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Monday, November 21, 2016

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 211

RIN 3206–AM79

Veterans' Preference

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a final rule that implements statutory changes pertaining to veterans' preference. These changes were made in response to the Hubbard Act, which broadened the category of individuals eligible for veterans' preference; and to implement the VOW (Veterans Opportunity to Work) to Hire Heroes Act of 2011, which requires Federal agencies to treat certain active duty service members as preference eligibles for purposes of an appointment to the competitive service, even though the service members have not been discharged or released from active duty and do not have a Department of Defense (DD) Form 214, *Certificate of Release or Discharge from Active Duty.* In addition, OPM has updated its regulations to reference existing requirements for the alternative ranking and selection procedure called ''category rating,'' and to add a reference to the end date of Operation Iraqi Freedom, which affected veteran status and preference eligibility. This action aligns OPM's regulations with existing statutes.

DATES: This rule will be effective December 21, 2016.

FOR FURTHER INFORMATION CONTACT: Michael Gilmore by telephone on (202) 606–2429, by fax at (202) 606–4430, by TTY at (202) 418–3134, or by email at *Michael.gilmore@opm.gov.*

SUPPLEMENTARY INFORMATION: On December 29, 2014, OPM issued an interim rule at 79 FR 77833, which implemented statutory changes pertaining to veterans' preference. This action was taken to align OPM's regulations with existing statutes. Specifically, the interim rule (1) was issued in response to the Hubbard Act, which establishes a new category of preference for veterans discharged or released from active duty by reason of a sole survivorship discharge; (2) implemented the VOW (Veterans Opportunity to Work) to Hire Heroes Act of 2011, which provides for treatment of certain applicants as veterans or disabled veterans if they have not been separated or discharged from active duty, but submit a certification that they are expected to be discharged or released under honorable conditions within 120 days; (3) referenced the existing requirements for the alternative ranking and selection procedure called ''category rating;'' and (4) added a reference to the end date of Operation Iraqi Freedom.

During the 60-day comment period between December 29, 2014, and February 27, 2015, OPM received a total of 12 sets of comments, of which 4 were from individuals and 8 were from Federal agencies.

Discussion of Comments

Operation Iraqi Freedom

Six agencies sought guidance on corrective actions and remedies for applicants who may have erroneously received veterans' preference after the ending date of Operation Iraqi Freedom. These comments are outside the scope of the rulemaking. OPM notes that corrective actions and remedies are already addressed in the *Delegated Examining Operations Handbook* (DEOH) and in our guidance pertaining to Variations on the OPM Web site. Remedial actions are also addressed in Interagency Delegated Examining Agreements.

Four agencies asked OPM to amend the rule to extend preference eligibility to any persons who erroneously received preference after the end of Operation Iraqi Freedom, at least until December 29, 2014 (the date of the interim rule). OPM lacks authority to change the end date of Operation Iraqi Freedom or to create a category of veterans' preference that is not prescribed by law.

Implementation of the VOW (Veterans Opportunity To Work) To Hire Heroes Act

One agency commented that implementation of the VOW act may delay the hiring process while the hiring agency verifies the service member's character of discharge from the military. This agency believes the veteran has 120 days (from receipt of the veteran's job application) during which he or she can be considered for a federal job, and this 120-day period will extend an agency's time-to-hire. The commenter specifically asked if an agency must now hold a vacancy open until each veteran applicant has been discharged or released from active duty under honorable conditions.

OPM disagrees that implementation of the VOW act will result in delays in the hiring process. The certification letter is a statement that the individual is *expected* to be separated from active duty in the armed forces under honorable conditions not later than 120 days after the certification statement is submitted as part of the service member's job application package. The certification statement ensures that veterans who are expected to be discharged or released in the near term are not denied their preference in the early stages of the hiring process; agencies are to award such veterans with tentative preference until the job seeking veteran provides his or her DD Form 214 indicating character of service qualifying for preference, prior to appointment.

However, submission of the certification letter does not extend the hiring process. The VOW to Hire Veterans Act of 2011 does not require agencies to hold positions open until every applicant has been discharged or released from active duty or to delay hiring selections.

Four agencies asked OPM to specify the format and contents of a certification letter in greater detail. As described in the supplementary information accompanying the interim rule, the certification letter should be on the letterhead of the appropriate military branch in which the veteran served, and it should specify the veteran's military service dates, the veteran's expected date of release or discharge from active duty service, and the veteran's expected character of service. Commenters requested that OPM also require that the certification be signed by a commanding officer, list the applicants' campaign badges, and list the applicant's final rank, pay grade, and expected type of separation, *e.g.,* retirement, to assist in adjudicating preference eligibility. Because the certification letter is a military document issued by the Armed Forces, OPM is not mandating specific format and content requirements in the final rule. However, we will confer with the Department of Defense and provide more detail in the VetGuide and the Delegated Examining Operations Handbook.

One of these agencies asked how hiring agencies should publicize the contents of the certification letter to applicants. This comment is outside the scope of the rulemaking. However, OPM notes that agencies have the discretion to describe the VOW certification letter contents in their job opportunity announcements, or describe the contents of these letters on the agency's Web site. Agency headquarters human resources offices can circulate information about the certification letter to agency components, delegated examining units, Veterans Employment Program Offices (VEPOs), etc.

One agency suggested that the last sentence of § 211.102(h) be revised to state that before appointment, ''the service member's character of service and qualifying discharge or release must be verified through a DD Form 214 or equivalent DD form,'' or that OPM provide examples of documents agencies may consider to be the equivalent of a DD Form 214. The current text refers to ''equivalent documentation'' instead of an ''equivalent DD form.'' OPM is not adopting this suggestion. The reference to ''equivalent documentation'' was intended to include documentation such as disability letters issued by the Department of Veterans Affairs, and other official documents issued by a branch of the armed forces which may not be designated as a Department of Defense form but may help a veteran establish his or her entitlement to veterans' preference.

Another agency suggested that OPM require the certification letter to be dated within 120 days of the closing date of the job announcement to which the veteran is applying. OPM cannot adopt this suggestion. The Vow to Hire Veterans Act of 2011 (at 5 U.S.C. 2108a(a)(2) and (b)(2)) specifies that a certification is an expectation that the service member will be ''discharged or released from active duty in the armed forces under honorable conditions not later than 120 days *after the date of the submission* of the certification'' (emphasis supplied).

The same agency asked OPM to clarify how agencies should adjudicate veterans' preference for individuals who submit certification letters showing that the expected date of discharge or release from active duty has already passed. The agency recommended that OPM amend the regulation to treat such ''expired'' certificates as conclusive evidence that the service member has been discharged or released from active duty under honorable conditions. OPM does not accept this recommendation because the certification expresses only an expectation, and cannot be conclusive evidence that the expected event has in fact occurred.

Implementation of the Hubbard Act

One agency suggested that OPM add a clause to the final rule which ''grandfathers'' or grants veterans' preference based on a sole survivorship discharge to individuals who met the requirements of the Hubbard Act prior to the effective date of the interim regulation. (The President signed the Act on August 29, 2008. OPM's interim rule became effective on December 29, 2014). In response, section 211.102(c) of the interim regulation already recognized, as qualifying, discharges or releases from active duty after August 29, 2008 by reason of a sole survivorship discharge. Therefore no additional changes are needed in the final rule to address the agency's comment.

Another agency asked where a sole survivorship discharge would be documented on an individual's Department of Defense (DD) form 214. While this comment is outside the scope of the rulemaking, OPM notes that an individual's sole survivorship discharge may be indicated on the DD–214 in several places: The block pertaining to ''character of service,'' the section pertaining to ''service data,'' or the section labeled ''remarks.'' Individuals receiving sole survivor releases or discharges from their active duty service may have separate documentation which they can submit along with their resumes in order to claim preference.

Implementation of Category Rating

One individual asked OPM to identify the types of positions classified as scientific and professional positions, for purposes of 5 U.S.C. 3319(b), which states, with respect to category rating, that ''[f]or other than scientific and professional positions at GS–9 of the General Schedule (equivalent or higher), qualified preference-eligibles who have a compensable service-connected disability of 10 percent or more shall be listed in the highest quality category.'' This comment is outside the scope of the rulemaking. In addition, OPM notes that adopting the recommendation would result in an unnecessarily lengthy listing in the Code of Federal Regulations and would be subject to periodic change. OPM already publishes a list of scientific and professional job series and titles in appendix K of the *Delegated Examining Operations Handbook,* which is available on OPM's Web site.

The same individual also recommended that we amend the rule to allow certain disabled veterans to ''float'' (*i.e.,* be listed at the top of a certificate of eligibles under the numerical ranking process, or placed in the highest quality category under the category rating process), even for scientific and professional positions at GS–9 and higher, if they have certain scientific and professional skills. This recommendation is outside the scope of the rulemaking. In addition, OPM cannot adopt this recommendation because it would conflict with statutory requirements in 5 U.S.C. 3313(1) and 3319(b).

General Comments

Two individuals and one agency expressed their support for and approval of the interim rule. The agency noted that the rule's provision implementing the VOW to Hire Heroes Act of 2011 is consistent with the existing practice of granting ''tentative preference'' to applicants who have not yet been separated or discharged from active duty.

One agency recommended that OPM amend section 211.102(d)(5) of the interim rule to clarify the retention standing, during a reduction in force, of a Federal employee who is still in a terminal leave status with the military. OPM addressed this in the supplementary information accompanying the interim rule. We stated that veterans' preference does not apply to persons not yet discharged or released from active duty. As a result, such individuals would not receive veterans' preference during a reduction in force.

Four commenters asked whether (or when) OPM would update its implementing guidance pertaining to the provisions in the interim regulation. These comments are outside the scope of the rulemaking. OPM notes in response that it has updated the VetGuide, our Federal Employment Policy Handbook: Veterans and the Civil Service.

One agency recommended that OPM amend the rule to delegate veterans' preference adjudication for the government solely to the Department of Labor or the Department of Veterans Affairs, not to each delegated examining agency, for purposes of quality and consistency. This comment is outside the scope of the rulemaking. Moreover, OPM believes that it would complicate the hiring process if each agency had to refer its veterans preference adjudication decisions to other agencies, and no case has been presented to OPM for designating any particular agency or agencies to conduct consolidated adjudication services.

Another agency suggested OPM remove the second or consecutive occurrence of the word ''in'' which appears in section 211.102(d)(2), and that we change the word ''raking'' to ''rating'' in section 211.102(d)(4). OPM has adopted these suggestions.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

Regulatory Flexibility Act

I certify that this regulation would not have a significant economic impact on a substantial number of small entities because it affects only Federal employees.

List of Subjects in 5 CFR Part 211

Government employees, Veterans.

U.S. Office of Personnel Management.

Beth F. Cobert,

Acting Director.

Accordingly, OPM revises part 211 of title 5, Code of Federal Regulations, to read as follows:

PART 211—VETERAN PREFERENCE

Sec.
211.101 Purpose.
211.102 Definitions.
211.103 Administration of preference.

Authority: 5 U.S.C. 1302, 2108, 2108a.

§ 211.101 Purpose.

The purpose of this part is to define veterans' preference and the administration of preference in Federal employment. (5 U.S.C. 2108, 2108a)

§ 211.102 Definitions.

For the purposes of preference in Federal employment, the following definitions apply:

(a) *Veteran* means a person who has been discharged or released from active duty in the armed forces under honorable conditions, or who has a certification as defined in paragraph (h) of this section, if the active duty service was performed:

(1) In a war;

(2) In a campaign or expedition for which a campaign badge has been authorized;

(3) During the period beginning April 28, 1952, and ending July 1, 1955;

(4) For more than 180 consecutive days, other than for training, any part of which occurred during the period beginning February 1, 1955, and ending October 14, 1976;

(5) During the period beginning August 2, 1990, and ending January 2, 1992; or

(6) For more than 180 consecutive days, other than for training, any part of which occurred during the period beginning September 11, 2001, and ending on August 31, 2010, the last day of Operation Iraqi Freedom.

(b) *Disabled veteran* means a person who has been discharged or released from active duty in the armed forces under honorable conditions performed at any time, or who has a certification as defined in paragraph (h) of this section, and who has established the present existence of a service-connected disability or is receiving compensation, disability retirement benefits, or a pension because of a statute administered by the Department of Veterans Affairs or a military department.

(c) *Sole survivor veteran* means a person who was discharged or released from a period of active duty after August 29, 2008, by reason of a sole survivorship discharge (as that term is defined in 10 U.S.C. 1174(i)), and who meets the definition of a ''veteran'' in paragraph (a) of this section, with the exception that he or she is not required to meet any of the length of service requirements prescribed by paragraph (a).

(d) *Preference eligible* means a veteran, disabled veteran, sole survivor veteran, spouse, widow, widower, or mother who meets the definition of ''preference eligible'' in 5 U.S.C. 2108.

(1) Preference eligibles other than sole survivor veterans are entitled to have 5 or 10 points added to their earned score on a civil service examination in accordance with 5 U.S.C. 3309.

(2) Under numerical ranking and selection procedures for competitive service hiring, preference eligibles are entered on registers in the order prescribed by § 332.401 of this chapter.

(3) Under excepted service examining procedures in part 302 of this chapter, preference eligibles are listed ahead of persons with the same ratings who are not preference eligibles, or listed ahead of non-preference eligibles if numerical scores have not been assigned.

(4) Under alternative ranking and selection procedures, *i.e.,* category rating, preference eligibles are listed ahead of individuals who are not preference eligibles in accordance with 5 U.S.C. 3319.

(5) Preference eligibles, other than those who have not yet been discharged or released from active duty, are accorded a higher retention standing than non-preference eligibles in the event of a reduction in force in accordance with 5 U.S.C. 3502.

(6) Veterans' preference does not apply, however, to inservice placement actions such as promotions.

(e) *Armed forces* means the United States Army, Navy, Air Force, Marine Corps, and Coast Guard.

(f) *Active duty* or *active military duty:*

(1) For veterans defined in paragraphs (a)(1) through (3) and disabled veterans defined in paragraph (b) of this section, means active duty with military pay and allowances in the armed forces, and includes training, determining physical fitness, and service in the Reserves or National Guard; and

(2) For veterans defined in paragraphs (a)(4) through (6) of this section, means full-time duty with military pay and allowances in the armed forces, and does not include training, determining physical fitness, or service in the Reserves or National Guard.

(g) *Discharged* or *released from active duty* means with either an honorable or general discharge from active duty in the armed forces. The Department of Defense is responsible for administering and defining military discharges.

(h) *Certification* means any written document from the armed forces that certifies the service member is expected to be discharged or released from active duty service in the armed forces under honorable conditions not later than 120 days after the date the certification is submitted for consideration in the hiring process, at the time and in the manner prescribed by the applicable job opportunity announcement. Prior to appointment, the service member's character of service and qualifying discharge or release must be verified through a DD form 214 or equivalent documentation.

§ 211.103 Administration of preference.

Agencies are responsible for making all preference determinations except for preference based on a common law marriage. Such a claim must be referred to OPM's General Counsel for decision.

[FR Doc. 2016–27886 Filed 11–18–16; 8:45 am]

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 890

RIN 3206–AM66

Federal Employees Health Benefits Program Coverage for Certain Firefighters and Intermittent Emergency Response Personnel

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a final rule to amend the Federal Employees Health Benefits (FEHB) Program regulations to make certain firefighters hired under a temporary appointment and certain intermittent emergency response personnel eligible to be enrolled in a health benefits plan under the FEHB Program. These amendments were the subject of interim rules published on July 19, 2012 and November 14, 2012.

DATES: This rule is effective November 21, 2016.

FOR FURTHER INFORMATION CONTACT: Michael W. Kaszynski, Senior Policy Analyst at *Michael.Kaszynski@opm.gov* or (202) 606–0004.

SUPPLEMENTARY INFORMATION: This final rule provides eligibility for health insurance coverage under the Federal Employees Health Benefits (FEHB) Program to certain wildfire protection employees and certain intermittent emergency response personnel. The Federal Government has a critical need to hire and quickly deploy qualified firefighters, other fire protection personnel, and certain intermittent emergency response personnel to areas of the country where disasters caused by humans or nature require their services. The Federal agencies that routinely deploy firefighters to respond to these disasters, including the Departments of Agriculture and Interior, have used temporary appointment authorities which provide the flexibility they need to quickly increase their firefighting workforce during wildfire emergencies and then to decrease the workforce when the emergencies are resolved.

Pursuant to 5 U.S.C. 8913(b), OPM has broad authority to prescribe the conditions under which employees are eligible to enroll in the FEHB Program and is empowered to include or exclude employees on the basis of the nature and type of their employment or conditions pertaining to their appointments, including the duration of the appointments. This regulation allows agencies to make FEHB coverage offers to these firefighters and fire protection personnel, as well as their families, pursuant to OPM's broad regulatory authority under 5 U.S.C. 8913(b), allowing them to obtain health insurance through their employers on day one of employment.

OPM deems the extension of offers of coverage to be appropriate because firefighters face unique hazards and risks to their health. The day-to-day job of a firefighter involves frequent exposure to environmental risk factors that can precipitate the onset of severe and life-threatening diseases like cancer. See Guidotti TL, *Evaluating causality for occupational cancers: the example of firefighters.* Occup. Med. (Lond). 2007;57;466–71. The nature of this work necessarily involves intense physical stress that can result in potentially fatal cardiac events, job-related injuries, and an adverse psychological impact. See U.S. Dep't of Homeland Security, U.S. Fire Admin., Fire-Related Firefighter Injuries Reported to NFIRS, Topical Fire Report Series, Vol. 11, Issue 7, February 2011, *available at http://www.usfa.fema.gov/downloads/pdf/statistics/v11i7.pdf*; Kales SN, Soteriades ES, Christoudias SG, Christiani DC, *Firefighters and on-duty deaths from coronary heart disease: a case control study.* Environ. Health. 2003; 2(1):14; Carey MG, Al-Zaiti SS, Dean GE, Sessanna L, Finnell DS, *Sleep Problems, Depression, Substance Use, Social Bonding, and Quality of Life in Professional Firefighters.* J. Occup. Environ. Med. 2011; 53(8):928–33.

Although firefighters are eligible for workers' compensation for injuries suffered on the job, they nonetheless have a heightened need for health insurance coverage, so that they can obtain preventive care and benefit from early detection of the chronic and life-threatening conditions from which they face increased risk, in addition to receiving treatment for illnesses and injuries from which they are currently suffering. Providing firefighters coverage under the FEHB Program acknowledges the unique hazards and increased risks that they face for their Federal service and enhances the quality of their lives by ensuring access to the medical benefits necessary to promote prevention and early intervention, as well as treatment for diseases that cannot be prevented.

In addition, in order to protect the public health and safety, the Departments of Agriculture and Interior have had a critical need over the years for experienced firefighting personnel. The agencies wish not only to recruit experienced firefighters this year, but also to maintain their interest in returning to serve during subsequent fire seasons. Offering health insurance coverage on day one of employment will support these Departments' efforts to recruit and retain qualified firefighters and fire protection personnel for both this year's and future fire seasons. OPM is working closely with the Departments of Agriculture and Interior to ensure firefighters are able to promptly enroll for FEHB coverage with minimal burden.

OPM recognizes that there may be other groups of employees not currently eligible for the FEHB Program because of the nature of their work schedules, but who are similarly situated to firefighting personnel in that they perform emergency response services. Accordingly, OPM has also added a new subsection (i) to its regulations that permits agencies to request that OPM extend FEHB coverage to such employees. OPM intends to construe this subsection narrowly, applying it only to employees engaged in emergency response services similar to the services being performed by those responding to the wildfires, and only when requested by their employing agencies.

On July 19, 2012, OPM issued an interim final regulation to extend eligibility for health insurance coverage and a full Government contribution under the FEHB Program to temporary firefighters and fire protection personnel at 77 FR 42417. In addition, recognizing that there may be other groups of employees not currently covered by the FEHB Program because of the temporary nature of their appointments, the interim rule allowed agencies to request that OPM extend FEHB coverage to similarly situated temporary employees. We also solicited comments from the public regarding whether OPM should explicitly provide FEHB coverage to employees who are appointed pursuant to section 306(b)(1) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5149(b)(1)) (''Stafford Act'') to respond to major disasters and emergencies declared by the President.

In the meantime, a major natural disaster, Hurricane Sandy, struck the East Coast of the United States at the end of October 2012. The storm resulted in loss of life and major destruction of property across a wide swath of the Eastern seaboard. In affected areas, 8.5 million people went without power, gasoline was scarce, and massive flooding and cold temperatures increased the hardship on those living in the storm's path. President Obama declared that major disasters had occurred in Connecticut, New York, New Jersey, and Rhode Island, making disaster assistance available to those in the areas heaviest hit by the storm. The President also signed Federal emergency declarations for Connecticut, New York, New Jersey, New Hampshire, Massachusetts, Virginia, West Virginia, Maryland, Pennsylvania, Delaware, Rhode Island, and the District of Columbia.

Federal agencies, including the Federal Emergency Management Agency (FEMA), worked with state and local partners to respond to this emergency. Over 3,000 FEMA employees were immediately deployed to the hardest hit areas. These FEMA workers may have been exposed to dangerous conditions, and put their health and safety at risk in assisting others. Many of FEMA emergency employees continue to work schedules that prevent them from being eligible for FEHB coverage on day one of employment due to OPM's regulations, specifically 5 CFR 890.102(c)(3), 890.102(j)(1), and 890.102(j)(2). Pursuant to 5 U.S.C. 8913(b), OPM has broad authority to prescribe the conditions under which employees are eligible to enroll in the FEHB Program. OPM may include or exclude employees on the basis of the nature and type of their employment or conditions pertaining to their appointments, ''such as short-term appointment, seasonal or intermittent employment, and employment of like nature.'' *Id.* Intermittent emergency response employees often work in conditions that may expose them to various environmental hazards, similar to the wildland firefighters covered by the regulation described above. In light of the need for agencies to attract and bring emergency workers on board quickly and in recognition of the hazardous conditions those employees often face, OPM concluded in 2012 that its current policy of categorically excluding intermittent employees from FEHB coverage was no longer in the public interest and should be changed. Therefore, on November 14, 2012, OPM issued an interim final regulation at 77 FR 67743 to allow agencies to request FEHB coverage for intermittent employees engaged in emergency response and recovery work as defined by the Stafford Act. Since the publication of that rule, OPM also expanded coverage under the FEHB Program to certain temporary, seasonal and intermittent employees who are expected to work at least 130 hours per calendar month for at least 90 days.

In addition, if OPM grants any such requests, it is reserving the authority to limit FEHB coverage for intermittent employees only to the periods during which they are in a pay status. This would promote parity between intermittent employees and temporary employees like the wildland firefighters, who receive FEHB coverage only when called up for duty. It would also allow OPM the discretion to craft an appropriate approach to health insurance coverage based on the potentially diverse work schedules of intermittent employees.

We have received a number of comments on our two interim final regulations from Federal agencies, an employee association, a trade association of carriers, and a number of individual employees and union members. Most commenters expressed support for the interim final regulations. The following summarizes and responds to the remaining comments:

Comment: In many cases, there is no way to identify positions whose incumbents provide emergency response services for wildland fire protection. The language in Benefits Administration Letter (BAL) 12–203 seems to contradict, and be superior to, that of the rule itself in two important ways. First, in the rule the determination of eligibility is based on identification of positions, whereas in the Letter it is based on duties actually performed. Second, in the rule the determination of eligible positions is made by OPM, whereas in the Letter the determination of eligible duties is made by agencies. Clearly, the only way in which eligibility of militia members may be determined consistent with the rule's intent is by the process articulated in the Letter: By consideration of duties by agencies.

Response: The new rule at 5 CFR 890.102(h) states:

Notwithstanding paragraphs (c)(1) and (2) of this section, an employee who is in a position identified by OPM that provides emergency response services for wildland fire protection is eligible to be enrolled in a health benefits plan under this part.

BAL 12–203 clarifies the intent of the new rule with the following critically relevant statements:

''The following positions [. . .] are covered for purposes of 5 CFR 890.102(h): Any position (including supervisory positions) the duties of which include high risk or life-threatening work to control and extinguish wildland fires, to rescue persons endangered by fire, or to reduce or eliminate potential fire hazards, or involving the provision of direct on-site assistance to others engaged in such work.

''[I]n determining whether to extend health benefits coverage for employees, agencies should focus on the duties performed, regardless of the position's title, occupational series, grade level or geographic location.''

Therefore, there is no conflict between the rule and the BAL. The rule correctly points out that OPM has the ultimate authority to make eligibility determinations while the BAL delegates this authority to the agencies as it does for most FEHB Program eligibility determinations.

Comment: Eligibility should be expanded to other groups.

Response: The commenters believe that expanding the scope of coverage to include other temporary seasonal employees in the final rule is warranted. Since the publication of the interim final regulation, OPM expanded coverage under the FEHB Program to certain temporary, seasonal and intermittent employees. The final regulation is available at 79 FR 62325 and was published October 17, 2014. This regulation allows agencies to provide offers of FEHB coverage to firefighters and emergency response personnel identified by OPM that are not eligible under the FEHB modification rule due to their work schedules.

Comment: Are these new groups eligible for other Federal Benefit Programs?

Response: The regulation does not create eligibility under any other benefit program.

Comment: One trade association of carriers questioned the requirements for eligibility for enrollment under this new authority and felt that they needed clarification to know when to terminate enrollments.

Response: In the FEHB Program, employing offices are responsible for making enrollment and coverage termination decisions. Carriers must process enrollment and termination transactions based on agency determinations as they do today.

OPM has considered these comments and determined that the interim final regulations should be finalized and published with no changes.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation only adds additional groups to the list of groups eligible for coverage under the FEHB Program.

Executive Orders 13563 and 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Orders 13563 and 12866.

Federalism

We have examined this rule in accordance with Executive Order 13132, ''Federalism,'' and have determined that this rule will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

List of Subjects in 5 CFR Part 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon, Military personnel, Reporting and recordkeeping requirements, Retirement.

U.S. Office of Personnel Management.

Beth F. Cobert,

Acting Director.

Accordingly, OPM is amending 5 CFR part 890 as follows:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

■ 1. The authority citation for part 890 continues to read as follows:

Authority: 5 U.S.C. 8913; Sec. 890.301 also issued under sec. 311 of Pub. L. 111–03, 123 Stat. 64; Sec. 890.111 also issued under section 1622(b) of Pub. L. 104–106, 110 Stat. 521; Sec. 890.112 also issued under section 1 of Pub. L. 110–279, 122 Stat. 2604; 5 U.S.C. 8913; Sec. 890.803 also issued under 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c–1; subpart L also issued under sec. 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; Sec. 890.102 also issued under sections 11202(f), 11232(e), 11246 (b) and (c) of Pub. L. 105–33, 111 Stat. 251; and section 721 of Pub. L. 105–261, 112 Stat. 2061.

■ 2. Section 890.102 is amended by revising paragraphs (h) and (i) to read as follows:

§ 890.102 Coverage.

* * * * *

(h) Notwithstanding paragraphs (c)(1) and (2) of this section, an employee who is in a position identified by OPM that provides emergency response services for wildland fire protection is eligible to be enrolled in a health benefits plan under this part.

(i) Notwithstanding paragraphs (c)(1) through (3) of this section, upon request by the employing agency, OPM may grant eligibility to employees performing similar types of emergency response services to enroll in a health benefits plan under this part. In granting eligibility requests, OPM may limit the coverage of intermittent employees under a health benefits plan to the periods of time during which they are in a pay status.

* * * * *

[FR Doc. 2016–27901 Filed 11–18–16; 8:45 am]

BILLING CODE 6325–63–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. FAA–2016–9001; Special Conditions No. 23–278–SC]

Special Conditions: Pilatus Aircraft, Ltd., Model PC–12, PC–12/45, and PC–12/47 Airplanes, Lithium Batteries

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Pilatus Aircraft, Ltd., Model PC–12, PC–12/45, and PC–12/47 airplanes. This airplane as modified by Finnoff Aviation will have a novel or unusual design feature associated with the installation of a rechargeable lithium battery. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: These special conditions are effective November 21, 2016 and are applicable on November 10, 2016.

FOR FURTHER INFORMATION CONTACT: Ruth Hirt, Federal Aviation Administration, Programs and Procedures, ACE–114, Small Airplane Directorate, Aircraft Certification Service, 901 Locust; Kansas City, Missouri 64106; telephone (816) 329–4108; facsimile (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Background

On September 28, 2015, Finnoff Aviation applied for a supplemental type certificate for installation of a rechargeable lithium battery in the Model PC–12, PC–12/45, and PC–12/47 airplanes. The Model PC–12, PC–12/45, and PC–12/47 airplanes are single-engine turboprop-powered business aircraft that can accommodate up to nine passengers with a take-off weight up to 10,450 pounds.

The current regulatory requirements for part 23 airplanes do not contain adequate requirements for the application of rechargeable lithium batteries in airborne applications. This type of battery possesses certain failure and operational characteristics with maintenance requirements that differ significantly from that of the nickel-cadmium (Ni-Cd) and lead-acid rechargeable batteries currently approved in other normal, utility, acrobatic, and commuter category airplanes. Therefore, the FAA is issuing this special condition to address (1) all characteristics of the rechargeable lithium batteries and their installation that could affect safe operation of the modified Model PC–12, PC–12/45, and PC–12/47 airplanes, and (2) appropriate Instructions for Continued Airworthiness (ICAW) that include maintenance requirements to ensure the availability of electrical power from the batteries when needed.

Type Certification Basis

Under the provisions of § 21.101, Finnoff Aviation must show that the Model PC–12, PC–12/45, and PC–12/47 airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. A78EU [1] or the applicable regulations in effect on the date of application for the change.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 23) do not contain adequate or appropriate safety standards for the Model PC–12, PC–12/45, and PC–12/47 airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Model PC–12, PC–12/45, and PC–12/47 airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply for a supplemental type certificate to modify any other model included on the same type certificate to incorporate the same or similar novel or unusual design feature, the special conditions would

[1] *http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgMakeModel.nsf/0/6BCB00B1F3CA4EF886257FED0069EF2D?OpenDocument.*

also apply to the other model under § 21.101.

Novel or Unusual Design Features

The Model PC–12, PC–12/45, and PC–12/47 airplanes will incorporate the following novel or unusual design features: Installation of a rechargeable lithium battery as the main or engine start aircraft battery.

Discussion

Presently, there is limited experience with use of rechargeable lithium batteries and rechargeable lithium battery systems in applications involving commercial aviation. However, other users of this technology, ranging from personal computers, wireless telephone manufacturers to the electric vehicle industry, have noted safety problems with rechargeable lithium batteries. These problems include overcharging, over-discharging, flammability of cell components, cell internal defects, and during exposure to extreme temperatures that are described in the following paragraphs.

1. Overcharging: In general, rechargeable lithium batteries are significantly more susceptible than their Ni-Cd or lead-acid counterparts to thermal runway, which is an internal failure that can result in self-sustaining increases in temperature and pressure. This is especially true for overcharging which causes heating and destabilization of the components of the cell, leading to the formation (by plating) of highly unstable metallic lithium. The metallic lithium can ignite, resulting in a self-sustaining fire or explosion. Finally, the severity of thermal runaway due to overcharging increases with increasing battery capacity due to the higher amount of electrolyte in large batteries.

2. Over-discharging: Discharge of some types of lithium battery cells beyond a certain voltage (typically 2.4 volts) can cause corrosion of the electrodes of the cell, resulting in loss of battery capacity that cannot be reversed by recharging. This loss of capacity may not be detected by the simple voltage measurements commonly available to flight crews as a means of checking battery status, which is a problem shared with Ni-Cd batteries. In addition, over-discharging has the potential to lead to an unsafe condition (creation of dendrites that could result in internal short circuit during the recharging cycle).

3. Flammability of Cell Components: Unlike Ni-Cd and lead-acid batteries, some types of lithium batteries use liquid electrolytes that are flammable. The electrolyte may serve as a source of fuel for an external fire, if there is a breach of the battery container.

4. Cell Internal Defects: The rechargeable lithium batteries and rechargeable battery systems have a history of undetected cell internal defects. These defects may or may not be detected during normal operational evaluation, test, and validation. This may lead to unsafe conditions when operating in service.

5. Extreme Temperatures: Exposure to an extreme temperature environment has the potential to create major hazards. Care must be taken to ensure that the lithium battery remains within the manufacturer's recommended specification.

These problems experienced by users of lithium batteries raise concern about the use of these batteries in commercial aviation. The intent of the special condition is to establish appropriate airworthiness standards for lithium battery installations in the Model PC–12, PC–12/45, and PC–12/47 airplanes and to ensure, as required by §§ 23.1309 and 23.601, that these battery installations are neither hazardous nor unreliable.

In summary, the lithium battery installation will consider the following items:

(a) The flammable fluid fire protection requirement is § 23.863. In the past, this rule was not applied to batteries of normal, utility, acrobatic, and commuter category airplanes since the electrolytes utilized in Ni-Cd and lead-acid batteries are not flammable.

(b) New Instructions for Continuous Airworthiness that include maintenance requirements to ensure that batteries used as spares have been maintained in an appropriate state of charge and installed lithium batteries have been sufficiently charged at appropriate intervals. These instructions must also describe proper repairs, if allowed, and battery part number configuration control.

(c) The applicant must conduct a system safety assessment for the failure condition classification of a failure of the battery charging and monitoring functionality (per Advisory Circular AC 23.1309–1E),[2] and develop mitigation to preclude any adverse safety effects. Mitigation may include software, Airborne Electronic Hardware (AEH) or a combination of software and hardware, which should be developed to the appropriate Design Assurance Level(s) (DALs), respectively (per Advisory Circular AC 20–115C[3] and Advisory Circular AC 20–152).[4]

(d) New requirements, in the special conditions section, address the hazards of overcharging and over-discharging that are unique to lithium batteries, which should be applied to all rechargeable lithium battery and battery installations on the Model PC–12, PC–12/45, and PC–12/47 airplanes in lieu of the requirements of § 23.1353(a)(b)(c)(d)(e), amendment 23–49.

These special conditions are not intended to replace § 23.1353(a)(b)(c)(d)(e) at amendment 23–49 in the certification basis of Model PC–12, PC–12/45, and PC–12/47 airplanes. These special conditions apply only to rechargeable lithium batteries and lithium battery systems and their installations. The requirements of § 25.1353 at amendment 23–49 remains in effect for batteries and battery installations on Model PC–12, PC–12/45, and PC–12/47 airplanes that do not use rechargeable lithium batteries.

Discussion of Comments

Notice of proposed special conditions No. 23–16–02–SC for the Pilatus Aircraft, Ltd., Model PC–12, PC–12/45, and PC–12/47 Airplanes, Lithium Batteries was published in the **Federal Register** on August 24, 2016 (81 FR 57810). No comments were received, and the special conditions are adopted as proposed.

Applicability

The special conditions are applicable to the Model PC–12, PC–12/45, and PC–12/47 airplanes. Should Finnoff Aviation apply at a later date for a supplemental type certificate to modify any other model included on Type Certificate No. A78EU[5] to incorporate the same novel or unusual design feature, the special conditions would apply to that model as well.

Under standard practice, the effective date of final special conditions would be 30 days after the date of publication in the **Federal Register**; however, as the certification date for the Pilatus Aircraft, Ltd., Model PC–12, PC–12/45, and PC–12/47 airplanes is imminent, the FAA finds that good cause exists to make

[2] *http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/719e41e1d26099108625795d005d5302/$FILE/23.1309-1E.pdf.*

[3] *http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/e35fbc0060e2159186257bbe00719fb3/$FILE/AC20-115C.pdf.*

[4] *http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/6d4ae0bf1bde3579862570360055d119/$FILE/AC%2020-152.pdf.*

[5] *http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgMakeModel.nsf/0/6BCB00B1F3CA4EF886257FED0069EF2D?OpenDocument.*

these special conditions effective upon issuance.

Conclusion

This action affects only certain novel or unusual design features on one model series of airplanes. It is not a rule of general applicability and it affects only the applicant who applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113 and 44701; 14 CFR 21.16 and 21.101; and 14 CFR 11.38 and 11.19.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Pilatus Aircraft, Ltd., Model PC–12, PC–12/45, and PC–12/47 airplanes modified by Finnoff Aviation.

1. Installation of Lithium Batteries must show compliance to the following requirements:

(1) Safe cell temperatures and pressures must be maintained during—

i. Normal operations;

ii. Any probable failure conditions of charging or discharging or battery monitoring system;

iii. Any failure of the charging or battery monitoring system not shown to be extremely remote.

(2) The rechargeable lithium battery installation must be designed to preclude explosion or fire in the event of (1)(ii) and (1)(iii) failures.

(3) Design of the rechargeable lithium batteries must preclude the occurrence of self-sustaining, uncontrolled increases in temperature or pressure.

(4) No explosive or toxic gasses emitted by any rechargeable lithium battery in normal operation or as the result of any failure of the battery charging system, monitoring system, or battery installation which is not shown to be extremely remote, may accumulate in hazardous quantities within the airplane.

(5) Installations of rechargeable lithium batteries must meet the requirements of § 23.863(a) through (d) at amendment 23–34.

(6) No corrosive fluids or gases that may escape from any rechargeable lithium battery may damage surrounding structure or any adjacent systems, equipment, electrical wiring, or the airplane in such a way as to cause a major or more severe failure condition, in accordance with § 23.1309(c) at amendment 23–62 and applicable regulatory guidance.

(7) Each rechargeable lithium battery installation must have provisions to prevent any hazardous effect on structure or essential systems that may be caused by the maximum amount of heat the battery can generate during a short circuit of the battery or of its individual cells.

(8) Rechargeable lithium battery installations must have—

i. A system to automatically control the charging rate of the battery to prevent battery overheating and overcharging, or;

ii. A battery temperature sensing and over-temperature warning system with a means for automatically disconnecting the battery from its charging source in the event of an over-temperature condition, or;

iii. A battery failure sensing and warning system with a means for automatically disconnecting the battery from its charging source in the event of battery failure.

(9) Any rechargeable lithium battery installation functionally required for safe operation of the airplane must incorporate a monitoring and warning feature that will provide an indication to the appropriate flight crewmembers whenever the State of Charge (SOC) of the batteries has fallen below levels considered acceptable for dispatch of the airplane.

(10) The Instructions for Continued Airworthiness required by § 23.1529 at amendment 23–26 must contain maintenance requirements to assure that the battery has been sufficiently charged at appropriate intervals specified by the battery manufacturer and the equipment manufacturer that contain the rechargeable lithium battery or rechargeable lithium battery system. This is required to ensure that lithium rechargeable batteries and lithium rechargeable battery systems will not degrade below specified ampere-hour levels sufficient to power the aircraft system. The Instructions for Continued Airworthiness must also contain procedures for the maintenance of replacement batteries in spares storage to prevent the installation of batteries that have degraded charge retention ability or other damage due to prolonged storage at a low state of charge. Replacement batteries must be of the same manufacturer and part number as approved by the FAA.

Note: The term ''sufficiently charged'' means that the battery will retain enough of a charge, expressed in ampere-hours, to ensure that the battery cells will not be damaged. A battery cell may be damaged by lowering the charge below a point where there is a reduction in the ability to charge and retain a full charge. This reduction would be greater than the reduction that may result from normal operational degradation.

(11) In showing compliance with the proposed special conditions herein, paragraphs (1) through (8), and the RTCA document, Minimum Operational Performance Standards for Rechargeable Lithium Battery Systems, DO–311, may be used. The list of planned DO–311 tests should be documented in the certification or compliance plan and agreed to by the geographic ACO. Alternate methods of compliance other than DO–311 tests must be coordinated with the directorate and geographic ACO.

Issued in Kansas City, Missouri, on November 10, 2016.

Mel Johnson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–28013 Filed 11–18–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 770 and 774

[Docket No. 151030999–6552–02]

RIN 0694–AG76

Clarifications and Revisions to Military Aircraft, Gas Turbine Engines and Related Items License Requirements

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

ACTION: Final rule.

SUMMARY: This rule modifies the Commerce Control List (CCL) entries for two types of items: Military aircraft and related items, and military gas turbine engines and related items. The rule adds clarifying text to the descriptions of the types of military aircraft controlled on the CCL. The lists of items that are subject only to the anti-terrorism reason for control are clarified and expanded. This rule, which is being published simultaneously with a rule by the Department of State, is based on a review of Categories VIII and XIX of the United States Munitions List (USML). This rule and the related Department of State rule are part of a plan to review rules published as part of the Export Control Reform Initiative (ECRI). This rule also furthers the retrospective regulatory review directed by the President in Executive Order 13563.

DATES: This rule is effective December 31, 2016.

FOR FURTHER INFORMATION CONTACT: Thomas DeFee or Jeffrey Leitz in the Office of Strategic Industries and Economic Security, Munitions Control Division by telephone at (202) 482–4506 or by email at *Thomas.DeFee@bis.doc.gov* or *Jeffrey.Leitz@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Bureau of Industry and Security (BIS), Department of Commerce maintains the Export Administration Regulations (EAR), including the Commerce Control List (CCL). The Export Control Reform Initiative (ECRI), a fundamental reform of the U.S. export control system announced by the President in 2010, has resulted in the transfer to the CCL of military and other items the President determined did not warrant control on the USML, including certain military aircraft, military gas turbine engines, and related items. The USML is part of the International Traffic in Arms Regulations (ITAR) maintained by the Department of State. A core element of the ECRI is regularly streamlining USML categories and adding items that the President determines do not warrant USML control to the CCL. On December 10, 2010, the Department of State provided notice to the public of its intent, pursuant to the ECRI, to revise the USML to create a more ''positive list'' that describes controlled items using, to the extent possible, objective criteria rather than broad, open-ended, subjective, or design intent-based criteria (*see* 75 FR 76935). As a practical matter, this meant revising USML categories so that, with some exceptions, the descriptions of defense articles that continued to warrant control under the USML did not use catch-all phrases, such as ''specially designed'' or ''specifically designed or modified,'' to control unspecified items. With limited exceptions, the defense articles that warranted control under the USML were those that provided the United States with a critical military or intelligence advantage. All other items were to become subject to the jurisdiction of the EAR and controlled as warranted for various national security, foreign policy, and other reasons. Since that time, the Departments of State and Commerce have jointly published final rules setting forth revisions for fifteen USML categories, each of which has been reorganized into a uniform and more ''positive list'' structure, and corresponding revisions to the CCL.

All references to the USML in this rule are to the list of defense articles controlled for the purpose of export or temporary import pursuant to the ITAR, and not to the defense articles on the USML that are controlled by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for the purpose of permanent import under its regulations. *See* 27 CFR part 447. Pursuant to section 38(a)(1) of the Arms Export Control Act (AECA), all defense articles controlled for export or import are part of the USML under the AECA. The list of defense articles controlled by ATF for the purpose of permanent import is the U.S. Munitions Import List (USMIL). The transfer of defense articles from the ITAR's USML to the EAR's CCL does not affect the list of defense articles controlled on the USMIL.

As part of the ECRI, certain military aircraft and gas turbine engines along with related parts, components, accessories and attachments, materials, software, and technology were added to the CCL on October 15, 2013 (*see* 78 FR 22660, April 16, 2013). At the same time, the USML was amended by revising Category VIII (Aircraft and Related Articles) and by creating Category XIX (Gas Turbine Engines and Associated Equipment) to describe, for the most part, the defense articles in those categories that remained on the USML in positive, objective terms (*see* 78 FR 22740, April 16, 2013).

The advantage of revising the USML into a more positive list is that its controls can be tailored to satisfy the national security and foreign policy objectives of the ITAR by maintaining control over those defense articles that provide a critical military or intelligence advantage, or otherwise warrant control under the ITAR, without inadvertently controlling items in normal commercial use or less sensitive military items. This approach, however, requires that both the USML and the CCL be regularly revised and updated to account for technological developments, practical application issues identified by exporters and reexporters, and changes in the military and commercial applications of items affected by the USML and the 600 series Export Control Classification Numbers (ECCNs).

In 2015, the Departments of Defense, State and Commerce reviewed the implementation of these changes to assess the effectiveness and utility of the 2013 amendments. That review included soliciting public comments by the Department of Commerce (*see* 80 FR 11315, March 2, 2015) and the Department of State (*see* 80 FR 11314, March 2, 2015).

After an interagency review of those public comments by the Departments of Defense, State, and Commerce, the Departments of Commerce and State published proposed rules to revise treatment of aircraft and gas turbine engines along with related parts, components, accessories and attachments, materials, software, and technology on the USML and the CCL (*see* 81 FR 6791 and 81 FR 6797, February 9, 2016, for Commerce and State's rules respectively). BIS's proposed rule is referred to in this document as the ''February 9 rule.'' BIS is publishing this final rule, after an interagency review of the public comments on its proposed rule, simultaneously with a final rule being published by the Department of State.

This rule also furthers the retrospective regulatory review directed by the President in Executive Order 13563.

Public Comments on the Proposed Rule

Comment: One commenter asked BIS to insert text into licenses that the party who will conduct a re-export or transfer is required to inform subsequent parties in the transaction of license terms and conditions. The commenter characterized this as a similar flow-down approach to informing parties that has been incorporated into Directorate of Defense Trade Controls (DDTC) authorizations.

This commenter also recommended that BIS consider clarifying or eliminating the requirement to obtain a letter of assurance in support of technology license applications as set forth in Supplement No. 2 to part 748, paragraph (o)(3)(i). The commenter stated that the requirement in that paragraph to submit the letter to BIS ''upon request'' combined with the requirement that, if the letter cannot be obtained, to state the reason the letter cannot be obtained in the license application creates ambiguity concerning the requirement.

Response: Although these are constructive proposals, they are outside the scope of the proposed rule. Therefore, BIS is making no changes to the proposed rule in response to these comments, but will consider them as part of other proposed rules to be issued later.

Comment: Four commenters addressed the proposal to replace with a single interpretation in § 770.2 a note that appears in several ECCNs. The note describes when an unfinished product is controlled in an ECCN. One commenter expressed approval of the idea because it centralizes the definition. Another commenter recommended retaining the note in individual ECCNs because doing so would, in the commenter's view, aid classification. A third commenter expressed approval of the idea of one interpretation and asked whether the interpretation's applicability would be limited to 600 series items and asked for clarification of the meaning of the term ''clearly identifiable'' in the text. The fourth commenter recommended that the applicability of the interpretation be extended to cover all unfinished commodities by removing the reference to the 600 series and that the definition of ''material'' in the EAR be revised to reference the interpretation.

Response: Although repeating the interpretation in each ECCN to which it applies might be a convenience for some users, doing so would lengthen the EAR and would increase the likelihood of inadvertent omissions or differences in text in the various renditions of the interpretation that would result. The text of this interpretation was adopted from the definition of defense article in § 120.6 of the ITAR, which applies throughout the USML. BIS is unaware of any difficulties that have arisen because the definition is not repeated throughout the USML. BIS believes that stating the interpretation and its scope once is the best way to promote a concise EAR and prevent inadvertent errors or omissions.

The interpretation was originally adopted as a series of notes in 600 series, Product Group A ECCNs so that commodities that were being transferred from the USML to the CCL would be subject to the same standard with respect to coverage of unfinished goods when on the CCL as they had been when on the USML. Because these commodities were previously on the USML, parties to transactions that are subject to the ITAR and the U.S. Government have substantial experience in dealing with the interpretation in connection with the commodities that are now in the 600 series. However, no such experience exists with respect to commodities that are not in the 600 series. To avoid possible unintended consequences, extending the interpretation to items outside the 600 series should not be undertaken without a comprehensive review to determine exactly which ECCNs would be affected and how they would be affected. Additionally, such a change would be outside the scope of what was in the proposed rule.

Although the interpretation does not define the term ''clearly identifiable,'' its text does provide some guidance. That term applies to unfinished products that ''have reached a stage in manufacturing where they are clearly identifiable by mechanical properties, material composition, geometry, or function as commodities controlled by any Product Group A . . . '600 series' ECCN.'' When, based on consideration of its mechanical properties, material composition, geometry, or function, an unfinished product can be recognized readily as a commodity that is controlled in a 600 series, Product Group A ECCN, it is clearly identifiable as that commodity. This term has been used to describe the affected commodities for years when they were controlled on the USML, and BIS is not aware of any confusion on this point.

Finally, the interpretation is intended to identify when an unfinished product is to be treated for export control purposes as it would be treated if finished. It is not intended to apply to raw materials that have not been subjected to any manufacturing processes. To determine whether a raw material not identified on the USML would be controlled on the CCL as such (*i.e.,* before it has been transformed as described above), one would need to review the C group ECCNs in the CCL.

Therefore, BIS is making no changes to the rule in response to this recommendation.

Comment: One commenter stated that under the EAR definition, the '' 'range' for . . . [unmanned aerial vehicle (UAV)] systems will be determined independently of any external factors such as operational restrictions, limitations imposed by telemetry, data links or other external constraints.'' The commenter suggested this condition be modified or removed to accommodate the increasing commercialization of UAVs. The commenter noted that: ''Many potential customers have expressed the desire to purchase UAVs that are capable of remaining on station for extended periods of time, which requires a certain amount of fuel. . . . an aircraft that can fly in circles for hours over an oil pipeline or fishing territory could easily trip the MTCR range thresholds if not for operational restrictions and limitations imposed by telemetry and data links.''

Response: The definition of range to which the commenter refers is adopted from the Missile Technology Control Regime (MTCR) and used in the EAR with respect to items on the MTCR Annex. In accordance with the United States' commitment to the MTCR, BIS would not change that definition unless the MTCR agrees to change the definition on the Annex. Accordingly, BIS is making no changes to the rule in response to this comment.

Comment: One commenter recommended that BIS add the phrase ''with no fuel reserve'' to technical note .d in the definition of ''range'' in the EAR to match the definition in note 2 to USML Category VIII(a) in the Department of State proposed rule.

Response: The definition of range in note 2 to USML Category VIII(a) of the Department of State proposed rule, although adopted from the MTCR definition of range, applies to things that are not on the MTCR annex, including certain manned aircraft for which range is one of the criteria that determines whether the aircraft is controlled under USML Category VIII(a). The notion of calculating the range of an aircraft that carries people without including an allowance for fuel reserves to deal with unexpected circumstances or emergencies is sufficiently unusual that the State proposed rule explicitly stated that fuel reserves should not be included when calculating range. By contrast, on the CCL, the term range, when describing how far something can fly, is used only in setting a criterion for the application of the missile technology reason for control and applies only to items controlled on the MTCR Annex, most of which, including unmanned vehicles, do not carry people. Thus, the exact text of the MTCR definition is appropriate. Therefore, BIS is making no changes to the rule in response to this comment.

Comment: One commenter proposed revising the definition of military aircraft in 9A610 Note 1 to apply to aircraft that are specially designed for operation by military end-users and to exclude: Aircraft that are not enumerated in USML Category VIII(a); civil aircraft (commenter's proposed definition in next comment); and aircraft for which the person obtaining airworthiness certification has ''knowledge'' that the aircraft will be a ''civil aircraft'' after planned designation in published airworthiness certification lists has been obtained. The note would define military end-users as meaning national armed services (army, navy, marine, air force, or coast guard), as well as national guard and national police, government intelligence or reconnaissance organizations, international military organizations, or irregular military forces or units. The commenter cited uniformity throughout the EAR, commonality of the definition for the CCL with the definition of military end user in part 744, consistency with the ITAR definition of defense services, and clarity with respect to non-military aircraft as the reason for proposing this change.

Response: BIS believes that the definition proposed by this commenter would not be an improvement over the text of the proposed rule. The commenter's proposed standard ''specially designed for operation by military end users'' would shift the focus from the capabilities of the aircraft to the nature of the intended end users. If adopted, this change would affect ECCNs that are outside the scope of the rule and should not be undertaken without seeking public comment on those changes. Accordingly, BIS is making no changes in response to this comment.

Comment: One commenter recommended adding a note to the definition of ''civil aircraft'' in EAR part 772 clarifying the meaning of the phrase ''legitimate civil, private or business use'' to explain which government uses fall within the term ''legitimate civil use.'' The commenter suggested that activities such as wildlife and environmental aerial survey, forest fire suppression, and public hospital medevac would reasonably be considered ''legitimate civil use'' of aircraft even if flown by governments. The commenter asserted that, ''given the definitions for 'military end user' in EAR [sections] 744.9, 744.17, 744.21 and 'armed forces' on the DDTC DSP–83, industry would reasonably conclude that a national police helicopter is a 'military aircraft' for military uses but that an unarmed city police helicopter with a WA type certificate is a 'civil aircraft' put to a 'legitimate civil use.' ''

Response: The suggestion would be a substantive change affecting multiple ECCNs outside the scope of the proposed rule. BIS is not adopting it in this final rule.

Comment: One commenter stated that commodities and software ''specially designed'' for current or planned ''civil aircraft'' should not be enumerated or described in ECCNs 9x610 or 9x619, even if DDTC controls the ''civil aircraft'' as a ''defense article'' because of a single incorporated defense article. For both the EAR and the ITAR, the full complement of ''specially designed'' items used in or with an aircraft should depend on more than incorporation of a single USML, 600 series, or xA018 commodity into the aircraft. It should also depend on whether the aircraft will be used for a purpose the government deems military, and if not, whether the items are classified in relation to the USML, 600 series, or xA018 commodity.

Response: The commenter's concern is unwarranted because parts, components, accessories, attachments, and software subject to the EAR that are, *inter alia,* designed for or common to 9A991 civil aircraft or engines in production cannot, pursuant to the release provisions of the EAR's definition of ''specially designed,'' become controlled under a 600 series ECCN merely because they are also used in an otherwise civil 9A991 aircraft or engine that has been converted to ITAR control by virtue of the provisions in USML Categories VIII(a) or XIX(a).

If a commodity or software is enumerated on the USML or in a 600 series ECCN, it is based on a decision that the commodity or software warrants control as a military item. BIS is making no change to the rule in response to this comment.

Comment: One commenter, referring to L–100 aircraft built prior to 2013, stated that ''It is not appropriate to enumerate under ECCN 9A610, which controls military aircraft and related commodities, a ''civil aircraft'' that has been operated by commercial aircraft operators since the 1960s, has been operated by more than one U.S. commercial airline and has been out of production for nearly a quarter of a century. It would be appropriate to enumerate in 9A610 L–100 aircraft that have been modified for military end users and no longer meet the definition of ''civil aircraft.'' The commenter stated that BIS has the flexibility to control possible exports, reexports and transfers to undesired recipients in parts 744 and 746.

Response: BIS included L–100 aircraft in ECCN 9A610 to resolve a long history of complex jurisdictional and classification issues. Controlling existing L–100s in ECCN 9A610, but applying the same reasons for control as ECCN 9A991 is consistent with the reasons for control that applied to those aircraft historically under ECCN 9A991. Therefore, BIS is making no changes in the rule in response to this comment.

Comment: One commenter expressed agreement with and appreciation for the clarification of the status of L–100 aircraft and the 501–D22 engine. The commenter noted that the issue has been an ongoing discussion for years. This clarification will help to drive consistency.

Response: BIS agrees.

Comment: One commenter recommended that DDTC and BIS clarify that all non-ship based UAV launching, recovery and landing systems fall under ECCN 9A610.u (or another CCL category) or clarify when to use ECCN 9A610.u and when to use USML Category VIII(h)(5).

Response: To clarify where non-ship based launching, recovery, and landing systems are controlled, this final rule adds the word ''runway'' to ECCN 9A610.e to make clear that ECCN 9A610.e controls runway-based arresting and systems for all aircraft (whether manned or unmanned) that are controlled by either USML Category VIII(a) or ECCN 9A610.a. Shipboard engagement and arresting systems will continue to be controlled under USML Category VIII(d). Mobile land-based arresting and engagement systems on runways for manned and unmanned aircraft controlled under USML Category VIII(a) or ECCN 9A610.a will be controlled by ECCN 9A610.e. ECCN 9A610.u will control all other non-ship based devices for handling, control, activation, and non-ship-based launching of UAVs or drones controlled by either USML paragraph VIII(a) or ECCN 9A610.a, and capable of a range equal to or greater than 300 km.

This final rule revises ECCN 9A115, which, prior to publication of this rule, referred readers only to the ITAR. The revised text alerts readers that both the ITAR USML Category VIII(d) and ECCN 9A610.e and .u need to be consulted when making jurisdictional and classification determinations regarding such items.

Comment: One commenter noted that the proposed rule incorporated text from a technical note that provides guidance on the meaning of the term ''ground equipment'' into the regulatory text of 9A610.f. The commenter noted that the word ''includes,'' which was in the technical note was omitted from proposed paragraph .f. This omission, the commenter noted, effectively narrowed the scope of the control from all ground equipment to only ground equipment for pressure refueling or to facilitate operation in confined areas. The commenter stated that, if such was the intent, the word ''other'' should be removed from the phrase ''Pressure refueling equipment and other ground equipment designed to facilitate operations in confined areas.''

Response: BIS agrees with the commenter's interpretation. This final rule revises the text of paragraph .f to make clear that it applies only to pressure refueling equipment and equipment that facilitates operations in confined areas that are specially designed for military aircraft, *i.e.,* aircraft controlled in USML Category VIII(a) or ECCN 9A610.a.

Comment: One commenter noted that the proposed rule would make application of the national security and regional stability reasons for control for parts covered by ECCN 9A610.x dependent on the end use. The commenter stated that this would cause significant difficulties for compliance automation. The commenter noted that end use controls normally follow separate logic from CCL controls. Another commenter recommended that parts for L–100 aircraft should be controlled in 9A991.d. to eliminate confusion when all reasons of control are the same. The commenter stated that the proposed change leaves confusion on when a 9A610.x part requires NS and RS control.

Response: The first commenter's perception that, in most instances, the EAR treats end-use based license requirements separately from CCL-based license requirements is correct. Only in a few instances is end use a factor to be considered in determining CCL-based license requirements. This rule creates an additional such instance with respect to aircraft parts that are common to C–130 aircraft and L–100 aircraft that were manufactured prior to 2013. If such parts are being exported or reexported to be installed in a C–130, the national security (NS 1) and regional stability (RS 1) reasons for control apply in addition to the anti-terrorism and United Nations embargo reasons for control. If the parts are being exported or reexported to be installed in an L–100 built prior to 2013, only the antiterrorism and United Nations embargo reasons for control apply. The proposed rule created this structure to maintain the level of control that C–130 parts had before moving from the USML to the CCL and to retain the level of control that applied to L–100s and their parts when controlled under ECCN 9A991. BIS acknowledges that the structure is somewhat awkward but believes that it is less awkward than classifying these parts under two entirely different ECCNs (9A610 and 9A991) depending on which aircraft will use them. Given the small number of L–100s still in use (in its comment on the proposed rule, the manufacturer stated that it produced more than 100 L–100s from 1965 to 1992 and that more than 50 were still in operation), BIS believes that any problems with classification are likely to be small and are likely to diminish as existing L–100s are retired from service. Accordingly, BIS is making no change to the rule in response to these comments.

Comment: One commenter recommended that the phrase ''not elsewhere specified on the USML, in 9A610.y, or 3A611.y,'' which appeared in the text of ECCN 9A610.x in the proposed rule be changed to read ''not elsewhere specified on the USML or in another 600 series entry.'' The commenter stated that this change would bring 9A610.x into line with Supplement No. 4 to part 774—Commerce Control List Order of Review.

Response: BIS believes that ECCN 9A610.x is consistent with Supplement No. 4 to Part 774—Commerce Control List Order of Review without the change suggested by this commenter. The order of review provides for checking the USML before checking the CCL, checking 600 series ECCNs and ECCNs ending with the numerals ''515'' before checking other ECCNs, and within an ECCN, checking paragraphs that specifically enumerate the items they cover before checking paragraphs that describe the items they cover by a general description. The reference to 9A610.y in 9A610.x serves as a reminder to check the .y paragraph (which specifically enumerates the items that it covers) before concluding that an item is controlled under 9A610.x. This reminder is useful because the paragraphs that precede paragraph .x all specifically enumerate the items that they cover whereas 9A610.x covers specially designed parts, but not specifically enumerated parts, for military aircraft. Readers who review the paragraphs in alphabetical order might erroneously conclude when they reach paragraph .x that no additional paragraphs that specifically enumerate the items that they control follow. The reference to ECCN 3A611.y serves a similar function because parts, components, accessories, and attachments enumerated in that paragraph might be specially designed for any 600 series ECCN. Although it is true that ECCN 9A610.x does not control parts, components, accessories, or attachments for items in other ECCNs, this fact is true for ECCNs generally. BIS does not believe that an additional reference is needed to make this point and is making no change to the rule in response to this comment.

Comment: One commenter stated that the effect on product classification of coating an aircraft part with a material controlled in USML Category XIII(j)(2) needed to be clarified. The commenter expressed a belief that DDTC has taken the position that the part is classified under USML Category XIII(j)(2) if any property of the material can be discerned after its application to the part is complete. The commenter stated that this interpretation can convert otherwise ECCN 9A610.x parts into ITAR-controlled and, in some instances, significant military equipment. Such an interpretation would create significant compliance and classification difficulties because, for example, the same part could have two different jurisdictional statuses. The commenter recommended that DDTC publish an interpretation confirming that XIII(j)(2) controls materials, not parts or components, and that BIS revise 9A610 to reinforce this point.

Response: The issues raised by this comment potentially apply not only to ECCN 9A610, but also to ECCNs that are outside the scope of this rule. In October 2015, the Department of State and BIS published notices of inquiry seeking comments on, *inter alia,* items controlled in USML Category XIII and related ECCNs (*see* 80 FR 61137 and 80 FR 61138). This commenter made a similar comment in response to the Department of State notice. Both agencies are now planning proposed rules dealing with USML Category XIII and related ECCNs as part of the ECRI's planned regular review of USML categories and their regular controls on the CCL. BIS believes that proposed rule will be a more appropriate vehicle for comprehensively addressing the issue raised by this commenter. Therefore, BIS is making no changes to this rule in response to this comment.

Comment: One commenter stated that moving items such as ''specially designed'' switches between various 600 series .y lists over time creates considerable labor for industry without any corresponding change in licensing policy. The commenter recommended that if an item is enumerated in 9A610.y or 9A619.y and has an equivalent enumeration in 3A611.y, then either ECCN could be allowed. This would allow appropriate policy treatment of the item without creating an undue burden on industry.

Response: ECCN 3A611 is the military electronics ECCN. Its .y paragraph applies the specific parts listed therein if '''specially designed' for a commodity subject to control in a '600 series' ECCN or a defense article and *not elsewhere specified in any '600 series' ECCN* or the USML . . . '' (emphasis added). Because all .y paragraphs in the 600 series are subject to the same level of control, the commenter's proposal would simplify classification without compromising any of the reasons for imposing likening requirements on 600 series .y items. Accordingly this rule revises paragraph .y in ECCN 3A611 to allow, but not require, commodities enumerated in that paragraph or in other .y paragraphs to be classified either under 3A611.y or the other .y paragraph by revising the italicized phrase noted above to read ''*not elsewhere specified in any paragraph other than the .y paragraph of a '600 series' ECCN*''.

