibited to filet "other flatfish," *petrale sole*, and *starry flounder*, at sea.

(v) \* \* \*

(A) \* \* \*

(1) Between 40°10' N. lat. and 38°57.50' N. lat. (Mendocino Management Area), recreational fishing for California scorpionfish is open from May 1 through August 31 (*i.e.*, it's closed from January 1 through April 30 and from September 1 through December 31).

\* \* \* \* \*

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