To avoid an inconsistent treatment of the similarly structured .x to the .y paragraphs, the same change is being made to 3A611.x. This will not only be logically consistent with the changes made to .y, it will also simplify classification of unspecified parts and components specially designed for one 600 series item that are likely later to be used on other 600 series items. Because the licensing and control policies for all .x items are the same, the changes will not compromise any of the reasons for imposing licensing requirements on 600 series .x items. In addition, the changes will not require any party to alter the existing classification of any item. Accordingly, this final rule makes a similar revision to ECCN 3A611.x. To highlight and clarify this conforming change, a Note 3 is added to 3A611.x stating that ''parts,'' ''components,'' ''accessories,'' and ''attachments'' subject to the EAR and within the scope of any 600 series .x entry that are of a type that are or would potentially be for use in or with multiple platforms (*e.g.,* military electronics, military vehicles, and military aircraft) may be classified under 3A611.x for the sake of convenience.

Comment: One commenter recommended that parts identified in 9A610.y or 9A619.y but unique to USML Categories XIX(f)(1) listed engines and VIII(h)(1) listed aircraft should be excluded from the ITAR and covered by the .y paragraph because they are not critical to national security.

Response: This commenter expressed the same idea in its comments on the Department of State proposed rule. Readers may check the Department of State final rule for its explanation of its decision not to remove these parts from the USML. Because these parts remain on the USML, they may not be included in a 600 series ECCN.

Comment: One commenter recommended that the final subparagraph numbers be dropped from the .y paragraphs of ECCN 9A610 and 9A619. The commenter stated that doing so would eliminate unnecessary reclassification efforts and allow flexibility to accommodate future changes. The commenter stated that it has to reclassify thousands of parts when a .y subparagraph number changes even though the license requirements remain the same.

Response: BIS believes that including the final subparagraph designator in the .y paragraphs is essential to maintaining the structure of the CCL and is making no change in response to this comment.

Comment: Several commenters questioned whether the word ''fluid'' refers to liquids only or to liquids and gases when used in ECCNs 9A610.y.8, .y.10 and .y.32 and in 9A619.y.3, .y.4, and .y.8. Others said the term should encompass both liquids. Commenters pointed out that in physics and engineering, ''fluid'' refers to substances with no fixed shape that generally take the shape of their container and that yield readily to external pressure. That definition encompasses liquids and gases.

Response: BIS agrees that for purposes of the .y paragraphs on the CCL, including in ECCNs 9A610 and 9A619, the term ''fluid'' should encompass both liquids and gases. This final rule adds a related definition to both ECCNs so stating. The entries do not control fluids because the scope of the controls is limited to ''parts,'' ''components,'' ''accessories,'' ''attachments,'' and other commodities, which, by definition, are not fluids. The definition of ''fluids'' is nonetheless necessary to know when determining the classification status of the commodities identified in .y and any other entry involving controlled commodities that contain fluids.

Comment: One commenter recommended removing the word ''fluid'' from proposed ECCNs 9A610.y.8, which applies to fluid filters and filter assemblies and 9A619.y.4, which applies to fluid hoses, straight and unbent lines, fittings, couplings, clamps and brackets, so that they do not limit ''.y'' controls to ''fluid'' filters and assemblies because ''pneumatic'' filters and assemblies are of same or lesser technology and should enjoy ''AT'' only controls as well.

Response: BIS believes that its confirmation that the definition of ''fluid'' includes both liquids and gases addresses the concern expressed in this comment. Therefore, this final retains the adjective ''fluid.''

Comment: One commenter recommended adding a new paragraph 3A611.y.36 for ''clamps and brackets (including block clamps also called line blocks, tube supports, or fairlead blocks) for wire harnesses, conduit, fluid or pneumatic hoses, lines, tubes, or pipes.'' The commenter noted that the same ''specially designed'' clamps and brackets could be used for wire harnesses, conduit, pipes, pneumatic lines or tubes as well as on both aircraft and engine. The commenter stated that because these commodities are basic, commonly used in multiple 600 series and other items, they do not warrant national security controls and should thus be in 3A611.y if specially designed not for a defense article or 600 series item. The commenter suggested that, as an alternative, these commodities would be appropriate for inclusion in the (b)(2) release within the ''specially designed'' definition.

Response: ECCN 3A611.y is unique among 600 series .y paragraphs in that it applies to commodities subject to the EAR named therein if the commodity is specially designed for an ITAR controlled defense article or any 600 series item, not just those in ECCN 3A611. As noted above, this final rule expands the scope of ECCN 3A611.y so that parties may classify a commodity under 3A611.y if it is described in both 3A611.y and the .y paragraph of some other ECCN. Thus adopting the commenter's proposal to add clamps and brackets (including block clamps also called line blocks, tube supports, or fairlead blocks) for wire harnesses, conduit, fluid or pneumatic hoses, lines, tubes, or pipes to ECCN 3A611.y would have the effect of making all such items in any 600 series ECCN controlled under 3A611.y unless enumerated in some other 600 series ECCN or on the USML. BIS is not adopting this proposal because doing so would remove license requirements for commodities that are unrelated to military aircraft and military gas turbine engines and, thus, outside the scope of this rule. In addition, the commenter is, in effect, asserting that all ''clamps and brackets'' used for any purpose on any 600 series commodity and on many ITAR defense articles have the same level of sensitivity. Without specific evidence that such is the case, BIS is not yet willing to make such a sweeping broadening of ECCN 3A611.y

Comment: One commenter recommended adding a new paragraph 9A610.y.33 and revising 9A619.y.5 to cover ''Clamps for hoses, lines, tubes and wires.'' The commenter stated that this change would make clear that all clamps are controlled at the .y level whereas the placement in 9A610.y.10 in the proposed rule implied that only clamps for fluid lines were controlled at that the .y level. The commenter stated that this change would align aircraft clamps in ECCN 9A610.y.33 with engine clamps in ECCN 9A619.y.5.

Response: BIS is making no changes to ECCN 9A610.y in response to this comment. However, for reasons described below, this final rule revises 9A619.y.5 to apply to gas turbine engine clamps of all types. Such a change is not warranted for aircraft clamps controlled in ECCN 9A610 because some such clamps carry significant loads and should be subject the reasons for control that apply to ECCN 9A610.x. Clamps for engines generally do not carry such loads. Therefore, this rule limits the applicability of ECCN 9A610.y.10 to clamps for commodities in that entry or defense articles in USML Category VIII. This final rule also limits the applicability of ECCN 9A619.y to clamps for commodities in that entry and defense articles in USML Category XIX.

Comment: One commenter noted that the proposed rule would move certain clamps from 9A619.y.5 to 9A619.y.3, a move that would require re-classification of a large number of clamps for no technical advantage. The proposed rule also would have added check valves to ECCN 9A619.y.5. The commenter stated that because ''check valves'' are new to ECCN 9A619.y, it would be better to move them to a new entry (ECCN 9A619.y.9) rather than displace clamps from 9A619.y.5.

Response: BIS agrees with the commenter. As proposed, the rule would have caused unnecessary reclassifications. Therefore, this final rule places clamps of all types in 9A619.y.5 and check valves for fluid systems in 9A619.y.9.

Comment: One commenter recommended replacing proposed ECCN 9A619.y.2 (Oil lines and tubes) and ECCN 9A619.y.3 (Fluid hoses, straight and unbent lines, fittings, couplings clamps and brackets) with one paragraph for ''fluid lines, tubes, and hoses, and related fittings of all types'' and another paragraph for clamps and brackets. The commenter's reason noted that the proposed rule assigned higher control to certain items such as bent lines when related to fluids other than oil, while allowing .y benefits to all lines (straight or bent) when related to oil (see proposed 9A619.y.3 vs 9A619.y.2). The commenter also noted that the proposed rule would remove a particular set of clamp types, namely V-band, cushion, broomstick, hinged and loop clamps, that currently are in ECCN 9A619.y.5 and would add unspecified clamps to 9A619.y.3, creating a new ambiguity. The commenter asserted that it is not clear whether the clamps from the previous 9A619.y.5 that are not for fluid lines now are covered by 9A619.x, or whether all clamps are now to be covered by 9A619.y.3.

Response: As noted above, this final rule includes a paragraph designated .y.5 for clamps of all types in ECCN 9A619. The absence of any modifiers in that paragraph signifies that the paragraph applies to clamps of all types that are specially designed for commodities in ECCNs 9A619 or USML Category XIX and not elsewhere specified on the USML or CCL. This final rule also removes the adjectives ''straight'' and ''unbent'' from the proposed text of ECCN 9A619.y.3. This proposed rule does not remove those adjectives from ECCN 9A610.y.10 because some of the aircraft fluid lines must withstand high internal pressure levels when configured in the shape that will be used in the aircraft. Fluid lines used in engines generally do not need to withstand very high pressures.

Comment: Several commenters recommended removing ''shims'' from proposed ECCN 9A619.y.6 and explicitly mentioning shims in paragraph (b)(2) of the definition of ''specially designed,'' found in § 772.1 of the EAR. Paragraph (b)(2) identifies several items that are excluded from the definition and, thus, from any ECCN paragraph that includes the term ''specially designed'' as a control parameter. The commenters noted that ''spacers'' are currently in paragraph (b)(2). One commenter asserted that shims are a type of spacer. Another commenter noted that shims are used to align parts, make them fit, or reduce wear. The commenter said that these functions are also performed by washers, spacers, and bushings, which are already identified in paragraph (b)(2) of the specially designed definition. Because of this equivalency of function, including shims in 9A619.y.6 causes confusion. One commenter recommended that if shims are retained in a .y paragraph they should be clearly differentiated from spacers. One commenter asserted that shims are by definition spacers and meet the release criteria in the definition of specially designed, but recommended that the release be made specific, by adding shims to paragraph (b)(2).

Response: Although many shims are simple spacing devices, some shims that are used in military gas turbine engines have particular characteristics that warrant control albeit at the .y level. Therefore, BIS is not making any changes to the rule in response to this comment.

Comment: One commenter recommended that identification plates, fluid hoses, straight and unbent lines, fittings, couplings, clamps brackets and cockpit or cabin mirrors should be released from the specially designed definition because they do not contain any military functionality or performance.

Response: Releasing a part from the specially designed definition would, in many cases, remove that part from all coverage on the CCL regardless of the end item into which that part is incorporated. In the case of 600 series items, doing so would remove all U.S. government visibility into the export or reexport of the released parts in connection with military related items, not just the items that are the subject of this rule. Such an action would be beyond the scope of the proposed rule. Accordingly, BIS is making no changes in response to this comment.

Comment: One commenter proposed replacing the phrase ''Fluid hoses, straight and unbent lines, fittings, couplings, clamps and brackets'' with ''Fluid lines, tubes, and hoses, and fittings, couplings and mounting brackets thereof'' in ECCN 9A610.y.10.

The same commenter also proposed removing the text of proposed 9A619.y.2 and revising the text of 9A619.y.3 to read the same as commenter's proposed text for ECCN 9A610.y.10, *i.e.,* ''Fluid lines, tubes, and hoses, and fittings, couplings and mounting brackets thereof.''

The commenter noted that the proposed revision would clarify that hoses and lines are for fluid and that any couplings, fitting or brackets are specific to those lines or hoses. The commenter stated that the current ''. y'' entries for engine and aircraft lines are inconsistent. Parts common to the airframe and engine should be treated at the same level of control. The current and proposed text of 9A619.y.2 ''Oil lines and hoses'' could be removed as unnecessary.

Response: BIS agrees with the commenter that adding a qualifier to ECCNs 9A610.y.10 and 9A619.y.3 would clarify the meaning of those paragraphs and this final rule adds the word ''therefor'' at the end of those paragraphs. This final rule does not make any other change to the proposed rule text of ECCN 9A610.y.10. This final rule does, however, make two changes ECCN 9A619.y.3, from what was proposed in the February 9 rule: It removes the terms ''straight and unbent'' and ''clamps.'' The term ''straight and unbent'' is removed because gas turbine engine fluid lines are typically low to moderate pressure lines that do not warrant control under 9A610.x or 9A619.x. whereas fluid lines used elsewhere in aircraft may be required to contain very high pressures after being bent or formed into their final shape and do warrant control under ECCN 9A610.x Accordingly, this final rule limits the applicability of ECCN 9A610.y to lines for commodities in that entry or defense articles in USML Category VIII. This final rule also limits the applicability of ECCN 9A619.y to lines for commodities in that entry and defense articles in 9A619.y and USML Category XIX.

Comment: One commenter suggested deleting the phrase ''cockpit or cabin'' from the description of ''aircraft mirrors'' in ECCN 9A610.y.10 because the technology for mirrors does not change.

Response: BIS is making no changes to the rule in response to this comment. BIS construes cockpit and cabin as used in ECCN 9A610.y.10 to encompass all areas of the aircraft to which the crew has access while in flight. BIS believes that further clarification is not needed.

Comment: One commenter recommended removing and reserving 9A610.y.23 (filtered and unfiltered panel knobs) and .y.31 (identification plates) along with 9A619.y.7 (identification plates) because they are duplicates to entries in 3A611.y.

Response: ECCN 3A611.y.33 controls identification plates and nameplates, .y.21 controls filtered and unfiltered mechanical switches, and .y.34 controls knobs. As noted above, this final rule revises ECCN 3A611.y to allow commodities that are controlled in 3A611.y and in another ECCN .y paragraph to be classified under 3A611.y. Removing and reserving the ECCN 9A610 and 9A619 paragraphs suggested by this commenter would have the effect of making this optional procedure mandatory—likely compelling some parties to reclassify existing parts. In addition, removing ECCN 9A610.y.23—filtered and unfiltered panel knobs, indicators, switches, buttons, and dials and, in effect replacing it with ECCN 3A611.y.21—filtered and unfiltered mechanical switches and .y.34—knobs would change the scope of items covered. Therefore, this final rule does not remove and reserve any paragraph of ECCNs 9A610 or 9A619. However, BIS agrees that the scope of ECCN 3A611.y.33 (identification plates and nameplates) should be identical with ECCNs 9A610.y.31 and 9A619.y.7, which were proposed in the February 9 rule as identification plates. Therefore, this final rule adds nameplates to ECCNs 9A610.y.31 and 9A619.y.7.

Comment: One commenter stated that identification plates do not merit control in the 600 series unless they convey ''technology'' or ''technical data'' and recommended that ECCNs 9A610.y.31 and 9A619.y.7 be revised to control only identification plates that convey ''technology'' or ''technical data.''

Response: Increasingly identification plates for defense articles are required to contain codes linking the plate with on-line technical data. Therefore, this final rule does not make any changes in response to this comment.

Comment: One commenter stated that marine gas turbine engines are not covered by CCL Category 9. The commenter recommended that marine gas turbine engines be added to ECCN 9A991.c by removing the word ''Aero'' or creating a new ECCN in Category 9. The commenter noted that USML Category XIX applies to all gas turbine engines and CCL Category 9 does not.

Response: Some marine gas turbine engines were controlled in ECCN 9A002 at the time the proposed rule was published and continue to be controlled in that ECCN. Marine gas turbine engines not controlled in ECCN 9A002 are EAR99. Therefore, BIS did not follow the commenter's suggestion to list marine gas turbine engines in ECCN 9A991. However, BIS agrees that more fully specifying where and how marine gas turbine engines are controlled under the EAR is desirable. To that end, this rule adds a related control note to ECCN 8A992 informing readers that marine gas turbine engines are not controlled in paragraph .g of ECCN 8A992. Rather, such engines may be controlled in ECCNs 9A002 or 9A619.a or may be designated EAR99. Paragraph .g of ECCN 8A992 controls certain inboard and outboard marine engines other than gas turbine engines.

Comment: One commenter stated that the word ''equipment'' should be removed from the related controls paragraphs in ECCNs 9B610 and 9B619 to be consistent with the removal of that word from USML Categories VIII(h) and XIX(f) in the State Department's proposed rule.

Response: BIS agrees and this final rule makes those changes.

Comment: One commenter suggested that the reference in ECCN 9B610 to Category VIII(h) paragraphs (2)–(26) should to be revised to read paragraphs (2)–(30) and that the reference in ECCN 9B619 to Category XIX(f) paragraphs (2)–(7) should to be revised to read paragraphs (2)–(17) to be consistent with the addition of paragraphs (h)(27) through (h)(30) and (f)(8) though (f)(12) in the DDTC proposed rule.

Response: BIS agrees. However, the paragraph numbering in Categories VIII(h) and XIX(f) have changed from what was in the proposed rule. In this final rule, the related control note in 9B610 refers to USML Category VIII(h) paragraphs (2)–(28) and the related control note in 9B619 refers to Category XIX(f) paragraphs (2)–(11) to be consistent with the Department of State final rule.

Comment: ECCN 9C610 controls materials specially designed for commodities controlled in ECCN 9A610. The proposed rule would have added materials specially designed for commodities controlled in USML Category VIII. ECCN 9C619 controls materials specially designed for commodities controlled in ECCN 9A619. The proposed rule would have added materials specially designed for commodities controlled in USML Category XIX.

One commenter stated that the proposed change could cause materials developed decades ago and that are in widespread commercial use to be controlled as military items because companies may not be able to definitively prove that these materials were not developed to have properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions in the relevant ECCN or USML paragraph. The commenter cited Alloy 454, DS 1000 and yttrium oxide stabilized zirconium oxide as examples of such materials. This commenter made a similar comment regarding USML Category XIX in the Department of State proposed rule. The commenter asserted that paragraphs (f)(13) through (15) in that category would place on the USML materials that are currently controlled in ECCN 9A619 or even materials that are EAR99.

Response: BIS does not believe the changes proposed in this comment are necessary because ECCNs 9C610 and 9C619 already contain notes stating: ''Materials enumerated elsewhere in the CCL . . . are controlled pursuant to controls of the applicable ECCN.'' In addition, this final rule includes a new paragraph .b of ECCN 9C619 to reference the materials proposed by the Department of State in USML Category XIX(f)(13) through (15). This final rule also adds a new note 3 to ECCN 9C619, which provides that materials that are used in engines that are or have been in production and are not enumerated or otherwise described on the USML or ECCN 9A619 are not subject to ECCN 9C619. To avoid confusion, this final rule makes clear that existing note 2 to ECCN 9C619, which states that materials used in engines controlled in USML Category XIX and ECCN 9A619 are controlled in ECCN 9C619, applies only to materials described in paragraph .a of that entry.

This rule also adds technology for the ''development,'' ''production,'' operation, installation, maintenance, repair, overhaul, or refurbishing of materials controlled in ECCN 9C619.b to ECCN 9E619.b, which imposes the national security (NS Column 1), regional stability (RS Column 1), antiterrorism (AT Column 1) and United Nations embargo reasons for control on the technology and limits use of License Exception STA to ''build to print'' technology.

Comment: One commenter questioned the criteria in Category VIII(a)(14) of the Department of State proposed rule, which applies to certain cargo and transport aircraft. The commenter noted that L–100 aircraft manufactured prior to 2013 were expressly excluded from Category VIII(a)(14) and expressly included in ECCN 9A610.b even though the L–100 is just as capable as the LM–100J in carrying payloads over 35,000 lbs. to ranges over 2,000 nautical miles with the same roll-on/roll-off and landing/takeoff capability. The commenter suggested that similar treatment would be appropriate for the planned but not yet produced LM–100J. The commenter stated that the LM–100J is a modern version of the L–100. The commenter questioned whether the criteria of a roll-on/roll-off ramp, range, payload and ability to land on short or unimproved airfields are appropriate for distinguishing military from civil cargo aircraft and pointed out that the L–100 is capable of meeting those criteria, but would be controlled on the CCL under the proposed rules. The commenter cited several potential civil end uses including: ''heavy equipment and fuel delivery; firefighting and search & rescue.'' The commenter also noted that certain military related items do not appear on the LM–100J but do appear on the military C–130J from which it is derived. Those items relate to radar, communications, protection from ground fire, and paratroop operations.

Response: The criteria of a roll-on/roll-off ramp, range, payload and ability to land on short or unimproved airfields are valuable military capabilities that enable supplying troops operating in areas that lack modern infrastructure. As noted above, the classification of L–100s manufactured prior to 2013 under ECCN 9A610.b was a measure adopted to promote consistency with prior classifications of a small number of airplanes, all of which are more than 20 years old. The LM–100J is a new design, derived from the C–130J that incorporates many modern features common to both aircraft.

To resolve the LM–100J classification issues while still maintaining an appropriate level of control over the export of such aircraft, this final rule revises the Note 1 in ECCN 9A610 to expressly include the LM–100J in paragraph .a, thereby treating it as a 600 series military aircraft. The Department of State final rule explicitly excludes the LM–100J from Category VIII(a)(14). This classification will retain the license requirement for all destinations except Canada and, like all other aircraft controlled under ECCN 9A610.a, License Exception STA will not be available for the LM–100J aircraft unless such use is approved pursuant to the procedures set forth in § 740.20(g) of the EAR.

Comment: The proposed rule would have removed related control note number 2 from ECCN 9E619. That note reads: ''Technology described in ECCN 9E003 is controlled by that ECCN.'' BIS made this proposal because of concerns that including that non-600 series ECCN might mislead readers into thinking that the order of review might not apply in this instance. One commenter expressed approval of this change stating that it ''will simplify the Order of Review analysis.'' Further, the commenter believed that the change will have no significant impact on licensing requirements because the technologies of concern in ECCN 9E003 are mirrored in ECCN 9E619.c, which has similar licensing requirements.

Response: BIS agrees and the final rule adopts the removal of that text.

Comment: In the Department of State proposed rule, USML category VIII(h)(7) read: ''Damage or failure-adaptive flight control systems, that do not consist solely of redundant internal circuitry, specially designed for aircraft controlled in [Category VIII of the USML] . . . and specially designed parts and components therefor.'' One commenter on that rule stated that the phrase ''specially designed parts and components therefor'' would effectively re-control on the USML parts that had previously been moved to ECCN 9A610.x.

Response: The Department of State agreed and its final rule removes the phrase ''specially designed parts and components therefor'' from Category VIII(h)(7). As a result, BIS retains control of such parts and components controlled in ECCN 9A610.x. The technology for the development or production of such parts and components is retained under ECCN 9E610. However, this rule revises ECCN 9E610 because of the sensitivity of the technology for the development or production of those parts and components. This final rule makes 9E610 technology (other than ''build-to-print'' technology) required for either the ''development'' or ''production'' of ''specially designed'' parts or components controlled in 9A610.x for damage or failure-adaptive flight control systems controlled in USML Category VIII(h)(7) ineligible for License Exception STA. Currently the technology required for the ''development'' and ''production'' of ''specially designed'' parts or components controlled in 9A610.x or failure-adaptive flight control systems controlled in Category VIII(h)(7) of the USML is controlled in ECCN 9E610.a. Upon its effective date, this rule will specifically enumerate that technology in ECCN 9E610.b, limiting its STA eligibility to ''build to print'' technology.

Comment: Two commenters proposed that a transition plan be published. One commenter noted that implementing the proposed changes would require resources and effort and noted that a transition period would not only permit US applicants to submit the appropriate ITAR export authorizations, but also allow foreign companies to request authorizations from the US applicants. The other commenter recommended one year to implement regulatory changes. It stated that one year will be needed because of the volume of items that will have to be reclassified. This commenter also recommended a three-year period during which EAR licenses, license exceptions and NLR may be used for items moving from the EAR to the ITAR.

Response: The Department of State will be publishing a transition plan.

Technical and Conforming Changes

This rule also updates the text of ECCN 9A610.w to reflect amendments made to that paragraph since the February 9 rule was published by adding references to ''pneumatic'' and ''fly-by-light'' flight control systems (*see* 81 FR 19026, April 4, 2016). These additions were made to align the descriptions in ECCN 9A610.w with the description of such systems in the current Equipment, Software And Technology Annex of the MTCR.

Export Administration Act

Since August 21, 2001, the Export Administration Act of 1979, as amended, has been in lapse. However, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013), and as extended by the Notice of August 4, 2016, 81 FR 52587 (August 8, 2016) has continued the EAR in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222 as amended by Executive Order 13637.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity).

Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

2. Notwithstanding any other provision of law, no person is required to respond to, nor is subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid OMB control number. This final rule would affect one approved collection: Simplified Network Application Processing + System (control number 0694–0088), which includes, among other things, license applications. This collection carries an annual burden hour estimate of 31,833 hours. BIS believes that this final rule will not materially affect the total number of burden hours. This rule makes certain aircraft and parts, components, accessories and attachments that currently are subject to the ITAR subject to the EAR. To the extent that this change results in an increase in the number of export license applications submitted to BIS, there is likely to be a corresponding reduction in the number of license applications submitted to the Department of State, Directorate of Defense Trade Controls. This rule also creates a license requirement to only eight destinations for some aircraft and engine parts and components that currently require a license to all destinations other than Canada. To the extent that this affects the annual burden hours associated this collection, the effect is likely to be a reduction in burden hours. Send comments regarding this burden estimate or any other aspect of this collections of information, including suggestions for reducing the burden, to Jasmeet K. Seehra, Office of Management and Budget, by email at *jseehra@omb.eop.gov* or by fax to (202) 395–7285 and to William Arvin, BIS, at *william.arvin@bis.doc.gov.*

3. This rule does not contain policies with Federalism implications as that term is defined under E.O. 13132.

4. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.,* generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute. Under section 605(b) of the RFA, however, if the head of an agency certifies that a rule will not have a significant impact on a substantial number of small entities, the statute does not require the agency to prepare a regulatory flexibility analysis. Pursuant to section 605(b), the Chief Counsel for Regulation, Department of Commerce, certified to the Chief Counsel for Advocacy, Small Business Administration at the proposed rule stage that this rule would not have a significant impact on a substantial number of small entities. The rationale for that certification is at 81 FR 6793 (February 9, 2016) and is not repeated here. BIS received no comments on the certification. Consequently, BIS has not prepared a final regulatory flexibility analysis.

List of Subjects

15 CFR Part 770

Exports.

15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, parts 770 and 774 of the Export Administration Regulations (15 CFR parts 730–774) are amended as follows:

PART 770–[AMENDED]

■ 1. The authority citation for 15 CFR part 770 continues to read as follows:

Authority: 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 4, 2016, 81 FR 52587 (August 8, 2016).

■ 2. Section 770.2 is amended by adding paragraph (n) to read as follows:

§ 770.2 Item interpretations.

* * * * *

(n) *Interpretation 14: Unfinished ''600 series'' commodities.* Forgings, castings, and other unfinished products, such as extrusions and machined bodies, that have reached a stage in manufacturing where they are clearly identifiable by mechanical properties, material composition, geometry, or function as commodities controlled by any Product Group A (''End Items,'' ''Equipment,'' ''Accessories,'' ''Attachments,'' ''Parts,'' ''Components'' and ''Systems'') ''600 series'' ECCN are controlled in that ''600 series'' ECCN.

PART 774—[AMENDED]

■ 3. The authority citation for 15 CFR part 774 continues to read as follows:

Authority: 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.;* 22 U.S.C. 6004; 42 U.S.C. 2139a; 15 U.S.C. 1824a; 50 U.S.C. 4305; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 4, 2016, 81 FR 52587 (August 8, 2016).

Supplement No. 1 to Part 774—The Commerce Control List

ECCN 0A604—[Amended]

■ 4. In in Supplement No. 1 to part 774, ECCN 0A604, remove Note 1 to 0A604.x and redesignate Note 2 to 0A604.x as Note to 0A604.x.

ECCN 0A614—[Amended]

■ 5. In ECCN 0A614, remove Note 3 to 0A614.

■ 6. In ECCN 3A611, in the ''List of Items Controlled'' section, ''Items'' paragraph, revise paragraph .x and revise paragraph .y, introductory text, to read as follows:

3A611 Military electronics, as follows (see List of Items Controlled).

* * * * *

List of Items Controlled

* * * * *

Items:

* * * * *

x. ''Parts,'' ''components,'' ''accessories,'' and ''attachments'' that are ''specially designed'' for a commodity controlled by this entry or for an article controlled by USML Category XI, and not enumerated or described in any USML category or in any paragraph other than the .x paragraph of another 600 series ECCN or in paragraph .y of this entry.

Note 1 to ECCN 3A611.x: ECCN 3A611.x includes ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' for a radar, telecommunications, acoustic system or equipment or computer ''specially designed'' for military application that are neither controlled in any USML category nor controlled in any paragraph other than the .x paragraph of another ''600 series'' ECCN.

Note 2 to ECCN 3A611.x: ECCN 3A611.x controls ''parts'' and ''components'' ''specially designed'' for underwater sensors or projectors controlled by USML Category XI(c)(12) containing single-crystal lead magnesium niobate lead titanate (PMN–PT) based piezoelectrics.

Note 3 to ECCN 3A611.x: ''Parts,'' ''components,'' ''accessories,'' and ''attachments'' subject to the EAR and within the scope of any 600 series .x entry that are of a type that are or would potentially be for use in or with multiple platforms (*e.g.,* military electronics, military vehicles, and military aircraft) may be classified under 3A611.x.

y. Specific ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' for a commodity subject to control in a ''600 series'' ECCN or a defense article and not elsewhere specified in any paragraph other than the .y paragraph of a ''600 series'' ECCN or the USML as follows, and ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' therefore:

* * * * *

■ 7. In ECCN 8A992, revised the related controls paragraph to read as follows:

8A992 Vessels, marine systems or equipment, not controlled by 8A001 or 8A002, and ''specially designed'' ''parts'' and ''components'' therefor, and marine boilers and ''parts,'' ''components,'' ''accessories,'' and ''attachments'' therefor (see List of Items Controlled).

* * * * *

List of Items Controlled

Related Controls: 1. See also 8A002. 2. Marine gas turbine engines are not controlled in paragraph .g of this entry. See ECCN 9A619 for possible controls on marine gas turbine engines specially designed for a military use. See ECCN 9A002 for possible controls on marine gas turbine engines not specially designed for a military use. Marine gas turbine engines subject to the EAR that are not controlled in ECCNs 9A002 or 9A619 are designated EAR99.

* * * * *

■ 8. Revise ECCN 9A115 to read as follows:

9A115 Apparatus, devices and vehicles, designed or modified for the transport, handling, control, activation and launching of rockets, missiles, and unmanned aerial vehicles capable of achieving a ''range'' equal to or greater than 300 km. (Some of these items are controlled in ECCN 9A610; others are ''subject to the ITAR.'' See 22 CFR parts 120 through 130.)

ECCN 9A604—[Amended]

■ 9. In ECCN 9A604, remove Note 1 to 9A604.x and redesignate Note 2 to 9A604.x as Note to 9A604.x.

■ 10. In ECCN 9A610, revise the ''Control(s)'' table in the ''License Requirements'' section and the ''List of Items Controlled'' section to read as follows:

9A610 Military aircraft and related commodities, other than those enumerated in 9A991.a (see List of Items Controlled).

License Requirements

* * * * *

Control(s)	Country Chart (See Supp. No. 1 to part 738)
NS applies to entire entry except: 9A610.b; parts and components controlled in 9A610.x if being exported or reexported for use in an aircraft controlled in 9A610.b; and 9A610.y.	NS Column 1
RS applies to entire entry except: 9A610.b; parts and components controlled in 9A610.x if being exported or reexported for use in an aircraft controlled in 9A610.b; and 9A610.y.	RS Column 1
MT applies to 9A610.t, .u, .v, and .w.	MT Column 1
AT applies to entire entry	AT Column 1.
UN applies to entire entry except 9A610.y.	See § 746.1(b) for UN controls.

* * * * *

List of Items Controlled

Related Controls: (1) Military aircraft and related articles that are enumerated in USML Category VIII, and technical data (including software) directly related thereto, are subject to the ITAR. (2) See ECCN 0A919 for controls on foreign-made ''military commodities'' that incorporate more than a *de minimis* amount of U.S.-origin ''600 series'' controlled content. (3) See USML Category XIX and ECCN 9A619 for controls on military aircraft gas turbine engines and related items.

Related Definitions: In paragraph .y of this entry, the term 'fluid' includes liquids and gases.

Items: a. 'Military Aircraft' ''specially designed'' for a military use that are not enumerated in USML paragraph VIII(a).

Note 1: For purposes of paragraph .a the term 'military aircraft' means the LM–100J aircraft and any aircraft ''specially designed'' for a military use that are not enumerated in USML paragraph VIII(a). The term includes: Trainer aircraft; cargo aircraft; utility fixed wing aircraft; military helicopters; observation aircraft; military non-expansive balloons and other lighter than air aircraft; and unarmed military aircraft, regardless of origin or designation. Aircraft with modifications made to incorporate safety of flight features or other FAA or NTSB modifications such as transponders and air data recorders are ''unmodified'' for the purposes of this paragraph .a.

Note 2: 9A610.a does not control 'military aircraft' that:

a. Were first manufactured before 1946;

b. Do not incorporate defense articles enumerated or otherwise described on the U.S. Munitions List, unless the items are required to meet safety or airworthiness standards of a Wassenaar Arrangement Participating State; and

c. Do not incorporate weapons enumerated or otherwise described on the U.S. Munitions List, unless inoperable and incapable of being returned to operation.

b. L–100 aircraft manufactured prior to 2013.

c.–d. [Reserved]

e. Mobile aircraft arresting and engagement runway systems for aircraft controlled by either USML Category VIII(a) or ECCN 9A610.a

f. Pressure refueling equipment and equipment that facilitates operations in confined areas, ''specially designed'' for aircraft controlled by either USML paragraph VIII(a) or ECCN 9A610.a.

g. Aircrew life support equipment, aircrew safety equipment and other devices for emergency escape from aircraft controlled by either USML paragraph VIII(a) or ECCN 9A610.a.

h. Parachutes, paragliders, complete parachute canopies, harnesses, platforms, electronic release mechanisms, ''specially designed'' for use with aircraft controlled by either USML paragraph VIII(a) or ECCN 9A610.a, and ''equipment'' ''specially designed'' for military high altitude parachutists, such as suits, special helmets, breathing systems, and navigation equipment.

i. Controlled opening equipment or automatic piloting systems, designed for parachuted loads.

j. Ground effect machines (GEMS), including surface effect machines and air cushion vehicles, ''specially designed'' for use by a military.

k. through s. [Reserved]

t. Composite structures, laminates, and manufactures thereof ''specially designed'' for unmanned aerial vehicles controlled under USML Category VIII(a) with a range equal to or greater than 300 km.

Note to paragraph .t: Composite structures, laminates, and manufactures thereof ''specially designed'' for unmanned aerial vehicles controlled under USML Category VIII(a) with a maximum range less than 300 km are controlled in paragraph .x of this entry.

u. Apparatus and devices ''specially designed'' for the handling, control, activation and non-ship-based launching of UAVs or drones controlled by either USML paragraph VIII(a) or ECCN 9A610.a, and capable of a range equal to or greater than 300 km.

Note to paragraph .u: Apparatus and devices ''specially designed'' for the handling, control, activation and non-ship-based launching of UAVs or drones controlled by either USML paragraph VIII(a) or ECCN 9A610.a with a maximum range less than 300 km are controlled in paragraph .x of this entry.

v. Radar altimeters designed or modified for use in UAVs or drones controlled by either USML paragraph VIII(a) or ECCN 9A610.a., and capable of delivering at least 500 kilograms payload to a range of at least 300 km.

Note to paragraph .v: Radar altimeters designed or modified for use in UAVs or drones controlled by either USML paragraph VIII(a) or ECCN 9A610.a. that are not capable of delivering at least 500 kilograms payload to a range of at least 300 km are controlled in paragraph .x of this entry.

w. Pneumatic hydraulic, mechanical, electro-optical, or electromechanical flight control systems (including fly-by-wire and fly-by-light systems) and attitude control equipment designed or modified for UAVs or drones controlled by either USML paragraph VIII(a) or ECCN 9A610.a., and capable of delivering at least 500 kilograms payload to a range of at least 300 km.

Note to paragraph .w. Pneumatic, hydraulic, mechanical, electro-optical, or electromechanical flight control systems (including fly-by-wire and fly-by-light systems) and attitude control equipment designed or modified for UAVs or drones controlled by either USML paragraph VIII(a) or ECCN 9A610.a., not capable of delivering at least 500 kilograms payload to a range of at least 300 km are controlled in paragraph .x of this entry.

x. ''Parts,'' ''components,'' ''accessories,'' and ''attachments'' that are ''specially designed'' for a commodity enumerated or otherwise described in ECCN 9A610 (except for 9A610.y) or a defense article enumerated or otherwise described in USML Category VIII and not elsewhere specified on the USML or in 9A610.y, 9A619.y, or 3A611.y.

y. Specific ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' for a commodity subject to control in this entry, ECCN 9A619, or for a defense article in USML Categories VIII or XIX and not elsewhere specified in the USML or the CCL, and other aircraft commodities ''specially designed'' for a military use, as follows, and ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' therefor:

y.1. Aircraft tires;

y.2. Analog gauges and indicators;

y.3. Audio selector panels;

y.4. Check valves for hydraulic and pneumatic systems;

y.5. Crew rest equipment;

y.6. Ejection seat mounted survival aids;

y.7. Energy dissipating pads for cargo (for pads made from paper or cardboard);

y.8. Fluid filters and filter assemblies;

y.9. Galleys;

y.10. Fluid hoses, straight and unbent lines (for a commodity subject to control in this entry or defense article in USML Category VIII), and fittings, couplings, clamps (for a commodity subject to control in this entry or defense article in USML Category VIII) and brackets therefor;

y.11. Lavatories;

y.12. Life rafts;

y.13. Magnetic compass, magnetic azimuth detector;

y.14. Medical litter provisions;

y.15. Cockpit or cabin mirrors;

y.16. Passenger seats including palletized seats;

y.17. Potable water storage systems;

y.18. Public address (PA) systems;

y.19. Steel brake wear pads (does not include sintered mix or carbon/carbon materials);

y.20. Underwater locator beacons;

y.21. Urine collection bags/pads/cups/pumps;

y.22. Windshield washer and wiper systems;

y.23. Filtered and unfiltered panel knobs, indicators, switches, buttons, and dials;

y.24. Lead-acid and Nickel-Cadmium batteries;

y.25. Propellers, propeller systems, and propeller blades used with reciprocating engines;

y.26. Fire extinguishers;

y.27. Flame and smoke/CO_2 detectors;

y.28. Map cases;

y.29. 'Military Aircraft' that were first manufactured from 1946 to 1955 that do not incorporate defense articles enumerated or otherwise described on the U.S. Munitions List, unless the items are required to meet safety or airworthiness standards of a Wassenaar Arrangement Participating State; *and* do not incorporate weapons enumerated or otherwise described on the U.S. Munitions List, unless inoperable and incapable of being returned to operation;

y.30. ''Parts,'' ''components,'' ''accessories,'' and ''attachments,'' other than electronic items or navigation equipment, for use in or with a commodity controlled by ECCN 9A610.h;

y.31. Identification plates and nameplates; and

y.32. Fluid manifolds.

■ 11. In ECCN 9A619, the List of Items Controlled section is amended by:

■ a. Revising the ''Related Controls'' paragraph;

■ b. Revising the ''Related Definitions'' paragraph;

■ c. Removing the note that immediately follows paragraph .e in the ''Items'' paragraph;

■ d. Revising paragraph .x in the ''Items'' paragraph; and

■ e. Revising paragraph .y in the ''Items'' paragraph.

The revisions read as follows:

9A619 Military gas turbine engines and related commodities (see List of Items Controlled).

* * * * *

List of Items Controlled

Related Controls: (1) Military gas turbine engines and related articles that are enumerated or otherwise described in USML Category XIX, and technical data (including software) directly related thereto, are subject to the jurisdiction of the International Traffic in Arms Regulations (ITAR). (2) Gas turbine engines designated 501–D22 are controlled in ECCN 9A991.d regardless of the aircraft type into which they will be installed. (3) See ECCN 0A919 for foreign-made ''military commodities'' that incorporate more than a *de minimis* amount of U.S.-origin ''600 series'' controlled content. (4) ''Parts,'' ''components,'' ''accessories,'' and ''attachments'' specified in USML Category XIX(f) are subject to the controls of that paragraph. (5) ''Parts,'' ''components,'' ''accessories,'' and ''attachments'' specified in ECCN 9A619.y are subject to the controls of that paragraph.

Related Definitions: In paragraph .y of this entry, the term 'fluid' includes liquids and gases.

* * * * *

Items:

* * * * *

x. Parts,'' ''components,'' ''accessories,'' and ''attachments'' that are ''specially designed'' for a commodity controlled by this ECCN 9A619 (other than ECCN 9A619.c) or for a defense article enumerated in USML Category XIX and not specified elsewhere on the USML or in ECCN 3A611.y, 9A610.y or 9A619.y.

Note to paragraph .x: ''Parts,'' ''components,'' ''accessories,'' and ''attachments'' specified in USML subcategory XIX(f) are subject to the controls of that paragraph. ''Parts,'' ''components,'' ''accessories,'' and ''attachments'' specified in ECCN 3A611.y, 9A610.y or 9A619.y are subject to the controls of that paragraph.

y. Specific ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' for a commodity subject to control in this entry, ECCN 9A610, or for a defense article in USML Category VIII or Category XIX and not elsewhere specified on the USML or in the CCL, and other commodities, as follows, and ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' therefor:

y.1. Oil tank and reservoirs;

y.2. Oil lines and tubes;

y.3. Fluid hoses, and lines (for a commodity subject to control in this entry or a defense article in USML Category XIX), fittings, couplings, and brackets therefor;

y.4. Fluid filters and filter assemblies;

y.5. Clamps (for a commodity subject to control in this entry or a defense article in USML Category XIX);

y.6. Shims;

y.7. Identification plates and nameplates;

y.8. Fluid manifolds; and

y.9. Check valves for fluid systems.

ECCN 9A620—[Amended]

■ 12. In ECCN 9A620, remove the note to 9A620.b that immediately follows paragraph .x.

■ 13. In ECCN 9B610, revise the ''Related Controls'' paragraph in the List of Items Controlled section to read as follows:

9B610 Test, inspection, and production ''equipment'' and related commodities ''specially designed'' for the ''development'' or ''production'' of commodities enumerated or otherwise described in ECCN 9A610 or USML Category VIII (see List of Items Controlled).

* * * * *

List of Items Controlled

Related Controls: USML Category VIII(h)(1) controls ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' for the aircraft enumerated or otherwise described in Category VIII(h)(1), but does not control the commodities enumerated or otherwise described in ECCN 9B610. USML Category VIII(h)(2)–(28) controls other aircraft ''parts,'' ''components,'' ''accessories,'' ''attachments,'' and ''systems.''

* * * * *

■ 14. In ECCN 9B619, revise the ''Related Controls'' paragraph in the List of Items Controlled section to read as follows:

9B619 Test, inspection, and production ''equipment'' and related commodities ''specially designed'' for the ''development'' or ''production'' of commodities enumerated or otherwise described in ECCN 9A619 or USML Category XIX (see List of Items Controlled).

* * * * *

List of Items Controlled

Related Controls: USML Category XIX(f)(1) controls ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' for the engines described in Category XIX(f)(1), but does not control the commodities enumerated or otherwise described in ECCN 9B619. USML Category XIX(f)(2)–(11) controls other engine ''parts,'' ''components,'' ''accessories,'' ''attachments,'' and ''systems.''

* * * * *

■ 15. In ECCN 9C610, revise the heading, and the ''Items'' paragraph of the ''List of Items Controlled'' section to read as follows:

9C610 Materials ''specially designed'' for commodities controlled by USML Category VIII or ECCN 9A610 and not elsewhere specified in the CCL or the USML (see List of Items Controlled).

* * * * *

List of Items Controlled

* * *

Items: a. Materials not elsewhere specified in the USML or the CCL and ''specially designed'' for commodities enumerated or otherwise described in USML Category VIII or ECCN 9A610 (except 9A610.y).

Note 1: Materials enumerated elsewhere in the CCL, such as in a CCL Category 1 ECCN, are controlled pursuant to controls of the applicable ECCN.

Note 2: Materials ''specially designed'' for both aircraft enumerated in USML Category VIII and aircraft enumerated in ECCN 9A610 are subject to the controls of this ECCN

b. [Reserved]

■ 16. In ECCN 9C619, revise the heading, and the ''Items'' paragraph of the ''List of Items Controlled'' section to read as follows:

9C619 Materials ''specially designed'' for commodities controlled by USML Category XIX or ECCN 9A619 and not elsewhere specified in the CCL or on the USML (see List of Items Controlled).

* * * * *

List of Items Controlled

* * *

Items:

a. Materials not controlled by paragraph .b of this entry and not elsewhere specified in the CCL or on the USML, and ''specially designed'' for commodities enumerated or otherwise described in USML Category XIX or ECCN 9A619 (except 9A619.y).

b. Materials ''specially designed'' for use in certain gas turbine engines, as follows:

b.1. Powders ''specially designed'' for thermal or environmental barrier coating of defense articles enumerated or described in USML Category XIX paragraphs (f)(1)–(f)(4) for engines listed in (f)(1);

b.2. Superalloys (*i.e.,* nickel, cobalt or iron based), used in directionally solidified or single crystal casting, ''specially designed'' for defense articles enumerated or described in USML Category XIX paragraphs (f)(1)–(f)(4) for engines listed in paragraph (f)(1); or

b.3. Imide matrix, metal matrix, or ceramic matrix composite material (*i.e.,* reinforcing fiber combined with a matrix) ''specially designed'' for defense articles enumerated or described in USML Category XIX paragraphs (f)(1)–(f)(4) for engines listed in paragraph (f)(1).

Note 1: Materials enumerated elsewhere in the CCL, such as in a CCL Category 1 ECCN, are controlled pursuant to the controls of the applicable ECCN.

Note 2: Materials described in paragraph .a of this entry that are ''specially designed'' for both an engine enumerated in USML Category XIX and an engine enumerated in ECCN 9A619 are subject to the controls of this ECCN 9C619

Note 3: Materials described in this entry that are or have been used in gas turbine engines in production (*i.e.,* not in development) that are not enumerated or otherwise described on the USML or ECCN 9A619 are not controlled by this entry.

■ 17. In ECCN 9E610, in the ''List of Items Controlled'' section, the ''Items'' paragraph is amended by:

■ a. Removing the word ''or'' from the end of paragraph .b.13;

■ b. Removing the period from the end of paragraph .b.14 and adding in its place a semicolon followed by the word ''or''; and

■ c. Adding paragraph .b.15.

The addition reads as follows.

9E610 Technology ''required'' for the ''development,'' ''production,'' operation, installation, maintenance, repair, overhaul, or refurbishing of military aircraft and related commodities controlled by 9A610, equipment controlled by 9B610, materials controlled by 9C610, or software controlled by 9D610 (see List of Items Controlled).

* * * * *

List of Items Controlled

* * * * *

Items:

* * * * *

b. * * *

b.15. Technology ''required'' for the ''development'' or ''production'' of ''parts'' or ''components'' controlled in 9A610.x and ''specially designed'' for damage or failure-adaptive flight control systems controlled in Category VIII(h)(7) of the USML.

* * * * *

■ 18. In ECCN 9E619, the ''List of Items Controlled'' section is amended by revising the ''Related Controls'' paragraph, and in the ''Items'' paragraph:

■ a. Revising the Note that immediately follows paragraph .a;

■ b. Removing the word ''or'' from the end of paragraph .b.8;

■ c. Removing the period from the end of paragraph .b.9 and adding in its place a semicolon followed by the word ''or''; and

■ d. Adding paragraph b.10.

The revision and addition read as follows:

9E619 ''Technology'' ''required'' for the ''development,'' ''production,'' operation, installation, maintenance, repair, overhaul, or refurbishing of military gas turbine engines and related commodities controlled by 9A619, equipment controlled by 9B619, materials controlled by 9C619, or software controlled by 9D619 (see List of Items Controlled).

* * * * *

List of Items Controlled

Related Controls: Technical data directly related to articles enumerated or otherwise described in USML Category XIX are subject to the control of USML Category XIX(g).

* * * * *

Items:

* * *

Note: ''Build-to-print technology'' ''required'' for the ''production'' of items described in paragraphs b.1 through b.10 of this entry is classified under 9E619.a.

b. * * *

b.10. Materials controlled by ECCN 9C619.b.

Dated: November 8, 2016.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2016–27777 Filed 11–18–16; 8:45 am]

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DEPARTMENT OF STATE

22 CFR Part 121

RIN 1400–AD89

[Public Notice: 9604]

Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Categories VIII and XIX

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: As part of the President's Export Control Reform (ECR) initiative, the Department of State amends the International Traffic in Arms Regulations (ITAR) to revise Categories

VIII (aircraft and related articles) and XIX (gas turbine engines and associated equipment) of the U.S. Munitions List (USML) to describe more precisely the articles warranting control on the USML. The revisions contained in this rule are part of the Department of State's retrospective plan under E.O. 13563.

DATES: This final rule is effective on December 31, 2016.

FOR FURTHER INFORMATION CONTACT: Mr. C. Edward Peartree, Director, Office of Defense Trade Controls Policy, Department of State, telephone (202) 663–2792; email *DDTCPublicComments@state.gov.* ATTN: ITAR Amendment—USML Categories VIII and XIX.

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130). The items subject to the jurisdiction of the ITAR, *i.e.,* ''defense articles,'' are identified on the ITAR's U.S. Munitions List (USML) (22 CFR 121.1). With few exceptions, items not subject to the export control jurisdiction of the ITAR are subject to the jurisdiction of the Export Administration Regulations (''EAR,'' 15 CFR parts 730–774, which includes the Commerce Control List (CCL) in Supplement No. 1 to Part 774), administered by the Bureau of Industry and Security (BIS), U.S. Department of Commerce. Both the ITAR and the EAR impose license requirements on exports and reexports. Items not subject to the ITAR or to the exclusive licensing jurisdiction of any other set of regulations are subject to the EAR.

All references to the USML in this rule are to the list of defense articles controlled for the purpose of export or temporary import pursuant to the ITAR, and not to the defense articles on the USML that are controlled by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for the purpose of permanent import under its regulations. *See* 27 CFR part 447. Pursuant to section 38(a)(1) of the Arms Export Control Act (AECA), all defense articles controlled for export or import are part of the USML under the AECA. The list of defense articles controlled by ATF for the purpose of permanent import is the U.S. Munitions Import List (USMIL). The transfer of defense articles from the ITAR's USML to the EAR's CCL does not affect the list of defense articles controlled on the USMIL.

Revision of Category VIII

This final rule revises USML Category VIII, covering aircraft and related articles. The revisions are undertaken in order to ensure that the category, which was last revised in 2013, is clear, does not inadvertently control items in normal commercial use, accounts for technological developments, and properly implements the national security and foreign policy objectives of the ECR initiative. The Department published a proposed rule for these revisions, as well as the revisions to Category XIX described below, on February 9, 2016 (81 FR 6797).

Paragraph (a) is revised to clarify that the controls for all paragraphs are applicable ''whether manned, unmanned, remotely piloted, or optionally piloted,'' by modifying paragraph (a)(5) to clarify the design feature meriting USML control, and by deleting paragraph (a)(6) and placing it into reserve, because the relevant control is subsumed by revised paragraph (a)(5). Paragraphs (a)(7), (a)(8), and (a)(9) are modified to clarify the respective design features meriting USML control. The text of paragraphs (a)(11) and (a)(13) is deleted and the paragraphs are placed into reserve. Paragraph (a)(14) is modified to exclude L–100 and LM–100J aircraft from the scope of control. Note 2 to paragraph (a) is revised to clarify the definition of the described term.

Paragraph (d) is modified to delete the ''ship-based'' control parameter and to clarify the intent and scope of the control.

Paragraph (e) reflects having been placed into reserve in the final rule published by the Department on October 12, 2016 (81 FR 70340).

Notes 1 and 3 to paragraph (f) are modified to incorporate clarifying language.

Several changes are made to paragraph (h). Paragraph (h)(1) is revised to update the list of subject platforms, and to delete the reference to ''equipment'' because the specific types of equipment that warrant ITAR control are now enumerated separately in paragraph (h)(29). The Note to paragraph (h)(1) is modified to incorporate technical corrections and to enhance the clarity of the note. Paragraph (h)(2) is revised to focus the scope of control on certain rotorcraft gearboxes meeting specific technical parameters, and a note to paragraph (h)(2) is added to clarify certain terminology used therein. Paragraph (h)(4)(ii) is modified to clarify the scope of control. Paragraph (h)(5) is updated to add the words ''On-aircraft'' in order to clarify the scope of control, while paragraph (h)(6) is updated to add the words ''or rocket'' after ''missile.'' Paragraph (h)(7) is modified to clarify the scope of control. Paragraph (h)(8) is modified to clarify the meaning of ''threat-adaptive autonomous flight control systems.'' Paragraph (h)(10) is modified to enhance the clarity of the control text. Paragraph (h)(13) is deleted and placed into reserve. Paragraph (h)(16) is modified to incorporate a technical correction. Paragraph (h)(18) is modified to control parts and components that are specially designed to meet the same performance criteria as the systems identified in the paragraph. Paragraph (h)(19) is modified to remove reference to ECCN 9A610.

Current paragraphs (h)(23) through (h)(26) are placed into reserve, with new controls added as paragraphs (h)(27) through (h)(29). Finally, the note to Category VIII is modified to update the paragraphs of paragraph (h) that are affected, as well as to reflect paragraph (e) having been placed into reserve.

A commenting party expressed concern that the objective of the USML review process, first announced in a Notice of Inquiry on March 2, 2015 (80 FR 11314), is to reconsider or reverse the effect of the ECR initiative. The Department clarifies that the purpose of the USML review process is to review and update the subject USML categories, as needed, to account for technological developments, practical application issues identified by exporters and reexporters, and changes in the military and commercial applications of items affected by the list. The ''positive list'' structure adopted in each of the revised USML categories requires an ongoing process of review in order to ensure that the list is current and reflective of the modern state of the subject technology. This ongoing effort has been anticipated since the start of the ECR initiative and is not intended to reconsider or reverse the effort.

A commenter requested clarification as to why paragraph (h)(2) had been removed from the Note to Category VIII. Paragraph (h)(2) has been revised significantly to control only a class of rotorcraft gearboxes for which there is no current civil application. Given the reduced scope of control in the revised paragraph (h)(2), inclusion in the Note to Category VIII is no longer appropriate.

Three commenting parties recommended that paragraph (a)(5) be deleted, given the proposed reference to ''unmanned'' aircraft in paragraph (a), while an additional commenter suggested that the proposed paragraph (a)(5) was less clear than the existing version of the same paragraph. In light of these comments, the Department modified the paragraph to control only those unmanned aerial vehicles that are specially designed to incorporate a defense article, in order to focus the paragraph on the intended scope of control. The Department disagrees with the commenters recommending deletion of the paragraph, as there is continuing oversight utility in maintaining a clear, enumerated control for unmanned aerial vehicles that are specially designed to incorporate a defense article, particularly in light of the unique considerations for these aircraft as set forth in the Department's policy on unmanned aerial systems.

Two commenters suggested that the proposed revisions to paragraph (a)(7) were less clear than the existing version of the same paragraph, and could potentially capture an overly broad scope of aircraft with intelligence, surveillance, and reconnaissance (ISR) capabilities where such aircraft incorporate a defense article. The Department agreed with these commenters and revised the paragraph to control only those aircraft that are specially designed to incorporate a defense article for the purpose of performing an intelligence, surveillance, and reconnaissance function, in order to better focus the scope of control and exclude certain aircraft that merely incorporate a defense article.

One commenter expressed concern that proposed paragraph (a)(8) would control technical data for electronic warfare or command, control, and communication aircraft that simply incorporated a defense article, while another party requested clarification of these terms as well as the significant military equipment (SME) designation for this paragraph. The Department notes that command, control, and communication systems are currently designated as SME in USML Category XI, so analogous treatment is appropriate in this paragraph. While the Department has not defined the referenced terms, as there were no examples provided of demonstrated uncertainty in the regulated community, the scope of the paragraph has been revised to control only those referenced aircraft types that are specially designed to incorporate a defense article for the purpose of performing a referenced function.

A commenting party recommended the replacement of each instance of the words ''capable of'' with ''equipped to'' or ''designed for,'' as appropriate in the context of the paragraph at issue. The Department reviewed each paragraph in which these words appeared and made the appropriate revisions where the paragraph did not otherwise provide technical parameters or performance criteria that sufficiently constrained and identified the class of articles subject to control.

Three commenters suggested that paragraph (a)(14) be revised to limit the scope of control to aircraft with uniquely military capabilities, to the exclusion of aircraft platforms such as the L–100 and LM–100J. One commenter asserted that the systems and functions that make the C–130J a sophisticated military platform are removed on the LM–100J, and that militarization of the latter platform would be very difficult. In response to these comments, the Department revised paragraph (a)(14) to exclude the L–100 and LM–100J aircraft.

A commenting party requested clarification regarding the classification of parts and components that are not enumerated or otherwise described on the USML, and are common to the C–130 and the L–100 aircraft. As with all parts and components classification concerns, the commenter is advised to follow the standard order of review guidance provided on the DDTC Web site (*see http://pmddtc.state.gov/faqs/ecr.html#b*). Where an item is described in multiple entries, an enumerated entry takes precedence over an entry controlling the item by virtue of a specially designed catch-all. The exception to this rule is where a SME entry is involved. In all situations, a SME entry will take precedence over a non-SME entry. If, through the order of review, one determines a particular item is not specifically enumerated in the USML, it may still be controlled by virtue of its parts and components, which are caught via a catch-all. For example, a part or component of an airborne radar system specially designed for the F–35 may not be enumerated or captured in USML Category XI but will be controlled under the specially designed catch-all of Category VIII(h)(1). If the article does not appear to fall under any USML paragraph or paragraph, consult the EAR to complete the classification inquiry.

A commenter recommended the deletion of paragraph (a)(15)(ii), based on the observation that paragraphs (a)(1) through (a)(14) do not specify whether the subject aircraft is of U.S. or foreign origin. The Department notes that paragraph (a)(15)(ii) follows paragraph (a)(15)(i), which captures aircraft not otherwise enumerated in paragraph (a) but bearing any enumerated military designation. Since foreign-origin aircraft would not bear a U.S. military designation, paragraph (a)(15)(ii) exists to capture the foreign equivalents of the U.S.-origin aircraft controlled by paragraph (a)(15)(i).

One commenting party recommended a revision of paragraph (d) to limit its scope to launching and recovery equipment for aircraft controlled in paragraph (a) that meet a minimum weight threshold, so as to exclude small UAVs. The Department disagreed with this recommendation, noting that the paragraph controls only launching and recovery equipment that is specially designed to allow a subject aircraft to land on a vessel described in Category VI(a)–(c). This language controls a sufficiently narrow class of aircraft and adequately excludes many small UAV platforms.

A commenter expressed concern regarding the removal of the word ''equipment'' from paragraph (h)(1), as it potentially confuses the jurisdiction of such equipment. To clarify the scope of controlled equipment and avoid a perception that equipment designed for aircraft enumerated in paragraph (h)(1) is *per se* controlled in the same paragraph, the Department created proposed paragraph (h)(30), which appears in this final rule as paragraph (h)(29), to specify the specific types of equipment that warrant USML control.

A commenting party recommended the exclusion from paragraph (h)(1) of those parts identified in ECCNs 9A610.y or 9A619.y. The Department disagreed with this recommendation. The structure of CCL controls is distinguishable from those in the USML, with the CCL utilizing ''reasons for control'' and country licensing policies that are not available under the ITAR or AECA. As such, provisions from the CCL cannot easily be adopted for the purposes of the USML. Given the unique policy considerations applicable to the enumerated aircraft in paragraph (h)(1) and their low observable/counter low observable capabilities, the Department declines to exclude classes of parts and components for these highly sensitive platforms.

One commenter recommended that paragraph (h)(2) be revised to control only those rotorcraft gearboxes that are qualified to a particular military standard. The Department disagreed with this comment, because military standards are not developed and published to advance export control-related objectives and may be revised frequently for reasons unrelated to export controls, which may additionally reduce the clarity of the USML through successive iterations of revisions to these standards.

Two commenters asserted that individual performance criteria specific in paragraph (h)(2) are not uniquely military in nature. The Department notes that both criteria are required for control, and it is the combination of the two specified criteria that makes the controlled article militarily significant. No examples were provided of commercial items capable of meeting both performance criteria.

A commenter suggested that tail boom folding systems controlled under paragraph (h)(3) could be useful in civil applications to optimize the use of space. The Department did not revise the control because the commenter did not provide an example of a current civil application for the articles controlled in this paragraph.

A commenter recommended that paragraph (h)(5) be reviewed in concert with ECCN 9A610.e to ensure that the two entries did not overlap. The Department reviewed the entries and made no change to the paragraph, as it is sufficiently limited in scope to on-aircraft arresting gear and excludes arresting gear used on the ground.

One commenting party recommended that paragraph (h)(6) be revised to control ''rocket launchers'' in addition to ''missile launchers,'' and further recommended criteria to exclude from control certain airborne UAV launching capabilities. The Department agreed with the addition of ''rocket launchers'' and revised the paragraph accordingly. However, the Department disagreed with the recommended airborne launching criteria, as the ability to deploy a UAV from an aircraft in flight is a current military capability.

A commenting party suggested that the Department had not offered a sufficient rationale to move to the USML specially designed parts and components for the systems controlled in paragraph (h)(7). The Department agreed with this comment and deleted the proposed addition. The disposition of the relevant parts and components will be addressed in the Department of Commerce's companion rule.

A commenting party recommended that paragraph (h)(8) be merged with paragraph (h)(12), in order to create a single paragraph for flight control systems that excludes commercial UAV ''sense-and-avoid'' capabilities. The Department observes that the ability of the subject UAVs to ''avoid collisions'' is only one aspect of the control parameter, which also requires the capability to ''stay together'' by virtue of the subject flight control system. No example has been presented of a commercial UAV flight control system that provides the capability for multiple UAVs to both ''avoid collisions'' and ''stay together.'' Accordingly, the Department did not revise the paragraph.

One commenter suggested that paragraph (h)(10) include a note, similar to the Note to Category XI(a)(3), indicating that the paragraph does not control radio altimeter equipment conforming to Federal Aviation Administration TSO–C87. The Department did not add this note to paragraph (h)(10), because commercial altimeters conforming to this standard would not possess either of the low probability of intercept capabilities described in the paragraph. Since current commercial altimeters cannot meet the criteria of paragraph (h)(10), it is not necessary to include a note that would impact only these commercial items.

Three commenting parties suggested that the Department had not offered a sufficient rationale to move to the USML specially designed parts and components for the systems controlled in paragraph (h)(18). The Department partially agreed with this comment and revised the proposed addition. The only parts and components added to paragraph (h)(18) are those that are specially designed to function after impact of a 7.62 mm or larger projectile. This is the same criterion that applies to the drive systems and flight control systems subject to control under this paragraph; thus, this paragraph unifies the articles subject to control under a common parameter of military criticality.

Two commenters recommended revisions to enhance the clarity of paragraph (h)(20). This paragraph pertains to classified defense articles and classified information, and replicates the structure of similar entries in other revised USML categories that are outside of the scope of this rule. To maintain conformity with those entries, the Department has noted these commenters' recommendations and will reconsider them in the context of a later review of all USML entries relating to classified defense articles and classified information.

Four commenting parties asserted that the proposed paragraph (h)(27) did not control articles providing a critical military advantage, would control variable speed gearboxes in commercial use, or would otherwise limit commercial development utilizing such technology. The Department notes that former paragraph (h)(2), prior to the revisions set forth in this rule, controlled ''variable speed gearboxes'' generally. Accordingly, the proposed paragraph (h)(27) constituted a reduction in the range of variable speed gearboxes subject to the ITAR to those employed in next-generation military technology. In light of the comments received, the Department has further refined paragraph (h)(27) to clarify the meaning of ''variable speed gearbox,'' as well as to articulate the varying output speed currently in use in military applications.

A commenting party observed that the proposed paragraph (h)(28) would capture dual-use electrical power or thermal management systems used with Category XIX engines. The Department agreed with this comment and revised the paragraph to control electrical power or thermal management systems specially designed for an engine controlled in Category XIX.

A commenter requested clarification that the use of the term ''pound'' in paragraph (h)(28)(i) refers only to the generator and not the controller. The Department updated the paragraph to clarify that the referenced threshold excludes the mass of the controller for the purpose of calculating the gravimetric power density. The commenter additionally requested clarification as to whether the threshold reflects the total heat exchanger capacity or a single heat exchanger. The Department updated the paragraph to address the concerns expressed in the comment.

The same commenter asserted that paragraph (h)(28)(iii) lacked clarity and should be deleted. The Department agreed with this comment and deleted the paragraph. Consequentially, proposed paragraph (h)(28)(iv) now appears in this final rule as paragraph (h)(28)(iii). Additionally, the commenter requested clarification regarding the conditions for measuring the threshold in proposed paragraph (h)(28)(iv). The Department did not insert additional criteria regarding measurement conditions because the paragraph as drafted describes the threshold for ITAR control at a sufficient level of granularity.

A commenter proposed revisions to proposed paragraph (h)(29) to better articulate the scope of software to be controlled. A second commenter recommended deletion of the paragraph, since algorithms and software are already controlled as technical data. The Department agreed with the second commenter and deleted the proposed paragraph, having determined that the subject software is already controlled under paragraph (i).

Three commenters suggested that proposed paragraph (h)(30) would result in expense to industry with questionable regulatory benefit, and would require the re-review of certain parts and components to determine whether classification under the new paragraph is appropriate.

The Department notes that Category VIII was among the first two categories to undergo revision pursuant to the ECR initiative, a primary goal of which was to create a ''positive list'' that would inevitably require periodic revisions to keep reflective of the current state of technology. The experience of industry with the earliest revised categories, as well as the U.S. government in enforcing the regulations, has identified areas in which adjustments to Categories VIII and XIX were necessary to best articulate the articles subject to control.

The former treatment of equipment in paragraph (h)(1) potentially created the impression that equipment for enumerated aircraft was broadly controlled under that paragraph. For additional clarity, a newly-created paragraph, now found at (h)(29), enumerates certain types of equipment that merit ITAR control. While the Department's review considered in all cases the potential impact to industry in revising aspects of these categories, the primary standard of review was the ''critical military or intelligence advantage'' standard set forth in ITAR § 120.3(b). As a general principle, where migration of items from the CCL to the USML was considered, the Department sought first to accommodate the item in a revised ECCN. The articles that newly appear on or have returned to the USML in this rule are those that constitute or are specially designed for next-generation technology and thus satisfy ITAR § 120.3. In response to comments received, the Department revised the paragraph to better articulate the specific types of equipment that meet this standard.

Finally, a commenter recommended replacing the words ''technical data'' in paragraph (x) with ''technology,'' to align the text with other revised categories and utilize the appropriate EAR terminology. The Department agreed and made the recommended change.

Revision of Category XIX

This final rule revises USML Category XIX, covering gas turbine engines. As with USML Category VIII, the revisions are undertaken in order to ensure that the category is clear, does not inadvertently control items in normal commercial use, accounts for technological developments, and properly implements the national security and foreign policy objectives of the ECR initiative.

Paragraph (a) is modified to clarify the scope of controlled engines and to incorporate technical corrections. Paragraph (b)(1) is revised to update the performance criteria meriting control, while paragraph (b)(2) is revised to clarify the specific power threshold specified therein.

Paragraph (c) is modified to incorporate conforming and technical changes and to make clear that the paragraph applies only to gas turbine engines, while paragraph (d) is modified to update the list of subject engines. The Note to paragraph (e) is modified to incorporate a conforming change.

Several changes are included within paragraph (f). Paragraph (f)(1) is modified to incorporate technical corrections and to update the list of subject engines. Paragraph (f)(2) introduces additional text to clarify the scope of controlled hot section components, and to reorganize the text according to the nature of the articles. New controls are included in paragraphs (f)(7) through (f)(12).

A commenter asserted that the PT6C–67A, a commercial model, would exceed the threshold proposed in paragraph (b)(1). In response to this comment, the Department increased the relevant threshold to 2000 mechanical shp (1491 kW).

Three commenting parties recommended clarification regarding the specific power threshold set forth in paragraph (b)(2). The Department agreed with these commenters and revised the relevant language to include a unit of measurement for the specific power threshold and maximum takeoff shaft horsepower. The Department further notes that given the additional modifications to paragraph (b)(2) described below, and the requirement that an engine must meet all of the criteria of paragraph (b)(2) to be subject to ITAR control, the revised paragraph should not pose a risk of capturing next-generation commercial engine models.

Two commenters asserted that the term ''armament gas'' in paragraph (b)(2) is unclear and requested a definition. The Department disagreed with the commenters because the term can be interpreted based on the plain meaning of the words ''armament gas ingestion''—that is, the term describes an engine that is specially designed to ingest gas released from armaments.

Three commenting parties requested clarification regarding the term ''transient maneuvers'' in paragraph (b)(2), and requested revision to capture only maneuvers that are unique to military scenarios. The Department agreed with these comments and revised the parameter to capture non-civil transient maneuvers.

Three commenting parties suggested that the phrase ''controlled in this category'' in paragraph (c) be revised to read ''controlled in Category VIII.'' The Department partially agreed and revised the phrase to read ''controlled in this subchapter.''

A commenter recommended the removal of the GE38 engine from paragraph (d), indicating that it is a marketing name that was used during the development of the T408 and will not be used in production. The Department agrees with this observation but also notes that GE38 models remain in use in test aircraft. Accordingly, the GE38 reference will remain in paragraph (d) while such engines are still in use.

One commenter recommended the removal of the MT7 engine from paragraph (d), arguing that it is a derivative of the AE1107C and that oil sump sealing is being designed out of the model. While the comment appears to describe a design modification that has not yet occurred, the Department further notes that the subject engine is unique to a destroyer platform. For these reasons, the MT7 was retained in paragraph (d).

The Department has removed the TF60 engine from paragraph (d) in response to a public comment that recommended its removal.

A commenter questioned whether the word ''systems'' in paragraph (e) should be interpreted to also indicate controls of parts and components thereof. The Department confirms that paragraph (e) is limited to specified systems and includes no reference to ''parts and components thereof''; accordingly, parts and components thereof are not controlled under paragraph (e).

Two comments asserted, with respect to paragraph (f) as well as several paragraphs thereof, that materials should not be controlled in this category because Category XIII is intended to contain all materials entries. The Department disagreed in part with these comments. Where the materials at issue pertain only to a particular class of defense articles that are controlled in a single subcategory—as with these materials relevant only to gas turbine engines controlled in Category XIX—there is little utility in requiring the reader to review multiple USML categories for articles of potential relevance. Were these materials of broad applicability for a variety of defense articles controlled under more than one USML category, the Department would locate the relevant USML entries in Category XIII. However, in this case, ECCN 9C619 remains the appropriate category for the materials described in the proposed rule. The companion rule the Commerce Department has published explains the new licensing policies pertaining to such materials. No new materials controls are added to Category XIX.

Two commenting parties recommended the exclusion from paragraph (f)(1) of those parts identified in ECCNs 9A610.y or 9A619.y. The Department disagreed with this comment for reasons similar to those explained above in the context of a similar comment on Category VIII(h)(1), regarding the different structures and objectives of CCL ECCNs as well as the national security interest in retaining control over the parts and components of engines with evolving or next-generation applications.

One commenter expressed concern regarding the removal of the word ''equipment'' from paragraph (f)(1). As with Category VIII(h)(1), the word was removed to avoid the impression that all equipment, including production equipment, relevant to the enumerated aircraft was subject to control under this paragraph. The Department has created a new paragraph (f)(12), which appeared in the proposed rule as proposed paragraph (f)(16), to enumerate certain types of equipment that merit control.

Three commenters requested clarification of the word ''actively'' in paragraph (f)(2), and requested the addition of a definition. The Department agreed that the term, which first appeared in the proposed rule, did not improve the clarity of the paragraph and deleted each instance of the term.

A commenting party recommended the reorganization of paragraph (f)(2) to refer to ''intermediate pressure turbine blades'' after ''high pressure turbine blades'' and before ''low pressure turbine blades.'' The Department agreed and revised the paragraph accordingly.

A commenting party expressed difficulty interpreting the meaning of ''engine monitoring systems'' in paragraph (f)(5) and suggested that a definition of the term might be beneficial. The Department disagreed with the comment because the term can be sufficiently understood without a new definition, given the existing definition of ''system'' set forth in ITAR § 120.45(g).

Four parties commented generally on the new paragraphs that appeared in the proposed rule as (f)(7) through (f)(16), arguing that USML control of the subject articles will result in expense to industry by requiring reclassification of articles previously subject to the EAR. As with Category VIII, described above, Category XIX was among the first two categories to undergo revision pursuant to the ECR initiative, a primary goal of which was to create a ''positive list'' that would inevitably require periodic revisions to keep reflective of the current state of technology. The experience of industry with the earliest revised categories, as well as the U.S. government in enforcing the regulations, has identified areas in which adjustments to Categories VIII and XIX were necessary to best articulate the articles subject to control.

While the Department's review considered in all cases the potential impact to industry in revising aspects of these categories, the primary standard of review was the ''critical military or intelligence advantage'' standard set forth in ITAR § 120.3(b). As a general principle, where a migration of items from the CCL to the USML was considered, the Department sought first to accommodate the item in a revised ECCN. The articles that nevertheless appear in new USML entries in this rule constitute or are specially designed for next-generation technology and thus satisfy ITAR § 120.3.

The Department disagrees with the commenters' characterization of proposed paragraph (f)(16), now appearing as paragraph (f)(12), which controls certain enumerated types of equipment. Since ''equipment'' was referenced generally in the previous iteration of paragraph (f), the objective of this addition is to better clarify the equipment subject to ITAR control. With respect to the remaining proposed paragraphs, the Department applied this standard and determined that proposed paragraphs (f)(7), (f)(13), (f)(14), and (f)(15) were not necessary for inclusion in the USML. Accordingly, these proposed paragraphs have been deleted. The considerations that prompted the addition of proposed paragraph (f)(7) are adequately addressed through paragraph (g), while the remaining deleted proposed entries will be addressed by the Department of Commerce in ECCN 9C619.

The Department retained proposed paragraph (f)(8), now appearing in the category as paragraph (f)(7), because the referenced equipment allows for the production of gas turbine engines and parts and components that offer a critical military advantage.

Among the retained new paragraphs and in response to public comments, the Department revised proposed paragraphs (f)(9) through (f)(12)—now appearing as paragraphs (f)(8) through (f)(11)—to reference only systems specially designed for gas turbine engines controlled in Category XIX, in order to avoid a chilling effect on potential commercial applications of these technologies.

The Department revised proposed paragraph (f)(16), now appearing in this final rule as paragraph (f)(12), to enumerate certain types of equipment that is specially designed for a defense article described in paragraph (f)(1).

Finally, a commenter recommended replacing the words ''technical data'' in paragraph (x) with ''technology,'' to align the text with other revised categories and utilize the appropriate EAR terminology. The Department agreed and made the recommended change.

Regulatory Findings

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from sections 553 (Rulemaking) and 554 (Adjudications) of the Administrative Procedure Act (APA). Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department published this rule as a proposed rule (81 FR 6797) with a 45-day provision for public comment and without prejudice to its determination that controlling the import and export of defense services is a foreign affairs function.

Regulatory Flexibility Act

Since this rule is exempt from the rulemaking provisions of 5 U.S.C. 553, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This amendment does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This amendment has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This amendment will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this amendment.

Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988

The Department of State has reviewed the amendment in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this rulemaking.

Paperwork Reduction Act

Following is a listing of approved collections that will be affected by revision of the U.S. Munitions List (USML) and the Commerce Control List pursuant to the President's Export Control Reform (ECR) initiative. This rule continues the implementation of ECR. The list of collections pertains to revision of the USML in its entirety, not only to the categories published in this rule. The Department is not proposing or making changes to these collections in this rule. The information collections impacted by the ECR initiative are as follows:

(1) Statement of Registration, DS–2032, OMB No. 1405–0002.

(2) Application/License for Permanent Export of Unclassified Defense Articles and Related Unclassified Technical Data, DSP–5, OMB No. 1405–0003.

(3) Application/License for Temporary Import of Unclassified Defense Articles, DSP–61, OMB No. 1405–0013.

(4) Application/License for Temporary Export of Unclassified Defense Articles, DSP–73, OMB No. 1405–0023.

(5) Application for Amendment to License for Export or Import of Classified or Unclassified Defense Articles and Related Technical Data, DSP–6, –62, –74, –119, OMB No. 1405–0092.

(6) Request for Approval of Manufacturing License Agreements, Technical Assistance Agreements, and Other Agreements, DSP–5, OMB No. 1405–0093.

(7) Maintenance of Records by Registrants, OMB No. 1405–0111.

List of Subjects in 22 CFR Part 121

Arms and munitions, Exports.

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, part 121 is amended as follows:

PART 121—THE UNITED STATES MUNITIONS LIST

■ 1. The authority citation for part 121 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920; Section 1261, Pub. L. 112–239; E.O. 13637, 78 FR 16129.

■ 2. Section 121.1 is amended by revising U.S. Munitions List Categories VIII and XIX to read as follows:

§ 121.1 The United States Munitions List.

* * * * *

Category VIII—Aircraft and Related Articles

(a) Aircraft, whether manned, unmanned, remotely piloted, or optionally piloted, as follows (MT if the aircraft, excluding manned aircraft, has a range equal to or greater than 300 km):

* (1) Bombers;

* (2) Fighters, fighter bombers, and fixed-wing attack aircraft;

* (3) Turbofan- or turbojet-powered trainers used to train pilots for fighter, attack, or bomber aircraft;

* (4) Attack helicopters;

* (5) Unmanned aerial vehicles (UAVs) specially designed to incorporate a defense article;

* (6) [Reserved]

* (7) Aircraft specially designed to incorporate a defense article for the purpose of performing an intelligence, surveillance, and reconnaissance function;

* (8) Aircraft specially designed to incorporate a defense article for the purpose of performing an electronic warfare function; airborne warning and control aircraft; or aircraft specially designed to incorporate a defense article for the purpose of performing a command, control, and communications function;

(9) Aircraft specially designed to incorporate a defense article for the purpose of performing an air refueling function;

(10) Target drones;

(11) [Reserved]

(12) Aircraft capable of being refueled in-flight including hover-in-flight refueling (HIFR);

(13) [Reserved]

(14) Aircraft with a roll-on/roll-off ramp, capable of airlifting payloads over 35,000 lbs. to ranges over 2,000 nm without being refueled in-flight, and landing onto short or unimproved airfields, other than L–100 and LM–100J aircraft;

* (15) Aircraft not enumerated in paragraphs (a)(1) through (a)(14) as follows:

(i) U.S.-origin aircraft that bear an original military designation of A, B, E, F, K, M, P, R, or S; or

(ii) Foreign-origin aircraft specially designed to provide functions equivalent to those of the aircraft listed in paragraph (a)(15)(i) of this category; or

(16) Aircraft that are armed or are specially designed to be used as a platform to deliver munitions or otherwise destroy targets (*e.g.,* firing lasers, launching rockets, firing missiles, dropping bombs, or strafing);

Note 1 to paragraph (a): Aircraft specially designed for military applications that are not identified in paragraph (a) of this section are subject to the EAR and classified as ECCN 9A610, including any model of unarmed military aircraft manufactured prior to 1956, regardless of origin or designation, and unmodified since manufacture. Aircraft with modifications made to incorporate safety of flight features or other FAA or NTSB modifications such as transponders and air data recorders are considered ''unmodified'' for the purposes of this paragraph.

Note 2 to paragraph (a): ''Range'' is the maximum distance that the specified aircraft system is capable of traveling in the mode of stable flight as measured by the projection of its trajectory over the surface of the Earth. The maximum capability based on the design characteristics of the system, when fully loaded with fuel or propellant, will be taken into consideration in determining range. The range for aircraft systems will be determined independently of any external factors such as operational restrictions, limitations imposed by telemetry, data links, or other external constraints. For aircraft systems, the range will be determined for a one-way distance using the most fuel-efficient flight profile (*e.g.,* cruise speed and altitude), assuming International Civil Aviation Organization (ICAO) standard atmosphere with zero wind, but with no fuel reserve.

(b)–(c) [Reserved]

(d) Launching and recovery equipment specially designed to allow an aircraft described in paragraph (a) of this category to take off or land on a vessel described in Category VI paragraphs (a) through (c) (MT if the launching and recovery equipment is for an aircraft, excluding manned aircraft, that has a range equal to or greater than 300 km).

Note to paragraph (d): For the definition of ''range,'' see note to paragraph (a) of this category.

(e) [Reserved]

(f) Developmental aircraft funded by the Department of Defense via contract or other funding authorization, and specially designed parts, components, accessories, and attachments therefor.

Note 1 to paragraph (f): This paragraph does not control aircraft and specially designed parts, components, accessories, and attachments therefor (a) in production; (b) determined to be subject to the EAR via a commodity jurisdiction determination (see § 120.4 of this subchapter), or (c) identified in the relevant Department of Defense contract or other funding authorization as being developed for both civil and military applications.

Note 2 to paragraph (f): Note 1 does not apply to defense articles enumerated on the U.S. Munitions List, whether in production or development.

Note 3 to paragraph (f): This paragraph is applicable only to those contracts, other funding authorizations, or modifications initiating development of a new defense article that are dated April 16, 2014, or later.

(g) [Reserved]

(h) Parts, components, accessories, attachments, associated equipment and systems, as follows:

(1) Parts, components, accessories, and attachments specially designed for the following U.S.-origin aircraft: The B–1B, B–2, B–21, F–15SE, F/A–18 E/F, EA–18G, F–22, F–35, and future variants thereof; or the F–117 or U.S. Government technology demonstrators. Parts, components, accessories, and attachments of the F–15SE and F/A–18 E/F that are common to earlier models of these aircraft, unless listed in paragraph (h) of this category, are subject to the EAR;

Note to paragraph (h)(1): This paragraph does not control parts, components, accessories, and attachments that are common to aircraft described in paragraph (a) of this category but not identified in paragraph (h)(1), and those identified in paragraph (h)(1). For example, when applying § 120.41(b)(3), a part common to only the F–16 and F–35 is not specially designed for purposes of this paragraph. A part common to only the F–22 and F–35—two aircraft models identified in paragraph (h)(1)—is specially designed for purposes of this paragraph, unless one of the other paragraphs is applicable under § 120.41(b) of this subchapter.

(2) Rotorcraft gearboxes with internal pitch line velocities exceeding 20,000 feet per minute and able to operate 30 minutes with loss of lubrication without an emergency or auxiliary lubrication system, and specially designed parts and components therefor;

Note to paragraph (h)(2): Loss of lubrication means a situation where oil/lubrication is mostly or completely lost from a transmission/gearbox such that only a residual coating remains due to the lubrication system failure.

(3) Tail boom folding systems, stabilator folding systems or automatic rotor blade folding systems, and specially designed parts and components therefor;

(4) Wing folding systems, and specially designed parts and components therefor, for:

(i) Aircraft powered by power plants controlled under USML Category IV(d); or

(ii) Aircraft with any of the following characteristics and powered by gas turbine engines:

(A) The portion of the wing outboard of the wing fold is required for sustained flight;

(B) Fuel can be stored outboard of the wing fold;

(C) Control surfaces are outboard of the wing fold;

(D) Hard points are outboard of the wing fold;

(E) Hard points inboard of the wing fold allow for in-flight ejection; or

(F) The aircraft is designed to withstand maximum vertical maneuvering accelerations greater than +3.5g/ − 1.5g.

(5) On-aircraft arresting gear (*e.g.,* tail hooks and drag chutes) and specially designed parts and components therefor;

(6) Bomb racks, missile or rocket launchers, missile rails, weapon pylons, pylon-to-launcher adapters, unmanned aerial vehicle (UAV) airborne launching systems, external stores support systems for ordnance or weapons, and specially designed parts and components therefor (MT if the bomb rack, missile launcher, missile rail, weapon pylon, pylon-to-launcher adapter, UAV airborne launching system, or external stores support system is for an aircraft, excluding manned aircraft, or missile that has a ''range'' equal to or greater than 300 km);

(7) Damage or failure-adaptive flight control systems, that do not consist solely of redundant internal circuitry, specially designed for aircraft controlled in this category;

(8) Threat-adaptive autonomous flight control systems, where a ''threat-adaptive autonomous flight control system'' is a flight control system that, without input from the operator or pilot, adjusts the aircraft control or flight path to minimize risk caused by hostile threats;

(9) Non-surface-based flight control systems and effectors (*e.g.,* thrust vectoring from gas ports other than main engine thrust vector);

(10) Radar altimeters with output power management LPI (low probability of intercept) or signal modulation (*i.e.,* frequency hopping, chirping, direct sequence-spectrum spreading) LPI capabilities (MT if for an aircraft, excluding manned aircraft, or missile that has a ''range'' equal to or greater than 300 km);

(11) Air-to-air refueling systems and hover-in-flight refueling (HIFR) systems, and specially designed parts and components therefor;

(12) Unmanned aerial vehicle (UAV) flight control systems and vehicle management systems with swarming capability (*i.e.,* UAVs interact with each other to avoid collisions and stay together, or, if weaponized, coordinate targeting) (MT if for an aircraft, excluding manned aircraft, or missile that has a ''range'' equal to or greater than 300 km);

(13) [Reserved]

(14) Lift fans, clutches, and roll posts for short take-off, vertical landing (STOVL) aircraft and specially designed parts and components for such lift fans and roll posts;

(15) Integrated helmets incorporating optical sights or slewing devices, which include the ability to aim, launch, track, or manage munitions (*e.g.,* Helmet Mounted Cueing Systems, Joint Helmet Mounted Cueing Systems (JHMCS), Helmet Mounted Displays, Display and Sight Helmets (DASH)), and specially designed parts, components, accessories, and attachments therefor;

(16) Fire control computers, stores management systems, armaments control processors, and aircraft-weapon interface units and computers (*e.g.,* AGM–88 HARM Aircraft Launcher Interface Computer (ALIC));

(17) Mission computers, vehicle management computers, and integrated core processers specially designed for aircraft controlled in this category;

(18) Drive systems, flight control systems, and parts and components therefor, specially designed to function after impact of a 7.62mm or larger projectile;

(19) Thrust reversers specially designed to be deployed in flight for aircraft controlled in this category;

* (20) Any part, component, accessory, attachment, equipment, or system that:

(i) Is classified;

(ii) Contains classified software directly related to defense articles in this subchapter or 600 series items subject to the EAR; or

(iii) Is being developed using classified information.

Note to paragraph (h)(20): Classified means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or international organization;

(21)–(26) [Reserved]

(27) Variable speed gearboxes, where a ''variable speed gearbox'' has the ability to vary the gearbox output speed by mechanical means within the gearbox while the gearbox input speed from the engine or other source is constant, and is capable of varying output speed by 20% or greater and providing power to rotors, proprotors, propellers, propfans, or liftfans; and specially designed parts and components therefor;

(28) Electrical power or thermal management systems specially designed for an engine controlled in Category XIX and having any of the following:

(i) Electrical power generators that provide greater than 300kW of electrical power (per generator) with gravimetric power densities exceeding 2kW/pound (excluding the mass of the controller for the purpose of calculating the gravimetric power density);

(ii) Heat exchangers that exchange 60 kW/K-m^3 or 1 kW/K of heat or greater into the gas turbine engine flow path; or

(iii) Direct-cooling thermal electronic package heat exchangers that transfer 20kW of heat or greater at 100W/cm^2 or greater.

(29) Any of the following equipment if specially designed for a defense article described in paragraph (h)(1):

(i) Scale test models;

(ii) Full scale iron bird ground rigs used to test major aircraft systems; or

(iii) Jigs, locating fixtures, templates, gauges, molds, dies, or caul plates.

(i) Technical data (see § 120.10 of this subchapter) and defense services (see § 120.9 of this subchapter) directly related to the defense articles described in paragraphs (a) through (h) of this category and classified technical data directly related to items controlled in ECCNs 9A610, 9B610, 9C610, and 9D610 and defense services using classified technical data. (See § 125.4 of this subchapter for exemptions.) (MT for technical data and defense services related to articles designated as such.)

(j)–(w) [Reserved]

(x) Commodities, software, and technology subject to the EAR (see § 120.42 of this subchapter) used in or with defense articles controlled in this category.

Note to paragraph (x): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technology subject to the EAR (see § 123.1(b) of this subchapter).

Note: Parts, components, accessories, and attachments in paragraphs (h)(3)–(5), (7), (14), (17), or (19) are licensed by the Department of Commerce when incorporated in an aircraft subject to the EAR and classified under ECCN 9A610. Replacement systems, parts, components, accessories and attachments are subject to the controls of the ITAR.

* * * * *

Category XIX—Gas Turbine Engines and Associated Equipment

* (a) Turbofan and Turbojet engines (including those that are technology demonstrators, developmental engines, or variable cycle engines) capable of 15,000 lbf (66.7 kN) of thrust or greater that have any of the following:

(1) With or specially designed for thrust augmentation (afterburner);

(2) Thrust or exhaust nozzle vectoring;

(3) Parts or components controlled in paragraph (f)(6) of this category;

(4) Specially designed for sustained 30 second inverted flight or negative g maneuver; or

(5) Specially designed for high power extraction (greater than 50 percent of engine thrust at altitude) at altitudes greater than 50,000 feet.

* (b) Turboshaft and Turboprop engines (including those that are technology demonstrators or developmental engines) that have any of the following:

(1) Capable of 2000 mechanical shp (1491 kW) or greater and specially designed with oil sump sealing when the engine is in the vertical position; or

(2) Capable of a specific power of 225 shp/(lbm/sec) or greater and specially designed for armament gas ingestion and non-civil transient maneuvers, where specific power is defined as maximum takeoff shaft horsepower (shp) divided by compressor inlet flow (lbm/sec).

* (c) Gas turbine engines (including technology demonstrators, developmental engines, and variable cycle engines) specially designed for unmanned aerial vehicle systems controlled in this subchapter, cruise missiles, or target drones (MT if for an engine used in an aircraft, excluding manned aircraft, or missile that has a ''range'' equal to or greater than 300 km).

* (d) GE38, AGT1500, CTS800, MT7, T55, HPW3000, GE3000, T408, and T700 engines.

Note to paragraph (d): Engines subject to the control of this paragraph are licensed by the Department of Commerce when incorporated in an aircraft subject to the EAR and controlled under ECCN 9A610. Such engines are subject to the controls of the ITAR in all other circumstances.

* (e) Digital engine control systems (*e.g.,* Full Authority Digital Engine Controls (FADEC) and Digital Electronic Engine Controls (DEEC)) specially designed for gas turbine engines controlled in this category (MT if the digital engine control system is for an aircraft, excluding manned aircraft, or missile that has a range equal to or greater than 300 km).

Note to paragraph (e): Digital electronic control systems autonomously control the engine throughout its whole operating range from demanded engine start until demanded engine shut-down, in both normal and fault conditions.

(f) Parts, components, accessories, attachments, associated equipment, and systems as follows:

(1) Parts, components, accessories, and attachments specially designed for the following U.S.-origin engines (and military variants thereof): F101, F107, F112, F118, F119, F120, F135, F136, F414, F415, and J402;

Note to paragraph (f)(1): This paragraph does not control parts, components, accessories, and attachments that are common to engines enumerated in paragraph (a) through (d) of this category but not identified in paragraph (f)(1), and those identified in paragraph (f)(1). For example, a part common to only the F110 and F136 is not specially designed for purposes of this paragraph. A part common to only the F119 and F135—two engine models identified in paragraph (f)(1)—is specially designed for purposes of this paragraph, unless one of the other paragraphs is applicable under § 120.41(b).

* (2) Hot section components (*i.e.,* combustion chambers and liners; high pressure turbine blades, vanes, disks and related cooled structure; cooled intermediate pressure turbine blades, vanes, disks and related cooled structures; cooled low pressure turbine blades, vanes, disks and related cooled

structures; cooled shaft-driving power turbine blades, vanes, disks and related cooled structures; cooled augmenters; and cooled nozzles) specially designed for gas turbine engines controlled in this category;

(3) Uncooled turbine blades, vanes, disks, and tip shrouds specially designed for gas turbine engines controlled in this category;

(4) Combustor cowls, diffusers, domes, and shells specially designed for gas turbine engines controlled in this category;

(5) Engine monitoring systems (*i.e.,* prognostics, diagnostics, and health) specially designed for gas turbine engines and components controlled in this category;

* (6) Any part, component, accessory, attachment, equipment, or system that:

(i) Is classified;

(ii) Contains classified software directly related to defense articles in this subchapter or 600 series items subject to the EAR; or

(iii) Is being developed using classified information.

Note to paragraph (f)(6): ''Classified'' means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or international organization;

(7) Investment casting cores, core dies, or wax pattern dies for parts or components enumerated in paragraphs (f)(1), (f)(2), or (f)(3) of this category;

(8) Pressure gain combustors specially designed for engines controlled in this category, and specially designed parts and components therefor;

(9) Three-stream fan systems, specially designed for gas turbine engines controlled in this Category, that allow the movement of airflow between the streams to control fan pressure ratio or bypass ratio (by means other than use of fan corrected speed or the primary nozzle area to change the fan pressure ratio or bypass ratio), and specially designed parts, components, accessories, and attachments therefor;

(10) High pressure compressors, specially designed for gas turbine engines controlled in this Category, with core-driven bypass streams that have a pressure ratio greater than one, occurring across any section of the bypass duct, and specially designed parts, components, accessories, and attachments therefor;

(11) Intermediate compressors of a three-spool compression system, specially designed for gas turbine engines controlled in this Category, with an intermediate spool-driven bypass stream that has a pressure ratio greater than one, occurring across any section of the bypass duct, and specially designed parts, components, accessories, and attachments therefor; or

(12) Any of the following equipment if specially designed for a defense article described in paragraph (f)(1): Jigs, locating fixtures, templates, gauges, molds, dies, caul plates, or bellmouths.

(g) Technical data (see § 120.10 of this subchapter) and defense services (see § 120.9 of this subchapter) directly related to the defense articles described in paragraphs (a) through (f) of this category and classified technical data directly related to items controlled in ECCNs 9A619, 9B619, 9C619, and 9D619 and defense services using the classified technical data. (See § 125.4 of this subchapter for exemptions.) (MT for technical data and defense services related to articles designated as such.)

(h)–(w) [Reserved]

(x) Commodities, software, and technology subject to the EAR (see § 120.42 of this subchapter) used in or with defense articles controlled in this category.

Note to paragraph (x): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technology subject to the EAR (see § 123.1(b) of this subchapter).

Dated: November 14, 2016.

Thomas M. Countryman,

Acting Under Secretary, Arms Control and International Security, Department of State.

[FR Doc. 2016–27775 Filed 11–18–16; 8:45 am]

BILLING CODE 4710–25–P

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

Rule Exempting an Amended System of Records From Certain Provisions of the Privacy Act

AGENCY: National Labor Relations Board.

ACTION: Direct final rule.

SUMMARY: The National Labor Relations Board (NLRB) exempts an amended system of records, NLRB–17, Personnel Security Records, from certain provisions of the Privacy Act of 1974, 5 U.S.C. 552a, pursuant to sections (k)(1), (2), (3), (5), (6), and (7) of that Act.

DATES: This rule is effective January 20, 2017 without further action, unless adverse comment is received by December 21, 2016. If adverse comment is received, the NLRB will publish a timely withdrawal of the rule in the **Federal Register**.

ADDRESSES: All persons who desire to submit written comments for consideration by the Agency regarding the rule shall mail them to the Agency's Senior Agency Official for Privacy, National Labor Relations Board, 1015 Half Street SE., Third Floor, Washington, DC 20570–0001, or submit them electronically to *pac@nlrb.gov.* Comments may also be submitted electronically through *http://www.regulations.gov,* which contains a copy of this rule and any submitted comments.

FOR FURTHER INFORMATION CONTACT: Prem Aburvasamy, Senior Agency Official for Privacy, National Labor Relations Board, 1015 Half Street SE., Third Floor, Washington, DC 20570–0001, (855)-209–9394, *pac@nlrb.gov.*

SUPPLEMENTARY INFORMATION: Elsewhere in today's issue of the **Federal Register**, the Agency is amending one of its systems of records, NLRB–17, Personnel Security Records, pursuant to the Privacy Act of 1974.

Pursuant to subsections (k)(1), (2), (3), (5), (6), and (7) of the Privacy Act, and for the reasons set forth below, the Board includes within Section 102.119, additional paragraphs (o) and (p), exempting portions of the amended system of records (NLRB–17) from subsections (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f) of the Privacy Act.

Subsection (k)(1) of the Privacy Act authorizes the head of an agency to exempt a system of records from subsections (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f) of the Privacy Act (5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), (f)) (hereinafter, ''the applicable subsections'') if records are properly classified pursuant to an Executive Order, within the meaning of section 552(b)(1).

Subsection (k)(3) of the Privacy Act authorizes the head of an agency to exempt a system of records from the applicable subsections where the information is maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18 of the U.S. Code.

Subsections (k)(2), (5), and (7) of the Privacy Act, in combination, authorize the head of an agency to exempt a system of records from the applicable subsections if records are created or maintained for the purpose of determining suitability, eligibility, qualifications, or potential for promotion for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence. As indicated in the Agency's accompanying Privacy Act system of records notice amending NLRB–17, this system contains information compiled by the Agency in the course of carrying out its personnel security responsibilities.

Subsection (k)(6) of the Privacy Act authorizes the head of an agency to exempt a system of records from applicable subsections when they might compromise the objectivity of testing and examination materials used for a personnel investigation for employment or promotion in the Federal service.

The requirements of the applicable subsections, if applied to the amended system of records, NLRB–17, would substantially compromise the ability of the Agency's Security Branch staff to effectively conduct background investigations concerning the suitability, eligibility, and fitness for service of applicants for Federal employment and contract positions at the Agency, in addition to determining the appropriate level of access to the Agency's facilities. For instance, the disclosure requirements as set forth in the provisions for notice, access, amendment, review, and accountings, could enable subject individuals to take action to jeopardize the physical safety or anonymity of confidential sources used during background proceedings. Additionally, the disclosure of information gathered during a background investigation may unreasonably weaken the interests of protecting properly classified information and the objectivity of certain examination materials.

This rule relates to individuals rather than small business entities. Accordingly, pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601–612, this rule will not have a significant impact on a substantial number of small business entities.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Agency has determined that this rule would not impose new recordkeeping, application, reporting, or other types of information collection requirements on the public.

The rule will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among levels of government. Therefore, it is determined that this rule does not have federalism implications under Executive Order 13132.

In accordance with Executive Order 12866, it has been determined that this rule is not a ''significant regulatory action,'' and therefore does not require a Regulatory Impact Analysis.

List of Subjects in 29 CFR Part 102

Privacy, Reporting and recordkeeping requirements.

For the reasons stated in the Supplementary Information section, Part 102 of title 29, chapter I of the Code of Federal Regulations, is amended as follows:

PART 102—RULES AND REGULATIONS, SERIES 8

■ 1. The authority citation for Part 102 continues to read as follows:

Authority: Sections 1, 6, National Labor Relations Act (29 U.S.C. 151, 156). Section 102.117 also issued under section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)), and Section 102.117a also issued under section 552a(j) and (k) of the Privacy Act of 1974 (5 U.S.C. 552a(j) and (k)). Sections 102.143 through 102.155 also issued under section 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C. 504(c)(1)).

Source: 24 FR 9102, Nov. 7, 1959, unless otherwise noted.

Subpart K—Records and Information

■ 2. Section 102.119 is amended by adding paragraphs (o) and (p) to read as follows:

§ 102.119 Privacy Act Regulations: notification as to whether a system of records contains records pertaining to requesting individuals; requests for access to records, amendment of such records, or accounting of disclosures; time limits for response; appeal from denial of requests; fees for document duplication; files and records exempted from certain Privacy Act requirements.

* * * * *

(o) Pursuant to 5 U.S.C. 552a(k)(1), (2), (3), (5), (6), and (7) of the Privacy Act, the system of records maintained by the NLRB containing Personnel Security Records shall be exempted from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) insofar as the system may contain:

(1) Records properly classified pursuant to an Executive Order, within the meaning of section 552(b)(1);

(2) Investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2);

(3) Information maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18 of the U.S. Code;

(4) Investigatory material compiled solely for the purpose of determining suitability, eligibility or qualifications for Federal civilian employment and Federal contact or access to classified information;

(5) Testing and examination materials used for a personnel investigation for employment or promotion in the Federal service;

(6) Evaluation materials, compiled during the course of a personnel investigation, that are used solely to determine potential for promotion in the armed services.

(p) The Privacy Act exemptions contained in paragraph (o) of this section are justified for the following reasons:

(1)(i) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at his/her request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to him/her, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records.

(ii) Personnel investigations may contain properly classified information which pertains to national defense and foreign policy obtained from another Federal agency. Application of exemption (k)(1) is necessary to preclude an individual's access to and amendment of such classified information under 5 U.S.C. 552a(d).

(iii) Personnel investigations may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Application of exemption (k)(2) is necessary to preclude an individual's access to or amendment of such records under 5 U.S.C. 552a(c)(3) and (d).

(iv) Personnel investigations may also contain information obtained from another Federal agency that relates to providing protective services to the President of the United States or other individuals pursuant to 18 U.S.C. 3056. Application of exemption (k)(3) is necessary to preclude an individual's access to and amendment of such records under 5 U.S.C. 552a(d).

(v) Exemption (k)(5) is claimed with respect to the requirements of 5 U.S.C. 552a(c)(3) and (d) because this system contains investigatory material compiled solely for determining suitability, eligibility, and qualifications for Federal employment. To the extent that the disclosure of material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence, the applicability of exemption (k)(5) will be required to honor promises of confidentiality should an individual request access to or amendment of the record, or access to the accounting of disclosures of the record. Similarly, personnel investigations may contain evaluation material used to determine potential for promotion in the armed services. Application of exemption (k)(7) is necessary to the extent that the disclosure of data would compromise the anonymity of a source under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence. Both of these exemptions are necessary to safeguard the integrity of background investigations by minimizing the threat of harm to confidential sources, witnesses, and law enforcement personnel. Additionally, these exemptions reduce the risks of improper influencing of sources, the destruction of evidence, and the fabrication of testimony.

(vi) All information in this system that meets the criteria articulated in exemption (k)(6) is exempt from the requirements of 5 U.S.C. 552a(d), relating to access to and amendment of records by an individual. This exemption is claimed because portions of this system relate to testing or examining materials used solely to determine individual qualifications for appointment or promotion to the Federal service. Access to or amendment to this information by an individual would compromise the objectivity and fairness of the testing or examining process.

(2) 5 U.S.C. 552a(e)(1) requires an agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. This requirement could foreclose investigators from acquiring or receiving information the relevance and necessity of which is not readily apparent and could only be ascertained after a complete review and evaluation of all the evidence. This system of records is exempt from this requirement because in the course of personnel background investigations, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to favorably or unfavorably adjudicate a specific investigation at a specific point in time. However, in the interests of protecting the public trust and national security, it is appropriate to retain all information that may aid in establishing patterns in such areas as criminal conduct, alcohol and drug use, financial dishonesty, allegiance, foreign preference of influence, and psychological conditions, that are relevant to future personnel security or suitability determinations.

(3) 5 U.S.C. 552a(e)(4)(G) and (H) require an agency to publish a **Federal Register** notice concerning its procedures for notifying an individual, at his/her request, if the system of records contains a record pertaining to him/her, how to gain access to such a record and how to contest its content. Since this system of records is being exempted from subsection (f) of the Act, concerning agency rules, and subsection (d) of the Act, concerning access to records, these requirements are inapplicable to the extent that this system of records will be exempt from subsections (f) and (d) of the Act. Although the system would be exempt from these requirements, the NLRB has published information concerning its notification, access, and contest procedures because, under certain circumstances, it may be appropriate for a subject to have access to a portion of that individual's records in this system of records.

(4) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a **Federal Register** notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physical safety of confidential sources and witnesses, and to avoid the disclosure of investigative techniques and procedures. Although the system will be exempt from this requirement, the agency has published source information in the accompanying notice in broad generic terms.

(5) 5 U.S.C. 552a(f) requires an agency to promulgate rules which shall establish procedures whereby an individual can be notified in response to a request if any system of records named by the individual contains a record pertaining to that individual. The application of this provision could compromise the progress of an investigation concerning the suitability, eligibility, and fitness for service of applicants for Federal employment and impede a prompt assessment of the appropriate access to the Agency's facilities. Although this system would be exempt from the requirements of subsection (f) of the Act, the Agency has promulgated rules which establish agency procedures because, under certain circumstances, it could be appropriate for an individual to have access to all or a portion of that individual's records in this system of records.

Dated: Washington, DC, November 9, 2016.

By direction of the Board.

William B. Cowen,

Federal Register Liaison, National Labor Relations Board.

[FR Doc. 2016–27487 Filed 11–18–16; 8:45 am]

BILLING CODE 7545–01–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4044

Allocation of Assets in Single-Employer Plans; Valuation of Benefits and Assets; Expected Retirement Age

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This rule amends the Pension Benefit Guaranty Corporation's regulation on Allocation of Assets in Single-Employer Plans by substituting a new table for determining expected retirement ages for participants in pension plans undergoing distress or involuntary termination with valuation dates falling in 2017. This table is needed in order to compute the value of early retirement benefits and, thus, the total value of benefits under a plan.

DATES: Effective January 1, 2017.

FOR FURTHER INFORMATION CONTACT: Deborah C. Murphy (*Murphy.Deborah@pbgc.gov*), Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005, 202–326–4400 ext. 3451. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4400 ext. 3451.)

SUPPLEMENTARY INFORMATION: The Pension Benefit Guaranty Corporation (PBGC) administers the pension plan termination insurance program under

Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044) sets forth (in subpart B) the methods for valuing plan benefits of terminating single-employer plans covered under Title IV. Guaranteed benefits and benefit liabilities under a plan that is undergoing a distress termination must be valued in accordance with subpart B of part 4044. In addition, when PBGC terminates an underfunded plan involuntarily pursuant to ERISA section 4042(a), it uses the subpart B valuation rules to determine the amount of the plan's underfunding.

Under § 4044.51(b) of the asset allocation regulation, early retirement benefits are valued based on the annuity starting date, if a retirement date has been selected, or the expected retirement age, if the annuity starting date is not known on the valuation date. Sections 4044.55 through 4044.57 set forth rules for determining the expected retirement ages for plan participants entitled to early retirement benefits. Appendix D of part 4044 contains tables to be used in determining the expected early retirement ages.

Table I in appendix D (Selection of Retirement Rate Category) is used to determine whether a participant has a low, medium, or high probability of retiring early. The determination is based on the year a participant would reach "unreduced retirement age" (*i.e.,* the earlier of the normal retirement age or the age at which an unreduced benefit is first payable) and the participant's monthly benefit at unreduced retirement age. The table applies only to plans with valuation dates in the current year and is updated annually by the PBGC to reflect changes in the cost of living, etc.

Tables II–A, II–B, and II–C (Expected Retirement Ages for Individuals in the Low, Medium, and High Categories respectively) are used to determine the expected retirement age after the probability of early retirement has been determined using Table I. These tables establish, by probability category, the expected retirement age based on both the earliest age a participant could retire under the plan and the unreduced retirement age. This expected retirement age is used to compute the value of the early retirement benefit and, thus, the total value of benefits under the plan.

This document amends appendix D to replace Table I–16 with Table I–17 in order to provide an updated correlation, appropriate for calendar year 2017, between the amount of a participant's benefit and the probability that the participant will elect early retirement. Table I–17 will be used to value benefits in plans with valuation dates during calendar year 2017.

PBGC has determined that notice of, and public comment on, this rule are impracticable and contrary to the public interest. Plan administrators need to be able to estimate accurately the value of plan benefits as early as possible before initiating the termination process. For that purpose, if a plan has a valuation date in 2017, the plan administrator needs the updated table being promulgated in this rule. Accordingly, the public interest is best served by issuing this table expeditiously, without an opportunity for notice and comment, to allow as much time as possible to estimate the value of plan benefits with the proper table for plans with valuation dates in early 2017.

PBGC has determined that this action is not a "significant regulatory action" under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this regulation, the Regulatory Flexibility Act of 1980 does not apply (5 U.S.C. 601(2)).

List of Subjects in 29 CFR Part 4044

Pension insurance, Pensions.

In consideration of the foregoing, 29 CFR part 4044 is amended as follows:

■ 1. The authority citation for part 4044 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

■ 2. Appendix D to part 4044 is amended by removing Table I–16 and adding in its place Table I–17 to read as follows:

Appendix D to Part 4044—Tables Used To Determine Expected Retirement Age

TABLE I–17—SELECTION OF RETIREMENT RATE CATEGORY

[For plans with valuation dates after December 31, 2016, and before January 1, 2018]

If participant reaches URA in year—	Participant's Retirement Rate Category is— Low[1] if monthly benefit at URA is less than—	Medium[2] if monthly benefit at URA is— From—	To—	High[3] if monthly benefit at URA is greater than—
2018	631	631	2,665	2,665
2019	645	645	2,724	2,724
2020	660	660	2,787	2,787
2021	675	675	2,851	2,851
2022	691	691	2,916	2,916
2023	707	707	2,983	2,983
2024	723	723	3,052	3,052
2025	740	740	3,122	3,122
2026	757	757	3,194	3,194
2027 or later	774	774	3,268	3,268

[1] Table II–A.
[2] Table II–B.
[3] Table II–C.

* * * * *

Issued in Washington, DC, by:

Judith Starr,

General Counsel, Pension Benefit Guaranty Corporation.

[FR Doc. 2016–27986 Filed 11–18–16; 8:45 am]

BILLING CODE 7709–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2016–1011]

RIN 1625–AA00

Safety Zone; Great Egg Harbor Bay, Marmora, NJ

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the waters of Great Egg Harbor Bay in Marmora, NJ. The safety zone includes all waters within 500 yards of a blasting vessel and equipment being used to conduct bridge pile blasting operations, which is the final phase of the demolition of the Route 9, Beesley Point Bridge bascule span. This safety zone will only be enforced during times of explosive detonation. The safety zone will temporarily restrict vessel traffic from transiting or anchoring in a portion of the Great Egg Harbor Bay while pile blasting and removal operations are being conducted to facilitate the removal of bridge piles from the demolished Route 9, Beesley Point Bridge.

DATES: This rule is effective without actual notice from November 21, 2016 through November 24, 2016. For the purposes of enforcement, actual notice will be used from November 15, 2016, until November 21, 2016. During this period the safety zone will only be enforced during times of explosive detonation.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2016–1011 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email Marine Science Technician First Class Tom Simkins, U.S. Coast Guard, Sector Delaware Bay, Waterways Management Division, Coast Guard; telephone (215)271–4889, email *Tom.J.Simkins@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code
COTP Captain of the Port

II. Background Information and Regulatory History

In June 2013, demolition work began on the Route 9, Beesley Point Bridge between Somers Point and Marmora, NJ. Route 52 Construction, the company performing this demolition work, has completed all demolition of the bridge and piles except the portion of the bridge which has the bascule span opening for the navigational channel. The removal of the remaining piles, which are secured to the sea floor bed, will be completed by using explosives after which the piles and debris will be removed. The Captain of the Port has determined that potential hazards associated with pile blasting operations, beginning on or about November 15, 2016, will be a safety concern for anyone operating within 500 yards of pile blasting operations during times of explosive detonation.

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the final details for this event were not received by the Coast Guard until November 8, 2016, and the safety zone is needed for blasting and demolition operations which will begin November 15, 2016. It is impracticable to publish an NPRM and consider comments due to the short window of time until the operation begins. Allowing this event to go forward without a safety zone in place would expose mariners and the public to unnecessary dangers associated with explosive detonation.

We are issuing this rule, and under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making it effective less than 30 days after publication in the **Federal Register** for the reasons we stated above. Delaying the effective date of this rule would be contrary to public interest because the safety zone is needed to begin on November 15, 2016, to protect the public from safety hazards associated with explosive detonation.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The Captain of the Port has determined that potential hazards are associated with demolition and pile blasting operations of the Route 9, Beesley Point Bridge, over the Great Egg Harbor Bay, in Marmora, NJ, from November 15, 2016, through November 24, 2016. The rule will provide a safety buffer around the blasting vessel during times of explosive detonation.

The purpose of this rule is to promote maritime safety and protect vessels from the hazards of bridge demolition and pile blasting operations, and to maintain safety of navigation in the Great Egg Harbor Bay, in the vicinity of the Route 9, Beesley Point Bridge. The rule will provide a safety buffer around the crane and barge while demolition operations are conducted, and will provide a safety buffer around the blasting vessel during times of explosive detonation.

IV. Discussion of the Rule

On November 15, 2016, demolition work will begin on the remaining portion of the Route 9, Beesley Point Bridge, over the Great Egg Harbor Bay, in Marmora, NJ. The Captain of the Port has determined that the hazards associated with demolition and pile blasting operations requires a safety zone.

The safety zone will be enforced starting on or after November 15, 2016, only during times of explosive detonation, and encompasses all navigable waters in the Great Egg Harbor Bay within 500 yards of vessels and machinery being used to conduct pile blasting and removal operations. The duration of the enforcement of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while explosive detonation occurs. There will be two blasting events occurring on consecutive days to complete both piers. Actual dates and times of explosive detonation will be published with a combination of broadcast notice to mariners, local notice to mariners, posted warning signs, 500 yard marine traffic safety zone maintained by the contractors safety boats, a 10 minute, 5 minutes, and 1 minute warning made by the blasting vessel via VHF–FM channel 16, and warning signals at 5 minutes with 3 short blasts of the air horn, and 1 minute warning of 2 short blasts of the air horn. The schedule of the signals will be posted along with warning signs. The contractor will verify that all vessels and persons are clear of safety zone 10 minutes prior to the scheduled shot time and will remain secured until the blaster gives the ''All Clear'' that the channel is clear for vessels to transit.

Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port or his designated representative. No vessels may transit through the safety zone during times of explosive detonation. During pile blasting explosive detonation, vessels will be required to maintain a 500 yard distance from vessels and equipment used to conduct pile blasting and removal operations. This 500 yard radius will be secured by two contractor safety boats in the adjacent waterways.

V. Regulatory Analysis

We developed this rule after considering numerous statutes and Executive order related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, it has not been reviewed by the Office of Management and Budget.

This finding is based on the limited size of the zone and that vessels will only be affected during times of explosive detonation. In addition, the zone will be well publicized to allow mariners to make alternative plans for transiting the affected area.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

It is expected that there will be minimal disruption to the maritime community. Before the effective period, the Coast Guard will issue maritime advisories widely available to users of the river to allow mariners to make alternative plans for transiting the affected areas. In addition, vessels may transit the navigation channel, except during time of explosive detonation.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone encompassing all navigable waters in the Great Egg Harbor Bay within 500 yards of vessels and machinery being used to conduct pile blasting and removal operations during times of explosive detonation. It is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER**

INFORMATION CONTACT section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165.T05–1011, to read as follows:

§ 165.T05–1011 Safety Zone; Great Egg Harbor Bay, Marmora, NJ

(a) *Regulated areas.* The following area is a safety zone: All waters within 500 yards of the blasting vessel and equipment conducting pile blasting operations, in Great Egg Harbor Bay, in the vicinity of Route 9, Beesley Point Bridge, in Marmora, NJ.

(b) *Regulations.* The general safety zone regulations in § 165.23 apply to the safety zones created by this temporary section, § 165.T05–1011.

(1) All vessels and persons are prohibited from entering into or moving within the safety zone described in paragraph (a) of this section while they are subject to enforcement, unless authorized by the Captain of the Port or by his designated representative.

(2) Persons or vessels seeking to enter or pass through the safety zone must contact the Captain of the Port or his designated representative to seek permission to transit the area. The Captain of the Port, Delaware Bay can be contacted at telephone number 215–271–4807 or on Marine Band Radio VHF Channel 16 (156.8 MHz).

(3) No vessels may transit through the safety zone described in paragraph (a) of this section during times of explosives detonation. During pile blasting detonation, vessels will be required to maintain a 500 yard distance from the blasting vessel and equipment. Actual dates and times of explosive detonation will be announced with a combination of broadcast notice to mariners, local notice to mariners, posted warning signs, 500 yard marine traffic safety zone maintained by the contractors safety boats, 10 minute, 5 minutes, and 1 minute warning made by the blasting vessel via VHF–FM channel 16, and warning signals at 5 minutes with 3 short blasts of the air horn, and 1 minute warning of 2 short blasts of the air horn. The schedule of the signals will be posted along with all other required signage.

(4) This section applies to all vessels except those engaged in the following operations: Enforcing laws, servicing aids to navigation, and emergency response vessels.

(c) *Definitions.* As used in this section:

Captain of the Port means Captain of the Port Delaware Bay. The Captain of the Port is also the Commander, U.S. Coast Guard Sector Delaware Bay, Philadelphia, PA.

Captain of the Port Delaware Bay means the Commander, U.S. Coast Guard Sector Delaware Bay, Philadelphia, PA.

Designated representative means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Delaware Bay to assist in enforcing the safety zone described in paragraph (a) of this section.

(d) *Enforcement.* The U.S. Coast Guard may be assisted by Federal, State and local agencies in the patrol and enforcement of the zone.

(e) *Enforcement periods.* This section will be effective from November 15, 2016, through November 24, 2016. During this period the safety zone will only be enforced during times of explosive detonation.

Dated: November 15, 2016.

Benjamin A. Cooper,

Captain, U.S. Coast Guard, Captain of the Port, Delaware Bay.

[FR Doc. 2016–27914 Filed 11–18–16; 8:45 am]

BILLING CODE 9110–04–P

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 388

[Docket No. 16–CRB–0019–RM]

Procedural Regulations for the Copyright Royalty Board: Rates and Terms for Statutory Licenses; Technical Amendment

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule; technical amendment.

SUMMARY: The Copyright Royalty Judges are amending their regulations to relocate the provisions regarding coin-operated phonorecord players from the section of the Code of Federal Regulations (CFR) that contains Copyright Arbitration Royalty Panel (CARP) regulations to the section of the CFR that contains Copyright Royalty Board (CRB) regulations so that the Copyright Office may remove the outdated CARP regulation.

DATES: Effective on November 21, 2016.

FOR FURTHER INFORMATION CONTACT: Kimberly Whittle, Attorney Advisor, by telephone at (202) 707–7658 or by email at *crb@loc.gov.*

SUPPLEMENTARY INFORMATION: On October 3, 2016, the Copyright Office published a proposed rulemaking that, in part, proposes to eliminate obsolete CARP regulations from the CFR. 81 FR 67940, 67942. One of the CARP provisions, the regulation regarding rates for the statutory license for jukeboxes, is not obsolete and is therefore the only provision that would remain.[1] *See* 37 CFR 254. That provision could have been moved to the CRB section of the CFR earlier, but because the rates have remained unchanged for many years, neither the Copyright Office nor the CRB has moved the regulation.

The Copyright Royalty Judges hereby relocate that provision by adding it to Chapter III of title 37 of the CFR, the chapter governing CRB activities.

List of Subjects in 37 CFR Part 388

Copyright, Jukeboxes, Rates.

Final Regulations

For the reasons set out in the preamble, the Copyright Royalty Judges amend 37 CFR chapter III by adding part 388 to read as follows:

PART 388—ADJUSTMENT OF ROYALTY RATE FOR COIN–OPERATED PHONORECORD PLAYERS

Sec.

Authority: 17 U.S.C. 116, 801(b)(1).

§ 388.1 General.

This part 388 establishes the compulsory license fees for coin-operated phonorecord players beginning on January 1, 1982, in accordance with the provisions of 17 U.S.C. 116.

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[1] The Copyright Office proposed rulemaking indicated that part 256 will also remain, but the CRB recently gave notice of relocation of that part to part 387 and has notified the Copyright Office of that fact so it may now eliminate part 256 from Chapter II. *Id.;* 81 FR 62812 (Sept. 13, 2016).

§ 388.2 Definition of coin-operated phonorecord player.

As used in this part, the term *coin-operated phonorecord player* is a machine or device that:

(a) Is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by insertion of coins, currency, tokens, or other monetary units or their equivalent;

(b) Is located in an establishment making no direct or indirect charge for admission;

(c) Is accompanied by a list of the titles of all the musical works available for performance on it, which list is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

(d) Affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

§ 388.3 Compulsory license fees for coin-operated phonorecord players.

(a) Commencing January 1, 1982, the annual compulsory license fee for a coin-operated phonorecord player shall be $25.

(b) Commencing January 1, 1984, the annual compulsory license fee for a coin-operated phonorecord player shall be $50.

(c) Commencing January 1, 1987, the annual compulsory license fee for a coin-operated phonorecord player shall be $63.

(d) If performances are made available on a particular coin-operated phonorecord player for the first time after July 1 of any year, the compulsory license fee for the remainder of that year shall be one half of the annual rate of paragraph (a), (b), or (c) of this section, whichever is applicable.

(e) Commencing January 1, 1990, the annual compulsory license fee for a coin-operated phonorecord player is suspended through December 31, 1999, or until such earlier or later time as the March 1990 license agreement between AMOA and ASCAP/BMI/SESAC is terminated.

Dated: November 1, 2016.

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

Approved by:

Carla D. Hayden,

Librarian of Congress.

[FR Doc. 2016–27885 Filed 11–18–16; 8:45 am]

BILLING CODE 1410–72–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2014–0756; FRL–9955–29–Region 4]

Air Plan Approval/Disapproval; AL Infrastructure Requirements for the 2010 1-Hour NO_2 NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve in part, and disapprove in part, portions of the April 23, 2013, and December 9, 2015, of the State Implementation Plan (SIP) submissions, submitted by the State of Alabama, through the Alabama Department of Environmental Management (ADEM), to demonstrate that the State meets certain infrastructure requirements of the Clean Air Act (CAA or Act) for the 2010 1-hour nitrogen dioxide (NO_2) national ambient air quality standards (NAAQS). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an ''infrastructure'' SIP. ADEM certified that the Alabama SIP contains provisions that ensure the 2010 1-hour NO_2 NAAQS is implemented, enforced, and maintained in Alabama. With the exception of the provisions pertaining to prevention of significant deterioration (PSD) permitting, and visibility in other states, for which EPA is proposing no action through this notice, and the provisions respecting state boards, for which EPA is finalizing disapproval, EPA has determined portions of Alabama's infrastructure SIP submissions, provided to EPA on April 23, 2013, and updated on December 9, 2015, satisfy certain required infrastructure elements for the 2010 1-hour NO_2 NAAQS.

DATES: This rule will be effective December 21, 2016.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2014–0756. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* 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 *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Richard Wong, Air Regulatory Management Section, Air Planning and Implementation Branch, Pesticides and Toxics Management Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–8726. Mr. Richard Wong can also be reached via electronic mail at *wong.richard@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Overview

On January 22, 2010 (75 FR 6474, February 9, 2010), EPA promulgated a new 1-hour primary NAAQS for NO_2 at a level of 100 parts per billion (ppb), based on a 3-year average of the 98th percentile of the yearly distribution of 1-hour daily maximum concentrations. Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs for the 2010 NO_2 NAAQS to EPA no later than January 22, 2013.

In a proposed rulemaking published on July 20, 2016 (81 FR 47124), EPA proposed to approve Alabama's 2010 1-hour NO_2 NAAQS infrastructure SIP submissions submitted on April 23, 2013, and December 9, 2015, with the exception of the PSD permitting requirements for major sources of sections 110(a)(2)(C), prong 3 of D(i), and (J) and the interstate transport requirements of section 110(a)(2)(D)(i)(I) and (II) (prongs 1, 2, and 4), and the state board requirements of section

110(a)(2)(E)(ii). On March 18, 2015, EPA approved Alabama's April 23, 2013, infrastructure SIP submission regarding the PSD permitting requirements for major sources of sections 110(a)(2)(C), prong 3 of D(i) and (J) for the 2010 1-hour NO_2 NAAQS. *See* 80 FR 14019.[1] Therefore, EPA is not taking any action today pertaining to sections 110(a)(2)(C), prong 3 of D(i) and (J). With respect to the interstate transport requirements of section 110(a)(2)(D)(i)(I) (prongs 1, 2 and 4), Alabama provided a separate submissions. EPA is considering action on Alabama's submission related to 110(a)(2)(D)(i)(I) (prongs 1, 2 and 4) through a separate actions. Additionally, with respect to Alabama's infrastructure SIP submissions related to section 110(a)(2)(E)(ii) requirements respecting the section 128 state board requirements, EPA is disapproving this element of Alabama's submissions in this rulemaking. The details of Alabama's submission and the rationale for EPA's actions for this final rulemaking are explained in the July 20, 2016, proposed rulemaking. Comments on the proposed rulemaking were due on or before August 19, 2016. EPA received no adverse comments on the proposed action.

II. Final Action

EPA is taking final action to approve Alabama's infrastructure SIP submissions for the 2010 1-hour NO_2 NAAQS, with the exception of the PSD permitting requirements for major sources of sections 110(a)(2)(C), prong 3 of D(i), and (J) and the interstate transport requirements of section 110(a)(2)(D)(i)(I) and (II) (prongs 1, 2, and 4). With regard to the state board majority requirements of section 110(a)(2)(E)(ii), EPA is finalizing a disapproval of Alabama' April 23, 2013, and December 9, 2015, infrastructure submissions. Under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of a CAA Part D Plan or is required in response to a finding of substantial inadequacy as described in CAA section 110(k)(5) (SIP call) starts a sanctions clock. The portion of section 110(a)(2)(E)(ii) provisions (the provisions being disapproved in this notice) were not submitted to meet requirements for Part D or a SIP call, and therefore, no sanctions will be triggered. However, this final action will trigger the requirement under section 110(c) that EPA promulgate a Federal Implementation Plan (FIP) no later than two years from the date of the disapproval unless the State corrects the deficiency, and EPA approves the plan or plan revision before EPA promulgates such FIP.

[1] ADEM clarified that its December 9, 2015, submission was not intended to address the PSD requirements that were approved by EPA on March 18, 2015. *See www.regulations.gov* using Docket ID No. EPA–R04–OAR–2014–0756.

III. 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. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action 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).

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 as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it 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. 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 January 20, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: November 4, 2016.

Heather McTeer Toney,

Regional Administrator, Region 4.

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 B—Alabama

■ 2. Section 52.50(e), is amended by adding an entry for ''110(a)(1) and (2) Infrastructure Requirements for the 2010 1-hour NO_2 NAAQS'' at the end of the table to read as follows:

§ 52.50 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED ALABAMA NON-REGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA approval date	Explanation
*	*	*	*	* * *
110(a)(1) and (2) Infrastructure Requirements for the 2010 1-hour NO_2 NAAQS.	Alabama	4/23/2013	11/21/2016 [Insert citation of publication].	With the exception of sections: 110(a)(2)(C) and (J) concerning PSD permitting requirements; 110(a)(2)(D)(i)(I) and (II) (prongs 1 through 4) concerning interstate transport requirements and the state boards of section 110(a)(2)(E)(ii).

■ 3. Section 52.53 is amended by adding paragraph (c) to read as follows:

§ 52.53 Approval status.

* * * * *

(c) *Disapproval.* Submittal from the State of Alabama, through the Alabama Department of Environmental Management (ADEM) on April 23, 2013, and December 9, 2015, to address the Clean Air Act section 110(a)(2)(E)(ii) for the 2010 1-hour nitrogen dioxide (NO_2) National Ambient Air Quality Standards (NAAQS) concerning state board requirements. EPA is disapproving section 110(a)(2)(E)(ii) of ADEM's submittal because the Alabama SIP lacks provisions respecting state boards per section 128 of the CAA for the 2010 Nitrogen Dioxide National Ambient Air Quality Standards.

[FR Doc. 2016–27862 Filed 11–18–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2015–0846; FRL–9955–17–Region 9]

Promulgation of Air Quality Implementation Plans; Arizona; Regional Haze Federal Implementation Plan; Reconsideration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is revising portions of the Arizona Regional Haze Federal Implementation Plan (2014 FIP) applicable to the Phoenix Cement Company (PCC) Clarkdale Plant and the CalPortland Cement (CPC) Rillito Plant. This 2014 FIP was adopted earlier under the provisions of the Clean Air Act (CAA). We are finalizing without change our proposal to replace the control technology demonstration requirements for nitrogen oxides (NO_X) applicable to Kiln 4 at the Clarkdale Plant and Kiln 4 at the Rillito Plant with a series of revised recordkeeping and reporting requirements. When EPA finalized the 2014 FIP, we had limited operating data for the use of Selective Non-Catalytic Reduction (SNCR) on cement plants. Therefore, we required that PCC and CPC perform control technology demonstration projects to support the control efficiencies for SNCR in the 2014 FIP, as well as to determine if more stringent control efficiencies were achievable. In early 2015, a control technology demonstration project was performed on the SNCR installed at another CalPortland Cement facility, the Mojave Plant. Our analysis of the SNCR control efficiency data from that project indicated that more stringent SNCR control efficiencies were not achievable at PCC and CPC. As a result, the additional information from the control technology demonstration projects required by the 2014 FIP is no longer needed because the PCC and CPC SNCR control efficiencies in the 2014 FIP are consistent with the SNCR performance at the Mojave Plant. In addition, the EPA is making a minor technical correction to change an equation to match the language in the regulatory text.

DATES: This rule will be effective December 21, 2016.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2015–0846. 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 (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Colleen McKaughan, U.S. EPA, Region 9, Air Division, Air-1, 75 Hawthorne Street, San Francisco, CA 94105; telephone number: (520) 498–0118; email address: *mckaughan.colleen@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' refer to the EPA.

Table of Contents

I. Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

- The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.
- The initials *ADEQ* mean or refer to the Arizona Department of Environmental Quality.
- The words *Arizona* and *State* mean the State of Arizona.
- The initials *BART* mean or refer to Best Available Retrofit Technology.
- The term *Class I area* refers to a mandatory Class I Federal area.
- The initials *CBI* mean or refer to Confidential Business Information.
- The initials *CPC* mean or refer to CalPortland Cement.

• The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.
• The initials *FIP* mean or refer to Federal Implementation Plan.
• The initials NO_X mean or refer to nitrogen oxides.
• The initials *PCC* mean or refer to Phoenix Cement Company.
• The initials *SCR* mean or refer to selective catalytic reduction.
• The initials *SIP* mean or refer to State Implementation Plan.
• The initials *SNCR* mean or refer to selective non-catalytic reduction.
• The initials *SRPMIC* mean or refer to Salt River Pima-Maricopa Indian Community.

II. Background

A. Summary of Statutory and Regulatory Requirements

This section provides a brief overview of the requirements of the CAA and the EPA's Regional Haze Rule, as they apply to this particular action. Please refer to our previous rulemakings on the Arizona Regional Haze State Implementation Plan (SIP) for additional background regarding the visibility protection provisions of the CAA and the Regional Haze Rule.[1]

Congress created a program for protecting visibility in the nation's national parks and wilderness areas in section 169A of the 1977 Amendments to the CAA. This section of the CAA establishes as a national goal the ''prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I Federal areas which impairment results from man-made air pollution.''[2] Specifically, section 169A(b)(2)(A) of the CAA requires states to revise their SIPs to contain such measures as may be necessary to make reasonable progress towards the natural visibility goal. In the 1990 CAA Amendments, Congress amended the visibility provisions in the CAA to focus attention on the problem of regional haze, which is visibility impairment produced by a multitude of sources and activities located across a broad geographic area.[3] The Regional Haze Rule was promulgated in 1999 and is in the process of being revised.[4] It requires states to develop and implement SIPs to ensure reasonable progress toward improving visibility in mandatory Class I Federal areas[5] (''Class I area'') by reducing emissions that cause or contribute to regional haze.[6]

B. History of FIP Requirements for the State of Arizona

The Arizona Department of Environmental Quality (ADEQ) submitted a Regional Haze SIP to the EPA on February 28, 2011. The EPA acted on ADEQ's Regional Haze SIP in three separate rulemakings. Specifically, the first final rule approved in part and disapproved in part the State's Best Available Retrofit Technology (BART) determinations for three power plants (Apache Generating Station, Cholla Power Plant, and Coronado Generating Station), and promulgated a FIP for NO_X BART as well as the compliance requirements for all three power plants.[7] The second final rule, which addressed the remaining elements of the Arizona Regional Haze SIP, included our disapproval of the State's analysis of reasonable progress measures for point sources of NO_X.[8] In the third final rule, the EPA promulgated a FIP in 2014 (2014 FIP) addressing the requirements of the Regional Haze Rule and interstate visibility transport for the remainder of the disapproved portions of Arizona's Regional Haze SIP.[9]

Among other things, the 2014 FIP includes requirements for NO_X emission controls applicable to PCC Clarkdale Plant Kiln 4 and CPC Rillito Plant Kiln 4 under the reasonable progress requirements of the Regional Haze Rule. In particular, the EPA established two alternative emission limits for NO_X on Kiln 4 of the Clarkdale Plant: An emission limit of 2.12 pounds per ton (lb/ton) of clinker produced or an emission limit of 810 tons/year. The 2.12 lb/ton limit is achievable through installation of selective non-catalytic reduction (SNCR), based on a 50 percent control efficiency, while the 810 ton/year limit could be met either by installing SNCR or by maintaining recent production levels.[10 11 12 13] We set an emission limit for NO_X at the Rillito Plant of 3.46 lb/ton of clinker produced, based on a 35 percent control efficiency.[14] The 2014 FIP also includes monitoring, recordkeeping, and reporting requirements and a compliance deadline for the final NO_X emission limits of December 31, 2018. Finally, in response to comments asserting that SNCR control efficiencies of 50 percent for Kiln 4 at the Clarkdale Plant and 35 percent for Kiln 4 at the Rillito Plant were unsupported and that SNCR was capable of achieving higher control efficiencies, we included in the final 2014 FIP requirements for a control technology demonstration project for the SNCR system at each plant, which entailed the collection of data and preparation of a SNCR optimization protocol that would be used to determine if a higher control efficiency would be achievable.

C. Petitions for Reconsideration and Stay

PCC and CPC each submitted a petition to the EPA on November 3, 2014, seeking administrative reconsideration and a partial stay of the 2014 FIP under CAA section 307(d)(7)(B) and the Administrative Procedure Act.[15] In their petitions, both companies raised multiple objections to the control technology demonstration requirements in the 2014 FIP. CPC asserted that the requirements were burdensome, expensive, and unnecessary, given that CPC had already ''evaluated fuels, fuel fineness, and the other characteristics listed in the Optimization Protocol'' as part of its effort to reduce energy usage.[16] PCC stated that the requirements ''would be burdensome to implement'' and ''would

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[1] 77 FR 42834, 42837–42839 (July 20, 2012), (Arizona Regional Haze ''Phase 1'' Rule); 77 FR 75704, 75709–75712 (December 21, 2012), (Arizona Regional Haze ''Phase 2'' Rule).

[2] 42 U.S.C. 7491(a)(1).

[3] *See* CAA section 169B, 42 U.S.C. 7492.

[4] 81 FR 26942, May 4, 2016.

[5] Areas designated as mandatory Class I Federal areas consist of national parks exceeding 6000 acres, wilderness areas, and national memorial parks exceeding 5000 acres, and all international parks that were in existence on August 7, 1977. 42 U.S.C. 7472(a).

[6] *See generally* 40 CFR 51.308.

[7] 77 FR 72512 (December 5, 2012).

[8] 78 FR 46142 (July 30, 2013).

[9] 79 FR 52420 (September 3, 2014) (The 2014 FIP final rule).

[10] Memorandum dated November 19, 2012, from John Summerhays (EPA), Subject: ''Review of Cost Effectiveness of Selective Noncatalytic Reduction (SNCR) at St. Mary's Cement's (SMC) Facility in Charlevoix (SMC-Charlevoix).''

[11] De-NO_X Technologies, LLC, ''Report of NO_X Removal Measurements from an SNCR System at the St. Mary's Cement Dixon IL Facility,'' October 2005.

[12] 77 FR 181 (September 18, 2012) (Ash Grove Cement and Holcim Cement BART 5-factor analysis).

[13] Colorado Department of Public Health and Environment, ''Colorado Regional Haze SIP'', January 2011; *See* Reasonable Progress (RP) Four-Factor Analysis of Control Options for Holcim Portland Plant, Florence, Colorado.

[14] Letter dated March 31, 2014 from Jay Grady (CPC) to Thomas Webb (EPA) and Exhibit 1, ''Evaluation of EPA's Reasonable Progress Analysis for Kiln 4 at CalPortland Company's Rillito Cement Plant.''

[15] Letter dated November 3, 2014, from Verle C. Martz (PCC) to Regina McCarthy (EPA); letter dated November 3, 2014 from Jay Grady (CPC) to Regina McCarthy (EPA).

[16] Letter November 3, 2014, from Jay Grady (CPC) to Regina McCarthy (EPA) with attachment ''Petition of CalPortland Company for Partial Reconsideration and Request for Administrative Stay of EPA Final Rule, Promulgation of Air Quality Implementation Plans; Arizona; Regional Haze and Interstate Visibility Transport Federal Implementation Plan Published at 79 FR 52420'' at 4.

substantially interfere with the cement manufacturing operations'' at the Clarkdale Plant.[17] PCC further asserted that requirements would harm the Salt River Pima-Maricopa Indian Community (SRPMIC), which relies on revenue from the Clarkdale Plant.[18]

The EPA sent letters to PCC and CPC on January 16, 2015 and January 27, 2015, respectively, granting reconsideration of the control technology demonstration project requirements pursuant to CAA section 307(d)(7)(B).[19] Although we did not act on the companies' request for a stay at that time, we subsequently granted a stay of the control technology demonstration project requirements under CAA section 307(d)(7)(B), effective from August 15, 2016 to November 14, 2016.[20]

III. Proposed Action

On June 30, 2016, the EPA proposed to revise the 2014 FIP based on our reconsideration of the control technology demonstration requirements for the PCC Clarkdale Plant and CPC Rillito Plant.[21] In particular, we proposed to replace these requirements, applicable to Kiln 4 at the Clarkdale Plant and to Kiln 4 at the Rillito Plant, with a series of revised recordkeeping and reporting conditions. We also proposed to find that these revisions to the 2014 FIP would comply with CAA section 110(l).

A. The EPA's Evaluation of Control Technology Demonstration Requirements

1. Rillito Plant Kiln 4

In light of the objections to the control technology demonstration requirements raised by CPC and PCC, we re-evaluated the necessity of these requirements for the Rillito and Clarkdale plants once additional information became available on the performance of SNCR at cement kilns. Although one of the objections to the control technology demonstration requirements raised in the petitions for reconsideration was that EPA lacks authority to impose such a requirement in a regional haze FIP, we disagree with that narrow interpretation of our authority. We note that the EPA's authority in promulgating a regional haze FIP derives not only from the visibility protection provisions of the CAA and our implementing regulations, but also from other provisions of the CAA. CAA section 302(y) defines a FIP, in pertinent part, as a plan (or portion thereof) promulgated by the EPA ''to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy'' in a SIP, ''and which includes enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions or emissions allowances).'' CAA section 302(k), in turn, defines ''emission limitation'' to include (among other things) ''any design, equipment, work practice or operational standard promulgated under [the CAA].'' Therefore, the EPA has authority to include design, equipment, work practice and operational standards, such as those included in the control technology demonstration requirements, in a FIP. Furthermore, CAA section 114 provides that in order to develop any SIP or FIP, or to ''carry[] out any provision of [the CAA],'' the EPA may require owners or operators of emission sources to install monitoring equipment, sample emissions, and ''provide such other information as the [EPA] may reasonably require.'' Accordingly, the EPA also has authority to require collection and submittal of emission and operating data in the manner set forth in the control technology demonstration requirements. Nonetheless, we are now finalizing our action to remove the control technology demonstration requirements, including the requirement for an optimization protocol, from the 2014 FIP for the reasons set out in our proposal and elsewhere in this document.

The EPA proposed to remove the control technology demonstration requirements for Kiln 4 at the CPC Rillito Plant after we evaluated NO_X emission data from a SNCR system operating at a similar kiln at another CPC facility, the Mojave Plant in California, which gave us the information that we were seeking regarding SNCR performance. The data from the Mojave Plant demonstrated that the installed SNCR system could only achieve a control efficiency of 40 percent. In our proposed action to revise the FIP, we specifically noted several site-specific factors indicating that a SNCR system at CPC Rillito Kiln 4 would underperform the SNCR system at the Mojave Plant. Given the relatively low SNCR effectiveness on the Mojave Plant, we proposed to find that a SNCR control efficiency more stringent than the 35 percent required by the 2014 FIP was not achievable at CPC. Therefore, the additional information from the 2014 FIP control technology demonstration project is no longer needed because the CPC SNCR control efficiency in the 2014 FIP is consistent with the SNCR performance at Mojave. Based on our analysis of emissions data and control efficiencies from the Mojave Plant, we proposed to find that it is no longer necessary for CPC to meet the relatively detailed and prescriptive control technology demonstration requirements in the 2014 FIP, including submittal of a SNCR optimization protocol. We therefore proposed to remove the control technology demonstration requirements. As explained in section III.B below, we proposed to replace these requirements with a set of revised recordkeeping and reporting conditions.

2. Clarkdale Plant Kiln 4

In our proposed action to revise the 2014 FIP, we noted that the 50 percent control efficiency for PCC Clarkdale Kiln 4 is already more stringent than the control efficiency demonstrated at the Mojave Plant, and we proposed to find that the 50 percent control efficiency specified in the 2014 FIP for PCC Clarkdale was supported by the available data. Therefore, the additional information from the 2014 FIP control technology demonstration project is no longer needed because the PCC SNCR control efficiency in the 2014 FIP is more stringent than the SNCR performance at Mojave. The EPA proposed to remove the control technology demonstration requirements for Kiln 4 at the PCC Clarkdale Plant and replace them with revised recordkeeping and reporting conditions.

B. Revised Recordkeeping and Reporting Requirements

As described in III.A above, we proposed to find that it is no longer necessary for CPC and PCC to comply with the relatively prescriptive and detailed control technology demonstration requirements established in our 2014 FIP, and we are replacing those provisions with a set of revised recordkeeping and reporting requirements.

C. Non-Interference With Applicable Requirements

The CAA requires that any revision to an implementation plan shall not be approved by the Administrator if the revision would interfere with any applicable requirement concerning

[17] Letter dated November 3, 2014, from Verle C. Martz (PCC) to Regina McCarthy (EPA) at 2.

[18] We note that while the Clarkdale Plant is tribally owned, it is not located on tribal land. It is subject to State jurisdiction and is regulated by ADEQ.

[19] Letter dated January 16, 2015, from Jared Blumenfeld (EPA) to Verle C. Martz, PCC; letter dated January 27, 2015, from Jared Blumenfeld (EPA) to Jay Grady (CPC).

[20] 81 FR 53929 (Aug. 15, 2016).

[21] 81 FR 42600 (June 30, 2016).

attainment and reasonable further progress or any other applicable requirement of the CAA.[22] We proposed to find that the revisions to the 2014 FIP would not affect any applicable requirements of the CAA because they would not alter the amount or timing of emission reductions from the Clarkdale Plant or the Rillito Plant. In particular, the replacement of the control technology demonstration requirements with revised recordkeeping and reporting conditions would not alter any of the applicable emission limitations, compliance determination methodologies, or compliance deadlines. Therefore, we proposed to find that these revisions would comply with CAA section 110(l).

IV. Public Comments and EPA Responses

Our proposed action provided a 45-day public comment period. During this period, we received three comments: A comment letter from PCC,[23] a comment letter from CPC,[24] and a comment letter from Earthjustice on behalf of National Parks Conservation Association and Sierra Club.[25] The significant comments and our responses are set forth below.

Comment: PCC commented that the EPA's reconsideration rulemaking is necessary for the reasons stated in PCC's petition for reconsideration and in its opening and reply briefs filed with Ninth Circuit in litigation over the Arizona Regional Haze FIP. PCC included each of these documents as attachments to its comments and incorporated them by reference into its comments. PCC also requested that the rulemaking be finalized as soon as possible.

Response: We acknowledge PCC's support for our action on reconsideration. However, PCC's references to and incorporation of the documents it has filed in litigation concerning the Arizona Regional Haze FIP go far beyond the narrow scope of the revisions to the 2014 FIP that we are considering in this action. For example, PCC's arguments regarding the adequacy of notice and the EPA's reasoning concerning the inclusion of the optimization provisions in the FIP are not relevant to this action because the EPA has already completed its proceeding for reconsideration of these provisions under CAA section 307(d)(7)(B) (*i.e.,* this rulemaking action).

Comment: CPC expressed support for this reconsideration action to replace control technology demonstration requirements at CPC with a series of revised recordkeeping and reporting requirements.

Response: We acknowledge CPC's support for our action on reconsideration.

Comment: Earthjustice submitted comments on behalf of the National Parks Conservation Association and Sierra Club (collectively referred to as Earthjustice). The comment letter asserts that the EPA should require PCC and CPC to install Selective Catalytic Reduction (SCR) rather than SNCR technology as reasonable progress controls in our final action. Earthjustice states that the EPA rejected SCR in our initial action in the 2014 FIP because SCR was not being used in the United States to control cement manufacturing facilities. The comment letter indicates that two cement manufacturing facilities in the United States have installed SCR technology since our 2014 FIP. Noting that the EPA proposed reconsideration of the control technology demonstration requirements based on data from the CPC Mojave Plant in California, Earthjustice states:

> If EPA is going to revise the existing FIP's requirements based on recent data from a cement plant in California, it should also examine the recent success of SCR controls at the cement plants in Illinois and Texas. Reconsidering the FIP's requirements based on recent data from other plants should not be a one-way ratchet toward weakening the FIP's requirements. Instead, in order to make a reasonable and fully–informed decision on reconsideration, EPA should also re-examine whether more stringent SCR controls are warranted. [Footnote omitted] [26]

The comment letter concludes: ''Given this recent information documenting the success of SCR at cement plants, EPA should reconsider whether SCR at the Rillito and Clarkdale plants is necessary to ensure reasonable progress.'' [27]

Response: Our proposed revision to the FIP in this action is very limited in scope. The proposed FIP revision followed petitions for reconsideration filed by PCC and CPC in November 2014. The EPA granted reconsideration in January 2015, at which time we stated that the scope of our reconsideration of the 2014 FIP was narrowly limited to the control technology demonstration requirements for SNCR at the Clarkdale and Rillito facilities. When we proposed to revise the FIP, we proposed only ''to replace the control technology optimization requirements at the PCC Clarkdale Plant and CPC Rillito Plant with a series of recordkeeping and reporting requirements.'' 81 FR 42600, 42603 (June 30, 2016).

Contrary to Earthjustice's contention, our evaluation of the data from the Mojave Plant does not justify re-examining all other cement manufacturing facilities in the United States to establish whether a NO_X emission limit achievable through installation of SNCR or SCR should be required for reasonable progress at PCC or CPC. The scope of our revision to the 2014 FIP was limited to evaluating the need for the control technology demonstration requirements to ensure that the NO_X emission limits at the Clarkdale and Rillito facilities are appropriate and to ensure that the performance of the SNCR systems at these facilities is optimized. As explained in our proposal, the data from the Mojave Plant demonstrated that SNCR could only achieve a control efficiency of 40 percent. The analysis of data from the Mojave Plant indicated that more stringent SNCR control efficiencies were not achievable at PCC and CPC. Therefore, the additional information from the 2014 FIP control technology demonstration projects is no longer needed because the PCC and CPC SNCR control efficiencies are consistent with the SNCR performance at Mojave. As a result, we no longer consider the SNCR control technology demonstration provisions in the 2014 FIP to be necessary. Therefore, we disagree with Earthjustice that we should consider SCR technology in the context of the FIP revision at issue in this action.

Comment: Earthjustice also commented that the NO_X emission data from the Mojave plant's SNCR demonstration period does not warrant elimination of the control technology optimization project requirements for CPC and PCC. Specifically, Earthjustice asserts that because optimization of the SNCR system is a site-specific inquiry, the fact that the Mojave plant's optimization did not result in significant improvement does not mean that SNCR optimization at CPC and PCC would be similarly unsuccessful. As a result, the control technology optimization project requirements should remain in place.

Response: We disagree with the commenter's assertion. We acknowledge that control technology determinations for cement kilns are site specific in nature; however, while a site-specific analysis involves consideration of special circumstances and

[22] 42 U.S.C. 7410(l).

[23] Letter dated July 13, 2016, from Verle C. Martz (PCC) to Vijay Limaye (EPA).

[24] Letter dated August 15, 2016, from Jay M. Grady (CPC) to Vijay Limaye (EPA).

[25] Letter dated August 12, 2016, from Michael Hiatt (Earthjustice) to Vijay Limaye (EPA).

[26] *Ibid.*

[27] *Ibid.*

characteristics pertinent to the source under review, it does not require excluding information from other, similar facilities, and information from these facilities can be highly relevant. For many control technologies with a wide range of performance levels, it is important to take into account their performance at other, similar sources.

In our proposed action to revise the FIP, we specifically noted several site-specific factors indicating that a SNCR system at CPC Rillito Kiln 4 would underperform the SNCR system at the kiln at the Mojave Plant. Given the relatively low SNCR effectiveness on the Mojave Plant, we noted in our proposed action that the final NO_X limit for CPC Rillito Kiln 4 was adequately supported by the available data. Aside from a general assertion about the site-specific nature of SNCR optimization, the commenter has not provided any additional information suggesting that retaining the control technology demonstration requirements for Rillito Kiln 4 would result in a more stringent NO_X limit, or that a comparison to the Mojave Plant is inappropriate.

Similarly, in our proposed action to revise the 2014 FIP, we noted that the final NO_X limit for PCC Clarkdale Kiln 4 is already more stringent than the NO_X limit demonstrated at the Mojave Plant, both in terms of emission limit and control effectiveness. Given that a more stringent limit was not demonstrated at the Mojave Plant, we find that the 50 percent control efficiency specified in the 2014 FIP for PCC Clarkdale is still supported, and we do not consider that the information from the control technology demonstration project will support re-evaluating the final NO_X limit for PCC Clarkdale Kiln 4. Aside from a general assertion about the site specific nature of SNCR optimization, the commenter has not provided any additional information or detail indicating that information from the control technology demonstration requirements will support re-evaluation of the NO_X limit that is achievable, or that a comparison to the Mojave Plant is inappropriate.

Comment: Earthjustice also states that our proposed revision of the 2014 FIP is a ''one-way ratchet toward weakening the FIP requirements,'' that we are replacing ''existing 'control optimization' requirements for the two Arizona plants with less stringent recordkeeping and reporting requirements'' and that we should not eliminate the control optimization provisions. The comment letter states:

> In the current rulemaking, EPA proposes to relax the existing FIP requirements for the Rillito and Clarkdale cement plants because of recent information regarding SNCR performance on other cements kilns in the United States. 81 FR at 42602–03. Specifically, EPA has reviewed recent SNCR performance data from the Mojave cement plant in California. EPA believes this recent SNCR data from California justifies replacing the existing ''control optimization'' requirements for the two Arizona plants with less stringent recordkeeping and reporting requirements.[28]

Response: We do not agree that today's rule will ''relax'' the relevant requirements of the 2014 FIP. When we finalized the 2014 FIP, we acknowledged that data being collected at the Mojave Plant could potentially support more stringent NO_X emission limits at the Rillito and Clarkdale facilities. However, data obtained from the Mojave Plant in early 2015 did not support any re-evaluation of the NO_X emission limits in the 2014 FIP at the Rillito and Clarkdale facilities. Accordingly, we proposed and are now finalizing the removal of the control technology demonstration requirements in the 2014 FIP. This action does not weaken or relax the NO_X emission limits in the 2014 FIP or the requirement to achieve the specified control efficiency when SNCR controls are used. This FIP revision merely removes a process that EPA has determined is no longer necessary. There will not be any additional NO_X emissions from these facilities and the 2014 FIP requirements remain fully enforceable.

V. Final Action

The EPA is taking final action to revise portions of the Arizona Regional Haze FIP to replace the control technology demonstration requirements at the PCC Clarkdale Plant and the CPC Rillito Plant with a series of recordkeeping and reporting requirements. The revisions to the reporting and recordkeeping conditions we are finalizing in this action, exactly as we proposed them, require documenting and submitting certain design and optimization activities that are part of a typical SNCR system installation. These revisions are detailed in the regulatory text at 40 CFR 52.145(k).

We are also making a minor technical correction to the regulatory text for this action by correcting the equation provided in 40 CFR 52.145(k)(7)(ii)(B)(1) to make the equation consistent with the text in that section.

We find that today's revision will not interfere with any applicable requirement concerning attainment, reasonable further progress, or any other applicable requirement of the CAA, because the FIP revision will not alter the amount or timing of emission reductions from the Clarkdale Plant or the Rillito Plant.

Finally, the EPA granted a 90-day administrative stay on August 15, 2016 that expires on November 14, 2016.[29] In this action, we are deleting the regulatory text in 40 CFR 52.145(n) establishing the administrative stay. We are deleting the regulatory provision because the stay will no longer be in effect after the effective date of our final action on the FIP revision.

VI. Environmental Justice Considerations

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). Today's revisions to portions of the Arizona Regional Haze FIP will not alter the amount or timing of emission reductions from the Clarkdale Plant or the Rillito Plant.

VII. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www2.epa.gov/laws-regulations/laws-and-executive-orders.*

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

This action is exempt from review by the Office of Management and Budget (OMB) because it applies to only two facilities and is therefore not a rule of general applicability.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. This rule applies to only two facilities. Therefore, its recordkeeping and reporting provisions do not constitute a ''collection of information'' as defined under 44 U.S.C. 3502(3) and 5 CFR 1320.3(c).

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. For purposes of assessing the impacts of today's rule on small entities,

[28] *Ibid.*

[29] 40 CFR 52.145(n); 81 FR 53929 (Aug. 15, 2016).

small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. Pursuant to 13 CFR 121.201, footnote 1, a firm is small if it is in NAICS 327310 (cement manufacturing) and the concern and its affiliates have no more than 750 employees. CPC is owned by Taiheiyo Cement Corporation, which has more than 750 employees.[30] PCC is a division of SRPMIC.[31] For the purposes of the RFA, tribal governments are not considered small governments. 5 U.S.C. 601(5). Therefore, SRPMIC is not a small entity.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538. This action may significantly or uniquely affect small governments. As a tribal government, SRPMIC is considered a ''small government'' under UMRA. See 2 U.S.C. 658(11) and (13). The EPA consulted with SRPMIC concerning the regulatory requirements that might significantly or uniquely affect it.[32]

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 has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. This action eliminates the SNCR optimization requirements that currently apply to the PCC Clarkdale Plant. The profits from the Clarkdale Plant are used to provide government services to SRPMIC's members.

The EPA consulted with tribal officials under the EPA Policy on Consultation and Coordination with Indian Tribes early in the process of developing this regulation to permit them to have meaningful and timely input into its development.[33]

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 health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

This rulemaking does not involve technical standards. The EPA is not revising any technical standards or imposing any new technical standards in this action.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The documentation for this decision is contained in section VI above.

K. Determination Under Section 307(d)

Pursuant to CAA section 307(d)(1)(B), this action is subject to the requirements of CAA section 307(d), as it revises a FIP under CAA section 110(c).

L. Congressional Review Act (CRA)

This rule is exempt from the CRA because it is a rule of particular applicability.

M. Petitions for 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 January 20, 2017. 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 CAA section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen oxides, Reporting and recordkeeping requirements, Visibility.

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

Dated: November 4, 2016.

Gina McCarthy,

Administrator.

Part 52, chapter I, title 40 of the Code of Federal Regulations 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 D—Arizona

■ 2. Amend § 52.145 by:
■ a. Revising paragraph (k); and
■ b . Removing ''Appendix A to § 52.145—Cement Kiln Control Technology Demonstration Requirements''.

The revision reads as follows:

§ 52.145 Visibility protection.

* * * * *

(k) *Source-specific federal implementation plan for regional haze at Clarkdale Cement Plant and Rillito Cement Plant*—(1) *Applicability.* This paragraph (k) applies to each owner/operator of the following cement kilns in the state of Arizona: Kiln 4 located at the cement plant in Clarkdale, Arizona, and kiln 4 located at the cement plant in Rillito, Arizona.

(2) *Definitions.* Terms not defined in this paragraph (k)(2) shall have the meaning given them in the Clean Air Act or EPA's regulations implementing the Clean Air Act. For purposes of this paragraph (k):

[30] *See* Taiheiyo Cement Corporation Annual Report 2015 at 1 and 36.

[31] Letter dated December 20, 2012, from Diane Enos (SRPMIC) to Jared Blumenfield (EPA).

[32] Memorandum dated June 15, 2016, from Charlotte Withey (EPA) to Rulemaking Docket EPA–R09–OAR–2015–0846, Subject: ''Summary of Consultation with SRPMIC Regarding Regional Haze FIP Reconsideration.''

[33] *Id.*

Ammonia injection shall include any of the following: Anhydrous ammonia, aqueous ammonia or urea injection.

Continuous emission monitoring system or CEMS means the equipment required by this section to sample, analyze, measure, and provide, by means of readings recorded at least once every 15 minutes (using an automated data acquisition and handling system), a permanent record of NO_X emissions, diluent, or stack gas volumetric flow rate.

Kiln operating day means a 24-hour period between 12 midnight and the following midnight during which the kiln operates at any time.

Kiln operation means any period when any raw materials are fed into the kiln or any period when any combustion is occurring or fuel is being fired in the kiln.

NO_X means nitrogen oxides.

Owner/operator means any person who owns or who operates, controls, or supervises a cement kiln identified in paragraph (k)(1) of this section.

Unit means a cement kiln identified in paragraph (k)(1) of this section.

(3) *Emissions limitations.* (i) The owner/operator of kiln 4 of the Clarkdale Plant, as identified in paragraph (k)(1) of this section, shall not emit or cause to be emitted from kiln 4 NO_X in excess of 2.12 pounds of NO_X per ton of clinker produced, based on a rolling 30-kiln operating day basis.

(ii) The owner/operator of kiln 4 of the Rillito Plant, as identified in paragraph (k)(1) of this section, shall not emit or cause to be emitted from kiln 4 NO_X in excess of 3.46 pounds of NO_X per ton of clinker produced, based on a rolling 30-kiln operating day basis.

(4) *Alternative emissions limitation.* In lieu of the emission limitation listed in paragraph (k)(3)(i) of this section, the owner/operator of kiln 4 of the Clarkdale Plant may choose to comply with the following limitation by providing notification per paragraph (k)(13)(iv) of this section. The owner/operator of kiln 4 of the Clarkdale Plant, as identified in paragraph (k)(1) of this section, shall not emit or cause to be emitted from kiln 4 NO_X in excess of 810 tons per year, based on a rolling 12-month basis.

(5) *Compliance date.* (i) The owner/operator of each unit identified in paragraph (k)(1) of this section shall comply with the NO_X emissions limitations and other NO_X-related requirements of this paragraph (k)(3) of this section no later than December 31, 2018.

(ii) If the owner/operator of the Clarkdale Plant chooses to comply with the emission limit of paragraph (k)(4) of this section in lieu of paragraph (k)(3)(i) of this section, the owner/operator shall comply with the NO_X emissions limitations and other NO_X-related requirements of paragraph (k)(4) of this section no later than December 31, 2018.

(6) [Reserved]

(7) *Compliance determination*—(i) *Continuous emission monitoring system.* (A) At all times after the compliance date specified in paragraph (k)(5) of this section, the owner/operator of the unit at the Clarkdale Plant shall maintain, calibrate, and operate a CEMS, in full compliance with the requirements found at 40 CFR 60.63(f) and (g), to accurately measure concentration by volume of NO_X, diluent, and stack gas volumetric flow rate from the in-line/raw mill stack, as well as the stack gas volumetric flow rate from the coal mill stack. The CEMS shall be used by the owner/operator to determine compliance with the emission limitation in paragraph (k)(3) of this section, in combination with data on actual clinker production. The owner/operator must operate the monitoring system and collect data at all required intervals at all times the affected unit is operating, except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, and required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments).

(B) At all times after the compliance date specified in paragraph (k)(5) of this section, the owner/operator of the unit at the Rillito Plant shall maintain, calibrate, and operate a CEMS, in full compliance with the requirements found at 40 CFR 60.63(f) and (g), to accurately measure concentration by volume of NO_X, diluent, and stack gas volumetric flow rate from the unit. The CEMS shall be used by the owner/operator to determine compliance with the emission limitation in paragraph (k)(3) of this section, in combination with data on actual clinker production. The owner/operator must operate the monitoring system and collect data at all required intervals at all times the affected unit is operating, except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, and required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments).

(ii) *Methods.* (A) The owner/operator of each unit shall record the daily clinker production rates.

(B)(*1*) The owner/operator of each unit shall calculate and record the 30-kiln operating day average emission rate of NO_X, in pounds per ton (lb/ton) of clinker produced, as the total of all hourly emissions data for the cement kiln in the preceding 30-kiln operating days, divided by the total tons of clinker produced in that kiln during the same 30-day operating period, using the following equation:

$$E_D = k\left(\frac{1}{n}\right)\frac{\sum_{i=1}^{n}(C_iQ_i)}{\sum_{i=1}^{n}P_i}$$

Where:

E[D] = 30 kiln operating day average emission rate of NO_X, lb/ton of clinker;

C[i] = Concentration of NO_X for hour i as recorded by the CEMS required by paragraph (k)(7)(i) of this section, ppm;

Q[i] = volumetric flow rate of effluent gas for hour i as recorded by the CEMS required by paragraph (k)(7)(i) of this section, where C[i] and Q[i] are on the same basis (either wet or dry), scf/hr;

P[i] = total kiln clinker produced during production hour i, ton/hr;

k = conversion factor, 1.194×10^{-7} for NO_X; and

n = number of kiln operating hours over 30 kiln operating days, n = 1 up to 720.

(*2*) For each kiln operating hour for which the owner/operator does not have at least one valid 15-minute CEMS data value, the owner/operator must use the average emissions rate in pounds per ton (lb/hr) from the most recent previous hour for which valid data are available. Hourly clinker production shall be determined by the owner/operator in accordance with the requirements found at 40 CFR 60.63(b).

(C) At the end of each kiln operating day, the owner/operator shall calculate and record a new 30-day rolling average emission rate in lb/ton clinker from the arithmetic average of all valid hourly emission rates for the current kiln operating day and the previous 29 successive kiln operating days.

(D) Upon and after the completion of installation of ammonia injection on a unit, the owner/operator shall install, and thereafter maintain and operate, instrumentation to continuously monitor and record levels of ammonia injection for that unit.

(8) *Alternative compliance determination.* If the owner/operator of the Clarkdale Plant chooses to comply with the emission limits of paragraph (k)(4) of this section, this paragraph may be used in lieu of paragraph (k)(7) of this section to demonstrate compliance with the emission limits in paragraph (k)(4) of this section.

(i) *Continuous emission monitoring system.* At all times after the compliance date specified in paragraph (k)(5) of this section, the owner/operator of the unit at the Clarkdale Plant shall maintain, calibrate, and operate a CEMS, in full compliance with the requirements found at 40 CFR 60.63(f) and (g), to accurately measure concentration by volume of NO_X, diluent, and stack gas volumetric flow rate from the in-line/raw mill stack, as well as the stack gas volumetric flow rate from the coal mill stack. The CEMS shall be used by the owner/operator to determine compliance with the emission limitation in paragraph (k)(4) of this section. The owner/operator must operate the monitoring system and collect data at all required intervals at all times the affected unit is operating, except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, and required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments).

(ii) *Method.* Compliance with the ton per year NO_X emission limit described in paragraph (k)(4) of this section shall be determined based on a rolling 12-month basis. The rolling 12-month NO_X emission rate for the kiln shall be calculated within 30 days following the end of each calendar month in accordance with the following procedure: Step one, sum the hourly pounds of NO_X emitted for the month just completed and the eleven (11) months preceding the month just completed, to calculate the total pounds of NO_X emitted over the most recent twelve (12) month period for that kiln; Step two, divide the total pounds of NO_X calculated from Step one by two thousand (2,000) to calculate the total tons of NO_X. Each rolling 12-month NO_X emission rate shall include all emissions that occur during all periods within the 12-month period, including emissions from startup, shutdown and malfunction.

(iii) Upon and after the completion of installation of ammonia injection on the unit, the owner/operator shall install, and thereafter maintain and operate, instrumentation to continuously monitor and record levels of ammonia injection for that unit.

(9) *Recordkeeping.* The owner/operator of each unit shall maintain the following records for at least five years:

(i) All CEMS data, including the date, place, and time of sampling or measurement; emissions and parameters sampled or measured; and results.

(ii) All records of clinker production.

(iii) Daily 30-day rolling emission rates of NO_X, calculated in accordance with paragraph (k)(7)(ii) of this section.

(iv) Records of quality assurance and quality control activities for emissions measuring systems including, but not limited to, any records specified by 40 CFR part 60, Appendix F, Procedure 1.

(v) Records of ammonia injection, as recorded by the instrumentation required in paragraph (k)(7)(ii)(D) of this section.

(vi) Records of all major maintenance activities conducted on emission units, air pollution control equipment, CEMS and clinker production measurement devices.

(vii) Any other records specified by 40 CFR part 60, subpart F, or 40 CFR part 60, Appendix F, Procedure 1.

(10) *Alternative recordkeeping requirements.* If the owner/operator of the Clarkdale Plant chooses to comply with the emission limits of paragraph (k)(4) of this section, the owner/operator shall maintain the records listed in this paragraph in lieu of the records contained in paragraph (k)(9) of this section. The owner or operator shall maintain the following records for at least five years:

(i) All CEMS data, including the date, place, and time of sampling or measurement; emissions and parameters sampled or measured; and results.

(ii) Monthly rolling 12-month emission rates of NO_X, calculated in accordance with paragraph (k)(8)(ii) of this section.

(iii) Records of quality assurance and quality control activities for emissions measuring systems including, but not limited to, any records specified by 40 CFR part 60, Appendix F, Procedure 1.

(iv) Records of ammonia injection, as recorded by the instrumentation required in paragraph (k)(8)(iii) of this section.

(v) Records of all major maintenance activities conducted on emission units, air pollution control equipment, and CEMS measurement devices.

(vi) Any other records specified by 40 CFR part 60, subpart F, or 40 CFR part 60, Appendix F, Procedure 1.

(11) *Reporting.* All reports and notifications required under this paragraph (k) shall be submitted by the owner/operator to U.S. Environmental Protection Agency, Region 9, Enforcement Division via electronic mail to *aeo_r9@epa.gov* and to Air Division via electronic mail to *R9AirPermits@epa.gov.* Reports required under this paragraph (k)(11)(iii) through (k)(11)(vii) of this section shall be submitted within 30 days after the applicable compliance date in paragraph (k)(5) of this section and at least semiannually thereafter, within 30 days after the end of a semiannual period. The owner/operator may submit reports more frequently than semiannually for the purposes of synchronizing reports required under this section with other reporting requirements, such as the title V monitoring report required by 40 CFR 70.6(a)(3)(iii)(A), but at no point shall the duration of a semiannual period exceed six months.

(i) Prior to commencing construction of the ammonia injection system, the owner/operator shall submit to the EPA a report describing the design of the SNCR system. This report shall include: reagent type, description of the locations selected for reagent injection, reagent injection rate (expressed as a molar ratio of reagent to exhaust gas), equipment list, equipment arrangement, and a summary of kiln characteristics that were relied upon as the design basis for the SNCR system.

(ii) Within 30 days following the NO_X compliance date in paragraph (k)(5)(i) of this section, the owner/operator shall submit to the EPA a report of any process improvement or debugging activities that were performed on the SNCR system. This report shall include: a description of each process adjustment performed on the SNCR system or the kiln, a discussion of whether the adjustment affected NO_X emission rates, a description of the range (if applicable) over which the adjustment was examined, and a discussion of how the adjustment will be reflected or accounted for in kiln operating practices. If CEMS data or kiln operating data were recorded during process improvement or debugging activities, the owner/operator shall submit the recorded CEMS and kiln operating data with the report. The data shall be submitted in an electronic format consistent with and able to be manipulated by a spreadsheet program such as Microsoft Excel.

(iii) The owner/operator shall submit a report that lists the daily 30-day rolling emission rates for NO_X.

(iv) The owner/operator shall submit excess emissions reports for NO_X limits. Excess emissions means emissions that exceed the emissions limits specified in paragraph (k)(3) of this section. The reports shall include the magnitude, date(s), and duration of each period of excess emissions, specific identification of each period of excess emissions that occurs during startups, shutdowns, and malfunctions of the unit, the nature and cause of any malfunction (if known), and the corrective action taken or preventative measures adopted.

(v) The owner/operator shall submit CEMS performance reports, to include dates and duration of each period during which the CEMS was inoperative (except for zero and span adjustments and calibration checks), reason(s) why the CEMS was inoperative and steps taken to prevent recurrence, and any CEMS repairs or adjustments.

(vi) The owner/operator shall also submit results of any CEMS performance tests specified by 40 CFR part 60, Appendix F, Procedure 1 (Relative Accuracy Test Audits, Relative Accuracy Audits, and Cylinder Gas Audits).

(vii) When no excess emissions have occurred or the CEMS has not been inoperative, repaired, or adjusted during the reporting period, the owner/operator shall state such information in the reports required by paragraph (k)(9)(ii) of this section.

(12) *Alternative reporting requirements.* If the owner/operator of the Clarkdale Plant chooses to comply with the emission limits of paragraph (k)(4) of this section, the owner/operator shall submit the reports listed in this paragraph in lieu of the reports contained in paragraph (k)(11) of this section. All reports required under this paragraph (k)(12) shall be submitted within 30 days after the applicable compliance date in paragraph (k)(5) of this section and at least semiannually thereafter, within 30 days after the end of a semiannual period. The owner/operator may submit reports more frequently than semiannually for the purposes of synchronizing reports required under this section with other reporting requirements, such as the title V monitoring report required by 40 CFR 70.6(a)(3)(iii)(A), but at no point shall the duration of a semiannual period exceed six months.

(i) The owner/operator shall submit a report that lists the monthly rolling 12-month emission rates for NO_X.

(ii) The owner/operator shall submit excess emissions reports for NO_X limits. Excess emissions means emissions that exceed the emissions limits specified in paragraph (k)(3) of this section. The reports shall include the magnitude, date(s), and duration of each period of excess emissions, specific identification of each period of excess emissions that occurs during startups, shutdowns, and malfunctions of the unit, the nature and cause of any malfunction (if known), and the corrective action taken or preventative measures adopted.

(iii) The owner/operator shall submit CEMS performance reports, to include dates and duration of each period during which the CEMS was inoperative (except for zero and span adjustments and calibration checks), reason(s) why the CEMS was inoperative and steps taken to prevent recurrence, and any CEMS repairs or adjustments.

(iv) The owner/operator shall also submit results of any CEMS performance tests specified by 40 CFR part 60, Appendix F, Procedure 1 (Relative Accuracy Test Audits, Relative Accuracy Audits, and Cylinder Gas Audits).

(v) When no excess emissions have occurred or the CEMS has not been inoperative, repaired, or adjusted during the reporting period, the owner/operator shall state such information in the reports required by paragraph (k)(9)(ii) of this section.

(13) *Notifications.* (i) The owner/operator shall submit notification of commencement of construction of any equipment which is being constructed to comply with the NO_X emission limits in paragraph (k)(3) of this section.

(ii) The owner/operator shall submit semiannual progress reports on construction of any such equipment.

(iii) The owner/operator shall submit notification of initial startup of any such equipment.

(iv) By June 30, 2018, the owner/operator of the Clarkdale Plant shall notify EPA Region 9 by letter whether it will comply with the emission limits in paragraph (k)(3)(i) of this section or whether it will comply with the emission limits in paragraph (k)(4) of this section. In the event that the owner/operator does not submit timely and proper notification by June 30, 2018, the owner/operator of the Clarkdale Plant may not choose to comply with the alternative emission limits in paragraph (k)(4) of this section and shall comply with the emission limits in paragraph (k)(3)(i) of this section.

(14) *Equipment operation.* (i) At all times, including periods of startup, shutdown, and malfunction, the owner or operator shall, to the extent practicable, maintain and operate the unit including associated air pollution control equipment in a manner consistent with good air pollution control practices for minimizing emissions. Pollution control equipment shall be designed and capable of operating properly to minimize emissions during all expected operating conditions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Regional Administrator which may include, but is not limited to, monitoring results, review of operating and maintenance procedures, and inspection of the unit.

(ii) After completion of installation of ammonia injection on a unit, the owner or operator shall inject sufficient ammonia to achieve compliance with NO_X emission limits set forth in paragraph (k)(3) of this section for that unit while preventing excessive ammonia emissions.

(15) *Enforcement.* Notwithstanding any other provision in this implementation plan, any credible evidence or information relevant as to whether the unit would have been in compliance with applicable requirements if the appropriate performance or compliance test had been performed, can be used to establish whether or not the owner or operator has violated or is in violation of any standard or applicable emission limit in the plan.

[FR Doc. 2016–27422 Filed 11–18–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2014–0767; FRL–9955–19–Region 4]

Air Plan Approval; KY Infrastructure Requirements for the 2010 1-Hour NO_2 NAAQS

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve portions of the State Implementation Plan (SIP) submission, submitted by the Commonwealth of Kentucky, Energy and Environment Cabinet, Department for Environmental Protection, through the Kentucky Division for Air Quality (KDAQ), on April 26, 2013, to demonstrate that the Commonwealth meets the infrastructure requirements of the Clean Air Act (CAA or Act) for the 2010 1-hour nitrogen dioxide (NO_2) national ambient air quality standard (NAAQS). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an ''infrastructure'' SIP. KDAQ certified that Kentucky's SIP contains provisions that ensure the 2010 1-hour NO_2 NAAQS is implemented, enforced, and maintained in Kentucky. EPA has determined that portions of Kentucky's infrastructure submission, submitted on April 26, 2013, addresses certain required infrastructure elements for the 2010 1-hour NO_2 NAAQS.

DATES: This rule will be effective December 21, 2016.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–

2014–0767. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* 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 *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Richard Wong, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Mr. Wong can be reached via telephone at (404) 562–8726 or via electronic mail at *wong.richard@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Overview

On January 22, 2010, (published at 75 FR 6474, February 9, 2010), EPA promulgated a new 1-hour primary NAAQS for NO_2 at a level of 100 parts per billion, based on a 3-year average of the 98th percentile of the yearly distribution of 1-hour daily maximum concentrations. Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS. Section 110(a)(2) requires states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs for the 2010 1-hour NO_2 NAAQS to EPA no later than January 22, 2013.

In a proposed rulemaking published on June 27, 2016 (81 FR 41488), EPA proposed to approve Kentucky's 2010 1-hour NO_2 NAAQS infrastructure SIP submission submitted on April 26, 2013, with the exception of the PSD permitting requirements for major sources of sections 110(a)(2)(C), prong 3 of D(i), and (J), the interstate transport requirements of section 110(a)(2)(D)(i)(I) and (II) (prongs 1, 2, and 4), and the regulation of minor sources and minor modifications under section 110(a)(2)(C). On March 18, 2015 (80 FR 14019), EPA approved Kentucky's April 26, 2013, infrastructure SIP submission regarding the PSD permitting requirements for major sources of sections 110(a)(2)(C), prong 3 of D(i), and (J) for the 2010 1-hour NO_2 NAAQS. Therefore, EPA is not taking any action today pertaining to sections 110(a)(2)(C), prong 3 of D(i), and (J). With respect to the interstate transport requirements of section 110(a)(2)(D)(i)(I) (prongs 1 and 2), EPA does not yet have a submission before the Agency for action. In regards to Kentucky submission related to prong 4 and the regulation of minor sources and minor modifications under section 110(a)(2)(C), EPA will consider action on these elements in a separate rulemaking. The details of Kentucky's submission and the rationale for EPA's action are explained in the proposed rulemaking. Comments on the proposed rulemaking were due on or before July 27, 2016. EPA received no adverse comments on the proposed action.

II. Final Action

With the exception of the PSD permitting requirements for major sources of sections 110(a)(2)(C), prong 3 of D(i), and (J), the interstate transport requirements of section 110(a)(2)(D)(i)(I) and (II) (prongs 1, 2, and 4), and the regulation of minor sources and minor modifications under section 110(a)(2)(C), EPA is taking final action to action to approve Kentucky's infrastructure submission submitted on April 26, 2013, for the 2010 1-hour NO_2 NAAQS. EPA is taking final action to approve Kentucky's infrastructure SIP submission for the 2010 1-hour NO_2 NAAQS because the submission is consistent with section 110 of the CAA.

III. 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. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action 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).

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 as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it 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. 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 January 20, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: November 3, 2016.

Heather McTeer Toney,

Regional Administrator, Region 4.

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 S—Kentucky

■ 2. In § 52.920, the table in paragraph (e) is amended by adding the entry ''110(a)(1) and (2) Infrastructure Requirements for the 2010 1-hour NO_2 NAAQS'' at the end of the table to read as follows:

§ 52.920 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED KENTUCKY NON-REGULATORY PROVISIONS

Name of non-regulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA approval date	Explanations
*	*	*	*	* * *
110(a)(1) and (2) Infrastructure Requirements for the 2010 1-hour NO_2 NAAQS.	Kentucky	4/26/2013	11/21/2016, [insert **Federal Register** citation].	With the exception of the regulation of new minor sources and minor modifications under section 110(a)(2)(C), section 110(a)(2)(D)(i)(I) and (II) (prongs 1–4) and the PSD requirements of section 110(a)(2)(J).

[FR Doc. 2016–27538 Filed 11–18–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2015–0819; FRL–9954–78–Region 9]

Revisions to the California State Implementation Plan; South Coast Air Quality Management District; Control of Oxides of Nitrogen Emissions From Off-Road Diesel Vehicles

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve South Coast Air Quality Management District (SCAQMD or ''the District'') Rule 2449, Control of Oxides of Nitrogen Emissions from Off-Road Diesel Vehicles, as a revision to the SCAQMD portion of the California State Implementation Plan (SIP). SCAQMD Rule 2449 adopts by reference title 13, chapter 9, section 2449.2 of the California Code of Regulations, ''Surplus Off-Road Opt-In for NO_X (SOON) Program.'' SCAQMD Rule 2449 requires certain in-use off-road vehicle fleets to meet more stringent requirements in the South Coast area when funding is provided by the District in order to achieve additional reductions of oxides of nitrogen (NO_X).

DATES: This rule will be effective on December 21, 2016.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2015–0819. 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 through *http://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Laura Lawrence, EPA Region IX, (415) 947–3407, *lawrence.laura@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to the EPA.

Table of Contents

I. Summary of Proposed Action

On March 10, 2016 (81 FR 12637), under section 110(k) of the Clean Air Act (CAA or ''the Act''), the EPA proposed to approve SCAQMD Rule 2449, ''Control of Oxides of Nitrogen Emissions from Off-Road Diesel Vehicles'' into the South Coast portion of the California SIP. SCAQMD Rule 2449 adopts by reference title 13, chapter 9, section 2449.2 of the California Code of Regulations, ''Surplus Off-Road Opt-In for NO_X (SOON) Program.'' The rule requires certain in-use off-road vehicle fleets meet more stringent requirements in the South Coast area when funding is provided by the District in order to achieve additional reductions of NO_X. SCAQMD Rule 2449 was originally adopted by the SCAQMD on May 2, 2008, and submitted to the EPA by the

State of California on July 18, 2008. The District adopted revisions to the rule on July 11, 2014, and the amended rule was submitted to the EPA by the State on September 5, 2014. The 2014 revisions incorporated minor administrative updates made to the SOON program by the California Air Resources Board (CARB) in December 2011.

Off-road diesel vehicles collectively represent one of the largest sources of NO_X emissions in the South Coast Air Basin. The purpose of Rule 2449 is to achieve surplus NO_X reductions from this source category beyond those required under CARB's Off-Road Regulation, with funding provided by the SCAQMD. The SCAQMD's 2012 Air Quality Management Plan relies on NO_X reductions from Rule 2449 to attain the one-hour and 1997 eight-hour ozone National Ambient Air Quality Standards. Rule 2449 is expected to achieve 7.5 tons per day (tpd) of NO_X reductions in 2023. We note that the EPA is not approving these emission reductions in today's proposed rule; emission reductions or SIP credit from Rule 2449 will be addressed in future EPA actions on attainment plans.

Since our action proposing approval of Rule 2449, SCAQMD has adopted revisions to the SOON program guidelines. The revised guidelines were adopted on March 4, 2016, and sent to CARB for evaluation on August 17, 2016. CARB approved the guidelines on October 6, 2016.[1] A copy of this approval letter is found in the docket for this rulemaking action.

We proposed to approve this rule because we determined that it complied with the relevant CAA requirements. Our proposed action contains more information on the rule and our evaluation.

II. Public Comments and the EPA's Responses

The EPA's proposed action provided a 30-day public comment period. During this period, we received no comments.

III. Final Action

Pursuant to section 110(k)(3) of the Act and for the reasons stated in our proposed rule, the EPA is approving CARB's September 5, 2014 submittal of SCAQMD Rule 2449, ''Control of Oxides of Nitrogen Emissions from Off-Road Diesel Vehicles,'' as a revision to the SCAQMD portion of the California SIP.

[1] *See* letter dated October 6, 2016, from Jack Kitowski, Chief, CARB Mobile Source Control Division to Henry Hogo, Deputy Executive Officer, SCAQMD.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of SCAQMD Rule 2449 in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, SCAQMD Rule 2449 available through *www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Under the Clean Air Act, 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 Clean Air Act. 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 Clean Air Act; 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, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. 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 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 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 January 20, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

Dated: October 18, 2016.

Alexis Strauss,

Acting Regional Administrator, Region IX.

Part 52, chapter I, title 40 of the Code of Federal Regulations 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 F—California

■ 2. Section 52.220 is amended by adding paragraph (c)(482) to read as follows:

§ 52.220 Identification of plan—in part.

* * * * *

(c) * * *

(482) New regulations for the following APCDs were submitted on September 5, 2014 by the Governor's designee.

(i) Incorporation by reference.

(A) South Coast Air Quality Management District.

(*1*) Rule 2449, ''Control of Oxides of Nitrogen Emissions from Off-Road Diesel Vehicles,'' amended on July 11, 2014.

* * * * *

[FR Doc. 2016–27853 Filed 11–18–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2014–0425; FRL–9955–32-Region 4]

Air Quality Plan; Georgia; Infrastructure Requirements for the 2012 $PM_{2.5}$ NAAQS

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve a portion of the State Implementation Plan (SIP) submission, submitted by the State of Georgia, through the Georgia Department of Natural Resources, Environmental Protection Division, on December 14, 2015, to demonstrate that the State meets the infrastructure requirements of the Clean Air Act (CAA or Act) for the 2012 annual fine particulate matter ($PM_{2.5}$) national ambient air quality standard (NAAQS). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an ''infrastructure SIP submission.'' Georgia certified that its SIP contains provisions that ensure the 2012 Annual $PM_{2.5}$ NAAQS is implemented, enforced, and maintained in Georgia. EPA is approving portions of Georgia's infrastructure SIP submission, provided to EPA on December 14, 2015, as satisfying certain required infrastructure elements for the 2012 Annual $PM_{2.5}$ NAAQS.

DATES: This rule will be effective December 21, 2016.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2014–0425. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* 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 *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Tiereny Bell, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Ms. Bell can be reached via electronic mail at *bell.tiereny@epa.gov* or via telephone at (404) 562–9088.

SUPPLEMENTARY INFORMATION:

I. Background and Overview

On December 14, 2012, EPA promulgated a revised primary annual $PM_{2.5}$ NAAQS. The standard was strengthened from 15.0 micrograms per cubic meter (μg/m³) to 12.0 μg/m³. *See* 78 FR 3086 (January 15, 2013). Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs for the 2012 Annual $PM_{2.5}$ NAAQS to EPA no later than December 14, 2015.

In a proposed rulemaking published on August 23, 2016 (81 FR 57544), EPA proposed to approve portions of Georgia's December 14, 2015, SIP submission for the 2012 Annual $PM_{2.5}$ NAAQS, with the exception of the interstate transport requirements of section 110(a)(2)(D)(i)(I) and (II) (prongs 1, 2, and 4), for which EPA did not propose any action. On July 11, 2016, EPA published a proposed rule related to the prong 4 element of Georgia's December 14, 2015, SIP submission for the 2012 $PM_{2.5}$ NAAQS. *See* 81 FR 44831. EPA will consider final action on the prong 4 element of Georgia's March 25, 2013, SIP submission for the 2012 $PM_{2.5}$ NAAQS through a separate rulemaking. With respect to the interstate transport requirements of section 110(a)(2)(D)(i)(I) (prongs 1 and 2), EPA is considering this portion of Georgia's December 14, 2015, submission through a separate rulemaking. The details of Georgia's submission and the rationale for EPA's actions for this final rule are explained in the August 23, 2016, proposed rulemaking. Comments on the proposed rulemaking were due on or before September 22, 2016. EPA received no adverse comments.

II. Final Action

EPA is taking final action to approve Georgia's infrastructure submission submitted on December 14, 2015, for the 2012 Annual $PM_{2.5}$ NAAQS for the infrastructure SIP requirements, with the exception of the interstate transport requirements of section 110(a)(2)(D)(i)(I) and (II) (prongs 1, 2 and 4). EPA is taking final action to approve all other elements of Georgia's infrastructure SIP submissions for the 2012 Annual $PM_{2.5}$ NAAQS because the submission is consistent with section 110 of the CAA.

III. 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. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action 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 as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it 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. 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 January 20, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

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

Dated: November 3, 2016.

Heather McTeer Toney,

Regional Administrator, Region 4.

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 L—Georgia

■ 2. In § 52.570, the table in paragraph (e) is amended by adding the entry ''110(a)(1) and (2) Infrastructure Requirements for the 2012 Annual $PM_{2.5}$ NAAQS'' at the end of the table to read as follows:

§ 52. 570 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED GEORGIA NON-REGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or non-attainment area	State submittal date/effective date	EPA approval date	Explanation
* *	*	*	*	* *
110(a)(1) and (2) Infrastructure Requirements for the 2012 Annual $PM_{2.5}$ NAAQS.	Georgia	12/14/2015	11/21/2016, [insert **Federal Register** citation].	With the exception of sections 110(a)(2)(D)(i)(I) and (II) (prongs 1, 2 and 4).

[FR Doc. 2016–27857 Filed 11–18–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA R05 OAR 2015–0599; FRL–9955–37–Region 5]

Designation of Areas for Air Quality Planning Purposes; Ohio; Redesignation of the Ohio Portion of the Campbell-Clermont KY-OH Sulfur Dioxide Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In accordance with the Clean Air Act (CAA), the Environmental Protection Agency (EPA) is redesignating the Ohio portion of the Campbell-Clermont KY-OH sulfur dioxide (SO_2) nonattainment area from nonattainment to attainment. The Ohio portion of this area consists of Pierce Township in Clermont County, Ohio. EPA is also approving Ohio's maintenance plan, submitted on August 11, 2015. The primary emission source in the area has permanently closed, and the air quality in the area is now meeting the SO_2 standard. EPA received one comment in support of the redesignation.

DATES: This final rule is effective on November 21, 2016.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2015–0599. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Mary Portanova, Environmental Engineer, at (312) 353–5954 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Mary Portanova, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–5954, *Portanova.mary@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

I. Background

On July 20, 2016 (81 FR 47144), EPA proposed to redesignate the Ohio portion of the Campbell-Clermont KY–OH nonattainment area to attainment of the 2010 SO_2 National Ambient Air Quality Standard (NAAQS), because Ohio demonstrated that the most culpable source had closed, because the local SO_2 monitor was now registering attainment, and because various additional analyses showed that no other sources in or near the area were causing or contributing to violations in the area. The Ohio portion of the nonattainment area consists of Pierce Township in Clermont County. EPA also proposed to approve Ohio's maintenance plan for this area.

II. What comments were received on the proposal?

EPA received one comment on the proposal. Cheri A. Budzynski commented on August 19, 2016, on behalf of the Ohio Utility Group and its member companies (the Utilities). The comment states that the Utilities support the proposed action and believe that it should be finalized. This was the only comment EPA received on this notice of proposed rulemaking.

III. How does this affect the finding of failure to submit?

On March 18, 2016 (81 FR 14736), EPA published a finding that Ohio had failed to submit a nonattainment State Implementation Plan (SIP) for the Campbell-Clermont KY-OH SO_2 nonattainment area by the required deadline of April 4, 2015. Because the main SO_2 emission source in the nonattainment area had closed and the design value at the Campbell County, Kentucky, air quality monitor was in attainment of the SO_2 standard after 2014, instead of a full nonattainment SIP for this area, Ohio decided to submit a redesignation request. Ohio presented this decision in its April 3, 2015, nonattainment SIP submittal, and submitted its redesignation request on August 11, 2015. EPA's March 18, 2016, finding of failure to submit would require the imposition of sanctions if the SIP requirements are not met within 18 months; that is, by October 18, 2017. Since EPA is finalizing the redesignation of the Ohio portion of the Campbell-Clermont KY-OH SO_2 nonattainment area before October 18, 2017, EPA no longer requires Ohio to submit a nonattainment SIP for the area, and the sanctions described in the March 18, 2016, finding will not take effect.

IV. What action is EPA taking?

EPA is redesignating Pierce Township, Clermont County, Ohio, to attainment of the 2010 SO_2 NAAQS. Pierce Township is the Ohio portion of the Campbell-Clermont KY-OH SO_2 nonattainment area. Ohio has met the CAA requirements for redesignation. EPA is also approving Ohio's maintenance plan, submitted on August 11, 2015.

In accordance with 5 U.S.C. 553(d), EPA finds there is good cause for this action to become effective immediately upon publication. This is because a delayed effective date is unnecessary due to the nature of a redesignation to attainment, which relieves the area from certain CAA requirements that would otherwise apply to it. The immediate effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rulemaking actions may become effective less than 30 days after publication if the rule grants or recognizes an exemption or relieves a restriction, and section 553(d)(3), which allows an effective date less than 30 days after publication as otherwise provided by the agency for good cause found and published with the rule. The purpose of the 30-day waiting period prescribed in section 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. This rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, this rule relieves Ohio of various requirements for the Ohio portion of the Campbell-Clermont area. For these reasons, EPA finds good cause under 5 U.S.C. 553(d)(3) for this action to become effective on the date of publication of this action.

V. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of the maintenance plan under CAA section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those required by state law. A redesignation to attainment does not in and of itself impose any new requirements, but rather results in the application of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action 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. 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 January 20, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects

40 CFR Part 52

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

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: November 9, 2016.

Robert A. Kaplan,

Acting Regional Administrator, Region 5.

40 CFR parts 52 and 81 are 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.*

■ 2. In § 52.1870 the table in paragraph (e) is amended by adding an entry for ''SO_2 (2010)'' in alphabetical order under ''Summary of Criteria Pollutant Maintenance Plan'' to read as follows:

§ 52.1870 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED OHIO NONREGULATORY AND QUASI-REGULATORY PROVISIONS

Title	Applicable geographical or non-attainment area	State date	EPA approval	Comments
* * * * * * *				
Summary of Criteria Pollutant Maintenance Plan				
* * * * * * *				
SO_2 (2010)	Campbell-Clermont (Pierce Township in Clermont County).	8/11/2015	11/21/2016, [insert **Federal Register** citation].	
* * * * * * *				

■ 3. Section 52.1881 is amended by adding paragraph (a)(16) to read as follows:

§ 52.1881 Control strategy: Sulfur oxides (sulfur dioxide).

(a) * * *

(16) Approval—The 2010 SO_2 maintenance plan for the Ohio portion of the Campbell-Clermont KY-OH (Pierce Township, Clermont County), has been approved as submitted on August 11, 2015.

* * * * *

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 4. The authority citation for part 81 continues to read as follows:

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

■ 5. Section 81.336 is amended by revising the entry for ''Campbell-Clermont Counties, KY-OH'' in the table entitled ''Ohio—2010 Sulfur Dioxide NAAQS [Primary]'' to read as follows:

§ 81.336 Ohio.

* * * * *

OHIO—2010 SULFUR DIOXIDE NAAQS

[Primary]

Designated area	Designation	
	Date	Type
Campbell-Clermont Counties, KY-OH [1] Clermont County (part): Pierce Township	11/21/16	Attainment.
* * *	* *	*

[1] Excludes Indian country located in each area, if any, unless otherwise specified.

* * * * *

[FR Doc. 2016–27852 Filed 11–18–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2016–0382; FRL–9955–20–OAR]

RIN 2060–AT15

Revisions to Procedure 2—Quality Assurance Requirements for Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action to update a procedure in the New Source Performance Standards (NSPS). The procedure provides the ongoing quality assurance/quality control (QA/QC) procedures for assessing the acceptability of particulate matter (PM) continuous emissions monitoring systems (CEMS). The procedure explains the criteria for passing an annual response correlation audit (RCA) and the criteria for passing an annual relative response audit (RRA). The procedure currently contains a requirement that the annual QA/QC test results for affected facilities must fall within the same response range that was used to develop the existing PM CEMS correlation curve. As a result, some facilities are unable to meet the criteria for passing their annual QA/QC test because their emissions are now lower than the range previously set during their correlation testing. We are modifying the procedure to allow facilities to extend their PM CEMS correlation regression line to the lowest PM CEMS response obtained during the annual RCA or RRA, when these PM CEMS responses are less than the lowest response used to develop the existing correlation curve. This change will ensure that facilities that have reduced their emissions since completing their correlation testing will no longer be penalized because their lower emissions fall outside their initial response range. This action also corrects a typographical error in the procedure.

DATES: This rule is effective on February 21, 2017 without further notice, unless the EPA receives adverse comment by December 21, 2016. If the EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2016–0382, to the *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. 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 (*e.g.,* on the Web, Cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Questions concerning this direct final rule should be addressed to Ms. Kimberly Garnett, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Assessment Division, Measurement Technology Group (E143–02), Research Triangle Park, NC 27711; telephone number: (919) 541–1158; fax number: (919) 541-0516; email address: *garnett.kim@epa.gov.*

SUPPLEMENTARY INFORMATION: The information in this **SUPPLEMENTARY INFORMATION** section of this preamble is organized as follows:

I. General Information

A. Why is the EPA using a direct final rule?

The EPA is publishing this rule without a prior proposed rule because we view this as a non-controversial action and anticipate no adverse comment. This action modifies Procedure 2, sections 10.4(5) and (6), to allow facilities that have reduced their PM emissions since their PM CEMS correlation curve was developed to extend their correlation regression line to the point corresponding to the lowest PM CEMS response obtained during an annual RCA or RRA. This extended correlation regression line will then be used to determine if results of this RCA or RRA meet the criteria specified in section 10.4, paragraphs (5) and (6) of Procedure 2, respectively. This change will ensure that facilities that have reduced their emissions since completing their correlation testing will no longer be penalized because their lower emissions fall outside their initial response range. This action also corrects a typographical error in the introduction to section 10.4, paragraph (6) of Procedure 2. In the ''Proposed Rules'' section of this **Federal Register** publication, we are publishing a separate proposed rule to modify Procedure 2. If the EPA receives any significant and relevant adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. In that case, we would address all public comments in any subsequent final rule based on the proposed rule. We will not institute a second comment period on the proposed rule. Any parties interested in commenting must do so at this time. For further information about commenting on the proposed rule, see the **ADDRESSES** section of this direct final rule.

B. Does this action apply to me?

The entities potentially affected by this rule include any facility that is required to install and operate a PM CEMS under any provision of title 40 of the CFR. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

C. Where can I obtain a copy of this action?

In addition to being available in the docket, an electronic copy of this rule will also be available online at *http://www3.epa.gov/ttn/emc/new.html*.

D. Judicial Review.

Under section 307(b)(1) of the Clean Air Act (CAA), petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by January 20, 2017. Clean Air Act section 307(d)(7)(B) further provides that ''[o]nly an objection to a rule or procedure that was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.'' This section also provides a mechanism for the EPA to reconsider the rule ''[i]f the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.'' Any person seeking to make such a demonstration should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, EPA WJC, 1200 Pennsylvania Ave. NW., Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section of this direct final rule, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave. NW., Washington, DC 20460. Filing a petition for reconsideration by the Administrator of this final action 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 must be filed, and shall not postpone the effectiveness of this action. This action may not be challenged later in proceedings to enforce its requirements (*see* section 307(b)(2) of the CAA).

Rather than file an immediate petition for judicial review of this direct final rule, parties with objections are encouraged to file comments in response to the parallel notice of proposed rulemaking published in the ''Proposed Rules'' section of today's **Federal Register** to allow the EPA to withdraw this direct final rule and address the comment(s) in the final rulemaking.

II. This Final Action

On January 12, 2004, the EPA promulgated Procedure 2—Quality Assurance Requirements for Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources (69 FR 1786). Procedure 2, sections 10.4(5) and (6), contain the requirement that when conducting the annual RCA or RRA QA/QC test procedures, a specified amount of the required number of PM CEMS response values, or data points, must lie within the PM CEMS response range used to develop the PM CEMS correlation curve. In other words, when conducting the annual QA/QC tests, the PM CEMS response values should not be higher or lower than the values used to develop the correlation curve for that PM CEMS. Recently, as PM emission limits have been reduced and facilities have installed more robust PM emission control devices, a number of facilities have found that their PM emissions are lower than their PM CEMS correlation curve. As a result, the facilities are now unable to meet the criteria for a passing the annual Procedure 2 QA/QC tests.

In order to rectify this situation, we are modifying Procedure 2, sections 10.4(5) and (6), to allow facilities to extend their correlation regression line to the lowest PM CEMS response obtained during a RCA or RRA. When a RCA or RRA is performed, if any of the PM CEMS response values are lower than the response range of the existing correlation curve, the facility will take the existing correlation regression line and extend it to the lowest PM CEMS response value found during the annual RCA or RRA. The extension of the existing regression line will be accomplished by using the lowest PM CEMS response value, or x-value, found during the RCA or RRA, solving the regression line equation for the corresponding y-value and then extending the regression line to this new lowest point. This extended correlation regression line will then be used to determine if the RCA or RRA data meet the criteria specified for a RCA or a RRA, in section 10.4(5) and (6), respectively.

This action also corrects a typographical error in the introduction to section 10.4, paragraph (6) of Procedure 2. Paragraph (6) which originally read, ''To pass an RRA, you must meet the criteria specified in paragraphs (6)(i) and (ii) . . .'', is being corrected to read: ''To pass an RRA, you must meet the criteria specified in paragraphs (6)(i) through (iii) . . .'' Without this revision, paragraph (6)(iii) would remain unused in Procedure 2. This typographical correction is necessary to fulfill the intent of Procedure 2, section 10.4(6), when promulgated. *See* 69 FR 1786.

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. This action does not contain any information collection activities.

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. There are no small entities in the regulated industry for which Procedure 2 applies.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action 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. Procedure 2 is applicable to facility owners and operators who are responsible for one or more PM CEMS used for monitoring emissions. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

This rulemaking does not involve technical standards.

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

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. This regulatory action is a procedural change and does not have any impact on human health or the environment.

K. Congressional Review Act

This action is subject to the CRA, and the EPA will submit a rule report to each House of 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. Determination Under Section 307(d)

Pursuant to CAA section 307(d)(1)(V), the Administrator determines that this action is subject to provisions of section 307(d). Section 307(d) establishes procedural requirements specific to rulemaking under the CAA. Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to ''such other actions as the Administrator may determine.''

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Continuous emission monitoring systems, Particulate matter, Procedures.

Dated: November 8, 2016.

Gina McCarthy,

Administrator.

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

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for Part 60 continues to read as follows:

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

■ 2. In Appendix F, Procedure 2, in section 10.4, paragraphs (5) and (6) are revised to read as follows:

Appendix F to Part 60—Quality Assurance Procedures

* * * * *

Procedure 2—Quality Assurance Requirements for Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources

10.4 * * *

(5) What are the criteria for passing a RCA? To pass a RCA, you must meet the criteria specified in paragraphs (5)(i) through (iii) of this section. If your PM CEMS fails to meet these RCA criteria, it is out of control, with the following exception: If any of the PM CEMS response values resulting from your RCA are lower than the lowest PM CEMS response value of your existing correlation curve, you may extend your correlation regression line to the point corresponding to the lowest PM CEMS response value obtained during the RCA. This extended correlation regression line must then be used to determine if the RCA data meets the criteria specified in paragraphs (5)(i) through (iii) of this section.

(i) For all 12 data points, the PM CEMS response value can be no greater than the greatest PM CEMS response value used to develop your correlation curve.

(ii) For 9 of the 12 data points, the PM CEMS response value must lie within the PM CEMS output range used to develop your correlation curve.

(iii) At least 75 percent of a minimum number of 12 sets of PM CEMS and reference method measurements must fall within a specified area on a graph of the correlation regression line. The specified area on the graph of the correlation regression line is defined by two lines parallel to the correlation regression line, offset at a distance of ±25 percent of the numerical emission limit value from the correlation regression line.

(6) What are the criteria to pass a RRA? To pass a RRA, you must meet the criteria specified in paragraphs (6)(i) through (iii) of this section. If your PM CEMS fails to meet these RRA criteria, it is out of control, with the following exception: If any of the PM CEMS response values resulting from your RRA are lower than the lowest PM CEMS response value of your existing correlation curve, you may extend your correlation regression line to the point corresponding to the lowest PM CEMS response value obtained during the RRA; this extended correlation regression line must then be used to determine if the RRA data meets the criteria specified in paragraphs (6)(i) through (iii) of this section.

(i) For all three data points, the PM CEMS response value can be no greater than the greatest PM CEMS response value used to develop your correlation curve.

(ii) For two of the three data points, the PM CEMS response value must lie within the PM CEMS output range used to develop your correlation curve.

(iii) At least two of the three sets of PM CEMS and reference method measurements must fall within the same specified area on a graph of the correlation regression line as required for the RCA and described in paragraph (5)(iii) of this section.

* * * * *

[FR Doc. 2016–27849 Filed 11–18–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

EPA–HQ–OPP–2014–0613; FRL–9953–97]

Endothall; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of endothall in or on multiple commodities which are identified and discussed later in this document. United Phosphorus, Inc. requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 21, 2016. Objections and requests for hearings must be received on or before January 20, 2017 and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2014–0613, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Michael Goodis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2014–0613 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before January 20, 2017. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2014–0613, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Summary of Petitioned-for Tolerance

In the **Federal Register** of December 17, 2014 (79 FR 75110) (FRL–9918–90), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 4F8293) by United Phosphorus, Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406. The petition requested that 40 CFR 180.293 be amended by amending tolerances for residues of the herbicide endothall, in or on cattle, fat from 0.01 to 0.05 parts per million (ppm); cattle, kidney from 0.20 to 0.06 ppm; cattle, liver from 0.10 to 0.05 ppm; cattle, meat from 0.03 to 0.05 ppm; goat, fat from 0.005 to 0.05 ppm; goat, kidney from 0.15 to 0.06 ppm; goat, meat from 0.015 to 0.05 ppm; hog, fat from 0.005 to 0.05 ppm; hog, kidney from 0.10 to 0.06 ppm; hog, meat from 0.01 to 0.05 ppm; milk from 0.03 to 0.01 ppm; poultry, fat from 0.015 to 0.05 ppm; poultry, meat from 0.015 to 0.05 ppm; poultry, meat byproducts from 0.2 to 0.05 ppm; sheep, fat from 0.005 to 0.05 ppm; sheep, kidney from 0.15 to 0.06 ppm; and sheep, meat from 0.015 to 0.05 ppm. That document referenced a summary of the petition prepared by United Phosphorus, Inc., the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has adjusted the proposed tolerance for ruminant kidney from 0.06 to 0.05. The reason for this change is explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . . .''

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for endothall including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with endothall follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Endothall is a caustic chemical with toxicity being the result of a direct degenerative effect on tissue. By acute exposure, endothall is a skin sensitizer and an extreme irritant by the acute oral and ocular routes of administration. The most sensitive effect of endothall following oral administration is direct irritation of the gastrointestinal system. This effect was evident in several species and in several studies. The dog is particularly sensitive to endothall toxicity. Endothall caused gastric epithelial hyperplasia in dogs treated orally with endothall for 52 weeks (a no observed adverse effect level (NOAEL) was not determined). Besides gastric irritant effects, decreased body weight in the dog was also a sensitive effect following 13 weeks of endothall administration. The decreased body weights were most likely attributable to the constant and direct irritation of the gastric lining. In the rat, gastric irritation was noted at a dose level that was 1 to 2 orders of magnitude lower than doses resulting in kidney lesions. Proliferative lesions of the gastric epithelium were observed in F_1 parental male and female rats treated orally with endothall in a 2-generation reproduction study (a NOAEL for the parental effects was not identified). In a developmental rat study, pregnant rats exhibited decreased body weight and decreased body weight was also noted in a 90-day dietary study in the rat.

Dermally, endothall destroys the stratum corneum and then the underlying viable epidermis. In the 21-day dermal toxicity study, severe dermal effects were observed at the lowest dose tested. Available studies clearly demonstrate that local irritation (portal of entry effect) is the most sensitive and initial effect.

Acute inhalation toxicity of endothall is low; however, nasal and pulmonary toxicity were evident in the 5-day and 28-day inhalation toxicity studies in the rat including rales, labored respiration, pale lungs (gross necropsy), increased absolute and relative lung weights, subacute inflammation, alveolar proteinosis, and nasal hemorrhage inflammation, erosion, and ulceration.

Endothall does not cause pre-natal toxicity following in utero exposure to rats nor pre-and postnatal toxicity following exposures to rats for 2-generations. In the developmental mouse study, there was severe maternal toxicity (*i.e.,* greater than 30% mortality) at the highest dose tested; at this dose level, a slight increase in vertebral and rib malformations was observed in the offspring indicating that these effects were most likely secondary to severe maternal toxicity. The hazard data for endothall indicate no evidence of quantitative or qualitative increased susceptibility of rat fetuses exposed in utero to endothall in the developmental toxicity studies. In addition, no evidence of quantitative or qualitative increased susceptibility of rat fetuses or neonates was observed in the 2-generation reproduction study.

Available studies showed no evidence of neurotoxicity and do not indicate potential immunotoxicity. Endothall does not belong to the class of compounds (*e.g.,* the organotins, heavy metals, or halogenated aromatic hydrocarbons) that would be expected to be toxic to the immune system. Endothall is classified as ''not likely to be carcinogenic to humans'' based on lack of evidence of carcinogenicity in mice or rats. It has no mutagenic potential.

Specific information on the studies received and the nature of the adverse effects caused by endothall as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http:www.regulations.gov* in document ''Endothall: Human Health Risk Assessment in Support of Registration Review, and the Petition to Re-evaluate Tolerances for Livestock, and Remove the Restriction that Prohibits Livestock from Drinking Treated Water'' in docket ID number EPA–HQ–OPP–2014–0613.

B. Toxicological Points of Departure/ Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/ safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for endothall used for human risk assessment is shown in Table 1 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR ENDOTHALL FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/ safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary	An appropriate endpoint attributable to a single dose was not available from any study. An acute RfD was not established.		
Chronic dietary (All populations)	LOAEL= 2 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF UF_L = 3x	Chronic RfD = 0.007 mg/kg/day. cPAD = 0.007 mg/kg/day.	Rat 2-generation reproduction study. LOAEL = 2 mg/kg/day based on proliferative lesions of the gastric epithelium (both sexes).
Short-term Incidental oral (1 to 30 days).	Offspring NOAEL= 9.4 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	Residential LOC for MOE = 100 Occupational = N/A	Rat 2-generation reproduction study. LOAEL = 60 mg/kg/day based on decreased pup body weight (both sexes) on Day 0 in F_1 and F_2 generations.
Short-term Inhalation (1 to 30 days).	NOAEL = 0.001 mg/L. Residential HEC = 0.00049 mg/L (HED = 0.0143 mg/kg/day) Inhalation (or oral) study NOAEL = 0.001mg/L mg/kg/day (inhalation absorption rate = 100%) UF_A = 3x UF_H = 10x FQPA SF = 1x	Residential LOC for MOE = 30.	Subchronic inhalation toxicity study (MRID 47872201). Residential acute scenario: LOAEL = 0.005 mg/L based on clinical signs (rales and labored respiration) observed acutely (0–1 hr postdosing and prior to next exposure).
Cancer (Oral, dermal, inhalation).	Classified as a "Not Likely" human carcinogen.		

FQPA SF = Food Quality Protection Act Safety Factor. LOAEL = lowest-observed-adverse-effect-level. LOC = level of concern. mg/kg/day = milligram/kilogram/day. MOE = margin of exposure. NOAEL = no-observed-adverse-effect-level. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). UF_L = use of a LOAEL to extrapolate a NOAEL. HEC = Human Equivalent Concentration.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to endothall, EPA considered exposure under the petitioned-for tolerances as well as all existing endothall tolerances in 40 CFR 180.293. EPA assessed dietary exposures from endothall in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

No such effects were identified in the toxicological studies for endothall; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA National Health and Nutrition Examination Survey, What We Eat in America, (NHANES/WWEIA), conducted from 2003–2008. As to residue levels in food, average residue values have been used for all crops. The residue and processing data used in this assessment are from residue field trials and processing studies designed to produce maximum residues for the purpose of setting tolerances. All treatments in the field trials with irrigated crops were performed by overhead irrigation (*i.e.* are sprayed on the crops). The processing data available were translated to the important processed commodities of all crops. Where data were not available, DEEM default processing factors were used.

Anticipated residues of meat, milk, poultry, and eggs have been estimated by using the maximum or average residues in feed stuffs as well as the maximum allowed 5 ppm concentration of endothall in livestock drinking water. Tolerance level residues were used for finfish and shellfish.

EPA used average percent crop treated (PCT) data for alfalfa, cotton, and potato, the crops to which endothall is directly applied, as well as PCT data for irrigated crops.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that endothall does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and percent crop treated (PCT) information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- *Condition a:* The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- *Condition b:* The exposure estimate does not underestimate exposure for any significant subpopulation group.
- *Condition c:* Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area. In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The Agency estimated the PCT for existing uses as follows for irrigated crops: Apple 78%, fresh market apple 84%, processing apple 49%, apple juice 22%, canned apple 55%, barley for grain 40%, corn for grain 21%, dry beans 35%, grape 97%, fresh market grape 99%, processed grape 96%, green peas 42%, oats for grain 8%, peanut for nuts 34%, rice 100%, sorghum for grain 19%, soybean for beans 12%, strawberry 92%, fresh market strawberry 90%, processed strawberry 100%, sugarbeet for sugar 37%, sugarcane for sugar 54%, watermelon 38%, wheat for grain 13%. For direct uses of endothall, PCT estimates used include alfalfa 1%, cotton 1%, and potatoes 2.5%.

In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6 to 7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than one. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which endothall may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for endothall in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of endothall. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Simple First-Order Degradation the estimated drinking water concentrations (EDWCs) of endothall for chronic exposures for non-cancer assessments are estimated to be 31 ppb for surface water and ground water. This represents a conservative estimate of high-end chronic exposure from endothall from the use most likely to generate the highest exposures (treatment of a reservoir).

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Endothall is currently registered for the following uses that could result in residential exposures: Aquatic applications. EPA assessed residential exposure using the following assumptions: There are no registered residential uses resulting in residential handler exposure to endothall. Therefore, a quantitative residential handler exposure assessment was not performed. Residential post-application exposure/risk estimates were assessed for certain scenarios. The scenarios, routes of exposure and lifestages assessed include inhalation exposure during recreational swimming (both adults and children 3 to < 6 years old) and ingestion of water during recreational swimming (both adults and children 3 to < 6 years old.) The assessment of these lifestages is health protective for the exposures and risk estimates for any other potentially exposed lifestages. Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found endothall to share a common mechanism of toxicity with any other substances, and endothall does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that endothall does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* There is no evidence of quantitative or qualitative increased susceptibility following prenatal exposure to rats or rabbits in developmental toxicity studies, and pre- and post-natal exposure to rats in the 2-generation reproduction study.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X for all scenarios except the chronic dietary assessment. For the assessment of risk following chronic dietary exposure, the FQPA Safety Factor for increased susceptibility to infants and children is reduced to 3X because a lowest observed adverse effect level (LOAEL) established in the 2-generation reproduction study was used for assessing chronic dietary risks. Since a LOAEL was used, a 3X FQPA Safety Factor in the form of UF_L is retained for chronic exposure scenarios. A 3X factor (as opposed to a 10X) was determined to be adequate since the severity of the lesions observed at the LOAEL were minimal to mild, and therefore the true NOAEL for this study is likely to be very near the LOAEL value. For assessments other than the chronic dietary assessment, the FQPA safety factor was reduced to 1X for the following reasons:

i. The toxicity database is complete.

ii. There are no concerns for neurotoxicity, and thus no need to retain the 10X for the lack of a developmental neurotoxicity study.

iii. There is no indication of increased susceptibility of rats or rabbits in utero and/or postnatal exposure in the developmental and reproductive toxicity studies;

iv. There are no residual uncertainties identified in the exposure databases. The residential post-application exposure assessments are based upon the 2012 Residential Standard Operating Procedures (SOPs). These assessments of exposure are not likely to underestimate exposure to endothall. There is no residual uncertainty in the exposure database for endothall with respect to dietary exposure. An adequate database with respect to both the nature and magnitude of residues expected in food has been provided. The chronic dietary food exposure assessment is conservative as field trial data along with 100% of crop treated assumptions for some commodities, and default processing factors for some commodities were used. Also, conservative modeled drinking water estimates of exposure were included in the assessments which are likely to exaggerate actual exposures from drinking water. These assessments will not underestimate the exposure and risks posed by endothall.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, endothall is not expected to pose an acute risk.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to endothall from food and water will utilize 90% of the cPAD for children 1 to 2 years of age, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of endothall is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Endothall is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to endothall.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate MOEs of 1,200 for adults and 210 for children. Because EPA's level of concern for endothall is a MOE of 100 or below, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Intermediate-term exposure is not expected to result from the residential uses of endothall. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure. Because there is no intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess intermediate-term risk), no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for endothall.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, endothall is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to endothall residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (GC with microcoulometric nitrogen detection for plants, Method KP–245R0 for livestock, and Method KP–218R0 for fish and plants) is available to enforce the tolerance expression.

The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level. The Codex has not established a MRL for endothall.

C. Revisions to Petitioned-for Tolerances

The registrant requested modification of tolerances for all livestock commodities at the LOQ of the enforcement method (0.01 ppm for milk, 0.05 ppm for the remaining commodities) with the exception of ruminant kidney for which a tolerance of 0.06 ppm was proposed based on residues of 0.051 ppm observed in the cow feeding study. Based on available data and calculations of anticipated residues, EPA has determined that 0.05 ppm would be sufficient to cover residues for all meat, poultry, and egg commodities, including ruminant kidney.

D. International Trade Considerations

In this rulemaking, EPA is reducing the existing tolerances for cattle, goat, hog, and sheep kidney; cattle, liver; poultry, meat byproducts to 0.05 ppm and for milk to 0.01 ppm. The petitioner requested these reductions. EPA has determined that the reduction is appropriate based on available data and residue levels resulting from registered use patterns. In accordance with the World Trade Organization's (WTO) Sanitary and Phytosanitary Measures Agreement, EPA notified the WTO of the request to revise these tolerances. In this action, EPA is allowing the existing higher tolerances to remain in effect for 6 months following the publication of this rule in order to allow a reasonable interval for producers in the exporting countries to adapt to the requirements of these modified tolerances. On May 22, 2017, those existing higher tolerances will expire, and the new reduced tolerances for ruminant kidney, cattle, liver and poultry, meat byproducts and milk will remain to cover residues of endothall on those commodities. Before that date, residues of endothall on those commodities would be permitted up to the higher tolerance levels; after that date, residues of endothall on ruminant kidney, cattle, liver and poultry, meat byproducts and milk will need to comply with the new lower tolerance levels. This reduction in tolerance is not discriminatory; the same food safety standard contained in the FFDCA applies equally to domestically produced and imported foods.

V. Conclusion

Therefore, tolerances are amended for residues of endothall, in or on cattle, fat from 0.01 to 0.05 parts per million (ppm); cattle, kidney from 0.20 to 0.05 ppm; cattle, liver from 0.10 to 0.05 ppm; cattle, meat from 0.03 to 0.05 ppm; goat, fat from 0.005 to 0.05 ppm; goat, kidney from 0.15 to 0.05 ppm; goat, meat from 0.015 to 0.05 ppm; hog, fat from 0.005 to 0.05 ppm; hog, kidney from 0.10 to 0.05 ppm; hog, meat from 0.01 to 0.05 ppm; milk from 0.03 to 0.01 ppm; poultry, fat from 0.015 to 0.05 ppm; poultry, meat from 0.015 to 0.05 ppm; poultry, meat byproducts from 0.2 to 0.05 ppm; sheep, fat from 0.005 to 0.05 ppm; sheep, kidney from 0.15 to 0.05 ppm; and sheep, meat from 0.015 to 0.05 ppm.

VI. Statutory and Executive Order Reviews

This action establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 13, 2016.

Michael Goodis,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Amend the table in § 180.293 paragraph (d) as follows:
■ a. Revise the entries for ''Cattle, fat'', ''Cattle, meat'', ''Goat, fat'', ''Goat, meat'', ''Hog, fat'', ''Hog, meat'', ''Poultry, fat'', ''Poultry, meat'', ''Sheep, fat, and ''Sheep, meat'';
■ b. Add alphabetically footnotes for the entries ''Cattle, kidney [1]'', ''Cattle, liver [1]'', ''Goat, kidney [1]'', ''Hog, kidney [1]'', ''Milk'', ''Poultry, meat byproducts [1]'', and ''Sheep, kidney [1]''; and
■ c. Add alphabetically the entries for ''Cattle, kidney'', ''Cattle, liver'', ''Goat, kidney'', ''Hog, kidney'', ''Milk'', ''Poultry, meat byproducts'', and ''Sheep, kidney''.

The revisions and additions read as follows:

§ 180.293 Endothall; tolerances for residues.

* * * * *

(d) * * *

Commodity	Parts per million
* * * *	*
Cattle, fat	0.05
Cattle, kidney [1]	0.20
Cattle, kidney	0.05
Cattle, liver [1]	0.10
Cattle, liver	0.05
Cattle, meat	0.05
* * * *	*
Goat, fat	0.05
Goat, kidney [1]	0.15
Goat, kidney	0.05
* * * *	*
Goat, meat	0.05
* * * *	*
Hog, fat	0.05
Hog, kidney [1]	0.10
Hog, kidney	0.05
* * * *	*
Hog, meat	0.05
Milk [1]	0.03
Milk	0.01
* * * *	*
Poultry, fat	0.05
* * * *	*
Poultry, meat	0.05
Poultry, meat byproducts [1]	0.20
Poultry, meat byproducts	0.05
* * * *	*
Sheep, fat	0.05
Sheep, kidney [1]	0.15
Sheep, kidney	0.05
* * * *	*
Sheep, meat	0.05
* * * *	*

[1] This tolerance expires on May 22, 2017.

[FR Doc. 2016–27984 Filed 11–18–16; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

41 CFR Parts 101–42 and 101–45

[FPMR-Amendment 2016–01; FPMR–TechAmdt–2016–01; Docket No. 2007–0001; Sequence No. 6]

Federal Property Management Regulations; Technical Amendments

AGENCY: Office of Government-wide Policy, General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: GSA is amending the Federal Property Management Regulations (FPMR) to delete repetitive information that has already migrated to the Federal Management Regulation (FMR).

DATES: *Effective:* November 21, 2016.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Holcombe, Director, Personal Property Policy, at 202–501–3828, or email *robert.holcombe@gsa.gov* for clarification of content. For information pertaining to the status or publication schedules, contact the Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405, or 202–501–4755. Please cite FPMR–Tech Amdt–2016–01; Technical Amendments.

SUPPLEMENTARY INFORMATION:

Background

GSA is amending the FPMR to make editorial changes to FPMR Parts 101–42 and 101–45. Sections therein should have been removed when the policy migrated from FPMR parts 101–42 and 101–45 (with regards to items requiring special handling) to FMR part 102–40.

GSA indicated in the preamble of FMR Change–2015–01; FPMR Case 2003–101–1; FMR Case 2003–102–4, which was published in the **Federal Register** at 80 FR 7352, on February 10, 2015, that these sections were migrating from the FPMR to the FMR; but the deletion of these superseded FPMR sections were not specifically enumerated in the list of changes to be made. The end result is that, as of today, there is overlapping policy in both the FPMR and the FMR and the remaining FPMR material is outdated and redundant. Therefore, to remove this duplicative information, GSA is issuing a technical correction to FMR Change–2015–01; FPMR Case 2003–101–1; FMR Case 2003–102–4.

List of Subjects in 41 CFR Part 101–42 and 101–45

Disposition of personal property with special handling requirements; sale, abandonment or destruction of personal property.

Dated: November 9, 2016.

Denise Turner Roth,

Administrator of General Services.

For the reasons set forth in the preamble, 41 CFR parts 101–42 and 101–45 is amended as follows:

PART 101–42—DISPOSITION OF PERSONAL PROPERTY WITH SPECIAL HANDLNG REQUIREMENTS

■ 1. The authority for part 101–42 is revised to read as follows:

Authority: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c).

§ 101–42.001—101–42.1102–10 [Removed]

■ 2. Remove sections 101–42.001 through 101–42.1102–10.

PART 101–45—SALE, ABANDONMENT, OR DESTRUCTION OF PERSONAL PROPERTY

■ 3. The authority for part 101–45 continues to read as follows:

Authority: 40 U.S.C. 545 and 40 U.S.C. 121(c).

§ 101–45.001—101–45.004 [Removed]

■ 4. Remove sections 101–45.001 through 101–45.004.

[FR Doc. 2016–28010 Filed 11–18–16; 8:45 am]

BILLING CODE 6820–14–P

Proposed Rules

Federal Register

Vol. 81, No. 224

Monday, November 21, 2016

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 551

RIN 3206–AN41

Pay Administration Under the Fair Labor Standards Act

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) proposes to revise the regulations issued under the Fair Labor Standards Act of 1938, as amended (''FLSA'' or ''Act''). The revised regulations are intended to provide a clearer understanding of coverage under the Act and to ensure that the FLSA's intended overtime protections are fully implemented. By way of this rulemaking, OPM seeks to harmonize OPM's regulations with revisions made to the Department of Labor's (DOL) FLSA regulations by updating the salary-based nonexemption level and by providing for future automatic updates to that level consistent with the automatic updating mechanism utilized in DOL's FLSA regulations.

DATES: Comments must be received on or before December 21, 2016.

ADDRESSES: You may submit comments, identified by RIN number ''3206–AN41,'' using either of the following methods:

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

Email: FedClass@opm.gov.

FOR FURTHER INFORMATION CONTACT: Adam Garcia (813) 616–9296, or email: *Adam.Garcia@opm.gov.*

SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management (OPM) is publishing a proposed rule to amend regulations issued under the Fair Labor Standards Act of 1938, as amended (''FLSA'' or ''Act''). The purpose of this amendment is to update and harmonize OPM's FLSA regulations with certain changes made by the Department of Labor (DOL), Wage and Hour Division, 29 CFR part 541, RIN 1235–AA11, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (**Federal Register**, Vol. 81, No. 99, dated May 23, 2016).

OPM proposes to update the salary-based nonexemption level, increasing it to the annual rate of basic pay of $47,476, in order to ensure that the FLSA's intended overtime protections are fully implemented, and to simplify the identification of nonexempt employees, thus making the exemption easier for agency employers and employees to understand. OPM also proposes to make future automatic updates to the salary level to prevent the level from becoming outdated due to the often lengthy passage of time between rulemakings by incorporating the same automatic updating methodology utilized in the U.S. Department of Labor's (DOL) FLSA regulations.

Background

Part 551 provides the regulations, criteria, and conditions set forth by OPM as prescribed by the Fair Labor Standards Act (''FLSA'' or ''Act''). OPM's administration of the Act must comply with the terms of the Act, but the law does not require OPM's regulations to mirror the DOL's FLSA regulations. OPM's administration of the Act must be consistent with the DOL's administration of the Act only to the extent practicable and only to the extent that this consistency is required to maintain compliance with the terms of the Act.

The FLSA guarantees a minimum wage and overtime pay at a rate of not less than one and one-half times the employee's regular rate for hours worked in excess of 40 in a workweek. While these protections extend to most employees, the FLSA does provide a number of exemptions. OPM proposes to update and revise the regulations issued under the FLSA implementing the criteria for exemption from the minimum wage and overtime pay provisions. One of the criteria required to qualify as an exempt employee is that the employee must be paid a certain salary level. The salary level required for exemption under OPM's FLSA regulations (5 CFR 551.203) is currently the annual rate of basic pay of $23,660.

Updates to DOL's FLSA Regulations

On March 13, 2014, President Obama signed a Presidential Memorandum directing the Department of Labor to update the overtime regulations regarding executive, administrative, and professional employees, who are exempt from the FLSA's minimum wage and overtime standards. 79 FR 18737 (April 3, 2014). Consistent with the President's goal of ensuring workers are paid a fair day's pay for a fair day's work, the memorandum instructed DOL to look for ways to modernize and simplify the regulations while ensuring that the FLSA's intended overtime protections are fully implemented.

On July 6, 2015, the DOL issued proposed regulations in the **Federal Register** (80 FR 38515) that updated the salary level under part 541 of title 29, Code of Federal Regulations (CFR), Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees. The final rule, providing an increase to the salary level to $913 per week ($47,476 annually), and providing for automatic updates to the salary level in the future, was issued on May 23, 2016 (81 FR 32391) with an effective date of December 1, 2016. See 29 CFR 541.600, 541.607.

Proposed Revisions to OPM's FLSA Regulations

In order to maintain consistency with DOL's updates to the salary level provisions under their FLSA regulations, OPM proposes to revise 5 CFR 551.203 to include the updated salary level (annual rate of basic pay of $47,476). In addition, OPM proposes to include a new paragraph (c) in section 551.203, providing for future automatic updates to the salary level, consistent with the automatic updating mechanism utilized in DOL's FLSA regulations. These updates are being proposed to ensure that the FLSA's intended overtime protections are fully implemented.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.''

The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear. These regulations will not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

Unfunded Mandates Reform Act of 1995

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

Executive Orders 12866 and 13563—Regulatory Planning and Review

OPM has determined that this rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, ''Regulatory Planning and Review''. Nevertheless, the Office certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), and Executive Order 13563, ''Improving Regulation and Regulatory Review.'' Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including consideration of potential economic, environmental, public health, and safety effects, distributive impacts, and equity. The benefits of this proposed rule include simplification of the identification of nonexempt employees, inclusion of a mechanism to prevent the rule from becoming outdated, and harmonization with Department of Labor FLSA regulations. Additionally, the proposed rule provides equity in the treatment of Federal and private sector FLSA minimum wage and overtime pay treatment. The Office does not foresee any burdens to the public.

Executive Order 13132—Federalism

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988—Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this proposed rule because there are no new or revised recordkeeping or reporting requirements.

List of Subjects in 5 CFR Part 551

Government employees, and wages.

U.S. Office of Personnel Management.

Beth F. Cobert,

Acting Director.

Accordingly, OPM proposes to amend title 5, Code of Federal Regulations, part 551, as follows:

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

■ 1. The authority citation for part 551 continues to read as follows:

Authority: 5 U.S.C. 5542(c); Sec. 4(f) of the Fair Labor Standards Act of 1938, as amended by Pub. L. 93–259, 88 Stat. 55 (29 U.S.C. 204(f)).

■ 2. Revise § 551.203 to read as follows:

§ 551.203 Salary-based nonexemption.

(a) An employee, including a supervisory employee, whose annual rate of basic pay is less than $47,476 is nonexempt, unless:

(1) The employee is subject to § 551.211 (Effect of performing different work or duties for a temporary period of time on FLSA exemption status); or

(2) The employee is subject to § 551.212 (Foreign exemption criteria); or

(3) The employee is a professional engaged in the practice of law or medicine as prescribed in paragraphs (c) and (d) of § 551.208.

(b) For the purpose of this section, ''rate of basic pay'' means the rate of pay fixed by law or administrative action for the position held by an employee, including any applicable locality payment under 5 CFR part 531, subpart F, special rate supplement under 5 CFR part 530, subpart C, or similar payment or supplement under other legal authority, before any deductions and exclusive of additional pay of any other kind, such as premium payments, differentials, and allowances.

(c) Beginning on January 1, 2020, and every three years thereafter, the salary-based nonexemption level will be updated to equal the annualized earnings amount of the 40th percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census Region in the second quarter of the year preceding the update as published by the Bureau of Labor Statistics.

[FR Doc. 2016–27887 Filed 11–18–16; 8:45 am]

BILLING CODE 6325–39–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 71

[NRC–2016–0179]

RIN 3150–AJ85

Revisions to Transportation Safety Requirements and Compatibility With International Atomic Energy Agency Transportation Standards

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of issues paper, public meeting, and request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering a potential amendment to its regulations that would revise the regulations on packaging and transporting radioactive material. The NRC is gathering information about potential changes that may be proposed in a subsequent rulemaking activity. The NRC is requesting public comment on the issues paper about potential changes that is referenced in this document. The

NRC plans to hold a public meeting to promote full understanding of the issues paper and to facilitate public comment.

DATES: Submit comments by January 20, 2017. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received before this date. A public meeting will be held December 5–6, 2016.

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–2016–0179. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *Email comments to: Rulemaking.Comments@nrc.gov.* If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.

• *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.

• *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

• *Hand deliver comments to:* 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. (Eastern Time) Federal workdays; telephone: 301–415–1677.

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: Emma Wong, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–7091; *Emma.Wong@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2016–0179 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–2016–0179.

• *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.*

• *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.

B. Submitting Comments

Please include Docket ID NRC–2016–0179 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as entering the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, 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 the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

In accordance with Commission direction, the NRC has initiated a rulemaking effort that addresses the need to make the regulations in part 71 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Packaging and Transportation of Radioactive Material,'' compatible with the most current revisions of the International Atomic Energy Agency (IAEA) Specific Safety Requirements (SSR) No. SSR–6, ''Regulations for the Safe Transport of Radioactive Material,'' (SSR–6). The regulations in 10 CFR part 71 are based, in general, on the specific safety requirements developed by the IAEA. The IAEA has been revising its requirements on an approximate 10-year cycle, with the last edition of IAEA SSR–6 published in 2012 and the current draft of the new revision of SSR–6 expected to be published in 2018. Further, as described below, the NRC is considering other changes to 10 CFR part 71 that are not related to SSR–6.

To facilitate discussion and public comments, the NRC has prepared an issues paper that describes potential rulemaking issues (IAEA and non-IAEA-related) for the next revision to 10 CFR part 71. The issues paper will be posted at *http://www.regulations.gov/docket?D=NRC-2016-0179*.

The issues paper was developed in coordination with the U.S. Department of Transportation (DOT), because the DOT and the NRC co-regulate transportation of radioactive materials in the United States and have historically coordinated to harmonize their respective regulations to these IAEA revisions through the rulemaking process. Coordination ensures that consistent regulatory standards are maintained between the NRC's and the DOT's radioactive material transportation regulations, and coordinated publication of any final rules and associated regulatory guidance documents by each agency.

III. Regulatory Objectives

The NRC identified changes made in SSR–6 published in 2012 by comparing it to the previous revision of SSR–6 published in 2009, and then identified affected sections of 10 CFR part 71. Based on this comparison, the NRC identified compatibility issues to potentially be addressed through the rulemaking process. The NRC also identified changes based on the current draft of the new revision of SSR–6, which is expected to be published in 2018. These issues are discussed in greater detail in the issues paper that will be posted at *http://www.regulations.gov/docket?D=NRC-2016-0179.* The NRC identified additional potential issues for incorporation in the rulemaking action that are also discussed in the issues paper (*i.e.,* changes related to harmonization with DOT regulations and include administrative, editorial, or clarification matters).

IV. Specific Considerations

The NRC is seeking to gauge perspectives from the public before proceeding to the development of the proposed rule. The NRC is particularly interested in receiving comment and supporting rationale from the public about the potential changes in the packaging and transportation of radioactive material requirements. The following topics are discussed in the issues paper and will be discussed at the public meeting:

- Aging
- Definitions
- Fissile Materials
- Low Specific Activity (LSA)—III
- NRC-Identified Changes
- Reduced External Pressure Requirement for Type A Package Test
- Solar Insolation
- Surface Contaminated Object (SCO)—III
- Transitional Arrangements
- Type C Package
- UF_6 Package

Specifically, the NRC is interested in public and industry comments related to: (1) Quantitative information expressed as a realistic range of estimated costs and benefits for the potential changes described in the issues paper; (2) operational data about radiation exposures (increased or reduced) that might result from implementing the potential changes; (3) whether the potential changes are appropriate; and (4) whether there are any additional changes that should be considered, and if so, the supporting rationale and quantitative information for the additional change. The NRC will consider the stakeholders' comments to help quantify the potential impact of any proposed changes.

The NRC will provide another opportunity for public comment in any subsequent proposed rule that may be developed. Comments received in response to this **Federal Register** document will be considered in any subsequent rulemaking process.

V. Public Meeting

The NRC will conduct a public meeting to describe the issues paper and answer clarifying questions from the public about the potential changes in the packaging and transportation of radioactive material requirements. The NRC will not be accepting verbal or written comments at the public meeting. All comments must be submitted as indicated in the **ADDRESSES** section of this document.

The meeting will be held on December 5–6, 2016, at Two White Flint North, 11545 Rockville Pike, Rockville, MD 20852–2738, between 9:00 a.m. and 5:00 p.m. in Room T02B03. Public access to the meeting room is through the adjacent building located at One White Flint North, 11555 Rockville Pike.

This is a Category 3 meeting. Public participation is actively sought for this meeting to fully engage the public in a discussion of regulatory issues. The purpose of the meeting is for the NRC to present the potential changes to the requirements in 10 CFR part 71.

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If reasonable accommodation is needed to participate in this meeting, or if a meeting notice or other information about this meeting is needed in another format (*e.g.,* Braille, large print), please notify the individual listed in the **FOR FURTHER INFORMATION CONTACT** section in this document. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

Individuals should monitor the NRC's public meeting Web page for information about the public meeting at: *http://www.nrc.gov/public-involve/public-meetings/index.cfm* where the telephone bridge line and passcode for the meeting will be available. All individuals should register their attendance for the meeting by contacting the individual listed in the **FOR FURTHER INFORMATION CONTACT** section in this document, or by completing the webinar registration at the NRC's public meeting Web page.

The NRC may post additional materials to the Federal rulemaking Web site at *www.regulations.gov,* under Docket ID NRC–2016–0179. The Federal rulemaking Web site allows you to receive alerts when changes or additions occur in a docket folder. To subscribe: (1) Navigate to the docket folder (NRC–2016–0179); (2) click the ''Sign up for Email Alerts'' link; and (3) enter your email address and select how frequently you would like to receive emails (daily, weekly, or monthly).

VI. Cumulative Effects of Regulation (CER)

The NRC has implemented a program to address the possible cumulative effects of regulation (CER), in the development of a regulatory basis for a rulemaking. The CER describes the challenges that licensees or other impacted entities (such as shippers, receivers, carriers, and State regulatory agencies) may face while implementing new or revised regulatory positions, programs, and requirements (*e.g.,* rules, generic letters, backfits, inspections). The CER is an organizational effectiveness challenge that results from a licensee or impacted entity implementing a number of complex positions, programs, or requirements within a limited implementation period and with resources which may lack expertise to address a specific issue. The NRC is specifically requesting comment on the cumulative effects that may result from the potential changes in 10 CFR part 71. In developing comments on the potential changes relative to CER, consider the following questions:

(1) In light of any current or projected CER challenges, what should be a reasonable effective date, compliance date, or submittal date(s) from the time a final rule is published to the actual implementation of new or revised requirements in 10 CFR part 71 including changes to programs, procedures, or facilities?

(2) If current or projected CER challenges exist, what should be done to address this situation? For example if more time is required to implement a new or revised requirement, what period of time would be sufficient and why would such a time frame is necessary?

(3) Do other regulatory actions (*e.g.,* orders, generic communications, license amendment requests, and inspection findings of a generic nature) from the NRC, DOT or other agencies influence the implementation of a new or revised requirement?

(4) Are there unintended consequences? Does a new or revised requirement create conditions that would be contrary to the requirement's intent? If so, what are the consequences and how should they be addressed?

(5) Please provide information on the costs and benefits for a new or revised requirement. The information should be expressed as a realistic range of estimated costs and benefits. This information would be used for the NRC's regulatory analysis of the proposed changes.

VII. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31883). The NRC requests comment on this document with respect to the clarity and effectiveness of the language used.

VIII. Rulemaking Process

The NRC does not intend to provide formal comment responses for information provided from the public comment period on the issues paper. The NRC will consider comments on the issues paper in the rule development process. If the NRC develops a regulatory basis sufficient to support a proposed rule, there will be an opportunity for additional public comment when the draft regulatory basis and the proposed rule are published. If supporting guidance is developed for the proposed rule, stakeholders will have an opportunity to provide feedback on it as well. Alternatively, if the regulatory basis does not provide sufficient support for a proposed rule, the NRC will publish a **Federal Register** document withdrawing this rulemaking activity and addressing the public comments received on the issues paper.

Dated at Rockville, Maryland, this 1st day of November, 2016.

For the Nuclear Regulatory Commission.

Mark D. Lombard,

Director, Division of Spent Fuel Management.

[FR Doc. 2016–27944 Filed 11–18–16; 8:45 am]

BILLING CODE 7590–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 343 and 390

RIN 3064–AE49

Removal of Transferred OTS Regulations Regarding Consumer Protection in Sales of Insurance and Amendments to FDIC Consumer Protection in Sales of Insurance Regulation

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this notice of proposed rulemaking, the Federal Deposit Insurance Corporation (''FDIC'') proposes to rescind and remove from the Code of Federal Regulations the subpart entitled ''Consumer Protection in Sales of Insurance'' (''the subpart'') that was included in the regulations transferred to the FDIC from the Office of Thrift Supervision (''OTS'') on July 21, 2011 in connection with the implementation of applicable provisions of title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''). The requirements for State savings associations in this subpart are substantively similar to the requirements in the FDIC's part which is also entitled ''Consumer Protection in Sales of Insurance'' (''the part'') and is applicable for all insured depository institutions (''IDIs'') for which the FDIC has been designated the appropriate Federal banking agency.

The FDIC proposes to rescind in its entirety the subpart and to modify the scope of the part to include State savings associations and their subsidiaries to conform to and reflect the scope of the FDIC's current supervisory responsibilities as the appropriate Federal banking agency. The FDIC also proposes to define ''FDIC-supervised insured depository institution or institution'' and ''State savings association.'' Finally, the FDIC proposes to transfer an anticoercion and antitying provision from the subpart that is applicable to State savings associations.

Upon removal of the subpart, the Consumer Protection in Sales of Insurance, regulations applicable for all IDIs for which the FDIC has been designated the appropriate Federal banking agency will be found in the part.

DATES: Comments must be received on or before January 20, 2017.

ADDRESSES: You may submit comments by any of the following methods:

- *FDIC Web site: http://www.fdic.gov/regulations/laws/federal/propose.html.* Follow instructions for submitting comments on the agency Web site.
- *FDIC Email: Comments@fdic.gov.* Include RIN #3064–AE49 on the subject line of the message.
- *FDIC Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery to FDIC:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street building (located on F Street) on business days between 7 a.m. and 5 p.m.

Please include your name, affiliation, address, email address, and telephone number(s) in your comment. Where appropriate, comments should include a short Executive Summary consisting of no more than five single-spaced pages. All statements received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. You should submit only information that you wish to make publicly available.

Please note: All comments received will be posted generally without change to *http://www.fdic.gov/regulations/laws/federal/propose.html,* including any personal information provided. Paper copies of public comments may be requested from the Public Information Center by telephone at 1–877–275–3342 or 1–703–562–2200.

FOR FURTHER INFORMATION CONTACT: Martha L. Ellett, Counsel, Consumer Compliance Section, Legal Division, (202) 898–6765; John Jackwood, Sr. Policy Analyst, Division of Depositor and Consumer Protection, (202) 898–3991.

SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Act

The Dodd-Frank Act [1] provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding companies. Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act, codified at 12 U.S.C. 5411, the powers, duties, and functions formerly performed by the OTS were divided among the FDIC, as to State savings associations, the Office of the Comptroller of the Currency (''OCC''), as to Federal savings associations, and the Board of Governors of the Federal Reserve System (''FRB''), as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act, codified at 12 U.S.C. 5414(b), provides the manner of treatment for all orders, resolutions, determinations, regulations, and advisory materials that had been issued, made, prescribed, or allowed to become effective by the OTS. The section provides that if such materials were in effect on the day before the transfer date, they continue to be in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Section 316(c) of the Dodd-Frank Act, codified at 12 U.S.C. 5414(c), further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations that would be enforced by the FDIC and the OCC, respectively. On June 14, 2011, the FDIC's Board of Directors approved a ''List of OTS Regulations to be enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.'' This list was published by the FDIC and the OCC as a Joint Notice in the **Federal Register** on July 6, 2011.[2]

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act, codified at 12 U.S.C. 5412(b)(2)(B)(i)(II), granted the OCC rulemaking authority relating to both State and Federal savings associations, nothing in the Dodd-Frank Act affected the FDIC's existing authority to issue regulations under the Federal Deposit Insurance Act (''FDI Act'') and other laws as the ''appropriate Federal banking agency'' or under similar statutory terminology. Section

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. 5301 *et seq.*).

[2] 76 FR 39247 (July 6, 2011).

312(c) of the Dodd-Frank Act amended the definition of ''appropriate Federal banking agency'' contained in section 3(q) of the FDI Act, 12 U.S.C. 1813(q), to add State savings associations to the list of entities for which the FDIC is designated as the ''appropriate Federal banking agency.'' As a result, when the FDIC acts as the designated ''appropriate Federal banking agency'' (or under similar terminology) for State savings associations, as it does here, the FDIC is authorized to issue, modify and rescind regulations involving such associations, as well as for State nonmember banks and insured branches of foreign banks.

As noted, on June 14, 2011, pursuant to this authority, the FDIC's Board of Directors reissued and redesignated certain transferring regulations of the former OTS. These transferred OTS regulations were published as new FDIC regulations in the **Federal Register** on August 5, 2011.[3] When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS rules and might later recommend incorporating the transferred OTS regulations into other FDIC rules, amending them, or rescinding them, as appropriate.

One of the OTS rules transferred to the FDIC governed OTS oversight of consumer protections for depository institution sales of insurance. The OTS rule, formerly found at 12 CFR part 536, was transferred to the FDIC with only minor nonsubstantive changes and is now found in the FDIC's rules at part 390, subpart I, entitled ''Consumer Protection in Sales of Insurance.'' Before the transfer of the OTS rules and continuing today, the FDIC's rules contained part 343, also entitled ''Consumer Protection in Sales of Insurance,'' a rule governing FDIC oversight of consumer protection regulations that apply to retail sales practices, solicitations, advertising, or offers of any insurance product with respect to IDIs for which the FDIC has been designated the appropriate Federal banking agency. After careful review and comparison of part 390, subpart I, and part 343, the FDIC proposes to rescind part 390, subpart I, because, as discussed below, it is substantively redundant to existing part 343 and simultaneously we propose to make technical conforming edits to our existing rule.

FDIC's Existing 12 CFR Part 343 and Former OTS's Part 536 (Transferred, in Part, to FDIC's Part 390, Subpart I)

Section 305 of the Gramm-Leach-Bliley Act (''GLB Act'')[4] added section 47 to the FDI Act,[5] entitled ''Insurance Consumer Protections.'' Section 47 applies to retail sales practices, solicitations, advertising, or offers of insurance products by depository institutions[6] or persons engaged in these activities at an office of the institution or on behalf of the institution.[7] Section 47 directs the FDIC, the OTS, the OCC, and the FRB (collectively the ''Federal banking agencies'') to include provisions specifically relating to sales practices, disclosures and advertising, the physical separation of banking and nonbanking activities, and domestic violence discrimination.[8] On December 4, 2000, pursuant to section 305 of the GLB Act,[9] the Federal banking agencies published a joint final rule[10] to implement consumer protection in sales of insurance provisions of section 47 of the FDI Act.

Section 47 of the FDI Act instructs the Federal banking agencies to consult and coordinate with one another and prescribe and publish joint consumer protection regulations that apply to retail sales practices, solicitations, advertising, or offers of insurance products by depository institutions or persons engaged in these activities at an office of the institution or on behalf of the institution.[11] Section 47 also requires the Federal banking agencies to consult with the State insurance regulators, as appropriate.[12] The Federal banking agencies consulted and coordinated with respect to this rulemaking and on an interagency basis jointly issued rules that are substantively identical with regard to consumer protection in sales of insurance requirements,[13] including the same definition of a ''covered person'' or ''you.''[14]

The scope of part 343 in the FDIC's regulations and of part 390, subpart I in the OTS's regulations is also substantively similar. The FDIC regulations apply to any bank[15] or any other person that is engaged in such activities at an office of the bank or on behalf of the bank.[16] Similarly, the OTS regulations apply to any State savings association or any other person that is engaged in such activities at an office of a State savings association or on behalf of a State savings association.[17] In the FDIC's scope provisions, any other person includes subsidiaries[18] because only subsidiaries that are selling insurance products or annuities at an office of the institution or acting on behalf of the depository institution as defined in the rules would be subject to the requirements of the rules.[19] The OTS regulation specifically states that its regulation applies to subsidiaries of a State savings association only to the extent that it sells, solicits, advertises, or offers insurance products or annuities at an office of a State savings association or on behalf of a State savings association.[20] This OTS provision will not be carried over to the FDIC's part 343 because it is redundant and unnecessary, since the FDIC scope provision already includes subsidiaries within its definition.[21] The rule specifically states that a covered person (or you) includes any person *including a subsidiary or other affiliate* if that person or one of its employees sells, solicits, advertises, or offers insurance products or annuities at an office of an institution or on behalf of an institution.[22]

Accordingly, the portions of the OTS regulations that applied to State savings associations, their subsidiaries and their affiliates, originally codified at 12 CFR part 536 and subsequently transferred to

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[3] 76 FR 47652 (Aug. 5, 2011).

[4] Gramm-Leach-Bliley Act, Public Law 106–102, 113 Stat. 1338 (1999).

[5] 12 U.S.C. 1831x.

[6] A ''depository institution'' in this context means a national bank in the case of institutions supervised by the OCC, a State member bank in the case of the FRB, a State nonmember bank in the case of the FDIC, and a savings association in the case of the OTS. 65 FR 75822 fn. 1 (Dec. 4, 2000).

[7] 12 U.S.C. 1831x(a)(1)(A).

[8] 12 U.S.C. 1831x.

[9] 12 U.S.C. 1831x(a)(3).

[10] 65 FR 75822 (Dec. 4, 2000).

[11] 12 U.S.C. 1831x(a)(1).

[12] 12 U.S.C. 1831x(a)(3).

[13] 65 FR 75822 (Dec. 4, 2000).

[14] 65 FR 75822, 75824 (Dec. 4, 2000). A ''covered person'' or ''you'' means ''any depository institution or any other person selling, soliciting, advertising, or offering insurance products or annuities to a consumer at an office of the institution or on behalf of the institution. A 'covered person' includes any person, including a subsidiary or other affiliate, if that person or one of its employees sells, solicits, advertises, or offers insurance products or annuities at an office of an institution or on behalf of an institution. 65 FR 75824 (Dec. 4, 2000). *See also* 12 CFR 343.20(j)(1) and 12 CFR 390.181.

[15] Bank means an FDIC-insured, state-chartered commercial or savings bank that is not a member of the Federal Reserve System and for which the FDIC is the appropriate federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)). 12 CFR 343.20(b).

[16] 12 CFR 343.10.

[17] 12 CFR 390.180(a)(1), (2).

[18] *See* 65 FR 75822, 75823 (Dec. 4, 2000).

[19] 65 FR 75822, 75823 (Dec. 4, 2000) (footnote omitted).

[20] 12 CFR 390.180(b).

[21] 12 CFR 343.10.

[22] 65 FR 75822, 75824 (Dec. 4, 2000) (italics added).

FDIC's part 390, subpart I, are substantively similar to the current FDIC regulations codified at 12 CFR part 343. By amending part 343 to encompass State savings associations and rescinding part 390, subpart I, the FDIC will streamline its regulations and reduce redundancy.

Although the former OTS rule and part 390, subpart I, covers savings and loan holding companies that are affiliated with savings associations in addition to savings associations, the FDIC does not supervise savings and loan or bank holding companies for purposes of this rule. Section 312 of the Dodd-Frank Act [23] divides and transfers the functions of the former OTS to the FDIC, OCC, and FRB by amending section 1813(q) of the FDI Act. Specifically, section 312 transfers the former OTS's power to regulate State savings associations to the FDIC, while it transfers the power to regulate savings and loan holding companies to the FRB.[24] As a result, whereas the former OTS part 536 applied to savings associations, their subsidiaries and their affiliates, including savings and loan holding companies,[25] upon transfer of part 536 to FDIC's part 390, subpart I, only the authority over State savings associations and their subsidiaries and other affiliates was transferred to the FDIC for purposes of this rule.[26] The FRB currently has jurisdiction over the regulation and supervision of consumer protections in connection with retail insurance sales practices as it applies to affiliates, including savings and loan holding companies of State savings associations.[27] For this reason, the existing references to affiliates in part 390, subpart I, are not proposed to be transferred to part 343 of the FDIC rules.

After careful comparison of the FDIC's part 343 with the transferred OTS rule in part 390, subpart I, the FDIC has concluded that the transferred OTS rules governing consumer protection in sales of insurance are substantively redundant. Based on the foregoing, the FDIC proposes to rescind and remove from the Code of Federal Regulations the transferred OTS rules located at part 390, subpart I, and to make minor conforming changes to part 343 to incorporate State savings associations.

II. The Proposal

Regarding the functions of the former OTS that were transferred to the FDIC, section 316(b)(3) of the Dodd-Frank Act, 12 U.S.C. 5414(b)(3), in pertinent part, provides that the former OTS's regulations will be enforceable by the FDIC until they are modified, terminated, set aside, or superseded in accordance with applicable law. After reviewing the rules currently found in part 390, subpart I, the FDIC proposes (1) to rescind part 390, subpart I, in its entirety; (2) to modify to the scope of part 343 to include State savings associations and their subsidiaries to conform to and reflect the scope of FDIC's current supervisory responsibilities as the appropriate Federal banking agency for State savings associations; (3) delete the definition of bank and replace it with a definition of FDIC-supervised insured depository institution or institution, which means any State nonmember insured bank or State savings association for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)); (4) add a new subsection (i), which would define ''State savings association'' as having the same meaning as in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3)); (5) transfer an anticoercion and antitying provision from part 390, subpart I, that is applicable to State savings associations to part 343; and (6) make conforming technical edits throughout, including replacing the term ''institution'' in place of ''bank'' throughout the rule where necessary.

If the proposal is finalized, oversight of consumer protection in sales of insurance in part 343 would apply to all FDIC-supervised institutions, including State savings associations, and part 390, subpart I, would be removed because it is largely redundant of the rules found in part 343. Rescinding part 390, subpart I, will serve to streamline the FDIC's rules and eliminate unnecessary regulations.

III. Request for Comments

The FDIC invites comments on all aspects of this proposed rulemaking, and specifically requests comments on the following:

(1) Are there any specific provisions of part 343 that are outdated or obsolete, or are behind industry standards? If so, please describe and recommend alternate methodology.

(2) What impacts, positive or negative, can you foresee in the FDIC's proposal to rescind part 390, subpart I?

Written comments must be received by the FDIC no later than January 20, 2017.

IV. Regulatory Analysis and Procedure

A. The Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act (''PRA'') of 1995, 44 U.S.C. 3501–3521, the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (''OMB'') control number.

The Proposed Rule would rescind and remove from FDIC regulations part 390, subpart I from the FDIC regulations. This rule was transferred with only nominal changes to the FDIC from the OTS when the OTS was abolished by title III of the Dodd-Frank Act. Part 390, subpart I, is largely redundant of the FDIC's existing part 343 regarding consumer protections for depository institution sales of insurance. The information collections contained in part 343 are cleared by OMB under the FDIC's Insurance Sales Consumer Protections information collection (OMB Control No. 3064–0140). The FDIC reviewed its burden estimates for the collection at the time it assumed responsibility for supervision of State savings associations transferred from the OTS and determined that no changes to the burden estimates were necessary. The Proposed Rule would not revise the Insurance Sales Consumer Protections information collection under OMB Control No. 3064–0140 or create any new information collection pursuant to the PRA. Consequently, no submission will be made to the Office of Management and Budget for review. The FDIC requests comment on its conclusion that this NPR does not revise the Insurance Sales Consumer Protections information collection 3064–0140.

Finally, the Proposed Rule would (1) amend part 343 to include State savings associations and their subsidiaries within its scope; and (2) define ''FDIC-supervised insured depository institution or institution'' and ''State savings association;'' (3) transfer an anticoercion and antitying provision from part 390, subpart I, that is applicable to State savings associations to part 343; and (4) make conforming technical edits throughout These measures clarify that State savings associations, as well as State nonmember banks are subject to part 343. With respect to part 343, the Proposed Rule does not revise any existing, or create any new information collection pursuant to the PRA. Consequently, no submission will be made to the Office of Management and Budget for review. The FDIC requests

[23] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. 5412).

[24] 12 U.S.C. 5412.

[25] 12 CFR 536.1.

[26] 12 CFR 390.180.

[27] 12 CFR part 208, subpart H.

comment on its conclusion that this aspect of the NPR does not create a new or revise and existing information collection.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities (defined in regulations promulgated by the Small Business Administration to include banking organizations with total assets of less than or equal to $550 million).[28] However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, and publishes its certification and a short explanatory statement in the **Federal Register** together with the proposed rule. For the reasons provided below, the FDIC certifies that the Proposed Rule would not have a significant economic impact on a substantial number of small entities.

As discussed in this notice of proposed rulemaking, part 390, subpart I, was transferred from OTS part 536, which governed consumer protections for depository institution sales of insurance. OTS part 536 had been in effect since 2001 and all State savings associations were required to comply with it. Because it is substantially same as existing part 343 of the FDIC's rules and therefore redundant, the FDIC proposes rescinding and removing the transferred regulation now located in part 390, subpart I. As a result, all FDIC-supervised institutions—including State savings associations and their subsidiaries—would be required to comply with part 343 if they are selling, soliciting, advertising, or offering any insurance product. Because all State savings associations and their subsidiaries have been required to comply with substantially similar consumer protection rules if they engaged in sales of insurance since 2001,[29] the Proposed Rule would not place additional requirements or burdens on any State savings association irrespective of its size. Therefore, the Proposed Rule would not have a significant impact on a substantial number of small entities.

[28] 5 U.S.C. 601 *et seq.*

[29] 65 FR 75822 (Dec. 4, 2000). The final rule became effective April 1, 2001.

C. Plain Language

Section 722 of the GLB Act, codified at 12 U.S.C. 4809, requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. The FDIC invites comments on whether the Proposed Rule is clearly stated and effectively organized, and how the FDIC might make it easier to understand. For example:

- Has the FDIC organized the material to suit your needs? If not, how could it present the rule more clearly?
- Have we clearly stated the requirements of the rule? If not, how could the rule be more clearly stated?
- Does the rule contain technical jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

D. The Economic Growth and Regulatory Paperwork Reduction Act

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (''EGRPRA''), the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations imposed on insured institutions.[30] The FDIC completed the last comprehensive review of its regulations under EGRPRA in 2006 and is commencing the next decennial review. The action taken on this rule will be included as part of the EGRPRA review that is currently in progress. As part of that review, the FDIC invites comments concerning whether the Proposed Rule would impose any outdated or unnecessary regulatory requirements on insured depository institutions. If you provide such comments, please be specific and provide alternatives whenever appropriate.

List of Subjects

12 CFR Part 343

Banks, banking; Consumer protection in sales of insurance; Savings associations.

12 CFR Part 390

Consumer protection in sales of insurance.

[30] Public Law 104–208, 110 Stat. 3009 (1996).

Authority and Issuance

For the reasons stated in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation proposes to revise part 343 of title 12 of the Code of Federal Regulations and amend part 390 of title 12 of the Code of Federal Regulations as set forth below:

■ 1. Revise part 343 to read as follows:

PART 343—CONSUMER PROTECTION IN SALES OF INSURANCE

Authority: 12 U.S.C. 1819 (Seventh and Tenth); 12 U.S.C. 1831x.

§ 343.10 Purpose and scope.

This part establishes consumer protections in connection with retail sales practices, solicitations, advertising, or offers of any insurance product or annuity to a consumer by:

(a) Any institution; or

(b) Any other person that is engaged in such activities at an office of the institution or on behalf of the institution.

§ 343.20 Definitions.

As used in this part:

(a) *Affiliate* means a company that controls, is controlled by, or is under common control with another company.

(b) *Company* means any corporation, partnership, business trust, association or similar organization, or any other trust (unless by its terms the trust must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust). It does not include any corporation the majority of the shares of which are owned by the United States or by any State, or a qualified family partnership, as defined in section 2(o)(10) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841(o)(10)).

(c) *Consumer* means an individual who purchases, applies to purchase, or is solicited to purchase from you insurance products or annuities primarily for personal, family, or household purposes.

(d) *Control* of a company has the same meaning as in section 3(w)(5) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(5)).

(e) *Domestic violence* means the occurrence of one or more of the following acts by a current or former family member, household member, intimate partner, or caretaker:

(1) Attempting to cause or causing or threatening another person physical harm, severe emotional distress, psychological trauma, rape, or sexual assault;

(2) Engaging in a course of conduct or repeatedly committing acts toward another person, including following the person without proper authority, under circumstances that place the person in reasonable fear of bodily injury or physical harm;

(3) Subjecting another person to false imprisonment; or

(4) Attempting to cause or causing damage to property so as to intimidate or attempt to control the behavior of another person.

(f) *Electronic media* includes any means for transmitting messages electronically between you and a consumer in a format that allows visual text to be displayed on equipment, for example, a personal computer monitor.

(g) *FDIC-supervised insured depository institution or institution* means any State nonmember insured bank or State savings association for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

(h) *Office* means the premises of an institution where retail deposits are accepted from the public.

(i) *State savings association* has the same meaning as in section (3)(b)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b)(3).

(j) *Subsidiary* has the same meaning as in section 3(w)(4) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(4)).

(k)(1) *You* means:

(i) An institution; or

(ii) Any other person only when the person sells, solicits, advertises, or offers an insurance product or annuity to a consumer at an office of the institution or on behalf of an institution.

(2) For purposes of this definition, activities on behalf of an institution include activities where a person, whether at an office of the institution or at another location sells, solicits, advertises, or offers an insurance product or annuity and at least one of the following applies:

(i) The person represents to a consumer that the sale, solicitation, advertisement, or offer of any insurance product or annuity is by or on behalf of the institution;

(ii) The institution refers a consumer to a seller of insurance products or annuities and the institution has a contractual arrangement to receive commissions or fees derived from a sale of an insurance product or annuity resulting from that referral; or

(iii) Documents evidencing the sale, solicitation, advertising, or offer of an insurance product or annuity identify or refer to the institution.

§ 343.30 Prohibited practices.

(a) *Anticoercion and antitying rules.* You may not engage in any practice that would lead a consumer to believe that an extension of credit, in violation of section 106(b) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1972) in the case of a State nonmember insured bank and a foreign bank having an insured branch, or in violation of section 5(q) of the Home Owners' Loan Act (12 U.S.C. 1464(q)) in the case of a State savings association, is conditional upon either:

(1) The purchase of an insurance product or annuity from the institution or any of its affiliates; or

(2) An agreement by the consumer not to obtain, or a prohibition on the consumer from obtaining, an insurance product or annuity from an unaffiliated entity.

(b) *Prohibition on misrepresentations generally.* You may not engage in any practice or use any advertisement at any office of, or on behalf of, the institution or a subsidiary of the institution that could mislead any person or otherwise cause a reasonable person to reach an erroneous belief with respect to:

(1) The fact that an insurance product or annuity sold or offered for sale by you or any subsidiary of the institution is not backed by the Federal government or the institution, or the fact that the insurance product or annuity is not insured by the Federal Deposit Insurance Corporation;

(2) In the case of an insurance product or annuity that involves investment risk, the fact that there is an investment risk, including the potential that principal may be lost and that the product may decline in value; or

(3) In the case of an institution or subsidiary of the institution at which insurance products or annuities are sold or offered for sale, the fact that:

(i) The approval of an extension of credit to a consumer by the institution or subsidiary may not be conditioned on the purchase of an insurance product or annuity by the consumer from the institution or a subsidiary of the institution; and

(ii) The consumer is free to purchase the insurance product or annuity from another source.

(c) *Prohibition on domestic violence discrimination.* You may not sell or offer for sale, as principal, agent, or broker, any life or health insurance product if the status of the applicant or insured as a victim of domestic violence or as a provider of services to victims of domestic violence is considered as a criterion in any decision with regard to insurance underwriting, pricing, renewal, or scope of coverage of such product, or with regard to the payment of insurance claims on such product, except as required or expressly permitted under State law.

§ 343.40 What you must disclose.

(a) *Insurance disclosures.* In connection with the initial purchase of an insurance product or annuity by a consumer from you, you must disclose to the consumer, except to the extent the disclosure would not be accurate, that:

(1) The insurance product or annuity is not a deposit or other obligation of, or guaranteed by, the institution or an affiliate of the institution;

(2) The insurance product or annuity is not insured by the Federal Deposit Insurance Corporation (FDIC) or any other agency of the United States, the institution, or (if applicable) an affiliate of the institution; and

(3) In the case of an insurance product or annuity that involves an investment risk, there is investment risk associated with the product, including the possible loss of value.

(b) *Credit disclosure.* In the case of an application for credit in connection with which an insurance product or annuity is solicited, offered, or sold, you must disclose that the institution may not condition an extension of credit on either:

(1) The consumer's purchase of an insurance product or annuity from the institution or any of its affiliates; or

(2) The consumer's agreement not to obtain, or a prohibition on the consumer from obtaining, an insurance product or annuity from an unaffiliated entity.

(c) *Timing and method of disclosures*—(1) *In general.* The disclosures required by paragraph (a) of this section must be provided orally and in writing before the completion of the initial sale of an insurance product or annuity to a consumer. The disclosure required by paragraph (b) of this section must be made orally and in writing at the time the consumer applies for an extension of credit in connection with which an insurance product or annuity is solicited, offered, or sold.

(2) *Exception for transactions by mail.* If a sale of an insurance product or annuity is conducted by mail, you are not required to make the oral disclosures required by paragraph (a) of this section. If you take an application for credit by mail, you are not required to make the oral disclosure required by paragraph (b) of this section.

(3) *Exception for transactions by telephone.* If a sale of an insurance product or annuity is conducted by telephone, you may provide the written disclosures required by paragraph (a) of this section by mail within 3 business days beginning on the first business day after the sale, excluding Sundays and the legal public holidays specified in 5 U.S.C. 6103(a). If you take an application for credit by telephone, you may provide the written disclosure required by paragraph (b) of this section by mail, provided you mail it to the consumer within three days beginning the first business day after the application is taken, excluding Sundays and the legal public holidays specified in 5 U.S.C. 6103(a).

(4) *Electronic form of disclosures.* (i) Subject to the requirements of section 101(c) of the Electronic Signatures in Global and National Commerce Act (12 U.S.C. 7001(c)), you may provide the written disclosures required by paragraph (a) and (b) of this section through electronic media instead of on paper, if the consumer affirmatively consents to receiving the disclosures electronically and if the disclosures are provided in a format that the consumer may retain or obtain later, for example, by printing or storing electronically (such as by downloading).

(ii) Any disclosure required by paragraphs (a) or (b) of this section that is provided by electronic media is not required to be provided orally.

(5) *Disclosures must be readily understandable.* The disclosures provided shall be conspicuous, simple, direct, readily understandable, and designed to call attention to the nature and significance of the information provided. For instance, you may use the following disclosures in visual media, such as television broadcasting, ATM screens, billboards, signs, posters and written advertisements and promotional materials, as appropriate and consistent with paragraphs (a) and (b) of this section:

(i) NOT A DEPOSIT
(ii) NOT FDIC-INSURED
(iii) NOT INSURED BY ANY FEDERAL GOVERNMENT AGENCY
(iv) NOT GUARANTEED BY THE INSTITUTION
(v) MAY GO DOWN IN VALUE

(6) *Disclosures must be meaningful.* (i) You must provide the disclosures required by paragraphs (a) and (b) of this section in a meaningful form. Examples of the types of methods that could call attention to the nature and significance of the information provided include:

(A) A plain-language heading to call attention to the disclosures;

(B) A typeface and type size that are easy to read;

(C) Wide margins and ample line spacing;

(D) Boldface or italics for key words; and

(E) Distinctive type size, style, and graphic devices, such as shading or sidebars, when the disclosures are combined with other information.

(ii) You have not provided the disclosures in a meaningful form if you merely state to the consumer that the required disclosures are available in printed material, but do not provide the printed material when required and do not orally disclose the information to the consumer when required.

(iii) With respect to those disclosures made through electronic media for which paper or oral disclosures are not required, the disclosures are not meaningfully provided if the consumer may bypass the visual text of the disclosures before purchasing an insurance product or annuity.

(7) *Consumer acknowledgment.* You must obtain from the consumer, at the time a consumer receives the disclosures required under paragraphs (a) or (b) of this section, or at the time of the initial purchase by the consumer of an insurance product or annuity, a written acknowledgment by the consumer that the consumer received the disclosures. You may permit a consumer to acknowledge receipt of the disclosures electronically or in paper form. If the disclosures required under paragraphs (a) or (b) of this section are provided in connection with a transaction that is conducted by telephone, you must:

(i) Obtain an oral acknowledgment of receipt of the disclosures and maintain sufficient documentation to show that the acknowledgment was given; and

(ii) Make reasonable efforts to obtain a written acknowledgment from the consumer.

(d) *Advertisements and other promotional material for insurance products or annuities.* The disclosures described in paragraph (a) of this section are required in advertisements and promotional material for insurance products or annuities unless the advertisements and promotional materials are of a general nature describing or listing the services or products offered by the institution.

§ 343.50 Where insurance activities may take place.

(a) *General rule.* An institution must, to the extent practicable, keep the area where the institution conducts transactions involving insurance products or annuities physically segregated from areas where retail deposits are routinely accepted from the general public, identify the areas where insurance product or annuity sales activities occur, and clearly delineate and distinguish those areas from the areas where the institution's retail deposit-taking activities occur.

(b) *Referrals.* Any person who accepts deposits from the public in an area where such transactions are routinely conducted in the institution may refer a consumer who seeks to purchase an insurance product or annuity to a qualified person who sells that product only if the person making the referral receives no more than a one-time, nominal fee of a fixed dollar amount for each referral that does not depend on whether the referral results in a transaction.

§ 343.60 Qualification and licensing requirements for insurance sales personnel.

An institution may not permit any person to sell or offer for sale any insurance product or annuity in any part of its office or on its behalf, unless the person is at all times appropriately qualified and licensed under applicable State insurance licensing standards with regard to the specific products being sold or recommended.

Appendix A to Part 343—Consumer Grievance Process

Any consumer who believes that any institution or any other person selling, soliciting, advertising, or offering insurance products or annuities to the consumer at an office of the institution or on behalf of the institution has violated the requirements of this part should contact the Division of Depositor and Consumer Protection, Consumer Response Center, Federal Deposit Insurance Corporation, at the following address: 1100 Walnut Street, Box #11, Kansas City, MO 64106, or telephone 1–877–275–3342, or FDIC Electronic Customer Assistance Form at *http://www5.fdic.gov/starsmail/index.asp.*

PART 390—REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION

■ 2. The authority citation for part 390 continues to read as follows:

Authority: 12 U.S.C. 1831y.

Subpart I—[Removed and Reserved]

■ 3. Remove and reserve subpart I, consisting of §§ 390.180 through 390.185.

Dated at Washington, DC, this 15th day of November, 2016.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 2016–27898 Filed 11–18–16; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9385; Directorate Identifier 2016–NM–111–AD]

RIN 2120–AA64

Airworthiness Directives; Gulfstream Aerospace Corporation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Gulfstream Aerospace Corporation Model G–1159B airplanes. This proposed AD was prompted by a review of airplane maintenance records, which revealed that incorrect rudder assemblies were installed on certain airplanes. This proposed AD would require certain inspections, and replacement or modification of the rudder assembly if necessary. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by January 5, 2017.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Gulfstream Aerospace Corporation, Technical Publications Dept., P.O. Box 2206, Savannah, GA 31402–2206; telephone 800–810–4853; fax 912–965–3520; email *pubs@gulfstream.com*; Internet *http://www.gulfstream.com/product_support/technical_pubs/pubs/index.htm*. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9385; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the ADDRESSES section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Krista Greer, Aerospace Engineer, Airframe Branch, ACE–117A, FAA, Atlanta Aircraft Certification Office (ACO), 1701 Columbia Avenue, College Park, GA 30337; phone: 404–474–5544; fax: 404–474–5606; email: *krista.greer@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the ADDRESSES section. Include ''Docket No. FAA–2016–9385; Directorate Identifier 2016–NM–111–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We reviewed Gulfstream airplane maintenance records which revealed that incorrect rudder assemblies were installed on certain Gulfstream Model G–1159B airplanes (also referred to by marketing designation GIIB). Investigation revealed that the Gulfstream GII/GIIB Illustrated Parts Catalog (IPC) did not clearly specify that the rudder assemblies for Model G–1159 airplanes (also referred to by marketing designation GII) have part number (P/N) 1159CS20004–3, and the rudder assemblies for Model G–1159B airplanes have P/N 1159CS25000–3/–9. Installation of rudders for Model G–1159 airplanes on Model G–1159B airplanes does not comply with the design fail-safe requirements for Model G–1159B airplanes. Although the rudder assembly designs are similar, the upper hinge configuration for Model G–1159B airplanes includes a dual load path to prevent control surface flutter in the event of middle or upper hinge failure. Installation of an incorrect rudder assembly could result in flutter and subsequent loss of the rudder, which could result in loss of control of the airplane.

Related Service Information Under 1 CFR Part 51

We reviewed Gulfstream GII/IIB Customer Bulletin 468, dated February 17, 2016 (for Model G–1159 and Model G–1159B airplanes). The service information describes procedures for inspecting the rudder assembly to determine the part number, verifying that the part number of the rudder assembly matches what is recorded in the airplane maintenance records, inspecting the rudder hinges, and modifying the rudder assembly. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

We estimate that this proposed AD affects 24 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	1 work-hour × $85 per hour = $85	$0	$85	$2,040

We estimate the following costs to do any necessary replacements or modifications that would be required based on the results of the proposed inspection. We have no way of determining the number of aircraft that might need these replacements or modifications:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replacement/modification	3 work-hours × $85 per hour = $255	$51,445	$51,700

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

(2) Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Gulfstream Aerospace Corporation: Docket No. FAA–2016–9385; Directorate Identifier 2016–NM–111–AD.

(a) Comments Due Date

We must receive comments by January 5, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Gulfstream Model G–1159B airplanes, certificated in any category.

Note 1 to paragraph (c) of this AD: Model G–1159B airplanes are also referred to by marketing designation GIIB.

(d) Subject

Air Transport Association (ATA) of America Code 27; Flight Controls.

(e) Unsafe Condition

This AD was prompted by a review of airplane maintenance records, which revealed that incorrect rudder assemblies were installed on certain airplanes. We are issuing this AD to detect and correct the installation of incorrect rudder assemblies, which could result in flutter and subsequent loss of the rudder, and consequent loss of control of the airplane.

(f) Compliance

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

(g) Inspection To Determine Rudder Assembly Part Number and Verification of Maintenance Records

Within 12 months after the effective date of this AD, do an inspection to determine the part number of the rudder assembly, in accordance with the Accomplishment Instructions of Gulfstream GII/IIB Customer Bulletin Number 468, dated February 17, 2016, except as provided by paragraph (i)(1) of this AD. If the rudder assembly does not have part number (P/N) 1159CS20004–3, within 12 months after the effective date of this AD, verify that the rudder assembly part number recorded in the aircraft maintenance records matches the part number of the rudder assembly installed on the airplane and if the rudder assembly part number does not match, correct the aircraft maintenance records accordingly.

(h) Additional Inspection and Corrective Action

If, during the inspection required by paragraph (g) of this AD, a rudder assembly having P/N 1159CS20004–3 is found, before further flight, do a general visual inspection of the middle and upper rudder hinges to determine if a one-piece or two-piece hinge is installed, in accordance with the Accomplishment Instructions of Gulfstream GII/IIB Customer Bulletin Number 468, dated February 17, 2016, and do the applicable action specified in paragraph (h)(1) or (h)(2) of this AD, except as required by paragraph (i)(2) of this AD.

(1) For airplanes with a one-piece hinge installed: Do the actions specified in paragraph (h)(1)(i) or (h)(1)(ii) of this AD.

(i) Modify the rudder assembly, in accordance with the Accomplishment Instructions of Gulfstream GII/IIB Customer

Bulletin Number 468, dated February 17, 2016.

Note 1 to paragraph (h)(1)(i) of this AD: Gulfstream GII/IIB Customer Bulletin Number 468, dated February 17, 2016, refers to Gulfstream GII Aircraft Service Change Number 300, Amendment 1, dated May 21, 1984, as an additional source of guidance for accomplishment of the rudder modification.

(ii) Replace the rudder assembly with a rudder assembly that has been modified as specified in Gulfstream GII Aircraft Service Change Number 300. Do the replacement using a method approved in accordance with the procedures specified in paragraph (k)(1) of this AD.

(2) For airplanes with a two-piece hinge installed: Re-identify the rudder assembly as having incorporated the actions in Gulfstream GII Aircraft Service Change Number 300, in accordance with the Accomplishment Instructions of Gulfstream GII/IIB Customer Bulletin Number 468, dated February 17, 2016.

(i) Exceptions to Service Bulletin Specifications

(1) Where Gulfstream GII/IIB Customer Bulletin Number 468, dated February 17, 2016, specifies to record the rudder part number and serial number on the service reply card, that action is not required by this AD.

(2) Where Gulfstream GII/IIB Customer Bulletin Number 468, dated February 17, 2016, specifies to contact Gulfstream for instructions on modifying the rudder assembly, this AD requires modifying the rudder assembly before further flight using a method approved in accordance with the procedures specified in paragraph (k)(1) of this AD.

(j) Special Flight Permit

Special flight permits, as described in Section 21.197 and Section 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199), are not allowed.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Atlanta Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (l)(1) of this AD.

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

(3) Except as required by paragraph (i) of this AD: For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (k)(3)(i) and (k)(3)(ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(l) Related Information

(1) For more information about this AD, contact Krista Greer, Aerospace Engineer, Airframe Branch, ACE–117A, FAA, Atlanta Aircraft Certification Office (ACO), 1701 Columbia Avenue, College Park, GA 30337; phone: 404–474–5544; fax: 404–474–5606; email: *krista.greer@faa.gov.*

(2) For service information identified in this AD, contact Gulfstream Aerospace Corporation, Technical Publications Dept., P.O. Box 2206, Savannah, GA 31402–2206; telephone 800–810–4853; fax 912–965–3520; email *pubs@gulfstream.com;* Internet *http://www.gulfstream.com/product_support/technical_pubs/pubs/index.htm.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on November 2, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–27309 Filed 11–18–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–3257; Directorate Identifier 2015–SW–072–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters Deutschland GmbH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Airbus Helicopters Deutschland GmbH (Airbus Helicopters) MBB–BK 117 D–2 helicopters. This proposed AD would require repetitively inspecting the bushings of the inner and outer forward trusses of both engines. This proposed AD is prompted by reports of delaminated and worn engine mount bushings. The proposed actions are intended to detect delaminated engine mount bushings, which can lead to excessive vibration, cracking, failure of the engine mount front support pins, and loss of helicopter control.

DATES: We must receive comments on this proposed AD by January 20, 2017.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Docket:* Go to *http://www.regulations.gov*. Follow the online instructions for sending your comments electronically.
- *Fax:* 202–493–2251.
- *Mail:* Send comments to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to the "Mail" address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–3257; or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, European Aviation Safety Agency (EASA) AD, the economic evaluation, any comments received, and other information. The street address for the Docket Operations Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

For service information identified in this proposed rule, contact Airbus Helicopters, 2701 N. Forum Drive, Grand Prairie, TX 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *http://www.airbushelicopters.com/techpub*. You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177.

FOR FURTHER INFORMATION CONTACT: Matt Fuller, Senior Aviation Safety Engineer, Safety Management Group, Rotorcraft Directorate, FAA, 10101 Hillwood Pkwy, Fort Worth, TX 76177; telephone (817) 222–5110; email *matthew.fuller@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

We will file in the docket all comments that we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

Discussion

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD No. 2015–0198, dated September 30, 2015, to correct an unsafe condition for Airbus Helicopters Model MBB–BK 117 D–2 helicopters. EASA advises that during a pre-flight check of an MBB–BK 117 D–2 helicopter, an engine mount bushing was found delaminated. More cases of delaminated engine mount bushings were reported following additional investigations. According to EASA, this condition could lead to cracks and eventually failure of the engine mount front support pins, possibly resulting in loss of helicopter control.

The EASA AD consequently requires repetitive inspections of the engine mount bushings and depending of the findings, repairing or replacing the bushings.

FAA's Determination

These helicopters have been approved by the aviation authority of Germany and are approved for operation in the United States. Pursuant to our bilateral agreement with Germany, EASA, its technical representative, has notified us of the unsafe condition described in its AD. We are proposing this AD because we evaluated all known relevant information and determined that an unsafe condition is likely to exist or develop on other products of the same type design.

Related Service Information

We reviewed Airbus Helicopters Alert Service Bulletin (ASB) MBB–BK117 D–2–71A–002, Revision 0, dated September 28, 2015, for Model MBB–BK 117 D–2 helicopters. The ASB introduces repetitive visual inspections of the engine mount bushings for defects, deformation, separation of the rubber, and missing rubber after reports of delaminated engine mount bushings and bushings with damage to the metal inner sleeve. If there is any deformation or separation of the rubber, the ASB specifies performing a detailed inspection of the bushing in accordance with the aircraft maintenance manual.

Proposed AD Requirements

This proposed AD would require within 50 hours time-in-service (TIS) and at intervals not to exceed 50 hours TIS thereafter, visually inspecting the bushings of the inner and outer forward trusses of both engines, and depending on the outcome of the inspections, replacing or repairing the bushings before further flight.

Differences Between This Proposed AD and the EASA AD

The EASA AD allows for a 10 hour time-in-service, non-cumulative tolerance for its required compliance times. This proposed AD would not.

Costs of Compliance

We estimate that this proposed AD would affect 5 helicopters of U.S. Registry and that labor costs average $85 per work hour. Based on these estimates, we expect the following costs:

- Inspecting the bushings would require 1 work hour. No parts would be needed, for a total cost of $85 per helicopter and $425 for the U.S. fleet.
- Replacing a bushing would require 1 work hour and $373 for parts, for a total cost of $458 per bushing.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared an economic evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus Helicopters Deutschland GmbH: Docket No. FAA–2016–3257; Directorate Identifier 2015–SW–072–AD.

(a) Applicability

This AD applies to Airbus Helicopters Deutschland GmbH Model MBB–BK 117 D–2 helicopters with a bushing part number 105–60386 installed, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as a delaminated engine mount bushing. This condition could result in excessive vibration, which could lead to cracking and failure of the engine mount front support pins, and loss of helicopter control.

(c) Comments Due Date

We must receive comments by January 20, 2017.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

Within 50 hours time-in-service (TIS) and thereafter at intervals not to exceed 50 hours TIS:

(1) Visually inspect each engine mount bushing (bushing) for separation of the rubber from the metal or missing rubber.

(2) If any rubber has separated from the metal or if there is missing rubber, inspect the bushing for deformation, corrosion, and mechanical damage.

(i) Replace the bushing with an airworthy bushing if there is any deformation, separation of the rubber from the metal, corrosion, or mechanical damage, or repair the bushing if the deformation, separation of the rubber, corrosion, or mechanical damage is within the maximum repair damage limitations.

(ii) If the inner and outer parts of the bushing are separated with missing rubber, replace the bushing with an airworthy bushing.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: Matt Fuller, Senior Aviation Safety Engineer, Safety Management Group, Rotorcraft Directorate, FAA, 10101 Hillwood Pkwy, Fort Worth, TX 76177; telephone (817) 222–5110; email *9-ASW-FTW-AMOC-Requests@faa.gov*.

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

(g) Additional Information

(1) Airbus Helicopters Alert Service Bulletin ASB MBB–BK117 D–2–71A–002, Revision 0, dated September 28, 2015, which is not incorporated by reference, contains additional information about the subject of this proposed rule. For service information identified in this proposed rule, contact Airbus Helicopters, 2701 N. Forum Drive, Grand Prairie, TX 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *http://www.airbushelicopters.com/techpub*. You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177.

(2) The subject of this AD is addressed in European Aviation Safety Agency (EASA) AD No. 2015–0198, dated September 30, 2015. You may view the EASA AD on the Internet at *http://www.regulations.gov* in the AD Docket.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 7200, Engine (Turbine, Turboprop).

Issued in Fort Worth, Texas, on November 10, 2016.

Lance T. Gant,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2016–27765 Filed 11–18–16; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2015–0142; FRL–9954–66–Region 6]

Approval and Promulgation of Air Quality Implementation Plans; Oklahoma; Infrastructure and Interstate Transport for the 2012 Fine Particulate Matter and Interstate Transport for the 2010 Sulfur Dioxide National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve and disapprove elements of State Implementation Plan (SIP) submissions from the State of Oklahoma for the 2012 Fine Particulate Matter ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS or standard) and the 2010 Sulfur Dioxide (SO_2) NAAQS. The 2012 $PM_{2.5}$ submission addresses how the existing SIP provides for implementation, maintenance, and enforcement of this NAAQS (infrastructure SIP or i-SIP). The i-SIP ensures that the Oklahoma SIP is adequate to meet the State's responsibilities under the Federal Clean Air Act (CAA). The majority of the 2010 SO_2 submission was addressed in a separate rulemaking, only the visibility component listed in 110(a)(2)(D)(i)(II) is being addressed in this action.

We are proposing to disapprove the visibility component of 110(a)(2)(D)(i)(II), often referred to as prong 4. We are also proposing to disapprove the portion of the January 28, 2015 SIP submission from Oklahoma for the 2010 Sulfur Dioxide (SO_2) NAAQS only as it addresses Section 110(a)(2)(D)(i)(II) for visibility protection.

DATES: Written comments must be received on or before December 21, 2016.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2015–0142, at *http://www.regulations.gov* or via email to *Donaldson.tracie@epa.gov*. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. 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. 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 Tracie Donaldson, (214) 665–6633, *Donaldson.tracie@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 docket index and publicly available docket materials for this action are available electronically at *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: Tracie Donaldson, 214–665–6633, *Donaldson.tracie@epa.gov*. To inspect the hard copy materials, please schedule an appointment with her or Bill Deese at 214–665–7253.

SUPPLEMENTARY INFORMATION: In this document "we," "us," and "our" means the EPA.

I. Background

On October 17, 2006, following a periodic review of the NAAQS for $PM_{2.5}$, EPA revised the $PM_{2.5}$ NAAQS. The 24-hour standard was revised to 35 micrograms per cubic meter (μg/m3), and the annual standard was revised to 15 μg/m3 (71 FR 61144). On December 14, 2012, we promulgated a revised primary annual $PM_{2.5}$ NAAQS (78 FR 3086). The primary annual standard was revised to 12.0 µg/m3, and we retained the 24-hour $PM_{2.5}$ standard of 35 µg/m3 (78 FR 3086). For more information on this standard, please visit *https://www.epa.gov/criteria-air-pollutants.* Oklahoma submitted an i-SIP revision on June 16, 2016 to address this revised NAAQS.

On June 22, 2010, we revised the primary NAAQS for SO_2 to establish a new 1-hour standard at a level of 75 ppb, based on the 3-year average of the annual 99th percentile of 1-hour daily maximum concentrations (75 FR 35520).

Pursuant to section 110(a)(1) of the CAA, states are required to submit i-SIPs that provide for the implementation, maintenance and enforcement of a new or revised NAAQS within 3 years following the promulgation of such new or revised NAAQS. Section 110(a)(2) lists specific requirements that i-SIPs must include to adequately address such new or revised NAAQS, as applicable. In an effort to assist states in complying with this requirement, EPA issued guidance addressing the i-SIP.

Our technical evaluation of the Oklahoma 2012 $PM_{2.5}$ submittal is provided in the Technical Support Document (TSD), which is in the docket for this rulemaking.[1] Section 110(a)(2)(D)(i)(I), which addresses the contribution to nonattainment and interference with maintenance of the 2012 $PM_{2.5}$ NAAQS in other states; was not included in this submittal and will be addressed by Oklahoma in a separate submittal.

II. EPA's Evaluation of the Oklahoma $PM_{2.5}$ i-SIP and Interstate Transport Submittals

The State's submittal on June 16, 2016 demonstrates how the existing Oklahoma SIP meets the infrastructure requirements for the 2012 $PM_{2.5}$ NAAQS. A summary of our evaluation of the Oklahoma SIP for each applicable element of CAA section 110(a)(2)(A)–(M) follows.

(A) Emission limits and other control measures: CAA section 110(a)(2)(A) requires SIPs to include enforceable emission limits and other control measures, means or techniques, as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the Act, and other related matters as needed to implement, maintain and enforce each of the NAAQS.[2] The Oklahoma Clean Air Act (OCAA) provides the Oklahoma Department of Environmental Quality (ODEQ) with broad legal authority, to establish and implement air quality programs and enforce regulations it has promulgated. The ODEQ has authority to: adopt emission standards and compliance schedules applicable to regulated entities; adopt other measures necessary for attainment and maintenance of the NAAQS; enforce applicable laws, regulations, standards and compliance schedules; and seek injunctive relief.[3] The approved SIP for Oklahoma is documented at 40 CFR part 52.1920, Subpart LL. Most of the State's air quality rules and standards are codified at Title 252, Chapter 100 of the Oklahoma Administrative Code (denoted OAC 252:100). A detailed list of the applicable rules at OAC 252:100 and elsewhere in the OAC, along with the citations for approval into the SIP, is provided in Table 1 of the TSD.

(B) Ambient air quality monitoring/data system: CAA section 110(a)(2)(B) requires SIPs to provide for establishment and implementation of ambient air quality monitors, collection and analysis of monitoring data, and providing such data to EPA upon request. The OCAA provides the authority allowing the ODEQ to collect air monitoring data, quality-assure the results, and report the data.[4] The ODEQ maintains and operates a monitoring network to measure ambient levels of the pollutants in accordance with EPA regulations which specify siting and monitoring requirements. All monitoring data is measured using EPA approved methods and subject to EPA quality assurance requirements. The ODEQ submits all required data to EPA in accordance with EPA regulations. The monitoring network was approved into the SIP and undergoes annual review by EPA.[5] In addition, 40 CFR 58.10(d) requires that state assess their monitoring network every five years. The ODEQ submitted their 5-year monitoring network assessments to us on April 11, 2016. Our comments on the 5-year assessment, dated July 22, 2016, are in the docket for this rulemaking.[6] The ODEQ Web site identifies Oklahoma's ambient monitor locations, and provides past and current concentrations of criteria pollutants measured by the State's monitors.[7]

(C) Program for enforcement: CAA section 110(a)(2)(C) requires SIPs to include the following three elements: (1) A program providing for enforcement of the measures in paragraph *A* above; (2) a program for the regulation of the modification and construction of stationary sources as necessary to protect the applicable NAAQS (*i.e.,* state-wide permitting of minor sources); and (3) a permit program to meet the major source permitting requirements of the CAA (for areas designated as attainment or unclassifiable for the NAAQS in question).[8]

(1) Enforcement of SIP Measures. As noted earlier in section 110(a)(2)(A), the ODEQ and its Executive Director have the authority to enforce the requirements of the OCAA and any regulations, permits, or final compliance orders. This statute also provides the ODEQ and its Executive Director with general enforcement powers. Among other things, they can investigate regulated entities; issue field citations and compliance orders; file lawsuits to compel compliance with the statutes and regulations; commence civil actions; pursue criminal prosecutions; collect criminal and civil penalties; enter into remediation agreements; and issue emergency orders to cease operations. The OCAA also provides additional enforcement authorities and funding mechanisms.[9]

(2) Minor New Source Review (NSR). The CAA requires the SIP to include measures to regulate construction and modification of stationary sources to

[1] Additional information on: EPA's approach for reviewing i-SIPs; the details of the SIP submittal and EPA's evaluation; the effect of recent court decisions on i-SIPs; the statute and regulatory citations in the Oklahoma SIP specific to this review; the specific applicable CAA and EPA regulatory citations; **Federal Register** citations for Oklahoma SIP approvals; Oklahoma minor New Source Review program and EPA approval activities; and Oklahoma Prevention of Significant Deterioration (PSD) program can be found in the TSD.

[2] The specific nonattainment area plan requirements of section 110(a)(2)(I) are subject to the timing requirements of section 172, not the timing requirement of section 110(a)(1). Thus, section 110(a)(2)(A) does not require that states submit regulations or emissions limits specifically for attaining the NAAQS. Those SIP provisions are due as part of each state's attainment plan, and will be addressed separately from the requirements of section 110(a)(2)(A). In the context of an i-SIP, we are not evaluating the existing SIP provisions for this purpose. Instead, EPA is only evaluating whether the Oklahoma SIP has basic structural provisions for the implementation of the NAAQS.

[3] Please see the TSD for our complete analysis and citations to the specific provisions.

[4] Please see the TSD for our complete analysis and citations to the specific provisions.

[5] A copy of the 2016 Annual Air Monitoring Network Plan and EPA's approval letter are included in the docket for this proposed rulemaking.

[6] A copy of the ODEQ's 5-year monitoring network assessment and EPA's evaluation are included in the docket for this proposed rulemaking.

[7] *see http://www.ODEQ.Oklahoma.gov/airquality/monops/sites/mon_sites.html* and *http://www17.ODEQ.Oklahoma.gov/tamis/index.cfm?fuseaction=home.welcome.*

[8] *See* TSD, beginning on page 6.

[9] Please see the TSD for our complete analysis and citations to the specific provisions.

protect the NAAQS. The Oklahoma minor NSR permitting requirements have been approved in the SIP.[10]

(3) Prevention of Significant Deterioration (PSD) permit program. Oklahoma's PSD program covers all NSR regulated pollutants, as well as the NAAQS subject to our review contained herein, and has been approved by EPA into the SIP.[11]

(D)(i) Interstate Pollution Transport: There are four requirements the SIP must include relating to interstate transport. The SIP must prohibit emissions within Oklahoma from contributing significantly to the nonattainment of the NAAQS in other states, and from interfering with the maintenance of the NAAQS in other states (section 110(a)(2)(D)(i)(I)). The SIP must also prohibit emissions within Oklahoma both from interfering with measures required to prevent significant deterioration in other states and from interfering with measures required to protect visibility in other states (section 110(a)(2)(D)(i)(II)).

At this time ODEQ has not submitted the infrastructure submittal regarding the prevention of emissions which significantly contribute to nonattainment of the $PM_{2.5}$ NAAQS in other states, and interference with the maintenance of the $PM_{2.5}$ NAAQS in other states (110(a)(2)(D)(i)(I)). We are taking action on the portion of the submittal addressing prevention of significant deterioration in other states and on visibility protection (110(a)(2)(D)(i)(II)). Section 110(a)(2)(D)(i)(II) consists of two provisions, prohibiting emissions which will interfere with measures required to be included in the SIP for any other State to prevent significant deterioration of (1) air quality and (2) protect visibility. Oklahoma has an approved PSD program which satisfies (1) above. The program regulates all NSR pollutants, including GHG, which prevents significant deterioration in nearby states.

We find that Oklahoma has not included measures that conform to the mutually agreed upon regional haze reasonable progress goals. A FIP cannot be relied upon to satisfy this requirement.[12] We are proposing to disapprove this sub-element (often referred to as prong 4) of the i-SIP submission (110(a)(2)(D)(i)(II)) for visibility protection.

(D)(ii)Interstate Pollution Abatement and International Air Pollution: Pursuant to section 110(a)(2)(D)(ii), states must comply with the requirements listed in sections 115 and 126 of the CAA which were designed to aid in the abatement of interstate and international pollution. Section 126(a) requires new or modified sources to notify neighboring states of potential impacts from the source. Oklahoma's PSD program contains the element pertaining to notification of neighboring states of the issuance of PSD permits. Section 115 relates to international pollution abatement. There are no findings by EPA that air emissions originating in Oklahoma affect other countries. Thus, the Oklahoma SIP satisfies the requirements of section 110(a)(2)(D)(ii) for the four NAAQS discussed herein.

(E) Adequate authority, resources, implementation, and oversight: The SIP must provide for the following: (1) Necessary assurances that the state (and other entities within the state responsible for implementing the SIP) will have adequate personnel, funding, and authority under state or local law to implement the SIP, and that there are no legal impediments to such implementation; (2) compliance with requirements relating to state boards as explained in section 128 of the CAA; and (3) necessary assurances that the state has responsibility for ensuring adequate implementation of any plan provision for which it relies on local governments or other entities to carry out that portion of the plan.

Sections 110(a)(2)(A) and (C), discussed earlier in this rulemaking, also require that the state have adequate authority to implement and enforce the SIP without legal impediments. The State's submittals describe the Oklahoma statutes and SIP regulations governing the various functions of personnel within the ODEQ, including the administrative, technical support, planning, enforcement, and permitting functions of the program. See the TSD for further detail.

With respect to funding, the OCAA and the SIP provide the ODEQ with authority to hire and compensate employees; accept and administer grants or other funds; require the ODEQ to establish an emissions fee schedule for sources in order to fund the reasonable costs of administering various air pollution control programs; and authorizes the ODEQ to collect additional fees necessary to cover reasonable costs associated with processing air permit applications. The EPA conducts periodic program reviews to ensure that the state has adequate resources and funding to, among other things, implement and enforce the SIP. See the OCAA and 27A O.S. 2–5–105.

As required by the CAA, the Oklahoma statutes and the SIP stipulate that any board or body that approves permits or enforcement orders must have at least a majority of members who represent the public interest and do not derive any ''significant portion'' of their income from persons subject to permits and enforcement orders; and the members of the board or body, or the head of an agency with similar powers, are required to adequately disclose any potential conflicts of interest. See 27A O.S. 2–3–101 (addressing staff) and 27A O.S. 2–3–201 (addressing the Executive Director).

Oklahoma has not delegated authority to implement any of the provisions of its plan to local governmental entities—the ODEQ acts as the primary air pollution control agency.

(F) Stationary source monitoring system: The SIP must provide for the establishment of a system to monitor emissions from stationary sources and to submit periodic emission reports. It must require the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources, to monitor emissions from sources. The SIP shall also require periodic reports on the nature and amounts of emissions and emissions-related data from sources, and require that the state correlate the source reports with emission limitations or standards established under the CAA. These reports must be made available for public inspection at reasonable times.

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[10] EPA is not proposing to approve or disapprove the existing Oklahoma minor NSR program to the extent that it may be inconsistent with EPA's regulations governing this program. EPA has maintained that the CAA does not require that new infrastructure SIP submissions correct any defects in existing EPA-approved provisions of minor NSR programs in order for EPA to approve the infrastructure SIP for element C (*e.g.,* 76 FR 41076–41079). EPA believes that a number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs. Citations for the Oklahoma NSR program are provided in our TSD for this action.

[11] See 79 FR 66626, November 10, 2014 and the TSD for further discussion.

[12] We finalized a Federal Implementation Plan (FIP) that in combination with the controls required by the portion of the Oklahoma RH submittal approved in the same rulemaking, would serve to prevent sources in Oklahoma from emitting pollutants in amounts that would interfere with efforts to protect visibility in other states. 76 FR 81728 (December 28, 2011). As explained in the i-SIP guidance, ''it is the EPA's interpretation of sections 110(a)(1) and 110(a)(2) that the EPA cannot give 'credit' for the FIP when determining whether an agency'' has met its obligations under these sections. Therefore, while the FIP provides an appropriate level of $PM_{2.5}$ control, the SIP does not and thus our proposal to disapprove for the visibility prong only.

The OCAA and SIP require stationary sources to monitor or test emissions and to file reports containing information relating to the nature and amount of emissions. There also are SIP-approved State regulations pertaining to sampling and testing and requirements for reporting of emissions inventories. In addition, SIP-approved rules establish general requirements for maintaining records and reporting emissions.[13] The ODEQ uses this information, in addition to information obtained from other sources, to track progress towards maintaining the NAAQS, developing control and maintenance strategies, identifying sources and general emission levels, and determining compliance with SIP-approved regulations and additional EPA requirements. The SIP requires this information be made available to the public. Provisions concerning the handling of confidential data and proprietary business information are included in the SIP-approved regulations. These rules specifically exclude from confidential treatment any records concerning the nature and amount of emissions reported by sources. Please see the Table 4 in the TSD for the specific relevant state regulations.

(G) Emergency authority: The SIP must provide the ODEQ with authority to restrain any source from causing imminent and substantial endangerment to public health or welfare or the environment. The SIP must include an adequate contingency plan to implement the ODEQ's emergency authority.

The OCAA provides the ODEQ with authority to address environmental emergencies. The ODEQ has an ''Emergency Episode Plan,'' which includes contingency measures and these provisions are in the SIP (56 FR 5656). The ODEQ has general emergency powers to address any possible dangerous air pollution episode if necessary to protect the environment and public health.

(H) Future SIP revisions: States must have the authority to revise their SIPs in response to changes in the NAAQS, availability of improved methods for attaining the NAAQS, or in response to an EPA finding that the SIP is substantially inadequate to attain the NAAQS. The OCAA authorizes the ODEQ to revise the Oklahoma SIP as necessary, to account for revisions to an existing NAAQS, establishment of a new NAAQS, to attain and maintain a NAAQS, to abate air pollution, to adopt more effective methods of attaining a NAAQS, and to respond to EPA SIP calls concerning NAAQS adoption or implementation.[14]

(I) Nonattainment areas: Section 110(a)(2)(I) of the Act requires that in the case of a plan or plan revision for areas designated as nonattainment, states must meet applicable requirements of part D of the CAA, relating to SIP requirements for designated nonattainment areas. There are no areas designated as nonattainment for $PM_{2.5}$ in Oklahoma. In addition, EPA believes that nonattainment area requirements should be treated separately from the infrastructure SIP requirements. The specific SIP submissions for designated nonattainment areas, as required under CAA title I, part D, are subject to different submission schedules than those required for section 110 infrastructure elements. EPA will take action on any part D attainment plan SIP submissions through a separate rulemaking process governed by the requirements for nonattainment areas, as described in part D.

(J) Consultation with government officials, public notification, PSD and visibility protection: The SIP must meet the following three CAA requirements: (1) The interagency consultation requirements found in section 121; (2) the public notification requirements found in section 127; and, (3) prevention of significant deterioration of air quality and visibility protection.

(1) Interagency consultation: As required by the OCAA and the Oklahoma SIP, there must be a public hearing before the adoption of any regulations or emission control requirements, and all interested persons must be given a reasonable opportunity to review the action that is being proposed and to submit data or arguments, and to examine the testimony of witnesses from the hearing. In addition, the OCAA provides the ODEQ the power and duty to advise, consult and cooperate with other agencies of the State, towns, cities, counties, industries, other states, and the federal government regarding the prevention and control of new and existing air contamination sources in the State. Furthermore, the Oklahoma PSD SIP rules mandate that the ODEQ shall provide for public participation and notification regarding permitting applications to any other state or local air pollution control agencies, local government officials of the city or county where the source will be located, tribal authorities, and Federal Land Managers (FLMs) whose lands may be affected by emissions from the source or modification.[15] Additionally, the State's PSD SIP rules require the ODEQ to consult with FLMs regarding permit applications for sources with the potential to impact Class I Federal Areas. The SIP also includes a commitment to consult continually with the FLMs on the review and implementation of the visibility program, and the State recognizes the expertise of the FLMs in monitoring and new source review applicability analyses for visibility and has agreed to notify the FLMs of any advance notification or early consultation with a major new or modifying source prior to the submission of a permit application.

(2) *Public Notification:* The ODEQ regularly notifies the public of instances or areas in which any NAAQS are exceeded. Included in the SIP are the rules for ODEQ to advise the public of the health hazard associated with such exceedances, enhance public awareness of measures that can prevent such exceedances, and inform the public on how it can participate in regulatory and other efforts to improve air quality. In addition, as described in the discussion of section 110(a)(2)(B) earlier in this rulemaking, the ODEQ air monitoring Web site provides quality data for each of the monitoring stations in Oklahoma; this data is provided instantaneously for certain pollutants, such as ozone. The Web site also provides information on the health effects of all six criteria pollutants.

(3) *PSD and Visibility Protection:* The PSD requirements for this element are the same as those addressed under 110(a)(2)(C) earlier in this rulemaking—the State has a SIP-approved PSD program, so this requirement has been met. The Oklahoma SIP requirements relating to visibility and regional haze are not affected when EPA establishes or revises a NAAQS. Therefore, EPA believes that there are no new visibility protection requirements due to the revision of $PM_{2.5}$ NAAQS in 2012, and consequently there are no newly applicable visibility protection obligations here.

(K) Air quality and modeling/data: The SIP must provide for performing air quality modeling, as prescribed by EPA, to predict the effects on ambient air quality of any emissions of any NAAQS pollutant, and for submission of such data to EPA upon request.

The ODEQ has the authority and duty under the OCAA to conduct air quality

[13] A list of such rules and SIP approval dates are provided in Table 4 of the TSD.

[14] Please see the TSD for our complete analysis and citations to the specific provisions.

[15] Please see the TSD for our complete analysis and citations to the specific provisions.

research and assessments, including the causes, effects, prevention, control and abatement of air pollution. Past modeling and emissions reductions measures have been submitted by the State and approved into the SIP. Additionally, the ODEQ has the ability to perform modeling for the NAAQS on a case-by-case permit basis consistent with their SIP-approved PSD rules and EPA guidance. Furthermore, the OCAA empowers the ODEQ to cooperate with the federal government and others concerning matters of common interest in the field of air quality control, thereby allowing the agency to make such submissions to the EPA.[16]

(L) Permitting Fees: The SIP must require each major stationary source to pay permitting fees to the permitting authority as a condition of any permit required under the CAA. The fees cover the cost of reviewing and acting upon any application for such a permit, and, if the permit is issued, the costs of implementing and enforcing the terms of the permit. The fee requirement applies until such a time when a fee program is established by the state pursuant to Title V of the CAA, and is submitted to and is approved by EPA. The State has met this requirement as it has a fully developed fee system in place and approved in the SIP. See also the discussion of section 110(a)(2)(E) earlier in this rulemaking action. Regulation 1.4.1(d) of the Oklahoma Air Pollution Control Regulations provides for permit fees, and was approved by EPA into the Oklahoma SIP on August 25, 1983 (48 FR 38635). The Oklahoma SIP also addresses annual operating fees at OAC 100–5 (see 75 FR 72695).

(M) Consultation/participation by affected local entities: The SIP must provide for consultation and participation by local political subdivisions affected by the SIP.

See the discussion of section 110(a)(2)(J)(1) and (2) earlier in this proposed rulemaking for a description of the SIP's public participation process, the authority to advise and consult, and the PSD SIP public participation requirements. Additionally, the OCAA requires cooperative action between itself and other agencies of the State, towns, cities, counties, industry, other states, affected groups, and the federal government in the prevention and control of air pollution.

III. EPA's Evaluation of the Oklahoma SO_2 Interstate Transport Submittal

(D)(i) Interstate Pollution Transport: There are four requirements the SIP must include relating to interstate transport. The SIP must prohibit emissions within Oklahoma from contributing significantly to the nonattainment of the NAAQS in other states, and from interfering with the maintenance of the NAAQS in other states (section 110(a)(2)(D)(i)(I)). The SIP must also prohibit emissions within Oklahoma both from interfering with measures required to prevent significant deterioration in other states and from interfering with measures required to protect visibility in other states (section 110(a)(2)(D)(i)(II)).

States can satisfy the requirement to prevent interference with another state's measures to protect visibility by having an EPA approved Regional Haze Program in place. State agencies may also "elect to satisfy prong 4 by providing, as an alternative to relying on its regional haze SIP alone, a demonstration in its infrastructure SIP submission that emissions within its jurisdiction do not interfere with other air agencies' plans to protect visibility."[17] Oklahoma did not include such a demonstration with its i-SIP submittal. On December 28, 2011, we finalized a Federal Implementation Plan (FIP) that in combination with the controls required by the portion of the Oklahoma RH submittal approved in the same rulemaking, would serve to prevent sources in Oklahoma from emitting pollutants in amounts that would interfere with efforts to protect visibility in other states (76 FR 81728). On March 7, 2014, we withdrew the Oklahoma RH and Interstate Transport FIPs' applicability to two units,[18] but the FIP provisions applicable to Oklahoma Gas and Electric's Muscogee and Sooner plants remain in place (79 FR 12954). As explained in the i-SIP guidance, "it is the EPA's interpretation of sections 110(a)(1) and 110(a)(2) that the EPA cannot give 'credit' for the FIP when determining whether an agency" has met its obligations under these sections.

Therefore, while the FIP provides an appropriate level of SO_2 control, the SIP does not and thus our proposal to disapprove for the visibility prong only.

IV. Proposed Action

EPA is proposing to partially approve and partially disapprove the June 16, 2016, infrastructure SIP submission from Oklahoma, which addresses the requirements of CAA sections 110(a)(1) and (2) as applicable to the 2012 $PM_{2.5}$ NAAQS.

Based upon review of this infrastructure SIP submission and relevant statutory and regulatory authorities and provisions referenced in these submissions or referenced in the Oklahoma SIP, we believe Oklahoma has the infrastructure in place to address the following required elements of sections 110(a)(1) and (2) to ensure that the 2012 $PM_{2.5}$ NAAQS are implemented in the State:

Sections 110(a)(2)(A), (B), (C), (D)(i)(II) for interference with PSD, (D)(ii), (E)(i), (E)(ii), (F), (G), (H), (J), (K), (L) and (M).

We are not proposing to approve Interstate transport provisions (prongs 1&2): Section 110(a)(2)(D)(i)(I) which were not included in this submission.

We are proposing to disapprove the Interstate transport provisions for visibility protection (prong 4): Section 110(a)(2)(D)(i)(II).

We are also proposing to disapprove the January 28, 2015 SIP submission from Oklahoma for the 2010 Sulfur Dioxide (SO_2) NAAQS only as it addresses Section 110(a)(2)(D)(i)(II) for visibility protection (prong 4).

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 not a significant regulatory action and was therefore not submitted to the Office of Management and Budget 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 merely proposes to approve i-SIP provisions that are consistent with the CAA and disapprove i-SIP provisions that are inconsistent with the CAA.

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 merely proposes to approve i-SIP provisions that are consistent with the CAA and disapprove i-SIP provisions that are inconsistent with the CAA; therefore this action will not impose any requirements on small entities.

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[16] Please see the TSD for our complete analysis and citations to the specific provisions.

[17] Guidance on Infrastructure State Implementation Plans (SIP) Elements Under Clean Air Act Sections 110(a)(1) and 110(a)(2). September 13, 2013, p. 34.

[18] These are Units 3 and 4 of the Northeastern Power Station in Rogers County, Oklahoma, which is operated by the American Electric Power/Public Service Company of Oklahoma.

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 merely proposes to approve i-SIP provisions that are consistent with the CAA and disapprove i-SIP provisions that are inconsistent with the CAA; 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 does not apply on any Indian reservation land, any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, or non-reservation areas of Indian country. Thus, Executive Order 13175 does not apply to this action.

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

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that 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 merely proposes to disapprove a SIP submission as not meeting the CAA.

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

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

I. National Technology Transfer and Advancement Act

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 merely proposes to approve i-SIP provisions that are consistent with the CAA and disapprove i-SIP provisions that are inconsistent with the CAA.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Interstate transport of pollution, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

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

Dated: November 15, 2016.

Ron Curry,

Regional Administrator, Region 6.

[FR Doc. 2016–27924 Filed 11–18–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2016–0382; FRL–9955–21–OAR]

RIN 2060–AT15

Revisions to Procedure 2—Quality Assurance Requirements for Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing revisions to a procedure in the New Source Performance Standards (NSPS). The procedure provides the ongoing quality assurance/quality control (QA/QC) procedures for assessing the acceptability of particulate matter (PM) continuous emissions monitoring systems (CEMS). The procedure explains the criteria for passing an annual response correlation audit (RCA) and the criteria for passing an annual relative response audit (RRA). The procedure currently contains a requirement that the annual QA/QC test results for affected facilities must fall within the same response range as was used to develop the existing PM CEMS correlation curve. As a result, some facilities are unable to meet the criteria for passing their annual QA/QC test simply because their emissions are now lower than the range previously set during correlation testing. We are proposing to modify the procedure to allow facilities to extend their PM CEMS correlation regression line to the lowest PM CEMS response obtained during the RCA or RRA, when these PM CEMS responses are less than the lowest response used to develop the existing correlation curve. We also propose to correct a typographical error in the procedure.

DATES: Written comments must be received by December 21, 2016.

Public Hearing. If anyone contacts the EPA by December 1, 2016 requesting to speak at a public hearing on this action, the EPA will consider holding a public hearing on December 21, 2016 at the EPA facility in Research Triangle Park. Please check the EPA's Web page at *https://www3.epa.gov/ttn/emc/proposed.html* on December 12, 2016 for the announcement of whether a hearing will be held. To request a public hearing and present oral testimony at the hearing, please contact on or before December 1, 2016, the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document. If a hearing is held, the hearing schedule, including the list of speakers, will be posted on the EPA's Web page at *https://www3.epa.gov/ttn/emc/proposed.html.*

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2016–0382, 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: Ms. Kimberly Garnett, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Assessment Division, Measurement Technology Group (E143–02), Research Triangle Park, NC 27711; telephone number: (919) 541–1158; fax number: (919) 541- 0516; email address: *garnett.kim@epa.gov.*

SUPPLEMENTARY INFORMATION: The Environmental Protection Agency (EPA) is proposing revisions to a procedure in the New Source Performance Standards (NSPS). We also propose to correct a typographical error in the introduction to Paragraph (6) of section 10.4 of Procedure 2. Without this revision, paragraph (6)(iii) would remain unused in Procedure 2. This typographical correction is necessary to fulfill the intent of Procedure 2, section 10.4(6), when promulgated. *See* 69 FR 1786.

I. Why is the EPA issuing this proposed rule?

The EPA proposes a revision to Procedure 2, sections 10.4(5)and (6), to allow facilities that have reduced their emissions since completing their PM CEMS correlation testing to extend their correlation regression line to the point corresponding to the lowest PM CEMS response obtained during the RCA or RRA. This extended correlation regression line will be used to determine if results of this RCA or RRA meet the criteria specified in Section 10.4, paragraphs (5) and (6) of Procedure 2, respectively. This change will ensure that facilities that have reduced their emissions since completing their correlation testing will no longer be penalized because their lower emissions fall outside their initial response range. This action also proposes to correct a typographical error in the introduction to section 10.4, paragraph (6) of Procedure 2. Paragraph (6), which originally read, ''To pass an RRA, you must meet the criteria specified in paragraphs (6)(i) and (ii) . . .'', is being corrected to read: ''To pass an RRA, you must meet the criteria specified in paragraphs (6)(i) through (iii) . . .'' Without this revision, paragraph (6)(iii) would remain unused in Procedure 2. This typographical correction is necessary to fulfill the intent of Procedure 2, section 10.4(6), when promulgated in 69 FR 1786. We have published a direct final rule approving the revisions to Procedure 2 in the ''Rules and Regulations'' section of this **Federal Register** publication because we view this as a non-controversial action and anticipate no adverse comment. We have explained our reasons for this action in the preamble of the direct final rule.

If we receive no adverse comment, we will not take further action on this proposed rule. If the EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the direct final rule will not take effect. In that case, we would address all public comments in any subsequent final rule based on this proposed rule.

We do 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 about commenting on this rule, please see the information provided in the **ADDRESSES** section of this document.

The regulatory text for the proposal is identical to that for the direct final rule published in the ''Rules and Regulations'' section of this **Federal Register** publication. For further supplementary information, the detailed rationale for the proposal and the regulatory revisions, see the direct final rule published in a separate part of this **Federal Register** publication.

II. Does this action apply to me?

The entities potentially affected by this rule include any facility that is required to install and operate a PM CEMS under any provision of title 40 of the CFR. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Continuous emission monitoring systems, Particulate matter, Procedures.

Dated: November 8, 2016.

Gina McCarthy,

Administrator.

[FR Doc. 2016–27847 Filed 11–18–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 172

[Docket No. PHMSA–2016–0079 (HM–213E)]

RIN 2137–AF25

Hazardous Materials: PIPES Act Requirements for Identification Numbers on Cargo Tanks Containing Petroleum Based Fuel

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: PHMSA is publishing this advance notice of proposed rulemaking (ANPRM) in response to the Protecting our Infrastructure of Pipelines and Enhancing Safety (PIPES) Act of 2016, which reauthorizes the pipeline safety program and requires a number of reports and mandates. The PIPES Act requires PHMSA to take regulatory actions to establish minimum safety standards for underground natural gas storage facilities; to update the minimum safety standards for permanent, small scale liquefied natural gas pipeline facilities; and to publish an ANPRM to address a petition for rulemaking proposing hazardous materials regulations related to the marking of identification numbers on cargo tanks. This ANPRM specifically addresses the PIPES Act requirement applicable to the petition for rulemaking related to the marking of identification numbers on cargo tanks. PHMSA will consider the comments, data, and information received in any future action related to the petition.

DATES: Comments must be received by February 21, 2017.

ADDRESSES: You may submit comments identified by the Docket Number PHMSA–2016–0079 (HM–213E) through any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System, U.S. Department of Transportation, Dockets Operations, M–30, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, Ground Floor, Room W12–140 in the West Building, 1200 New Jersey Avenue SE., Washington, DC 20590,

between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Instructions: All submissions must include the agency name and Docket Number (PHMSA–2016–0079) or RIN (2137–AF25) for this notice at the beginning of the comment. Note that all comments received will be posted without change to the docket management system, including any personal information provided. If sent by mail, comments must be submitted in duplicate. Persons wishing to receive confirmation of receipt of their comments must include a self-addressed stamped postcard.

Docket: For access to the dockets to read background documents or comments received, go to *http://www.regulations.gov* or DOT's Docket Operations Office (*see* **ADDRESSES**).

Privacy Act: Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, 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 [45 FR 19477] or you may visit *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT:
Steven Andrews, (202) 366–8553, Office of Hazardous Materials Standards, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary

On November 12, 2015, PHMSA received a petition for rulemaking from the Commercial Vehicle Safety Alliance (CVSA) proposing amendments to the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) applicable to the marking of cargo tanks transporting petroleum distillates. In an acknowledgment letter dated November 10, 2015, PHMSA assigned the CVSA petition to Petition Number P–1667 [1] (P–1667 or the petition; Docket No: PHMSA–2015–0219). Subsequently, on November 24, 2015, PHMSA received another petition for rulemaking from the American Trucking Association (ATA) proposing amendments to the HMR; this petition is also applicable to the marking of cargo tanks transporting petroleum distillates. In an acknowledgement letter dated November 25, 2015, PHMSA assigned the ATA petition to Petition Number P–1668 [2] (P–1668 or the petition; Docket No: PHMSA–2015–0251).

In this ANPRM, PHMSA outlines issues raised by these two petitions and discusses the background relevant to the marking of cargo tanks containing petroleum distillates. PHMSA further poses a series of questions and solicits public comment to determine the best practice for addressing the issues outlined in these two petitions.

II. Objective of This ANPRM

Federal hazardous materials transportation law (49 U.S.C. 5101 *et seq.*) authorizes the Secretary of Transportation to ''prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce.'' *See* 49 U.S.C. 5103(b)(1). The Secretary has delegated this authority to PHMSA in 49 CFR 1.97(b). The HMR are designed to achieve three primary goals:

(1) To help ensure that hazardous materials are packaged and handled safely and securely during transportation;

(2) to provide effective communication to transportation workers and emergency responders of the hazards of the materials being transported; and

(3) to minimize the consequences of an incident should one occur.

[1] See P–1667 docket at the following URL: *https://www.regulations.gov/docket?D=PHMSA-2015-0219.*

[2] See P–1668 docket at the following URL: *https://www.regulations.gov/docket?D=PHMSA-2015-0251.*

The hazardous material regulatory system is a risk management system that is prevention-oriented and focused on identifying a safety or security hazard and reducing the probability and quantity of a hazardous material release.

Under the HMR, hazardous materials are categorized into hazard classes and packing groups based on analysis of and experience with the risks they present during transportation. The HMR do the following:

(1) Specify appropriate packaging and handling requirements for hazardous materials based on this classification, and require a shipper to communicate the material's hazards through the use of shipping papers, package marking and labeling, and vehicle placarding;

(2) require shippers to provide emergency response information applicable to the specific hazard or hazards of the material being transported; and

(3) mandate training requirements for persons who prepare hazardous materials for shipment or transport hazardous materials in commerce.

The HMR also include operational requirements applicable to each mode of transportation.

The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* requires Federal agencies to give interested persons the right to petition an agency to issue, amend, or repeal a rule. *See* 5 U.S.C. 553(e). In accordance with PHMSA's rulemaking procedure regulations in 49 CFR part 106, interested persons may ask PHMSA to add, amend, or repeal a regulation by filing a petition for rulemaking along with information and arguments that support the requested action. *See* 49 CFR 106.95. The issues being considered under this ANPRM are derived specifically from petitions submitted to PHMSA by CVSA and ATA regarding the marking of cargo tanks transporting distillate fuels.

On June 22, 2016, President Barack Obama signed the Protecting our Infrastructure of Pipelines and Enhancing Safety (PIPES) Act, which in part requires PHMSA to publish an ANPRM to address P–1667 related to the marking of identification numbers on cargo tanks. *See* Public Law 114–183. Section 15 of the PIPES Act reads as follows:

EC. 15. HAZARDOUS MATERIALS IDENTIFICATION NUMBERS.

Not later than 90 days after the date of enactment of this Act, the Secretary of Transportation shall issue an advanced notice of proposed rulemaking to take public comment on the petition for rulemaking dated October 28, 2015, titled ''*Corrections to Title 49 CFR 172.336 Identification numbers; special provisions*'' *(P–1667).*

As mandated by section 15 of the PIPES Act, the objective of this ANPRM is to solicit comments on P–1667. It further solicits comments on the related petition for rulemaking, P–1668.

III. Petitions Being Addressed (P–1667 and P–1668)

Through P–1667 and P–1668, the CVSA and ATA, respectively, asked PHMSA to revise § 172.336(c) of the HMR. In P–1667, CVSA proposed that PHMSA reinstate language that existed in § 172.336(c)(4) and (5) prior to the publication of the HM–219 final rule [78 FR 14702] on March 7, 2013. Prior to HM–219, the paragraphs in § 172.336(c)(4) and (5) read as follows:

(4) For each of the different liquid petroleum distillate fuels, including gasoline, in a compartmented cargo tank or tank car, if the identification number is displayed for the distillate fuel having the lowest flash point. After October 1, 2000, if a compartmented cargo tank or tank car contains such fuels together with a gasoline and alcohol fuel blend containing more than ten percent ethanol, the identification number ''3475'' or ''1987'' must also be displayed as appropriate in addition to the identification number for the liquid petroleum distillate fuel having the lowest flash point.

(5) For each of the different liquid petroleum distillate fuels, including gasoline transported in a cargo tank, if the identification number is displayed for the liquid petroleum distillate fuel having the lowest flash point.

CVSA indicated in its petition that the current regulations, as revised by the HM–219 final rule, are inconsistent with the previous requirements. CVSA further noted that the table in § 172.336 has created confusion and lack of uniformity for industry, enforcement, and first responders in regard to the display of identification numbers on multi-compartmented cargo tanks containing different petroleum distillate fuels.

In P–1668, ATA proposed removing the requirement to display the identification number of the petroleum distillate with the lowest flashpoint, in addition to the identification number for the fuel blend as ''3475'' or ''1987,'' on a multi-compartmented cargo tank carrying an alcohol fuel blend with more than 10 percent ethanol. ATA further noted that its comments to the HM–218D final rule [73 FR 4699] that was published on January 28, 2008, suggested a uniform marking for all gasoline and gasoline/alcohol fuel blends, as well as an update to the Emergency Response Guide (ERG) requiring alcohol-resistant foam for all releases. ATA noted that PHMSA disagreed with this statement at the time because ''the new shipping description for gasoline/ethanol fuel blends would enhance emergency responders'' ability to respond effectively to incidents involving these materials.

ATA identified several variations between Guide 127 and 128 in the ERG, used in the event of an unintentional release by emergency responders. The fuel blend identification numbers UN 1987 and 3475 are attributed to Guide 127 and Guide 128 as appropriate for several liquid petroleum distillates including UN 1203, 1270, and 1993. As noted by ATA, Guides 127 and 128 differ in the use of ''alcohol-resistant foam'' versus ''regular foam'' in the event of small and large fires. PHMSA has indicated that alcohol-resistant foam is necessary for emergency response involving polar/water-miscible flammable liquids, such as ethanol and gasoline fuel blends. In its petition, ATA reiterated the National Tank Truck Carriers' (NTTC) comments to HM–218D, suggesting that rather than displaying the identification number of the petroleum distillate and the alcohol/ethanol fuel blend, PHMSA should instead require the use of alcohol-resistant foam for both fuels in emergency response situations. Furthermore, ATA cited that emergency responders currently use alcohol-resistant foam to treat both types of fuel in the event of an unintentional release, recognizing that the identification number marking for fuel blends with greater than 10 percent ethanol is not needed for emergency response purposes.

IV. Background

A. Rulemakings

The rulemaking history pertaining to the marking of cargo tanks containing fuel oil and petroleum distillates, as applicable to P–1667, is complex. On June 6, 1979, the Research and Special Programs Administration (RSPA), PHMSA's predecessor agency, published a notice of proposed rulemaking (NPRM) (HM–126A) associated with the use of identification numbers on packages. *See* 44 FR 32972. In the NPRM, RSPA proposed to require that an identification number be displayed on orange panels affixed to portable tanks, cargo tanks, and tank cars. RSPA proposed a set of standards in § 172.328 that would require cargo tanks to be marked on each side with the identification numbers specified for the material in the Hazardous Materials Table (HMT), which is found in § 172.101. RSPA further proposed to add § 172.328(e) stating that a cargo tank marked with the identification number or name of a specific hazardous material may not be used to transport any other material unless the marking is removed or changed to identify the hazardous material the cargo tank contains.

RSPA received numerous comments to the HM–126A NPRM expressing concern that the identification number requirements for cargo tanks proposed and codified in § 172.328(e) would limit a carrier's ability to transport fuel oils and distillate fuels in multi-compartmented cargo tanks and tank cars. As a result, in May 22, 1980, RSPA published a final rule titled, ''Identification Numbers, Hazardous Substances, International Descriptions, Improved Descriptions, Forbidden Materials, and Organic Peroxides,'' which amended the HMR and codified language in § 172.336(c)(3) stating that identification markings are not required for different distillate fuels in the same cargo tank or tank car, if the identification number is displayed for the distillate fuel having the lowest flash point. *See* 45 FR 34560.

The May 22, 1980 final rule generated a number of appeals. On November 10, 1980 [45 FR 74640], RSPA published a response to appeals to the May 22, 1980 final rule. In the response, RSPA noted that the provisions for allowing cargo tanks and multi-compartment cargo tanks to only display the identification number of the distillate fuel with lowest flash point were intended to eliminate the need for continuous changes in identification numbers for operations where gasoline and fuel oil are transported in the same cargo tank for different trips that occur on the same day. However, in response to these appeals, RSPA revised the HMR. To address compartmented cargo tanks, RSPA moved regulatory text initially found in § 172.336 from paragraph (c)(3) to (c)(4); and to address cargo tanks and tank cars, RSPA moved regulatory text initially found in § 172.336(c)(3) to (c)(5). These two provisions allowed for the display of the identification number of the liquid distillate fuel having the lowest flash point carried in a cargo tank; however, as noted above, RSPA intended for this exception to be allowed for different trips that occurred on the same day.

In an April 20, 1987 final rule (HM–166) [52 FR 13034], RSPA revised the HMR and added the term ''Gasohol'' to § 172.336(c)(4) and (5). This term accounted for new formulations of gasoline mixed with ethyl alcohol (*i.e.,* ethanol) shipped under § 172.336 of the HMR.

In a January 28, 2008 final rule (HM–218D) [73 FR 4699], PHMSA revised the HMR and added ''UN 3475, Ethanol and gasoline mixture *or* Ethanol and motor spirit *or* Ethanol and petrol mixture, *with more than 10% ethanol*'' to the HMT to address gasoline and ethanol mixtures such as E85.[3] PHMSA further identified that emergency response techniques between petroleum distillates and gasoline and ethanol fuel blends differ. Specifically, gasoline and ethanol fuel blends with more than 10 percent ethanol are polar/water-miscible flammable liquids and decrease the effectiveness of alcohol-resistant fire-fighting foam. Due to these differences in fire-fighting methods, PHMSA revised the HMR and adopted language in § 172.336(c)(4) and (5) to clarify that when a petroleum distillate fuel and a gasoline/ethanol fuel blend with more than 10 percent ethanol are both carried on a multi-compartment cargo tank or tank car, the UN identification number ''3475'' or ''1987'' must be displayed in addition to the identification number of the petroleum distillate fuel with the lowest flash point. PHMSA notes that both NTTC and the Petroleum Marketers and Convenience Stores of Iowa (PMCI) suggested in their comments to the HM–218D NPRM that revising the Emergency Response Guidebook (ERG) to require alcohol-resistant foam for all flammable liquids (Class 3), rather than adopting a new shipping description for gasoline and ethanol fuel blends, would have made the requirement to display the identification number for the alcohol fuel blend unnecessary.

In a March 7, 2013 final rule (HM–219) [78 FR 14702], based on a petition for rulemaking (P–1522) from Shell Chemicals,[4] PHMSA removed all references to ''gasohol'' and codified a table to more clearly indicate hazard communication requirements for compartmented cargo tanks, tank cars, or cargo tanks containing these fuels. The revised text indicates that when a cargo tank contains more than one petroleum distillate fuel, it may be marked with the identification number for the liquid petroleum distillate fuel having the lowest flash point.

B. Letters of Interpretation

On October 16, 2000, RSPA issued an interpretation letter (Ref. No. 00–0208 [5]) to the Florida Department of Environmental Protection concerning the identification number markings on cargo tanks containing diesel fuel and gasoline. In this interpretation letter, RSPA stated that if a cargo tank containing gasoline is marked with the identification number for gasoline, ''1203,'' it may remain so marked on a subsequent trip when the cargo tank contains diesel fuel; however, the letter did not further clarify that this exception only applies to transportation occurring on the same day. Thus, it appears that industry uses this interpretation letter as standard practice to leave the ''1203'' identification number marking for gasoline on cargo tanks even if the cargo tank is not used for gasoline on any particular day or on a subsequent trip.

On June 26, 2015, PHMSA issued an interpretation letter (Ref. No. 14–0178 [6]) to the South Carolina State Police concerning the placement of identification numbers on multi-compartmented cargo tanks containing petroleum distillates. In the example provided in the interpretation letter, all of the compartments in the multi-compartmented cargo tank were loaded with only diesel fuel, but displayed ''1203,'' the identification number for gasoline. PHMSA's response determined that if a multi-compartmented cargo tank contains the same petroleum distillate fuel (other than gasoline) in each compartment, then it must be marked with the correct identification number for that material—not with ''1203.''

V. Comments and Questions

The PIPES Act specifically requires PHMSA to issue an ANPRM to solicit public comment on P–1667. In addition, PHMSA is considering the regulatory changes proposed in P–1668. We invite comment on the following key issues and request that commenters provide data sources to support their positions. If commenters suggest modification to the existing regulatory requirements, PHMSA requests that comments provided be as specific as possible.

A. General Questions

1. Are carriers currently marking cargo tanks with the identification number of a petroleum distillate fuel, including gasoline and gasohol, when that material is not present in that cargo tank? If so, why are carriers undertaking this practice? When and where does this practice occur? How prevalent is this practice?

2. If the answer to question 1 above is yes, how is this being done without violating the prohibitive marking requirements in § 172.303 of the HMR?

B. Safety Questions

1. Would marking a cargo tank with the identification number for the liquid petroleum distillate fuel having the lowest flash point, rather than with the identification numbers representing *each* of the *different* liquid petroleum distillate fuels including gasoline and gasohol, create concerns for emergency responders?

2. Does responding to an incident involving diesel fuel differ from responding to an incident involving gasoline—if so, how?

C. Policy Analysis Questions

1. How many entities and shipments would be affected by modifying the existing regulatory requirements related to the hazard communication standards for cargo tanks transporting petroleum distillate fuels? In addition, how many of the effected entities would be considered small businesses?

2. What are the potential costs of modifying the existing regulatory requirements related to hazardous materials communication on cargo tanks pursuant to the petitioners' suggestions? If no specific quantitative data is available, what types of costs would be reasonable to anticipate (*e.g.,* training cost, equipment replacement, etc.)?

3. What consequences would be mitigated or prevented by modifying the hazard communication requirements for cargo tanks transporting petroleum distillate fuels? Have there been instances in the U.S. safety record when the current requirements and industry practices related to the identification number markings have resulted in emergency response complications, injury, or death?

4. What are the potential quantifiable safety and societal benefits of modifying the existing regulatory requirements related to hazardous materials communication for cargo tanks?

5. What are the potential environmental impacts and human health effects of modifying the existing regulatory requirements?

VI. Regulatory Analysis

A. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

This ANPRM has not been designated a ''significant regulatory action'' under section 3(f) of Executive Order 12866, ''Regulatory Planning and Review.'' 58 FR 51735 (Oct. 4, 1993). Accordingly,

[3] E85 is an abbreviation for an ethanol fuel blend of 85% denatured ethanol fuel and 15% gasoline or other hydrocarbon by volume.

[4] *See* P–1522 docket at the following URL: *https://www.regulations.gov/searchResults?rpp=10&po=0&s=PHMSA-2008-0171.*

[5] *See* Reference Number 00–0208 letter of interpretation at: *http://docketsinfo.dot.gov/reports/rspa/2000-10/000208.pdf.*

[6] *See* Reference Number 14–0178 letter of interpretation at: *http://phmsa.dot.gov/portal/site/PHMSA/menuitem.6f23687cf7b00b0f22e4c6962d9c8789/?vgnextoid=2bd1d740bd03e410VgnVCM100000d2c97898RCRD&vgnextfmt=default.*

this ANPRM has not been reviewed by the Office of Management and Budget (OMB) and is not considered to be a significant regulatory action under the DOT Regulatory Policies and Procedures of February 26, 1979. *See* 44 FR 11034.

Executive Order 13563, ''Improving Regulation and Regulatory Review,'' 76 FR 3821 (Jan. 21, 2011), supplements and reaffirms the principles, structures, and definitions governing regulatory review that were established in Executive Order 12866. Together, Executive Orders 12866 and 13563 require agencies to regulate in the ''most cost-effective manner,'' to make a ''reasoned determination that the benefits of the intended regulation justify its costs,'' and to develop regulations that ''impose the least burden on society.''

Additionally, Executive Orders 12866 and 13563 require agencies to provide a meaningful opportunity for public participation. Therefore, PHMSA solicits comment on the key issues addressed in this ANPRM.

B. Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999), requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may 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.'' We invite State and local governments with an interest in this rulemaking to comment on any effect that revisions to the HMR relative to identification numbers displayed on cargo tanks may cause.

C. Executive Order 13175

Executive Order 13175, ''Consultation and Coordination and Indian Tribal Governments,'' 65 FR 67249 (Nov. 9, 2000), requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that ''significantly or uniquely affect'' Indian communities and impose ''substantial and direct compliance costs'' on such communities. We invite Indian tribal governments to provide comments on the costs and effects that this or a future rulemaking could potentially have on them.

D. Regulatory Flexibility Act, Executive Order 13272, and DOT Policies and Procedures

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* requires agencies to consider whether a rulemaking would have a ''significant economic impact on a substantial number of small entities.'' Small entities include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000.

As such, PHMSA solicits input from small entities on the issues presented in this ANPRM. If you believe that revisions to the HMR relative to identification numbers on cargo tanks would have a significant economic impact on a substantial number of small entities, please submit a comment to PHMSA. In your comment, please explain how and to what extent your business or organization could be affected, and whether there are alternative approaches to this regulation the agency should consider that would minimize any significant impact on small business while still meeting the agency's statutory objectives

Any future proposed rule would be developed in accordance with Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), as well as DOT's procedures and policies, so as to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts on small entities of a regulatory action are properly considered.

E. Paperwork Reduction Act

Section 1320.8(d), title 5, Code of Federal Regulations requires that PHMSA provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. It is possible that new or revised information collection requirements could occur as a result of any future rulemaking action. We invite comment on the need for any collection of information and paperwork burdens that may apply as result of a future rulemaking.

F. National Environmental Policy Act

The National Environmental Policy Act of 1969, 42 U.S.C. 4321–4375, requires Federal agencies to consider the consequences of major Federal actions and prepare a detailed statement on actions significantly affecting the quality of the human environment. The Council on Environmental Quality (CEQ) regulations require Federal agencies to conduct an environmental review considering (1) the need for the proposed action, (2) alternatives to the proposed action, (3) probable environmental impacts of the proposed action and alternatives, and (4) the agencies and persons consulted during the consideration process. *See* 40 CFR 1508.9(b). PHMSA welcomes any data or information related to environmental impacts that may result from this ANPRM.

G. Privacy Act

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** at 65 FR 19477 (April 11, 2000), or you may visit *http://www.dot.gov/privacy.html.*

H. Executive Order 13609 and International Trade Analysis

Under Executive Order 13609, ''Promoting International Regulatory Cooperation,'' 77 FR 26413 (May 4, 2012), agencies must consider whether the impacts associated with significant variations between domestic and international regulatory approaches are unnecessary, or may impair the ability of American business to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are, or would be, adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

Similarly, the Trade Agreements Act of 1979, Public Law 96–39, as amended by the Uruguay Round Agreements Act, Public Law 103–465, prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, Federal agencies may participate in the establishment of international standards, so long as the standards have a legitimate domestic objective, such as providing for safety, and do not operate to exclude imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

PHMSA participates in the establishment of international standards in order to protect the safety of the American public, and we have assessed the effects of this ANPRM to ensure that it does not cause unnecessary obstacles to foreign trade. Accordingly, this rulemaking is consistent with Executive Order 13609 and PHMSA's obligations under the Trade Agreement Act, as amended.

I. Statutory/Legal Authority for This Rulemaking

Federal hazardous materials transportation law, 49 U.S.C. 5101 *et seq.,* authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce. The Secretary has delegated this authorization to the Administrator for PHMSA. *See* 49 CFR 1.97. PHMSA is issuing this ANPRM to gather the necessary information to determine a course of action for clarifying issues pertaining to the display of identification numbers related to the transportation of fuel oils and petroleum distillates.

J. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

Issued in Washington, DC, on November 15, 2016, under authority delegated in 49 CFR 1.97.

William Schoonover,

Acting Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2016–27911 Filed 11–18–16; 8:45 am]

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Notices

Federal Register

Vol. 81, No. 224

Monday, November 21, 2016

DEPARTMENT OF AGRICULTURE

Meeting of the Council for Native American Farming and Ranching

AGENCY: Office of Tribal Relations, USDA.

ACTION: Notice of public meeting.

SUMMARY: This notice announces a forthcoming meeting of The Council for Native American Farming and Ranching (CNAFR), a public advisory committee of the Office of Tribal Relations (OTR). Notice of the meetings are provided in accordance with the Federal Advisory Committee Act, as amended. This will be the first meeting held during fiscal year 2017 and will consist of, but not be limited to: Hearing public comments, update of USDA programs and activities, and discussion of committee priorities. This meeting will be open to the public.

DATES: The meeting will be held on December 8, 2015, 10:00 a.m. to 6:00 p.m., and December 9, 2015, 8:30 a.m. to 6:00 p.m. The meeting will be open to the public on both days. Note that a period for public comment will be held on December 8, 2015, from 2:00 p.m. to 4:00 p.m.

ADDRESSES: The meeting will be held at the Flamingo Hotel, 3555 S. Las Vegas Boulevard, Las Vegas, Nevada 89109, in the El Dorado Room.

Written Comments: Written comments may be submitted to: the CNAFR Contact Person, Josiah Griffin, Acting Designated Federal Officer, USDA/Office of Tribal Relations, 1400 Independence Ave. SW., Whitten Bldg., 501–A; Stop 0160; Washington, DC 20250; by Fax: (202) 720–1058; or by email: *Josiah.Griffin@osec.usda.gov*.

FOR FURTHER INFORMATION CONTACT: Questions should be directed to Josiah Griffin, Acting Designated Federal Officer; USDA/Office of Tribal Relations, 1400 Independence Ave. SW., Whitten Bldg., 501–A; Stop 0160; Washington, DC 20250; by Fax: (202) 720–1058 or email: *Josiah.Griffin@osec.usda.gov*.

SUPPLEMENTARY INFORMATION: In accordance with the provisions of Section 10(a)(2) of the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. App. 2), USDA established an advisory council for Native American farmers and ranchers. The CNAFR is a discretionary advisory committee established under the authority of the Secretary of Agriculture.

The CNAFR will operate under the provisions of the FACA and report to the Secretary of Agriculture. The purpose of the CNAFR is (1) to advise the Secretary of Agriculture on issues related to the participation of Native American farmers and ranchers in USDA programs; (2) to transmit recommendations concerning any changes to USDA regulations or internal guidance or other measures that would eliminate barriers to program participation for Native American farmers and ranchers; (3) to examine methods of maximizing the number of new farming and ranching opportunities created by USDA programs through enhanced extension and financial literacy services; (4) to examine methods of encouraging intergovernmental cooperation to mitigate the effects of land tenure and probate issues on the delivery of USDA programs; (5) to evaluate other methods of creating new farming or ranching opportunities for Native American producers; and (6) to address other related issues as deemed appropriate.

The Secretary of Agriculture selected a diverse group of members representing a broad spectrum of persons interested in providing solutions to the challenges of the aforementioned purposes. Equal opportunity practices were considered in all appointments to the CNAFR in accordance with USDA policies. The Secretary selected the members in November 2016.

Interested persons may present views, orally or in writing, on issues relating to agenda topics before the CNAFR. Written submissions may be submitted to the contact person on or before November 30, 2015. Oral presentations from the public will be heard from 2:00 p.m. to 4:00 p.m. on December 8, 2015. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the issue they wish to present and the names and addresses of proposed participants by November 30, 2015. All oral presentations will be given three (3) to five (5) minutes depending on the number of participants.

The OTR will also make the agenda available to the public via the OTR Web site *http://www.usda.gov/tribalrelations* no later than 10 business days before the meeting and at the meeting. The minutes from the meeting will be posted on the OTR Web site. OTR welcomes the attendance of the public at the CNAFR meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please notify the Contact Person, at least 10 business days in advance of the meeting.

Dated: November 15, 2016.

Leslie Wheelock,

Director, Office of Tribal Relations.

[FR Doc. 2016–27915 Filed 11–18–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Notice of Solicitation of Applications (NOSA) Inviting Applications for the Rural Economic Development Loan and Grant Programs for Fiscal Year 2017

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice.

SUMMARY: This Notice is to invite applications for loans and grants under the Rural Economic Development Loan and Grant (REDLG) Programs pursuant to 7 CFR part 4280, subpart A for fiscal year (FY) 2017, subject to the availability of funding. This Notice is being issued in order to allow applicants sufficient time to leverage financing, prepare and submit their applications, and give the Agency time to process applications within FY 2017. Successful applications will be selected by the Agency for funding and subsequently awarded to the extent that funding may ultimately be made available through appropriations. An announcement on the Web site at *http://www.rd.usda.gov/newsroom/notices-solicitation-applications-nosas* will

identify the amount received, if any, in the appropriations.

All applicants are responsible for any expenses incurred in developing their applications.

DATES: The deadlines for completed applications to be received in the USDA Rural Development State Offices no later than 4:30 p.m. (local time) are: Second Quarter, December 31, 2016; Third Quarter, March 31, 2017; and Fourth Quarter, June 30, 2017.

ADDRESSES: Submit applications in paper format to the USDA Rural Development State Office for the State where the Project is located. A list of the USDA Rural Development State Office contacts can be found at: *http://www.rd.usda.gov/contact-us/state-offices.*

FOR FURTHER INFORMATION CONTACT: Specialty Programs Division, Business Programs, Rural Business-Cooperative Service, U.S. Department of Agriculture, 1400 Independence Avenue SW., MS 3226, Room 4204-South, Washington, DC 20250–3226, or call 202–720–1400. For further information on this Notice, please contact the USDA Rural Development State Office in the State in which the applicant's headquarters is located.

SUPPLEMENTARY INFORMATION:

Overview

Solicitation Opportunity Type: Rural Economic Development Loans and Grants.

Announcement Type: Initial Solicitation Announcement.

Catalog of Federal Domestic Assistance Number: 10.854.

Dates: The deadline for completed applications to be received in the USDA Rural Development State Office no later than 4:30 p.m. (local time) are: Second Quarter, December 31, 2016; Third Quarter, March 31, 2017; and Fourth Quarter, June 30, 2017.

A. Program Description

1. *Purpose of the Program.* The purpose of the program is to promote rural economic development and job creation projects.

2. *Statutory Authority.* These Programs are authorized under 7 U.S.C. 940c and 7 CFR part 4280, subpart A. Assistance provided to rural areas, as defined, under this program may include business startup costs, business expansion, business incubators, Technical assistance feasibility studies, Advanced telecommunications services and computer networks for medical, educational, and job training services, and community facilities projects for economic development.

Awards under the REDLG Programs will be made on a competitive basis using specific selection criteria contained in 7 CFR part 4280, subpart A. Information required to be in the application package includes Standard Form (SF) 424, ''Application for Federal Assistance;'' a Resolution of the Board of Directors; AD–1047, ''Debarment/Suspension Certification;'' AD–1049 ''Certification Regarding Drug-Free Workplace Requirements;'' SF LLL, Restrictions on Lobbying; RD 400–1, ''Equal Opportunity Agreement;'' RD 400–4, ''Assurance Agreement;'' Assurance Statement for the Uniform Act; Seismic Certification (if construction); paperwork required in accordance with 7 CFR part 1970, ''Environmental Policies and Procedures.'' If the proposal involves new construction; large increases in employment; hazardous waste; a change in use, size, capacity, purpose, or location from an original facility; or is publicly controversial, the following is required: environmental documentation in accordance with 7 CFR part 1970;'' RUS Form 7, ''Financial and Statistical Report;'' and RUS Form 7a, ''Investments, Loan Guarantees, and Loans,'' or similar information; and written narrative of Project description. Applications will be tentatively scored by the State Offices and submitted to the National Office for review.

3. *Definition of Terms.* The definitions applicable to this Notice are published at 7 CFR 4280.3.

4. *Application Awards.* The Agency will review, evaluate, and score applications received in response to this Notice based on the provisions found in 7 CFR part 4280, subpart A, and as indicated in this Notice. However, the Agency advises all interested parties that the applicant bears the burden in preparing and submitting an application in response to this Notice whether or not funding is appropriated for these Programs in FY 2017.

B. Federal Award Information

Type of Awards: Loans and Grants.

Fiscal Year Funds: FY 2017.

Available Funds: Anyone interested in submitting an application for funding under these Programs are encouraged to consult the Rural Development Web Newsroom Web site at *http://www.rd.usda.gov/newsroom/notices-solicitation-applications-nosas* for funding information.

Maximum Award: The Agency anticipates the following maximum amounts per award: Loans—$1,000,000; Grants—$300,000.

Award Dates: Second Quarter, February 28, 2017; Third Quarter, May 31, 2017; and Fourth Quarter, August 31, 2017.

Performance Period: October 1, 2016, through September 30, 2017.

Renewal or Supplemental Awards: None.

C. Eligibility Information

1. Eligible Applicants

Loans and grants may be made to any entity that is identified by USDA Rural Development as an eligible borrower under the Rural Electrification Act of 1936, as amended (Act). In accordance with 7 CFR 4280.13, applicants that are not delinquent on any Federal debt or otherwise disqualified from participation in these Programs are eligible to apply. An applicant must be eligible under 7 U.S.C. 940c. Notwithstanding any other provision of law, any former Rural Utilities Service borrower that has repaid or prepaid an insured, direct, or guaranteed loan under the Act, or any not-for-profit utility that is eligible to receive an insured or direct loan under such Act shall be eligible for assistance under section 313(b)(2)(B) of such Act in the same manner as a borrower under such Act. All other restrictions in this Notice will apply.

The Agency requires the following information to make an eligibility determination. These applications must include, but are not limited to, the following:

(a) An original and one copy of SF 424, ''Application for Federal Assistance (For Non-construction);''

(b) Copies of applicant's organizational documents showing the applicant's legal existence and authority to perform the activities under the Grant;

(c) A proposed scope of work, including a description of the proposed Project, details of the proposed activities to be accomplished and timeframes for completion of each task, the number of months duration of the Project, and the estimated time it will take from grant approval to beginning of Project implementation;

(d) A written narrative that includes, at a minimum, the following items:

(i) An explanation of why the Project is needed, the benefits of the proposed Project, and how the Project meets the Grant eligible purposes;

(ii) Area to be served, identifying each governmental unit, *i.e.,* tribe, town, county, etc., to be affected by the Project;

(iii) Description of how the Project will coordinate Economic Development activities with other Economic Development activities within the Project area;

(iv) Businesses to be assisted, if appropriate, and Economic Development to be accomplished;

(v) An explanation of how the proposed Project will result in newly created, increased, or supported jobs in the area and the number of projected new and supported jobs within the next 3 years;

(vi) A description of the applicant's demonstrated capability and experience in providing the proposed Project assistance, including experience of key staff members and persons who will be providing the proposed Project activities and managing the Project;

(vii) The method and rationale used to select the areas and businesses that will receive the service;

(viii) A brief description of how the work will be performed, including whether organizational staff or consultants or contractors will be used; and

(ix) Other information the Agency may request to assist it in making a grant award determination.

(e) The last 3 years of financial information to show the applicant's financial capacity to carry out the proposed work. If the applicant is less than 3 years old, at a minimum, the information should include all balance sheet(s), income statement(s), and cash flow statement(s). A current audited report is required if available;

(f) Documentation regarding the availability and amount of other funds to be used in conjunction with the funds from REDLG; and

(g) A budget which includes salaries, fringe benefits, consultant costs, indirect costs, and other appropriate direct costs for the Project.

2. Cost Sharing or Matching

For loans, either the Ultimate Recipient or the Intermediary must provide supplemental funds for the Project equal to at least 20 percent of the loan to the Intermediary. For grants, the Intermediary must establish a Revolving Loan Fund (or Fund) and contribute an amount equal to at least 20 percent of the Grant. The supplemental contribution must come from Intermediary's funds which may not be from other Federal Grants, unless permitted by law.

3. Other

Applications will only be accepted for projects that promote rural economic development and job creation.

There are no "responsiveness" or "threshold" eligibility criteria for these loans and grants. There is no limit on the number of applications an applicant may submit under this announcement. In addition to the forms listed under the program description, Form AD 3030 "Representations Regulation Felony Conviction and Tax Delinquent Status for Corporate Applicants," must be completed in the affirmative.

None of the funds made available by this or any other Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware of the unpaid tax liability, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

None of the funds made available by this or any other Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation that was convicted of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

4. Completeness Eligibility

Applications will not be considered for funding if they do not provide sufficient information to determine eligibility or are missing required elements.

D. Application and Submission Information

1. Address To Request Application Package

For further information, entities wishing to apply for assistance should contact the USDA Rural Development State Office provided in the **ADDRESSES** section of this Notice to obtain copies of the application package.

Applications must be submitted in paper format. Applications submitted to a Rural Development State Office must be received by the closing date and local time deadline.

All applicants must have a Dun and Bradstreet Data Universal Numbering System (DUNS) number which can be obtained at no cost via a toll-free request line at (866) 705–5711 or at *http://fedgov.dnb.com/webform.* Each applicant (unless the applicant is an individual or Federal awarding agency that is excepted from the requirements under 2 CFR 25.110(b) or (c) or has an exception approved by the Federal awarding agency under 2 CFR 25.110(d)) is required to: (i) Be registered in the System for Award Management (SAM) before submitting its application; (ii) provide a valid unique entity identifier in its application; and (iii) continue to maintain an active SAM registration with current information at all times during which it has an active Federal award or an application or plan under consideration by a Federal awarding agency. The Federal awarding agency may not make a Federal award to an applicant until the applicant has complied with all applicable unique entity identifier and SAM requirements and, if an applicant has not fully complied with the requirements by the time the Federal awarding agency is ready to make a Federal award, the Federal awarding agency may determine that the applicant is not qualified to receive a Federal award and use that determination as a basis for making a Federal award to another applicant.

Please note that applicants must locate the downloadable application package for this program by the Catalog of Federal Domestic Assistance Number or FedGrants Funding Opportunity Number, which can be found at *http://www.grants.gov.*

2. Content and Form of Application Submission

An application must contain all of the required elements. Each selection priority criterion outlined in 7 CFR 4280.42(b) must be addressed in the application. Failure to address any of the criterion will result in a zero-point score for that criterion and will impact the overall evaluation of the application. Copies of 7 CFR part 4280, subpart A, will be provided to any interested applicant making a request to a Rural Development State Office. An original copy of the application must be filed with the Rural Development State Office for the State where the Intermediary is located.

The applicant documentation and forms needed for a complete application are located in the PROGRAM DESCRIPTION section of this Notice, and 7 CFR part 4280, subpart A. There are no specific formats required per this Notice, and applicants may request forms and addresses from the **ADDRESSES** section of this Notice.

(a) There are no specific limitations on the number of pages or other formatting requirements other than those described in the PROGRAM DESCRIPTION section.

(b) There are no specific limitations on the number of pages, font size and type face, margins, paper size, number of copies, and the sequence or assembly requirements.

(c) The component pieces of this application should contain original signatures on the original application.

3. Submission Dates and Times

(a) *Application Deadline Dates:* No later than 4:30 p.m. (local time) on: Second Quarter, December 31, 2016; Third Quarter, March 31, 2017; and Fourth Quarter, June 30, 2017.

Explanation of Dates: Applications must be in the USDA Rural Development State Office by the dates and times as indicated above. If the due date falls on a Saturday, Sunday, or Federal holiday, the application is due the next business day.

(b) The deadline date means that the completed application package must be received in the USDA Rural Development State Office by the deadline date and time established above. All application documents identified in this Notice are required.

(c) If completed applications are not received by the deadline established above, the application will neither be reviewed nor considered under any circumstances.

(d) The Agency will determine the application receipt date based on the actual date postmarked.

(e) If the grantee has a previously approved indirect cost rate, it is permissible, otherwise, the applicant may elect to charge the 10 percent indirect cost permitted under 2 CFR 200.414(f). Due to the time required to evaluate Indirect Cost Rates, it is likely that all funds will be awarded by the time the Indirect Cost Rate is determined. No foreign travel is permitted. Pre-Federal award costs will only be permitted with prior written approval by the Agency.

(f) Applicants must submit applications in hard copy format as previously indicated in the APPLICATION AND SUBMISSION INFORMATION section of this Notice. If the applicant wishes to hand deliver its application, the addresses for these deliveries can be located in the **ADDRESSES** section of this Notice.

(g) If you require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, etc.) please contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

E. Application Review Information

1. Criteria

All eligible and complete applications will be evaluated and scored based on the selection criteria and weights contained in 7 CFR part 4280, subpart A. Failure to address any one of the criteria by the application deadline will result in the application being determined ineligible, and the application will not be considered for funding.

2. Review and Selection Process

The State Offices will review applications to determine if they are eligible for assistance based on requirements contained in 7 CFR part 4280, subpart A. If determined eligible, your application will be submitted to the National Office. Funding of projects is subject to the Intermediary's satisfactory submission of the additional items required by that subpart and the USDA Rural Development Letter of Conditions. The Agency reserves the right to award additional discretionary points under 7 CFR 4280.43.

In order to distribute funds among the greatest number of projects possible, applications will be reviewed, prioritized, and funded by ranking each State's highest scoring Project in highest to lowest score order. The highest scoring Project from each State will be considered that State's Priority One Project. Priority One projects will be ranked according to score from highest to lowest. The second highest scoring Project from each State will be considered the State's Priority Two Project. Priority Two projects will be ranked according to score from highest to lowest and so forth until all projects have been scored and ranked in priority order. All Priority One projects will be funded before any Priority Two projects and so forth until funds are depleted, so as to ensure broad geographic distribution of funding.

F. Federal Award Administration Information

1. Federal Award Notices

Successful applicants will receive notification for funding from the Rural Development State Office. Applicants must comply with all applicable statutes and regulations before the loan/grant award can be approved. Provided the application and eligibility requirements have not changed, an application not selected will be reconsidered in three subsequent quarterly funding competitions for a total of four competitions. If an application is withdrawn, it can be resubmitted and will be evaluated as a new application.

2. Administrative and National Policy Requirements

Additional requirements that apply to intermediaries or grantees selected for these Programs can be found in 7 CFR part 4280, subpart A. Awards are subject to USDA grant regulations at 2 CFR Chapter IV which incorporated the Office of Management and Budget (OMB) regulations 2 CFR 200.

All successful applicants will be notified by letter which will include a Letter of Conditions, and a Letter of Intent to Meet Conditions. This letter is not an authorization to begin performance. If the applicant wishes to consider beginning performance prior to the loan or grant being officially closed, all pre-award costs must be approved in writing and in advance by the Agency. The loan or grant will be considered officially awarded when all conditions in the Letter of Conditions have been met and the Agency obligates the funding for the Project.

Additional requirements that apply to intermediaries or grantees selected for these Programs can be found in 7 CFR 4280, subpart A; the Grants and Agreements regulations of the U.S. Department of Agriculture codified in 2 CFR parts 400.1 to 400.18, and successor regulations to these parts.

In addition, all recipients of Federal financial assistance are required to report information about first-tier sub-awards and executive compensation (see 2 CFR part 170). You will be required to have the necessary processes and systems in place to comply with the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282) reporting requirements (see 2 CFR 170.200(b), unless you are exempt under 2 CFR 170.110(b)).

The following additional requirements apply to intermediaries or grantees selected for these Programs:

(a) Form RD 4280–2 ''Rural Business-Cooperative Service Financial Assistance Agreement.''

(b) Letter of Conditions.

(c) Form RD 1940–1, ''Request for Obligation of Funds.''

(d) Form RD 1942–46, ''Letter of Intent to Meet Conditions.''

(e) Form AD–1047, ''Certification Regarding Debarment, Suspension, and Other Responsibility Matters-Primary Covered Transactions.''

(f) Form AD–1048 ''Certification Regarding Debarment, Suspension, Ineligibility and voluntary Exclusion-Lower Tier Covered Transactions.''

(g) Form AD–1049, ''Certification Regarding a Drug-Free Workplace Requirement (Grants).''

(h) Form AD–3031, ''Assurance Regarding Felony Conviction or Tax Delinquent Status for Corporate Applicants.'' Must be signed by corporate applicants who receive an award under this Notice.

(i) Form RD 400–4, ''Assurance Agreement.'' Each prospective recipient must sign Form RD 400–4, Assurance Agreement, which assures USDA that the recipient is in compliance with Title VI of the Civil Rights Act of 1964, 7 CFR part 15 and other Agency regulations. That no person will be discriminated against based on race, color or national origin, in regard to any program or activity for which the re-lender receives Federal financial assistance. That nondiscrimination statements are in advertisements and brochures.

Collect and maintain data provided by ultimate recipients on race, sex, and national origin and ensure Ultimate Recipients collect and maintain this data. Race and ethnicity data will be collected in accordance with OMB **Federal Register** notice, ''Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity'' (62 FR 58782), October 30, 1997. Sex data will be collected in accordance with Title IX of the Education Amendments of 1972. These items should not be submitted with the application but should be available upon request by the Agency.

The applicant and the ultimate recipient must comply with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973, Age Discrimination Act of 1975, Executive Order 12250, Executive Order 13166 Limited English Proficiency (LEP), and 7 CFR part 1901, subpart E.

(i) SF LLL, ''Disclosure of Lobbying Activities,'' if applicable.

(j) Use Form SF 270, ''Request for Advance or Reimbursement.''

3. Reporting

(a) A Financial Status Report and a Project performance activity report will be required of all grantees on a quarterly basis until initial funds are expended and yearly thereafter, if applicable, based on the Federal fiscal year. The grantee will complete the Project within the total time available to it in accordance with the Scope of Work and any necessary modifications thereof prepared by the grantee and approved by the Agency. A final Project performance report will be required with the final Financial Status Report. The final report may serve as the last quarterly report. The final report must provide complete information regarding the jobs created and supported as a result of the grant if applicable. Grantees must continuously monitor performance to ensure that time schedules are being met, projected work by time periods is being accomplished, and other performance objectives are being achieved. Grantees must submit an original of each report to the Agency no later than 30 days after the end of the quarter. The Project performance reports must include, but not be limited to, the following:

(1) A comparison of actual accomplishments to the objectives established for that period;

(2) Problems, delays, or adverse conditions, if any, which have affected or will affect attainment of overall Project objectives, prevent meeting time schedules or objectives, or preclude the attainment of particular Project work elements doing established time periods. This disclosure shall be accompanied by a statement of the action taken or planned to resolve the situation; and

(3) Objectives and timetable established for the next reporting period.

(4) Any special reporting requirements, such as jobs supported and created, businesses assisted, or economic development which results in improvements in median household incomes, and any other specific requirements, should be placed in the reporting section of the Letter of Conditions.

(5) Within 90 days after the conclusion of the Project, the grantee will provide a final Project evaluation report. The last quarterly payment will be withheld until the final report is received and approved by the Agency. Even though the grantee may request reimbursement on a monthly basis, the last 3 months of reimbursements will be withheld until a final report, Project performance, and financial status report are received and approved by the Agency.

In addition to any reports required by 2 CFR 200 and 2 CFR 400.1 to 400.18, the Intermediary or grantee must provide reports as required by 7 CFR part 4280, subpart A.

G. Federal Awarding Agency Contact(s)

For general questions about this announcement, please contact your USDA Rural Development State Office provided in the **ADDRESSES** section of this Notice.

H. Civil Rights Requirements

All grants made under this Notice are subject to Title VI of the Civil Rights Act of 1964 as required by the USDA (7 CFR part 15, subpart A) and Section 504 of the Rehabilitation Act of 1973, Title VIII of the Civil Rights Act of 1968, Title IX, Executive Order 13166 (Limited English Proficiency), Executive Order 11246, and the Equal Credit Opportunity Act of 1974.

I. Other Information

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, the information collection requirement contained in this Notice is approved by OMB under OMB Control Number 0570–0070.

Federal Funding Accountability and Transparency Act

All applicants, in accordance with 2 CFR part 25, must have a DUNS number, which can be obtained at no cost via a toll-free request line at (866) 705–5711 or online at *http://fedgov.dnb.com/webform.* Similarly, all applicants must be registered in SAM prior to submitting an application. Applicants may register for the SAM at *http://www.sam.gov.* All recipients of Federal financial grant assistance are required to report information about first-tier sub-awards and executive total compensation in accordance with 2 CFR part 170.

Nondiscrimination Statement

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA Programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339.

Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *http://www.ascr.usda.gov/complaint_filing_cust.html* and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by:

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

(2) *fax:* (202) 690–7442; or

(3) *email: program.intake@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

Dated: November 15, 2016.

Samuel H. Rikkers,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 2016–27977 Filed 11–18–16; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–827]

Certain Cased Pencils From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission; 2014—2015

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests from interested parties, the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain cased pencils (pencils) from the People's Republic of China (PRC). The period of review (POR) is December 1, 2014, through November 30, 2015. The Department preliminarily finds that Shandong Rongxin Import & Export Co., Ltd. (Rongxin) is not eligible for a separate rate, and, thus, remains part of the PRC-wide entity. In addition, we are rescinding the administrative review with respect to Orient International Holding Shanghai Foreign Trade Co., Ltd. (SFTC), and Wah Yuen Stationery Co. Ltd. and its affiliate, Shandong Wah Yuen Stationery Co. Ltd., and its claimed affiliate, Tianjin Tonghe Stationery Co. Ltd. (collectively, Wah Yuen), because the requests for administrative review of these companies were timely withdrawn. Interested parties are invited to comment on these preliminary results.

DATES: Effective November 21, 2016.

FOR FURTHER INFORMATION CONTACT: Mary Kolberg, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1785.

SUPPLEMENTARY INFORMATION:

Background

On December 1, 2015, the Department published a notice of an opportunity to request an administrative review of the antidumping duty order on cased pencils from the PRC.[1] On December 30, 2015, Dixon Ticonderoga Company (Dixon) requested an administrative review of Rongxin, and Wah Yuen.[2] On December 31, 2015, SFTC requested an administrative review of its own exports during the POR.[3] On February 9, 2016, the Department initiated a review of Rongxin, SFTC, and Wah Yuen.[4] On March 30, 2016, SFTC timely withdrew its request for administrative review.[5] Finally, on May 5, 2016, Dixon timely withdrew its request for an administrative review of Wah Yuen.[6]

Scope of the Order

The merchandise subject to the order includes certain cased pencils from the PRC. The subject merchandise is currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheading 9609.1010. A full description of the scope of the order is contained in the Preliminary Decision Memorandum.[7] Although the HTSUS subheadings are provided for convenience and customs purposes, the written product description is dispositive.

Partial Rescission of the Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party that requested the review withdraws the request within 90 days of the date of publication of the *Initiation Notice.* On March 30, 2016, SFTC timely withdrew its request for a review of its own exports and, on May 5, 2016, Dixon timely withdrew its request for a review of Wah Yuen. Accordingly, the Department is rescinding this administrative review with respect to SFTC and Wah Yuen.

Methodology

The Department is conducting this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act). We have preliminary determined that Rongxin is not eligible for a separate rate; as such, the Department has not calculated a margin for these preliminary results. For a full description of the methodology and analysis underlying our determination, *see* the *Preliminary Decision Memorandum.*[8] A list of topics discussed in the *Preliminary Decision Memorandum* is included as Appendix I to this notice. The *Preliminary Decision Memorandum* is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov,* and it is available to all parties in the Department's Central Records Unit, Room B8024 of the main Department of Commerce building. In addition, a complete version of the *Preliminary Decision Memorandum* can be accessed directly on the internet at *http://enforcement.trade.gov/frn/.* The signed *Preliminary Decision Memorandum* and the electronic versions of the *Preliminary Decision Memorandum* are identical in content.

Preliminary Results of Review

The Department preliminarily determines that, for the period

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[1] *See Antidumping and Countervailing Duty Order, Finding, Or Suspended Investigation; Opportunity To Request Administrative Review,* 80 FR 75078 (December 1, 2015).

[2] *See* letter from Dixon, re: ''Certain Cased Pencils from the People's Republic of China: Request for Administrative Review,'' dated December 30, 2015.

[3] *See* letter from SFTC, re: ''Request for Administrative Review of the Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China,'' dated December 31, 2015.

[4] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 81 FR 6832 (February 9, 2016) (*Initiation Notice).*

[5] *See* letter from SFTC, re: ''Withdrawal of Request for Review: Administrative Review of the Antidumping Order on Cased Pencils from the People's Republic of China,'' dated March 30, 2016.

[6] *See* letter from Dixon, re: ''Certain Cased Pencils from the People's Republic of China: Partial Withdrawal of Request for Administrative Review,'' dated May 5, 2016.

[7] *See* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado Assistant Secretary for Enforcement and Compliance, ''Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission: Certain Cased Pencils from the People's Republic of China; 2014—2015,'' dated concurrently with and hereby adopted by this notice *(Preliminary Decision Memorandum).*

[8] A list of topics discussed in the Preliminary Decision Memorandum is provided at Appendix I to this notice.

December 1, 2014, through November 30, 2015, Shandong Rongxin Import & Export Co., Ltd. is part of the PRC-wide entity. The rate applicable to the PRC-wide entity is 114.90 percent.[9]

Disclosure and Public Comment

The Department will disclose the analysis performed for these preliminary results within five days of the date of publication of this notice.[10] Interested parties may submit case briefs no later than 30 days after the date of publication of the preliminary results.[11] Rebuttals, limited to issues raised in the case briefs, may be filed no later than five days after the deadline for filing case briefs.[12] Parties submitting briefs should do so pursuant to the Department's electronic filing system ACCESS.

Any interested party may request a hearing within 30 days of publication of this notice.[13] Hearing requests should contain the following information: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230.[14]

The Department intends to issue the final results of this administrative review, including the results of its analysis of issues raised in any briefs, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act, unless extended.

Assessment Rates

Upon issuing the final results of review, the Department will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review.[15] The Department intends to issue appropriate assessment instructions to CBP 15 days after publication of the final results of review. We intend to instruct CBP to liquidate entries containing subject merchandise exported by the PRC-wide entity at the current rate for the PRC-wide entity (*i.e.,* 114.90 percent).

If, in the course of this review, we reverse our preliminary determination and find that Rongxin is eligible for a separate rate, and Rongxin's weighted-average dumping margin is above *de minimis* (*i.e.,* 0.50 percent) in the final results of this review, we will calculate importer-specific *ad valorem* rates on the basis of the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those sales, in accordance with 19 CFR 351.212(b)(1). Where an importer-specific *ad valorem* rate is zero or *de minimis,* the Department will instruct CBP to liquidate appropriate entries without regard to antidumping duties.[16] For entries that were not reported in the U.S. sales data submitted by Rongxin, the Department will instruct CBP to liquidate such entries at the rate for the PRC-wide entity.

The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future cash deposits of estimated antidumping duties, where applicable.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by sections 751(a)(2)(C) of the Act: (1) If we reverse our decision that Rongxin is entitled to a separate rate, then the cash deposit rate will be the rate established in the final results of this review (except, if the rate is zero or *de minimis,* then zero cash deposit will be required); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be that for the PRC-wide entity (*i.e.,*114.90 percent); and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213(d)(4) and 351.221(b)(4).

Dated: November 15, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

[FR Doc. 2016–27960 Filed 11–18–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE743

Marine Mammals; File No. 20443

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that the Alaska Department of Fish and Game, PO Box 115526, Juneau, AK 99811–5526 [Responsible Party: Robert Small, Ph.D.], has applied in due form for a permit to conduct research on marine mammals.

DATES: Written, telefaxed, or email comments must be received on or before December 21, 2016.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the ''Features'' box on the Applications and Permits for

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[9] *See Notice of Amended Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Cased Pencils from the People's Republic of China,* 67 FR 59049 (September 19, 2002).

[10] *See* 19 CFR 351.224(b).

[11] *See* 19 CFR 351.309(c)(ii).

[12] *See* 19 CFR 351.309(d).

[13] *See* 19 CFR 351.310(c).

[14] *See* 19 CFR 351.310(d).

[15] *See* 19 CFR 351.212(b)(1).

[16] *See* 19 CFR 351.106(c)(2).

Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 20443 from the list of available applications.

These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Rosa González or Sara Young, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The applicant requests a five-year permit to study harbor seals (*Phoca vitulina*) throughout their range in Alaska, including Southeast Alaska, Gulf of Alaska and Bering Sea. The overall objective of the research is to provide a greater understanding of the proximate and ultimate factors that regulate their abundance, which is required to develop effective management and conservation strategies. Research activities include aerial, vessel and ground surveys, radio tracking, photo-identification, photograph/video, behavioral observations and monitoring, and capture of up to 350 animals by entanglement in a net in the water or by hoop net or dip net on land. Captured animals may be chemical restraint; physical restraint by hand, net, cage or stretcher. Researchers may collect biological samples (*e.g.,* scat, blood, milk from lactating females, blubber, muscle, skin, hair, mucus membrane swabs, stomach content subsample, tooth and vibrissae); standard morphometrics and weight; measurements of blubber via ultrasound; and inject PIT tags and attach flipper tags. A subset of the captured animals may also be outfitted with external transmitters and data-loggers. The applicant also requests export (worldwide) and import of samples for analysis, incidental disturbance and unintentional mortality of harbor seals and porpoises (*Phocoena phocoena*), and intentional mortality (euthanasia) of harbor seals.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: November 15, 2016.

Julia Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–27861 Filed 11–18–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE204

Endangered Species; File No. 19621

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

ACTION: Notice; receipt of application for a permit modification.

SUMMARY: Notice is hereby given that Michael Arendt, South Carolina Department of Natural Resources, Marine Resources Division, 217 Fort Johnson Road, Charleston, SC 29412, has requested a modification to scientific research Permit No. 19621.

DATES: Written, telefaxed, or email comments must be received on or before December 21, 2016.

ADDRESSES: The modification request and related documents are available for review by selecting ''Records Open for Public Comment'' from the Features box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 19621 from the list of available applications. These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Amy Hapeman or Malcolm Mohead, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject modification to Permit No. 19621, issued on June 16, 2016 (81 FR 43589) is requested under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

Permit No. 19621 authorizes the Dr. Arendt to study loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempii*), green (*Chelonia mydas*), and leatherback (*Dermochelys coriacea*) sea turtles in the waters of Florida, Georgia and South Carolina. Researchers may capture animals by trawl or tangle net and perform the following procedures before release: Morphometrics, tagging, photography, biological sampling, ultrasound, marking, laparoscopy and associated transport, transmitter attachment, and/or epibiota removal. A limited number of sea turtles may accidentally die due to capture over the life of the permit. The permit holder requests authorization to: (1) take olive ridley sea turtles (*L. olivacea*) during all research projects for rare captures that could occur; (2) expand Project 3's area to include coastal shoals adjacent to the Cape Canaveral channel; (3) extend Project 3's duration through October 2020; and (4) increase the annual take of green and loggerhead sea turtles by four and nine turtles, respectively, and authorize double tagging and tissue sampling of a small subset of these animals. Project 3 changes would allow for new collaborations and funding sources to meet the existing objectives to assess the distribution, relative abundance, demographic structure, and health of foraging sea turtles in these waters. The permit expires on June 15, 2021.

Dated: November 16, 2016.

Julia Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–27975 Filed 11–18–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF052

Western Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting and scoping sessions.

SUMMARY: The Western Pacific Fishery Management Council (Council) will hold public meetings and scoping sessions to discuss fishery management regulations for the Monument Expanded Area in the Northwestern Hawaiian Islands.

DATES: The Council will hold meetings in Hawaii from Tuesday, December 6 through Saturday, December 17, 2016. For specific dates, times and agendas, see **SUPPLEMENTARY INFORMATION.**

ADDRESSES: The meetings will be held in Hilo, Kona, Kahului, Maui, Lihue, Kauai, Honolulu, Oahu, Kaunakakai, Molokai, HI. See **SUPPLEMENTARY INFORMATION** for specific locations of the meetings.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council; telephone: (808) 522–8220.

SUPPLEMENTARY INFORMATION: The Council will hold meetings in Hilo, HI, on Tuesday, December 6, 2016, between 6 p.m. and 9 p.m.; in Kona, HI, on Wednesday, December 7, 2016, between 6 p.m. and 9 p.m.; in Kahului, Maui, HI, on Thursday, December 8, 2016, between 6 p.m. and 9 p.m.; in Lihue, Kauai, HI on Tuesday, December 13, 2016, between 6 p.m. and 9 p.m.; in Honolulu, Oahu, HI, on Thursday, December 15, 2016, between 6 p.m. and 9 p.m.; and in Kaunakakai, Molokai, HI, on Saturday, December 17, 2016, between 1 p.m. and 4 p.m. All times listed are local island times.

The Hilo meeting will be held at the Hilo Intermediate School Cafeteria, 587 Waianuenue Ave, Hilo, HI 96720. The Kona meeting will be held at the West Hawaii Civic Center, Building G, 74–5044 Ane Keohokalole Hwy, Kailua-Kona, HI 96740. The Maui meeting will be held at the Courtyard Maui Kahului Airport, 532 Keolani Pl, Kahului, HI 96732. The Kauai meeting will be held at the Chiefess Kamakahelei Middle School, 4431 Nuhou St, Lihue, HI 96766. The Oahu meeting will be held at the Ala Moana Hotel, 410 Atkinson Dr, Honolulu, HI 96814. The Molokai meeting will be held at Kaunakakai Elementary School Cafeteria, 30 Ailoa St, Kaunakakai, HI 96761.

Public scoping and comment periods will be provided in the agenda. The order in which agenda items are addressed may change. The meetings will run as late as necessary to complete scheduled business.

Schedule and Agenda for All Meetings

1. Visit Informational Booths
2. Informational Briefing on Presidential Proclamation, Council Role in Rule-making Process, Data Discovery
3. Public Comment/Scoping Session
4. Adjourn

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: November 16, 2016.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–27973 Filed 11–18–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA774, 0648–XA806, and 0648–XE766

Marine Mammals and Endangered Species; File Nos. 13927, 16553, and 20532

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

ACTION: Notice; issuance of permits.

SUMMARY: Notice is hereby given that permits or permit amendments have been issued to the following entities:

Permit No. 13927–03: James H.W. Hain, Ph.D., Associated Scientists at Woods Hole, Box 721, Woods Hole, MA 02543;

Permit No. 16553–01: Brent Stewart, Ph.D., J.D., Hubbs SeaWorld Research Institute, 2595 Ingraham Street, San Diego, CA 92109; and

Permit No. 20532: Stephen John Trumble, Ph.D., Baylor University, 101 Bagby Ave., Waco, TX 76706.

ADDRESSES: The permits and related documents are available for review upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376.

FOR FURTHER INFORMATION CONTACT: Carrie Hubard (File Nos. 13927–03, 16553–01) and Shasta McClenahan or Jennifer Skidmore (File No. 20532) at (301) 427–8401.

SUPPLEMENTARY INFORMATION: Requests for a permit or permit amendment had been submitted by the above-named applicants. The requested permits have been issued under the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226), as applicable.

Permit No. 13927–03: The original permit (No. 13927), issued on October 19, 2011 (76 FR 67151, October 31, 2016) authorized Dr. Hain to conduct aerial and vessel surveys to study North Atlantic right whales (*Eubalaena glacialis*). Humpback whales (*Megaptera novaeangliae*), bottlenose dolphins (*Tursiops truncatus*) and Atlantic spotted dolphins (*Stenella frontalis*) may be incidentally harassed. Research may occur annually, December through April off the U.S. southeast coast. Two subsequent amendments (13927–01 issued January 13, 2013 and 13927–02 issued December 1, 2015) increased the number of North Atlantic right whale takes and added unmanned aircraft systems, respectively. The minor amendment (No. 13927–03) extends the duration of the permit through October 31, 2017, but does not change any other terms or conditions of the permit.

Permit No. 16553–01: The original permit (No. 16553), issued on October

24, 2011 (76 FR 68719, November 7, 2011) authorized Dr. Stewart to continue a long term study on pinnipeds in California. California sea lions (*Zalophus californianus*), northern elephant seals (*Mirounga angustirostris*), and harbor seals (*Phoca vitulina*) may be captured and sampled at several sites: San Nicolas Island, San Miguel Island, Santa Rosa Island, Santa Cruz Island, Piedras Blancas, Cape San Martin, and Gorda. The minor amendment (No. 16553–01) extends the duration of the permit through October 31, 2017, but does not change any other terms or conditions of the permit.

Permit No. 20532: The requested permit (81 FR 59190, August 29, 2016) authorizes receipt, import, and export of biological samples from museum holdings and stranded animals worldwide for scientific research to chronologically profile anthropogenic and physiological data including hormones and pesticides to record exposure and stress. Samples will be from blue (*Balaenoptera musculus*), gray (*Eschrichtius robustus*), fin (*B. physalus*), minke (*B. acutorostrata*), bowhead (*Balaena mysticetus*), humpback (*Megaptera novaeangliae*), and sperm whales (*Physeter macrocephalus*). Samples may also be obtained from subsistence hunted bowhead whales in Alaska. The permit is valid through November 1, 2021.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activities proposed are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

As required by the ESA, as applicable, issuance of these permits was based on a finding that such permits: (1) Were applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: November 15, 2016.

Julia Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–27860 Filed 11–18–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF050

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council), Atlantic Herring Committee, Atlantic Herring Advisory Panel and Atlantic Herring Plan Development Team is scheduling a public workshop on the Atlantic Herring Acceptable Biological Catch Control Rule Management Strategy Evaluation to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This workshop will be held on Wednesday, December 7, 2016 at 9 a.m. and Thursday, December 8, 2016 at 8:30 a.m.

ADDRESSES: The workshop will be held at the Sheraton Harborside Hotel, 250 Market Street, Portsmouth, ME 03801; phone: (888) 627–7138; fax: (603) 431–7805.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Introduction

The New England Fishery Management Council is currently developing Amendment 8 to the Atlantic Herring Fishery Management Plan. Through Amendment 8, the Council expects to establish a long-term control rule for the acceptable biological catch (ABC) of Atlantic herring that may explicitly account for herring's role in the ecosystem and address the biological and ecological requirements of the Atlantic herring resource. A control rule is a method for establishing an annual catch limit or target fishing level based on scientific information. A long-term control rule is needed to provide guidance on setting an annual ABC to account for scientific uncertainty, stock status, and the Council's risk tolerance to maintain a sustainable Atlantic herring stock that includes consideration of herring as a forage species.

In January 2016, the Council approved conducting a Management Strategy Evaluation (MSE) to support the development of alternatives for an ABC control rule. MSE is a collaborative decision-making process involving more public input and technical analysis than the normal amendment development process. The MSE will help determine how a range of control rules may perform relative to potential objectives.

The Council held an initial public workshop in May 2016 to develop recommendations for a range of potential objectives of the ABC control rule, how progress towards these objectives may be measured, and the control rules to test. In June 2016, after reviewing the workshop recommendations and additional input from the Herring Plan Development Team, Advisory Panel, and Committee, the Council approved moving forward with the MSE. Technical work has been underway ever since.

Workshop Purpose

The purpose of this workshop is to provide continued opportunities for public input on the Management Strategy Evaluation of Atlantic herring ABC control rules.

Workshop Goals

The Council is holding this workshop to: Develop a common understanding of the outcomes of the MSE technical simulations, which tested the performance of a range of ABC control rules relative to potential objectives, identified at the May 2016 public workshop and approved by the Council in June. The workshop also aims to get input from stakeholders on: Identifying acceptable ranges of performance for various metrics, so that tradeoffs in achieving objectives may be identified; narrowing the range of Atlantic herring ABC control rule alternatives to consider in more detail; and what, if any, additional (minor) MSE simulation work would be helpful for establishing a long-term ABC control rule. Finally, the workshop will provide a chance for stakeholders of the Atlantic herring fishery to have greater input than typically possible at Council meetings, through constructive and open dialogue among resource users, scientists, fishery managers, and members of the public.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to

Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: November 16, 2016.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–27974 Filed 11–18–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE931

Atlantic Highly Migratory Species; Atlantic Shark Management Measures; 2017 Research Fishery

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

ACTION: Notice of intent; request for applications.

SUMMARY: NMFS announces its request for applications for the 2017 shark research fishery from commercial shark fishermen with directed or incidental shark limited access permits. The shark research fishery allows for the collection of fishery-dependent and biological data for future stock assessments and to meet the research objectives of the Agency. The only commercial vessels authorized to land sandbar sharks are those participating in the shark research fishery. Shark research fishery permittees may also land other large coastal sharks (LCS), small coastal sharks (SCS), smoothhound sharks, and pelagic sharks. Commercial shark fishermen who are interested in participating in the shark research fishery need to submit a completed Shark Research Fishery Permit Application in order to be considered.

DATES: Shark Research Fishery Applications must be received no later December 21, 2016.

ADDRESSES: Please submit completed applications to the HMS Management Division at:

- *Mail:* Attn: Guý DuBeck, HMS Management Division (F/SF1), NMFS, 1315 East-West Highway, Silver Spring, MD 20910.
- *Fax:* (301) 713–1917.
- *Email: NMFS.Research.Fishery@noaa.gov.*

For copies of the Shark Research Fishery Permit Application, please write to the HMS Management Division at the address listed above, call (301) 427–8503 (phone), or fax a request to (301) 713–1917. Copies of the Shark Research Fishery Application are also available at the HMS Web site at *http://www.nmfs.noaa.gov/sfa/hms/compliance/efp/index.html.* Additionally, please be advised that your application may be released under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Karyl Brewster-Geisz, Guý DuBeck, Larry Redd, at (301) 427–8503 (phone) or (301) 713–1917 (fax), or Delisse Ortiz at 240–681–9037 (phone).

SUPPLEMENTARY INFORMATION: The Atlantic shark fisheries are managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Consolidated HMS Fishery Management Plan (FMP) is implemented by regulations at 50 CFR part 635.

The shark research fishery was established, in part, to maintain time series data for stock assessments and to meet NMFS' research objectives. Since the shark research fishery was established in 2008, the research fishery has allowed for: The collection of fishery-dependent data for current and future stock assessments; the operation of cooperative research to meet NMFS' ongoing research objectives; the collection of updated life-history information used in the sandbar shark (and other species) stock assessment; the collection of data on habitat preferences that might help reduce fishery interactions through bycatch mitigation; evaluation of the utility of the mid-Atlantic closed area on the recovery of dusky sharks and collection of hook-timer and pop-up satellite archival tag (PSAT) information to determine at-vessel and post-release mortality of dusky sharks; and collection of sharks to determine the weight conversion factor from dressed weight to whole weight.

The shark research fishery allows selected commercial fishermen the opportunity to earn revenue from selling additional sharks, including sandbar sharks. Only the commercial shark fishermen selected to participate in the shark research fishery are authorized to land sandbar sharks subject to the sandbar quota available each year. The base quota is 90.7 metric tons (mt) dressed weight (dw) per year, although this number may be reduced in the event of overharvests, if any. The selected shark research fishery permittees will also be allowed to land other LCS, SCS, smoothhound sharks, and pelagic sharks per any restrictions established on their shark research fishery permit. Generally, the shark research fishery permits are valid only for the calendar year for which they are issued.

The specific 2017 trip limits and number of trips per month will depend on the availability of funding, number of selected vessels, the availability of observers, the available quota, and the objectives of the research fishery, and will be included in the permit terms at time of issuance. The number of participants in the research fishery changes each year. In 2016, five fishermen were chosen to participate. From 2008 through 2016, there has been an average of seven participants each year with the range from five to eleven. The trip limits and the number of trips taken per month have changed each year the research fishery has been active. Participants may also be limited on the amount of gear they can deploy on a given set (*e.g.,* number of hooks and sets, soak times, length of longline).

In the 2016 fishing season, NMFS split the sandbar and LCS research fishery quotas equally among selected participants, with each vessel allocated 14.5 mt dw of sandbar shark research fishery quota and 8.0 mt dw of other LCS research fishery quota. NMFS also established a regional dusky bycatch limit where once three or more dusky sharks were brought to the vessel dead in any of five regions across the Gulf of Mexico and Atlantic through the entire year, any shark research fishery permit holder in that region was not able to soak their gear for longer than 3 hours. If, after the change in soak time, there were three or more additional dusky shark interactions (alive or dead) observed, shark research fishery permit holders were not able to make a trip in that region for the remainder of the year, unless otherwise permitted by NMFS. There were slightly different measures established for shark research fishery participants in the mid-Atlantic shark closed area in order to allow NMFS observers to place satellite archival tags on dusky sharks and collect other scientific information on dusky sharks while also minimizing any dusky shark mortality.

Participants were also required to keep any dead sharks, unless they were a prohibited species, in which case they were required to release them. If the regional non-blacknose SCS, blacknose, smoothhound and/or pelagic shark management group quotas were closed, then the shark research fishery permit holder fishing in the closed region had to discard all of the species from the closed management groups regardless of condition. Any sharks, except prohibited species or closed management groups (*i.e.,* SCS, smoothhound, or pelagic sharks), caught and brought to the vessel alive could have been released alive or landed. In addition, participants were restricted by the number of longline sets as well as the number of hooks they could deploy and have on board the vessel. The vessels participating in the shark research fishery fished an average of one trip per month.

In order to participate in the shark research fishery, commercial shark fishermen need to submit a completed Shark Research Fishery Application by the deadline noted above (see **DATES**) showing that the vessel and owner(s) meet the specific criteria outlined below.

Research Objectives

Each year, the research objectives are developed by a shark board, which is comprised of representatives within NMFS, including representatives from the Southeast Fisheries Science Center (SEFSC) Panama City Laboratory, Northeast Fisheries Science Center Narragansett Laboratory, the Southeast Regional Office Protected Resources Division, and the HMS Management Division. The research objectives for 2017 are based on various documents, including the 2012 Biological Opinion for the Continued Authorization of the Atlantic Shark Fisheries and the Federal Authorization of a Smoothhound Fishery, as well as recent stock assessments for the U.S. South Atlantic blacknose, U.S Gulf of Mexico blacknose, U.S. Gulf of Mexico blacktip, sandbar, and dusky sharks (all these stock assessments can be found at *http://sedarweb.org/*). The 2017 research objectives are:

- Collect reproductive, length, sex, and age data from sandbar and other sharks throughout the calendar year for species-specific stock assessments;
- Monitor the size distribution of sandbar sharks and other species captured in the fishery;
- Continue on-going tagging shark programs for identification of migration corridors and stock structure using dart and/or spaghetti tags;
- Maintain time-series of abundance from previously derived indices for the shark bottom longline observer program;
- Sample fin sets (*e.g.,* dorsal, pectoral) from prioritized species to further develop fin identification guides;
- Acquire fin-clip samples of all shark and other species for genetic analysis;
- Attach satellite archival tags to endangered smalltooth sawfish to provide information on critical habitat and preferred depth, consistent with the requirements listed in the take permit issued under Section 10 of the Endangered Species Act to the SEFSC observer program;
- Attach satellite archival tags to prohibited dusky and other sharks, as needed, to provide information on daily and seasonal movement patterns, and preferred depth;
- Evaluate hooking mortality and post-release survivorship of dusky, hammerhead, blacktip, and other sharks using hook-timers and temperature-depth recorders;
- Evaluate the effects of controlled gear experiments in order to determine the effects of potential hook changes to prohibited species interactions and fishery yields;
- Examine the size distribution of sandbar and other sharks captured throughout the fishery including in the Mid-Atlantic shark time/area closure off the coast of North Carolina from January 1 through July 31; and
- Develop allometric and weight relationships of selected species of sharks (*e.g.,* hammerhead, sandbar, blacktip shark).

Selection Criteria

Shark Research Fishery Permit Applications will be accepted only from commercial shark fishermen who hold a current directed or incidental shark limited access permit. While incidental permit holders are welcome to submit an application, to ensure that an appropriate number of sharks are landed to meet the research objectives for this year, NMFS will give priority to directed permit holders as recommended by the shark board. As such, qualified incidental permit holders will be selected only if there are not enough qualified directed permit holders to meet research objectives.

The Shark Research Fishery Permit Application includes, but is not limited to, a request for the following information: Type of commercial shark permit possessed; past participation and availability in the commercial shark fishery (not including sharks caught for display); past involvement and compliance with HMS observer programs per 50 CFR 635.7; past compliance with HMS regulations at 50 CFR part 635; past and present availability to participate in the shark research fishery year-round; ability to fish in the regions and season requested; ability to attend necessary meetings regarding the objectives and research protocols of the shark research fishery; and ability to carry out the research objectives of the Agency. Preference will be given to those applicants who are willing and available to fish year-round and who affirmatively state that they intend to do so, in order to ensure the timely and accurate data collection NMFS needs to meet this year's research objectives. An applicant who has been charged criminally or civilly (*e.g.,* issued a Notice of Violation and Assessment (NOVA) or Notice of Permit Sanction) for any HMS-related violation will not be considered for participation in the shark research fishery. In addition, applicants who were selected to carry an observer in the previous 2 years for any HMS fishery, but failed to contact NMFS to arrange the placement of an observer as required per 50 CFR 635.7, will not be considered for participation in the 2017 shark research fishery. Applicants who were selected to carry an observer in the previous 2 years for any HMS fishery and failed to comply with all the observer regulations per 50 CFR 635.7 will also not be considered. Exceptions will be made for vessels that were selected for HMS observer coverage but did not fish in the quarter when selected and thus did not require an observer. Applicants who do not possess a valid USCG safety inspection decal when the application is submitted will not be considered. Applicants who have been non-compliant with any of the HMS observer program regulations in the previous 2 years, as described above, may be eligible for future participation in shark research fishery activities by demonstrating 2 subsequent years of compliance with observer regulations at 50 CFR 635.7.

Selection Process

The HMS Management Division will review all submitted applications and develop a list of qualified applicants from those applications that are deemed complete. A qualified applicant is an applicant that has submitted a complete application by the deadline (see **DATES**) and has met the selection criteria listed above. Qualified applicants are eligible to be selected to participate in the shark research fishery for 2017. The HMS Management Division will provide the list of qualified applicants without identifying information to the SEFSC. The SEFSC will then evaluate the list of qualified applicants and, based on the temporal and spatial needs of the research objectives, the availability of observers, the availability of qualified applicants, and the available quota for a given year, will randomly select qualified applicants to conduct the prescribed research. Where there are multiple qualified applicants that meet the criteria, permittees will be randomly selected through a lottery system. If a public meeting is deemed necessary, NMFS will announce details of a public selection meeting in a subsequent **Federal Register** notice.

Once the selection process is complete, NMFS will notify the selected applicants and issue the shark research fishery permits. The shark research fishery permits will be valid only in calendar year 2017. If needed, NMFS will communicate with the shark research fishery permit holders to arrange a captain's meeting to discuss the research objectives and protocols. NMFS held mandatory captain's meetings before observers were placed on vessels since 2013 and expects to hold one again in late 2016 or early 2017. Once the fishery starts, the shark research fishery permit holders must contact the NMFS observer coordinator to arrange the placement of a NMFS-approved observer for each shark research trip. Additionally, selected applicants are expected to allow observers the opportunity to perform their duties as required and assist observers as necessary.

A shark research fishery permit will only be valid for the vessel and owner(s) and terms and conditions listed on the permit, and, thus, cannot be transferred to another vessel or owner(s). Shark research fishery permit holders must carry a NMFS-approved observer in order to land sandbar sharks. Issuance of a shark research permit does not guarantee that the permit holder will be assigned a NMFS-approved observer on any particular trip. Rather, issuance indicates that a vessel may be issued a NMFS-approved observer for a particular trip, and on such trips, may be allowed to harvest Atlantic sharks, including sandbar sharks, in excess of the retention limits described in 50 CFR 635.24(a). These retention limits will be based on available quota, number of vessels participating in the 2017 shark research fishery, the research objectives set forth by the shark board, the extent of other restrictions placed on the vessel, and may vary by vessel and/or location. When not operating under the auspices of the shark research fishery, the vessel would still be able to land LCS, SCS, smoothhound sharks, and pelagic sharks subject to existing retention limits on trips without a NMFS-approved observer.

NMFS annually invites commercial shark permit holders (directed and incidental) to submit an application to participate in the shark research fishery. Permit applications can be found on the HMS Management Division's Web site at *http://www.nmfs.noaa.gov/sfa/hms/compliance/efp/index.html* or by calling (301) 427–8503. Final decisions on the issuance of a shark research fishery permit will depend on the submission of all required information by the deadline (see **DATES**), and NMFS' review of applicant information as outlined above. The 2017 shark research fishery will start after the opening of the shark fishery and under available quotas as published in a separate **Federal Register** final rule.

Dated: November 15, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–27904 Filed 11–18–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF047

Fisheries of the Gulf of Mexico and South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Stock Identification (ID) Webinar for Gray Snapper

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

ACTION: Notice of SEDAR 51 Stock ID Webinar for Gray Snapper.

SUMMARY: The SEDAR 51 assessment of the Gray Snapper will consist of a data workshop, a review workshop, and a series of assessment Webinars,

DATES: The SEDAR 51 Stock ID Webinar will be held from 1 p.m. to 4 p.m. on December 7, 2016, to view the agenda see **SUPPLEMENTARY INFORMATION**.

ADDRESSES:

Meeting address: The meeting will be held via Webinar. The Webinar is open to members of the public. Those interested in participating should contact Julie A. Neer, at SEDAR (see Contact Information Below) to request an invitation providing Webinar access information. Please request webinar invitations at least 24 hours in advance of each Webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; (843) 571–4366. Email: *Julie.neer@safmc.net*

SUPPLEMENTARY INFORMATION:

Agenda

The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a multi-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report that compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report that describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion in the Stock ID Webinars are as follows:

1. Participants will use review genetic studies, growth patterns, existing stock definitions, prior SEDAR stock ID recommendations, and any other relevant information on Gray *Snapper* stock structure.

2. Participants will make recommendations on biological stock structure and define the unit stock or stocks to be addressed through this assessment.

3. Participants will provide recommendations to address Council management jurisdictions, to support management of the stock or stocks, and specification of management benchmarks and fishing levels by Council jurisdiction in a manner consistent with the productivity measures of the stock.

4. Participants will document work group discussion and recommendations through a Data Workshop working paper for SEDAR 51.Although non-emergency

issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**), at least 3 business days prior to each workshop. Note: The times and sequence specified in this agenda are subject to change.

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

Dated: November 16, 2016.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–27957 Filed 11–18–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE926

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the U.S. Air Force Conducting Maritime Weapon Systems Evaluation Program Operational Testing Within the Eglin Gulf Test and Training Range

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS (hereinafter, ''we'') received an application from the U.S. Department of the Air Force, Headquarters 96th Air Base Wing (Air Force), Eglin Air Force Base (Eglin AFB), requesting an Incidental Harassment Authorization (IHA or Authorization) to take marine mammals, by harassment, incidental to a Maritime Weapon Systems Evaluation Program (Maritime WSEP) within a section of the Eglin Gulf Test and Training Range in the northern Gulf of Mexico.

Eglin AFB's Maritime WSEP activities are military readiness activities per the Marine Mammal Protection Act (MMPA), as amended by the National Defense Authorization Act of 2004 (NDAA). Per the MMPA, NMFS requests comments on its proposal to issue an Authorization to Eglin AFB to incidentally take, by Level B and Level A harassment, two species of marine mammals, the Atlantic bottlenose dolphin (*Tursiops truncatus*) and Atlantic spotted dolphin (*Stenella frontalis*), during the specified activity.

DATES: NMFS must receive comments and information no later than December 21, 2016.

ADDRESSES: Address comments on the application to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing email comments is *ITP.Youngkin@noaa.gov.* Please include RIN 0648–XE926 in the subject line. Comments sent via email to *ITP.Youngkin@noaa.gov,* including all attachments, must not exceed a 25-megabyte file size. NMFS is not responsible for email comments sent to addresses other than the one provided in this notice.

Instructions: All submitted comments are a part of the public record, and generally we will post them to *http://www.nmfs.noaa.gov/pr/permits/incidental/military.htm* without change. All personal identifying information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

To obtain an electronic copy of Eglin AFB's application, a list of the references used in this document, and Eglin AFB's Environmental Assessment (EA) titled, ''Maritime Weapons System Evaluation Program,'' write to the previously mentioned address, telephone the contact listed here (see **FOR FURTHER INFORMATION CONTACT**), or visit the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental/military.htm.*

FOR FURTHER INFORMATION CONTACT: Dale Youngkin, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if, after NMFS provides a notice of a proposed authorization to the public for review and comment: (1) NMFS makes certain findings; and (2) the taking is limited to harassment.

An Authorization for incidental takings for marine mammals shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such taking are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

The NDAA (Pub. L. 108–136) removed the ''small numbers'' and ''specified geographical region'' limitations indicated earlier and amended the definition of harassment as it applies to a ''military readiness activity'' to read as follows (section 3(18)(B) of the MMPA): (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A Harassment); or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered (Level B Harassment).

Summary of Request

On February 4, 2016, we issued an Authorization to Eglin AFB to take marine mammals, by harassment, incidental to a Maritime Weapon Systems Evaluation Program (Maritime WSEP) within the Eglin Gulf Test and Training Range (EGTTR) in the Gulf of Mexico from February 4, 2016 through February 3, 2017 (see 81 FR 7307; February 11, 2016). These proposed missions were very similar to previous Maritime WSEP mission activities for which incidental harassment authorizations were issued the previous year (80 FR 17394). On September 19, 2016, we received a renewal request for an Authorization from Eglin AFB to continue the missions authorized in 2016. We considered the revised renewal request as adequate and complete on September 27, 2016.

Due to the ongoing nature of these activities, as well as the fact that other mission activities are conducted within the EGTTR, we have discussed developing a rulemaking to encompass all mission activities in the EGTTR, and anticipate that the Maritime WSEP activities will be part of that future rulemaking. However, this IHA is being proposed due to timing constraints to ensure that these activities are in compliance with the Marine Mammal Protection Act (MMPA) while the future rulemaking is in process.

Eglin AFB proposes to conduct Maritime WESP missions within the EGTTR airspace over the Gulf of Mexico within Warning Area 151 (W–151), specifically within sub-area W–151A (see Figure 2–1 of Eglin AFB's application and Figure 1 below). The proposed Maritime WSEP training activities are planned to occur during daylight hours in February and March 2017, however, the activities could occur between February 4, 2017, and February 3, 2018.

Eglin AFB proposes to use multiple types of live munitions (*e.g.,* gunnery rounds, rockets, missiles, and bombs) against small boat targets in the EGTTR. These activities qualify as military readiness activities.

The following aspects of the proposed Maritime WSEP training activities have the potential to take marine mammals: Exposure to impulsive noise and pressure waves generated by live ordnance detonation at or near the surface of the water. Take, by Level B harassment, of individuals of common bottlenose dolphin or Atlantic spotted dolphin could potentially result from the specified activity. Additionally, although NMFS does not expect it to occur, Eglin AFB has also requested authorization for Level A Harassment of up to three individuals of either common bottlenose dolphins or Atlantic spotted dolphins. Therefore, Eglin AFB has requested authorization to take individuals of two cetacean species by Level A and Level B harassment.

Eglin AFB's Maritime WSEP training activities may potentially impact marine mammals at or near the water surface in the absence of mitigation. Marine mammals could potentially be harassed, injured, or killed by exploding and non-exploding projectiles, and falling debris. However, based on analyses provided in Eglin AFB's 2016 application, Eglin AFB's previous applications and Authorizations Eglin AFB's 2015 Environmental Assessment (EA), and past monitoring reports for the authorized activities conducted in February and March 2016 and 2015, and for reasons discussed later in this document, we do not anticipate that Eglin AFB's Maritime WSEP activities would result in any serious injury or mortality to marine mammals.

For Eglin AFB, this would be the third such Authorization, if issued, following the Authorization issued effective from February 4, 2016, through February 3, 2017 (see 81 FR 7307; February 11, 2016). This IHA would be effective from February 4, 2017, through February 3, 2018, if issued. The monitoring report associated with the 2016 Authorization is available at *www.nmfs.noaa.gov/pr/permits/incidental/military.htm* and provides additional environmental information related to proposed issuance of this Authorization for public review and comment.

Description of the Specified Activity

Overview

Eglin AFB proposes to conduct live ordnance testing and training in the Gulf of Mexico as part of the Maritime WSEP operational testing missions. The Maritime WSEP test objectives are to evaluate maritime deployment data, evaluate tactics, techniques and procedures, and to determine the impact of techniques and procedures on combat Air Force training. The need to conduct this type of testing has developed in response to increasing threats at sea posed by operations conducted from small boats, which can carry a variety of weapons, can form in large or small numbers, and may be difficult to locate, track, and engage in the marine environment. Because of limited Air Force aircraft and munitions testing on engaging and defeating small boat threats, Eglin AFB proposes to employ live munitions against boat targets in the EGTTR in order to continue development of techniques and procedures to train Air Force strike aircraft to counter small maneuvering surface vessels.

Dates and Duration

Eglin AFB proposes to schedule up to eight Maritime WSEP training missions occurring during a one-week period in February 2017 and a one-week period in March 2017. The proposed missions would occur for up to four hours each day during the morning hours, with multiple live munitions being released per day. However, the proposed Authorization, would be effective to cover those activities anytime during the period from February 4, 2017 through February 3, 2018.

Specified Geographic Region

The specific planned mission location is approximately 17 miles (mi) (27.3 kilometers (km)) offshore from Santa Rosa Island, Florida, in nearshore waters of the continental shelf in the Gulf of Mexico. All activities would take place within the EGTTR, defined as the airspace over the Gulf of Mexico controlled by Eglin AFB, beginning at a point three nautical miles (nmi) (3.5 mi; 5.5 km) from shore. The EGTTR consists of subdivided blocks including Warning Area 151 (W–151) where the proposed activities would occur, specifically in sub-area W–151A (shown in Figure 1).

W–151: The inshore and offshore boundaries of W–151 are roughly parallel to the shoreline contour. The shoreward boundary is three nmi (3.5 mi; 5.5 km) from shore, while the seaward boundary extends approximately 85 to 100 nmi (97.8 mi; 157.4 km to 115 mi; 185.2 km) offshore, depending on the specific location. W–151 covers a surface area of approximately 10,247 square nmi (nmi^2) (13,570 square mi (mi^2); 35,145 square km (km^2)), and includes water depths ranging from about 20 to 700 meters (m) (65.6 to 2296.6 feet (ft)). This range of depth includes continental shelf and slope waters. Approximately half of W–151 lies over the shelf.

W–151A: W–151A extends approximately 60 nmi (69.0 mi; 111.1 km) offshore and has a surface area of 2,565 nmi^2 (3,396.8 mi^2; 8,797 km^2). Water depths range from about 30 to 350 m (98.4 to 1148.2 ft) and include continental shelf and slope zones. However, most of W–151A occurs over the continental shelf, in water depths less than 250 m (820.2 ft). Maritime WSEP training missions will occur in the shallower, northern inshore portion of the sub-area, in a water depth of about 35 meters (114.8 ft).

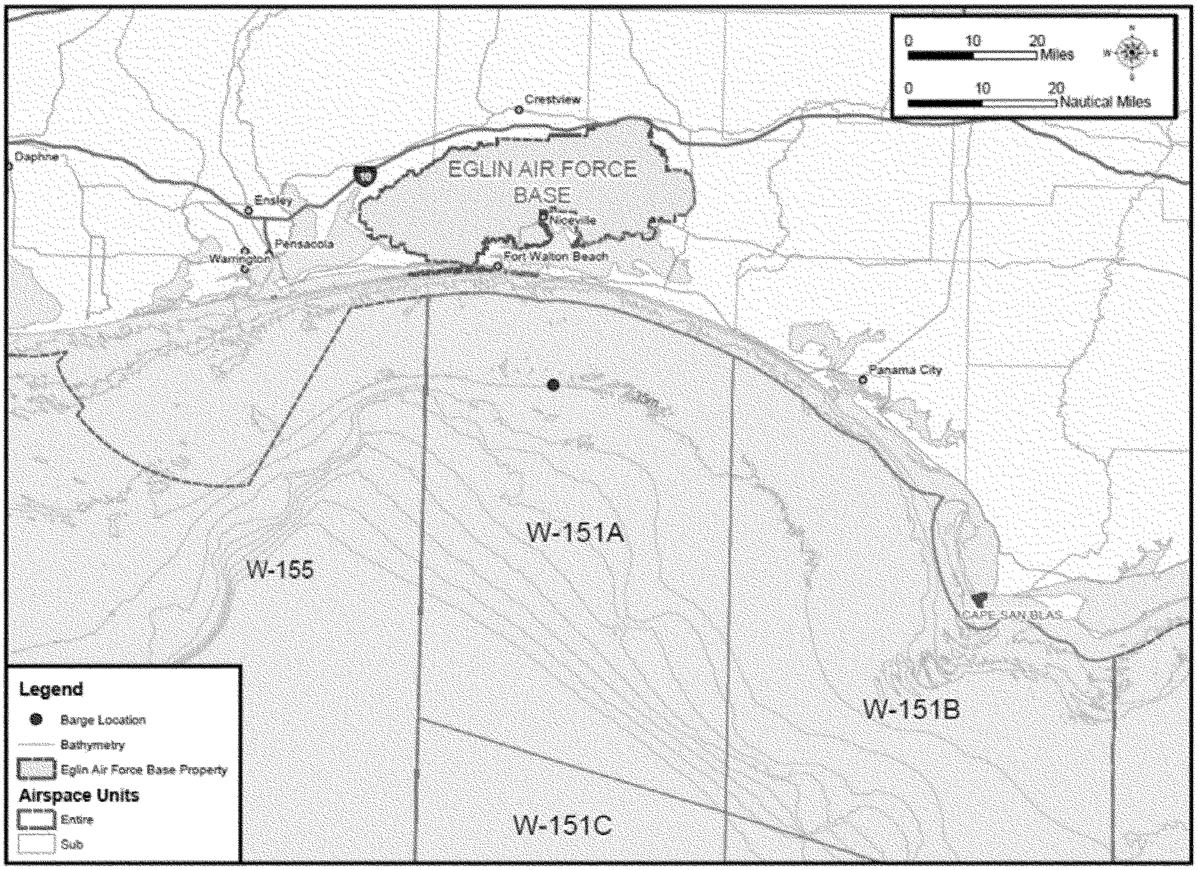

Figure 1 – Proposed Maritime WSEP operational testing location in block W-151A in the EGTRR.

Detailed Description of Activities

The Maritime WSEP training missions include the release of multiple types of inert and live munitions from fighter and bomber aircraft, unmanned aerial vehicles, and gunships against small, static, towed, and remotely-controlled boat targets. Munition types include bombs, missiles, rockets, and gunnery rounds (Table 1).

TABLE 1—LIVE MUNITIONS AND AIRCRAFT

Munitions	Aircraft (not associated with specific munitions)
GBU–10/–24/–31	F–16C fighter aircraft.
GBU–49	F–16C+ fighter aircraft.
JASSM	F–15E fighter aircraft.
GBU–12 (PWII)/–54 (LJDAM)/–38/–32 (JDAM)	A–10 fighter aircraft.
AGM–65 (Maverick)	B–1B bomber aircraft.
CBU–105 (WCMD)	B–52H bomber aircraft.
GBU–39 (Small Diameter Bomb)	MQ–1/9 unmanned aerial vehicle.
AGM–114 (Hellfire)	AC–130 gunship.
AGM–176 (Griffin).	
2.75 Rockets/AGR–20A/B.	
AIM–9X.	
PGU–12/B high explosive incendiary 30 mm rounds.	

Key: AGM = air-to-ground missile; CBU = Cluster Bomb Unit; GBU = Guided Bomb Unit; LJDAM = Laser Joint Direct Attack Munition; Laser SDB = Laser Small Diameter Bomb; mm = millimeters; PGU = Projectile Gun Unit; WCMD = wind corrected munition dispenser.

The proposed Maritime WSEP training activities involve detonations above the water, near the water surface, and under water within the EGTTR. However, because the tests will focus on weapons/target interaction, Eglin AFB will not specify a particular aircraft for a given test as long as it meets the delivery parameters.

Eglin AFB would deploy the munitions against static, towed, and remotely-controlled boat targets within the W–151A. Eglin AFB would operate the remote-controlled boats from an instrumentation barge (*i.e.,* the Gulf Range Armament Test Vessel; GRATV) anchored on site within the test area. The GRATV would provide a platform for video cameras and weapons-tracking equipment.

Table 2 lists the number, height, or depth of detonation, explosive material, and net explosive weight (NEW) in pounds (lbs) of each munition proposed for use during the Maritime WSEP activities.

TABLE 2—MARITIME WSEP MUNITIONS PROPOSED FOR USE IN THE W–151A TEST AREA

Type of munition	Total number of live munitions	Detonation type	Net explosive weight per munition
GBU–10/–24/–31	2	Subsurface (10-ft depth)	945 lbs.
GBU–49	4	Surface	500 lbs.
JASSM	4	Surface	255 lbs.
GBU–12 (PWII)/–54 (LJDAM)/–38/–32 (JDAM)	6	Subsurface (10-ft depth)	192 lbs.
AGM–65 (Maverick)	8	Surface	86 lbs.
CBU–105 (WCMD)	4	Airburst	83 lbs.
GBU–39 (Small Diameter Bomb)	4	Surface	37 lbs.
AGM–114 (Hellfire)	20	Subsurface (10-ft depth)	20 lbs.
AGM–176 (Griffin)	10	Surface	13 lbs.
2.75 Rockets/AGR–20A/B	100	Surface	12 lbs.
AIM–9X	1	Surface	7.9 lbs.
PGU–12/B high explosive incendiary 30 mm rounds	1,000	Surface	0.1 lbs.

Key: AGL = above ground level; AGM = air-to-ground missile; CBU = Cluster Bomb Unit; GBU = Guided Bomb Unit; JDAM = Joint Direct Attack Munition; LJDAM = Laser Joint Direct Attack Munition; mm = millimeters; msec = millisecond; lbs = pounds; PGU = Projectile Gun Unit; HEI = high explosive incendiary.

At least two ordnance delivery aircraft will participate in each live weapons release training mission, which lasts approximately four hours. Before delivering the ordnance, mission aircraft would make a dry run over the target area to ensure that it is clear of commercial and recreational boats. Jets will fly at a minimum air speed of 300 knots (approximately 345 miles per hour, depending on atmospheric conditions) and at a minimum altitude of 305 m (1,000 ft). Due to the limited flyover duration and potentially high speed and altitude, the pilots would not participate in visual surveys for protected species. Eglin AFB's 2016 and 2015 Authorization renewal request, 2014 application for the same activities, and 2015 EA and Finding of No Significant Impact (FONSI) contain additional detailed information on the Maritime WSEP training activities and are all available online (*http://www.nmfs.noaa.gov/pr/permits/incidental/military.htm#af_eglinwsep2016*).

Description of Marine Mammals in the Area of the Specified Activity

Table 3 lists marine mammal species with potential or confirmed occurrence in the proposed activity area during the project timeframe and summarizes key information regarding stock status and abundance. Please see NMFS' 2015 and 2014 Stock Assessment Reports (SAR), available at *www.nmfs.noaa.gov/pr/sars* and Garrison *et al.,* 2008; Navy, 2007; Davis *et al.,* 2000 for more detailed accounts of these stocks' status and abundance.

TABLE 3—MARINE MAMMALS THAT MAY OCCUR IN THE PROPOSED ACTIVITY AREA

Species	Stock name	Regulatory status [1] [2]	Estimated abundance	Relative occurrence in W–151
Common bottlenose dolphin	Choctawatchee Bay	MMPA—S ESA—NL	179 CV = 0.04 [3]	Uncommon.
	Pensacola/East Bay	MMPA—S ESA—NL	33 CV = 0.80 [4]	Uncommon.
	St. Andrew Bay	MMPA—S ESA—NL	124 CV = 0.57 [4]	Uncommon.
	Gulf of Mexico Northern Coastal	MMPA—S ESA—NL	7,185 CV = 0.21 [3]	Common.
	Northern Gulf of Mexico Continental Shelf	MMPA—NC ESA—NL	51,192 CV = 0.10 [3]	Uncommon.
	Northern Gulf of Mexico Oceanic	MMPA—NC ESA—NL	5,806 CV = 0.39 [4]	Uncommon.
Atlantic spotted dolphin	Northern Gulf of Mexico	MMPA—NC ESA—NL	37,611 [4] CV = 0.28	Common.

[1] MMPA: D = Depleted, S = Strategic, NC = Not Classified.
[2] ESA: EN = Endangered, T = Threatened, DL = Delisted, NL = Not listed.
[3] NMFS Draft 2015 SAR (Waring *et al.,* 2015).
[4] NMFS 2014 SAR (Waring *et al.,* 2014).

An additional 19 cetacean species could occur within the northeastern Gulf of Mexico, mainly occurring at or beyond the shelf break (*i.e.,* water depth of approximately 200 m (656.2 ft)) located beyond the W–151A test area. NMFS and Eglin AFB consider these 19 species to be rare or extralimital within the W–151A test location area. These species are the Bryde's whale (*Balaenoptera edeni*), sperm whale (*Physeter macrocephalus*), dwarf sperm whale (*Kogia sima*), pygmy sperm whale (*K. breviceps*), pantropical spotted dolphin (*Stenella attenuata*), Clymene dolphin (*S. clymene*), spinner dolphin (*S. longirostris*), striped dolphin (*S. coeruleoalba*), Blainville's beaked whale (*Mesoplodon densirostris*), Gervais' beaked whale (*M. europaeus*), Cuvier's beaked whale (*Ziphius cavirostris*), killer whale (*Orcinus orca*), false killer whale (*Pseudorca crassidens*), pygmy killer whale (*Feresa attenuata*), Risso's dolphin (*Grampus griseus*), Fraser's dolphin (*Lagenodelphis hosei*), melon-headed whale (*Peponocephala electra*), rough-toothed dolphin (*Steno bredanensis*), and short-finned pilot whale (*Globicephala macrorhynchus*).

Of these species, only the sperm whale is listed as endangered under the Endangered Species Act (ESA) and as depleted throughout its range under the MMPA. Sperm whale occurrence within W–151A is unlikely because almost all reported sightings have occurred in water depths greater than 200 m (656.2 ft).

Because these species are unlikely to occur within the W–151A area, Eglin AFB has not requested and we are not proposing to authorize take for them. Thus, we do not consider these species further in this notice.

We have reviewed Eglin AFB's species descriptions, including life history information, distribution, regional distribution, diving behavior, and acoustics and hearing, for accuracy and completeness. That information is contained in sections 3 and 4 of Eglin AFB's 2016 Authorization application and to Chapter 3 in Eglin AFB's EA rather than reprinting the information here.

Other Marine Mammals in the Proposed Action Area

The endangered West Indian manatee (*Trichechus manatus*) rarely occurs in the area (USAF 2014). The U.S. Fish and Wildlife Service has jurisdiction over the manatee; therefore, we would not include a proposed Authorization to harass manatees and do not discuss this species further in this notice.

Potential Effects of the Specified Activity on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components (*e.g.,* exposure to impulsive noise and pressure waves generated by live ordnance detonation at or near the surface of the water) of the specified activity, including mitigation may impact marine mammals and their habitat. The ''Estimated Take by Incidental Harassment'' section later in this document will include a quantitative analysis of the number of individuals that we expect Eglin AFB to take during this activity. The ''Negligible Impact Analysis'' section will include the analysis of how this specific activity would impact marine mammals. We will consider the content of the following sections: ''Estimated Take by Incidental Harassment'' and ''Proposed Mitigation'' to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals—and from that consideration—the likely impacts of this activity on the affected marine mammal populations or stocks.

In the following discussion, we provide general background information on sound and marine mammal hearing before considering potential effects to marine mammals from sound produced by underwater detonations.

Brief Background on Sound and WSEP Sound Types

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in hertz (Hz) or cycles per second. Wavelength is the distance between two peaks of a sound wave; lower frequency sounds have longer wavelengths than higher frequency sounds and attenuate (decrease) more rapidly in shallower water. Amplitude is the height of the sound pressure wave or the ''loudness'' of a sound and is typically measured using the decibel (dB) scale. A dB is the ratio between a measured pressure (with sound) and a reference pressure (sound at a constant pressure, established by scientific standards). It is a logarithmic unit that accounts for large variations in amplitude; therefore, relatively small changes in dB ratings correspond to large changes in sound pressure. When referring to sound pressure levels (SPLs; the sound force per unit area), sound is referenced in the context of underwater sound pressure to 1 microPascal (μPa). One pascal is the pressure resulting from a force of one newton exerted over an area of one square meter. The source level (SL) represents the sound level at a distance of 1 m from the source (referenced to 1 μPa). The received level is the sound level at the listener's position. Note that we reference all underwater sound levels in this document to a pressure of 1 μPa.

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Acousticians calculate rms by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick 1983). Rms accounts for both positive and negative values; squaring the pressures makes all values positive so that one can account for the values in the summation of pressure levels (Hastings and Popper 2005). Researchers often use this measurement in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

When underwater objects vibrate, or activity occurs, sound-pressure waves are created that alternately compress and decompress the water as the sound wave travels. These underwater sound waves radiate in all directions away from the source similar to ripples on the surface of a pond except in cases where the sound is directional. Aquatic life and underwater receptors such as hydrophones detect the changes in pressure associated with the compressions and decompressions of underwater sound waves as underwater sound or noise. Even in the absence of sound from the specified activity, the underwater environment has noise, or ambient sound, which is the environmental background sound levels lacking a single source or point (Richardson *et. al.,* 1995). The sound level of a region is defined by the total acoustic energy being generated by known and unknown sources. These sources can be physical (*e.g.,* waves, earthquakes, ice, or atmospheric sound); biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates); and anthropogenic (*e.g.,* vessels, dredging, aircraft, or construction).

The sum of the various natural and anthropogenic sound sources at any given location and time comprising the ambient, or background, sound depends on the source levels (as determined by weather conditions and levels of biological and anthropogenic activities) and the ability of sounds to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et. al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

Sounds fall into one of two general sound types: Impulsive (defined in the following paragraphs) and non-pulsed. The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward, 1997 in Southall *et al.,* 2007). Please see Southall *et al.,* (2007) for an in-depth discussion of these concepts. The sounds produced by the proposed WSEP activities are impulsive. Impulsive sound sources (*e.g.,* explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI, 1986; Harris, 1998; NIOSH, 1998; ISO, 2003; ANSI, 2005) and occur either as isolated events or repeated in some succession. These sounds have a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features.

Marine Mammal Hearing

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Current data indicate that not all marine mammal species have equal hearing capabilities (Richardson *et al.,* 1995; Southall *et al.,* 1997; Wartzok and Ketten 1999; Au and Hastings 2008).

Animals are less sensitive to sounds at the outer edges of their functional hearing range and are more sensitive to a range of frequencies within the middle of their functional hearing range. For mid-frequency cetaceans, such the common bottlenose dolphin and the Atlantic spotted dolphin (the two marine mammal species with expected occurrence in the EGTTR WSEP mission area), functional hearing estimates occur between approximately 150 Hz and 160 kHz with best hearing estimated to occur between approximately 10 to less than 100 kHz (Finneran *et al.,* 2005 and 2009; Natchtigall *et al.,* 2005 and 2008; Yuen *et al.,* 2005; Popov *et al.,* 2010 and 2011; and Schlundt *et al.,* 2011).

On August 4, 2016, NMFS released its Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Technical Guidance)(NMFS 2016; 81 FR 51694). This new guidance established new thresholds for predicting onset of temporary (TTS) and permanent (PTS) threshold shifts for impulsive (*e.g.,* explosives and impact pile drivers) and non-impulsive (*e.g.,* vibratory pile drivers) sound sources. These acoustic thresholds are presented using dual metrics of cumulative sound exposure level (SEL_{cum}) and peak sound level (PK) for impulsive sounds and SEL_{cum} for non-impulsive sounds. Eglin AFB used the new acoustic Technical Guidance to evaluate potential effects to marine mammals (more detailed information on PTS and TTS is provided below).

Common Bottlenose Dolphin Vocalization and Hearing

Bottlenose dolphins can typically hear within a broad frequency range of 0.04 to 160 kHz (Au 1993; Turl 1993). Electrophysiological experiments suggest that the bottlenose dolphin brain has a dual analysis system: One specialized for ultrasonic clicks and another for lower-frequency sounds, such as whistles (Ridgway 2000). Scientists have reported a range of highest sensitivity between 25 and 70 kHz, with peaks in sensitivity at 25 and 50 kHz (Nachtigall *et al.,* 2000). Research on the same individuals indicates that auditory thresholds obtained by electrophysiological methods correlate well with those obtained in behavior studies, except at lower (10 kHz) and higher (80 and 100 kHz) frequencies (Finneran and Houser 2006).

Sounds emitted by common bottlenose dolphins fall into two broad categories: Pulsed sounds (including clicks and burst-pulses) and narrow-band continuous sounds (whistles), which usually are frequency modulated. Clicks have a dominant frequency range of 110 to 130 kHz and a source level of 218 to 228 dB re: 1 μPa (peak-to-peak) (Au 1993) and 3.4 to 14.5 kHz at 125 to 173 dB re 1 μPa (peak-to-peak) (Ketten 1998). Whistles are primarily associated with communication and can serve to identify specific individuals (*i.e.,* signature whistles) (Caldwell and Caldwell 1965; Janik *et al.,* 2006). Cook *et al.* (2004) classified up to 52 percent of whistles produced by bottlenose dolphin groups with mother-calf pairs as signature whistles. Sound production is also influenced by group type (single or multiple individuals), habitat, and behavior (Nowacek 2005). Bray calls (low-frequency vocalizations; majority of energy below 4 kHz), for example, are used when capturing fish, specifically sea trout (*Salmo trutta*) and Atlantic salmon (*Salmo salar*), in some regions (*i.e.,* Moray Firth, Scotland) (Janik 2000). Additionally, whistle production has been observed to increase while feeding (Acevedo-Gutiérrez and Stienessen 2004; Cook *et al.,* 2004).

Atlantic Spotted Dolphin Vocalization and Hearing

Researchers have recorded a variety of sounds including whistles, echolocation clicks, squawks, barks, growls, and chirps for the Atlantic spotted dolphin. Whistles have dominant frequencies below 20 kHz (range: 7.1 to 14.5 kHz) but multiple harmonics extend above 100 kHz, while burst pulses consist of frequencies above 20 kHz (dominant frequency of approximately 40 kHz) (Lammers *et al.,* 2003). Other sounds, such as squawks, barks, growls, and chirps, typically range in frequency from 0.1 to 8 kHz (Thomson and Richardson 1995). Recorded echolocation clicks had two dominant frequency ranges at 40 to 50 kHz and 110 to 130 kHz, depending on source level (*i.e.,* lower source levels typically correspond to lower frequencies and higher frequencies to higher source levels (Au and Herzing 2003). Echolocation click source levels as high as 210 dB re 1 μPa-m peak-to-peak have been recorded (Au and Herzing 2003). Spotted dolphins in the Bahamas were frequently recorded during agonistic/aggressive interactions with bottlenose dolphins (and their own species) to produce squawks (0.2 to 12 kHz broad band burst pulses; males and females), screams (5.8 to 9.4 kHz whistles; males only), barks (0.2 to 20 kHz burst pulses; males only), and synchronized squawks (0.1–15 kHz burst pulses; males only in a coordinated group) (Herzing 1996). The hearing ability for the Atlantic spotted dolphin is unknown; however, odontocetes are generally adapted to hear high-frequencies (Ketten 1997).

The Maritime WSEP training exercises proposed for the incidental take of marine mammals have the potential to take marine mammals by exposing them to impulsive noise and pressure waves generated by live ordnance detonation at or near the surface of the water. Exposure to energy, pressure, or direct strike by ordnance has the potential to result in non-lethal injury (Level A harassment), disturbance (Level B harassment), serious injury, and/or mortality. In addition, NMFS also considered the potential for harassment from vessel and aircraft operations.

Acoustic Effects, Underwater Detonations

Underwater explosive detonations send a shock wave and sound energy through the water and can release gaseous by-products, create an oscillating bubble, or cause a plume of water to shoot up from the water surface. The shock wave and accompanying noise are of most concern to marine animals. Depending on the intensity of the shock wave and size, location, and depth of the animal, an animal can be injured, killed, suffer non-lethal physical effects, experience hearing related effects with or without behavioral responses, or exhibit temporary behavioral responses or tolerance from hearing the blast sound. Generally, exposures to higher levels of impulse and pressure levels would result in greater impacts to an individual animal.

The effects of underwater detonations on marine mammals are dependent on several factors, including the size, type, and depth of the animal; the depth, intensity, and duration of the sound; the depth of the water column; the substrate of the habitat; the standoff distance between activities and the animal; and the sound propagation properties of the environment. Thus, we expect impacts to marine mammals from MaritimeWSEP activities to result primarily from acoustic pathways. As such, the degree of the effect relates to the received level and duration of the sound exposure, as influenced by the distance between the animal and the source. The further away from the source, the less intense the exposure should be.

The potential effects of underwater detonations from the proposed Maritime WSEP training activities may include one or more of the following: Temporary or permanent hearing impairment; non-auditory physical or physiological effects; behavioral disturbance; and masking (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007). However, the effects of noise on marine mammals are highly variable, often depending on species and contextual factors (based on Richardson *et al.,* 1995).

In the absence of mitigation, impacts to marine species could result from physiological and behavioral responses to both the type and strength of the acoustic signature (Viada *et al.,* 2008). The type and severity of behavioral impacts are more difficult to define due to limited studies addressing the behavioral effects of impulsive sounds on marine mammals. Potential effects from impulsive sound sources can range in severity from effects such as behavioral disturbance or tactile perception to physical discomfort, slight injury of the internal organs and the auditory system, or mortality (Yelverton *et al.,* 1973).

Hearing Impairment and Other Physical Effects

Marine mammals exposed to high intensity sound repeatedly or for prolonged periods can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Kastak *et al.,* 1999; Schlundt *et al.,* 2000; Finneran *et al.,* 2002, 2005). TS can be permanent (PTS), in which case the loss of hearing sensitivity is not recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall *et al.,* 2007). Marine mammals depend on acoustic cues for vital biological functions, (*e.g.,* orientation, communication, finding prey, avoiding predators) thus, TTS may result in reduced fitness in survival and reproduction. However, this depends on the frequency and duration of TTS, as well as the biological context in which it occurs. TTS of limited duration, occurring in a frequency range that does not coincide with that used for recognition of important acoustic cues, would have little to no effect on an animal's fitness. Repeated sound exposure that leads to TTS could cause PTS. PTS constitutes injury, but TTS does not (Southall *et al.,* 2007). The following subsections provide a summary on the possibilities of TTS, PTS, and non-auditory physical effects.

Temporary Threshold Shift

TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter 1985). While experiencing TTS, the hearing threshold rises, and a sound must be stronger in order to be heard. In terrestrial mammals, TTS can last from minutes or hours to days (in cases of strong TTS). For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the sound ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals. According to Finneran and Jenkins (2012) the TTS onset thresholds for mid-frequency cetaceans are based on TTS data from a beluga whale exposed to an underwater impulse produced from a seismic watergun. TTS thresholds also use a dual criterion, and in a given analysis the more conservative of the two criteria is applied. The TTS thresholds for bottlenose and Atlantic spotted dolphins consist of the SEL of an underwater blast weighted to the hearing sensitivity of mid-frequency cetaceans and a peak SPL measure of the same. The dual thresholds for TTS in mid-frequency cetaceans are:

• SEP (mid-frequency weighted) of 170 dB re 1 $\mu Pa^2 s$

• Peak SPL (unweighted) of 224 dB re 1 μPa

Permanent Threshold Shift

When PTS occurs, there is physical damage to the sound receptors in the ear. In severe cases, there can be total or partial deafness, while in other cases the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter 1985). There is no specific evidence that exposure to pulses of sound can cause PTS in any marine mammal. However, given the possibility that mammals close to a sound source might incur TTS, there has been further speculation about the possibility that some individuals might incur PTS. Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage, but repeated or (in some cases) single exposures to a level well above that causing TTS onset might elicit PTS.

Relationships between TTS and PTS thresholds have not been studied in marine mammals, but they are assumed to be similar to those in humans and other terrestrial mammals. PTS might occur at a received sound level at least several dB above that inducing mild TTS if the animal were exposed to strong sound pulses with rapid rise time. There is no empirical data for onset of PTS in any marine mammal for ethical reasons and researchers must extrapolate PTS-onset based on hearing loss growth rates (*i.e.,* rate of how quickly threshold shifts grow in relation to increases in decibel level; expressed in dB of TTS/dB of noise) from limited marine mammal TTS studies and more numerous terrestrial mammal TTS/PTS experiments. Typically, the magnitude of a threshold shift increases with increasing duration or level of exposure, until it becomes asymptotic (growth rate begins to level or the upper limit of TTS; Mills *et al.,* 1979; Clark *et al.,* 1987; Laroche *et al.,* 1989; Yost 2007). Based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds is at least six dB higher than the TTS threshold on a peak-pressure basis and probably greater than six dB (Southall *et al.,* 2007). Jenkins and Finneran (2012) define PTS thresholds differently for three groups of cetaceans based on their hearing sensitivity: Low-frequency, mid-frequency; and high frequency. Bottlenose and Atlantic spotted dolphins (the subject of the Maritime WSEP acoustic impact analysis) both fall within the mid-frequency hearing category. The PTS thresholds use a dual criterion, one based on SEL and one based on SPL of an underwater blast. For a given analysis, the more conservative of the two is applied to afford the most protection to marine mammals. The mid-frequency cetacean criteria for PTS are:

- SEL(mid-frequency weighted) of 185 dB re 1 $\mu Pa^2 s$.
- Peak SPL (unweighted) of 230 dB re 1 μPa.

Non-Auditory Physiological Effects

Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to strong underwater sound include stress and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007). While Eglin AFB's activities involve the use of explosives that are associated with these types of effects, severe injury to marine mammals is not anticipated from these activities.

Adverse Stress Responses

An acoustic source is considered a potential stressor if, by its action on the animal, via auditory or non-auditory means, it may produce a stress response in the animal. Here, the stress response will refer to an increase in energetic expenditure that results from exposure to the stressor and which is predominantly characterized by either the stimulation of the sympathetic nervous system (SNS) or the hypothalamic-pituitary-adrenal (HPA) axis (Reeder and Kramer 2005). The SNS response to a stressor is immediate and acute and occurs by the release of the catecholamine neurohormones norepinephrine and epinephrine (*i.e.,* adrenaline). These hormones produce elevations in the heart and respiration rate, increase awareness, and increase the availability of glucose and lipids for energy. The HPA response results in increases in the secretion of the glucocorticoid steroid hormones, predominantly cortisol in mammals. The presence and magnitude of a stress response in an animal depends on a number of factors. These include the animal's life history stage (*e.g.,* neonate, juvenile, adult), the environmental conditions, reproductive or developmental state, and experience with the stressor. Not only will these factors be subject to individual variation, but they will also vary within an individual over time. The stress response may or may not result in a behavioral change, depending on the characteristics of the exposed animal. However, provided that a stress response occurs, we assume that some contribution is made to the animal's allostatic load. One can assume that any immediate effect of exposure that produces an injury also produce a stress response and contribute to the allostatic load. Allostasis is the ability of an animal to maintain stability through change by adjusting its physiology in response to both predictable and unpredictable events (McEwen and Wingfield 2003). If the animal does not perceive the sound, the acoustic source would not produce tissue effects and does not produce a stress response by any other means. Thus, we expect that the exposure does not contribute to the allostatic load.

Serious Injury/Mortality

Elgin AFB proposes to use several types of explosive sources during its training exercises. Proposed detonations could be either in air, at the water surface, or underwater, depending on the mission and type of munition. Airburst detonations have little transfer of energy underwater, but surface and underwater detonations are of most concern regarding potential effects to marine mammals. The underwater explosions from these weapons would send a shock wave and blast noise through the water, release gaseous by-products, create an oscillating bubble, and cause a plume of water to shoot up from the water surface. The shock wave and blast noise are of most concern to marine animals. In general, potential impacts from explosive detonations can range from brief effects (such as short term behavioral disturbance), tactile perception, physical discomfort, slight injury of the internal organs, and death of the animal (Yelverton *et al.,* 1973; O'Keeffe and Young 1984; DoN 2001). The effects of an underwater explosion on a marine mammal depend on many factors, including: the size, type, and depth of both the animal and the explosive charge; the depth of the water column; and the standoff distance between the charge and the animal, as well as the sound propagation properties of the environment. Physical damage of tissues resulting from a shock wave (from an explosive detonation) constitutes an injury. Blast effects are greatest at the gas-liquid interface (Landsberg 2000) and gas containing organs, particularly the lungs and gastrointestinal tract, are especially susceptible to damage (Goertner 1982; Hill 1978; Yelverton *et al.,* 1973). Nasal sacs, larynx, pharynx, trachea, and lungs may be damaged by compression/expansion caused by the oscillations of the blast gas bubble (Reidenberg and Laitman 2003). Severe damage (from the shock wave) to the ears can include tympanic membrane rupture, fracture of the ossicles, cochlear damage, hemorrhage, and cerebrospinal fluid leakage into the middle ear.

Non-lethal injury includes slight injury to internal organs and the auditory system, however, delayed lethality can be a result of individual or cumulative sublethal injuries (DoN, 2001). Immediate lethal injury would be a result of massive combined trauma to internal organs as a direct result of proximity to the point of detonation (DoN 2001).

Disturbance Reactions

Disturbance includes a variety of effects, including subtle changes in behavior, more conspicuous changes in activities, and displacement, or abandonment of habitat. Behavioral responses to sound are highly variable and context-specific and reactions, if any, depend on species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day, and many other factors (Richardson *et al.,* 1995; Wartzok *et al.,* 2003; Southall *et al.,* 2007). Behavioral reactions can vary among individuals as well as within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.,* 2012). Behavioral reactions can also vary depending on the characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, the number of sources, etc).

Tolerance

Studies on marine mammals' tolerance to sound in the natural environment are relatively rare. Richardson *et al.* (1995) defined tolerance as the occurrence of marine mammals in areas where they are exposed to human activities or manmade noise. In many cases, tolerance develops by the animal habituating to the stimulus (*i.e.,* the gradual waning of responses to a repeated or ongoing stimulus) (Richardson, *et al.,* 1995; Wartzok *et al.,* 2003), but because of ecological or physiological requirements, many marine animals may need to remain in areas where they are exposed to chronic stimuli (Richardson, *et al.,* 1995). Animals are most likely to habituate to sounds that are predictable and unvarying.

The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure. Behavioral state may affect the type of response as well. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; NRC, 2003; Wartzok *et al.,* 2003).

Numerous studies have shown that underwater sounds are often readily detectable by marine mammals in the water at distances of many kilometers. However, other studies have shown that marine mammals at distances more than a few kilometers away often show no apparent response to activities of various types (Miller *et al.,* 2005). This is often true even in cases when the sounds must be readily audible to the animals based on measured received levels and the hearing sensitivity of that mammal group. Although various baleen whales, toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to underwater sound from impulsive sources such as airguns, at other times, mammals of all three types have shown no overt reactions (*e.g.,* Malme *et al.,* 1986; Richardson *et al.,* 1995; Madsen and Mohl, 2000; Croll *et al.,* 2001; Jacobs and Terhune 2002; Madsen *et al.,* 2002; MacLean and Koski, 2005; Miller *et al.,* 2005; Bain and Williams 2006).

Controlled experiments with captive marine mammals showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.,* 1997; Finneran *et al.,* 2003). Observed responses of wild marine mammals to loud pulsed sound sources (typically seismic guns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; Thorson and Reyff, 2006; see also Gordon *et al.,* 2004; Wartzok *et al.,* 2003; Nowacek *et al.,* 2007).

Because the few available studies show wide variation in response to underwater sound, it is difficult to quantify exactly how sound from the Maritime WSEP operational testing would affect marine mammals. It is likely that the onset of underwater detonations could result in temporary, short term changes in an animal's typical behavior and/or avoidance of the affected area. These behavioral changes may include (Richardson *et al.,* 1995): Changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); or avoidance of areas where sound sources are located.

The biological significance of any of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor. However generally, one could expect the consequences of behavioral modification to be biologically significant if the change affects growth, survival, or reproduction. Significant behavioral modifications that could potentially lead to effects on growth, survival, or reproduction include:

- Drastic changes in diving/surfacing patterns (such as those thought to cause beaked whale stranding due to exposure to military mid-frequency tactical sonar);
- Habitat abandonment due to loss of desirable acoustic environment; and
- Cessation of feeding or social interaction.

The onset of behavioral disturbance from anthropogenic sound depends on both external factors (characteristics of sound sources and their paths) and the specific characteristics of the receiving animals (hearing, motivation, experience, demography) and is difficult to predict (Southall *et al.,* 2007). However, Finneran and Schlundt (2004) and Schlundt *et al.,* 2000 reported on observations of behavioral reactions in captive dolphins and belugas to pure tones (different type of noise than that produced from an underwater detonation). The behavioral impacts threshold for mid-frequency cetaceans exposed to multiple, successive detonations is 165 dB re 1 $\mu Pa^2 s$ SEL (mid-frequency weighted).

Auditory Masking

Natural and artificial sounds can disrupt behavior by masking, or interfering with, a marine mammal's ability to hear other sounds. Masking occurs when the receipt of a sound interferes with by another coincident sound at similar frequencies and at similar or higher levels (Clark *et al.,* 2009). Chronic exposure to excessive, though not high-intensity, sound could cause masking at particular frequencies for marine mammals, which utilize sound for vital biological functions. Masking can interfere with detection of acoustic signals such as communication calls, echolocation sounds, and environmental sounds important to marine mammals for other purposes such as navigation. Therefore, under certain circumstances, marine mammals whose acoustical sensors or environment are being severely masked could also be impaired from maximizing their performance fitness in survival and reproduction. If the coincident (masking) sound were man-made, it could be potentially harassing if it disrupted hearing-related behavior. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs during the sound exposure. Introduced underwater sound may, through masking, more specifically reduce the effective communication distance of a marine mammal species if the frequency of the source is close to that used as a signal by the marine mammal, and if the anthropogenic sound is present for a significant fraction of the time (Richardson *et al.,* 1995). Marine mammals are thought to be able to compensate for communication masking by adjusting their acoustic behavior through shifting call frequencies, increasing call volume, and increasing vocalization rates. For example in one study, blue whales increased call rates when exposed to noise from seismic surveys in the St. Lawrence Estuary (Di Iorio and Clark 2010). Other studies reported that some North Atlantic right whales exposed to high shipping noise increased call frequency (Parks *et al.,* 2007) and some humpback whales responded to low-frequency active sonar playbacks by increasing song length (Miller *et al.,* 2000). Additionally, beluga whales change their vocalizations in the presence of high background noise possibly to avoid masking calls (Au *et al.,* 1985; Lesage *et al.,* 1999; Scheifele *et al.,* 2005).

While it may occur temporarily, we do not expect auditory masking to result in detrimental impacts to an individual's or population's survival, fitness, or reproductive success. Dolphin movement is not restricted within the W–151A test area, allowing for movement out of the area to avoid masking impacts and the sound resulting from the underwater detonations is short in duration. Also, masking is typically of greater concern for those marine mammals that utilize low frequency communications, such as baleen whales and, as such, is not likely to occur for marine mammals in the W–151A test area.

Vessel and Aircraft Presence

The marine mammals most vulnerable to vessel strikes are slow-moving and/or spend extended periods of time at the surface in order to restore oxygen levels within their tissues after deep dives (*e.g.,* North Atlantic right whales (*Eubalaena glacialis*), fin whales (*Balaenoptera physalus*), and sperm whales). Smaller marine mammals such as common bottlenose and Atlantic spotted dolphins (the species anticipated to occur in the area of Eglin AFB's activities) are agile and move more quickly through the water, making them less susceptible to ship strikes. NMFS and Eglin AFB are not aware of any vessel strikes of common bottlenose and Atlantic spotted dolphins within in W–151 during training operations and both parties do not anticipate that Eglin AFB vessels engaged in the specified activity would strike any marine mammals.

Dolphins within the Gulf of Mexico are continually exposed to recreational, commercial, and military vessels. Behaviorally, marine mammals may or may not respond to the operation of vessels and associated noise. Responses to vessels vary widely among marine mammals in general, but also among different species of small cetaceans. Responses may include attraction to the vessel (Richardson *et al.,* 1995); altering travel patterns to avoid vessels (Constantine 2001; Nowacek *et al.,* 2001; Lusseau 2003, 2006); relocating to other areas (Allen and Read, 2000); cessation of feeding, resting, and social interaction (Baker *et al.,* 1983; Bauer and Herman 1986; Hall 1982; Krieger and Wing 1984; Lusseau 2003; Constantine *et al.,* 2004); abandoning feeding, resting, and nursing areas (Jurasz and Jurasz 1979; Dean *et al.,* 1985; Glockner-Ferrari and Ferrari 1985, 1990; Lusseau 2005; Norris *et al.,* 1985; Salden 1988; Forest 2001; Morton and Symonds 2002; Courbis 2004; Bejder 2006); stress (Romano *et al.,* 2004); and changes in acoustic behavior (Van Parijs and Corkeron 2001). However, in some studies marine mammals display no reaction to vessels (Watkins 1986; Nowacek *et al.,* 2003) and many odontocetes show considerable tolerance to vessel traffic (Richardson *et al.,* 1995). Dolphins may actually reduce the energetic cost of traveling by riding the bow or stern waves of vessels (Williams *et al.,* 1992; Richardson *et al.,* 1995).

Aircraft produce noise at frequencies that are well within the frequency range of cetacean hearing and also produce visual signals such as the aircraft itself and its shadow (Richardson *et al.,* 1995, Richardson and Wursig 1997). A major difference between aircraft noise and noise caused by other anthropogenic sources is that the sound is generated in the air, transmitted through the water surface and then propagates underwater to the receiver, diminishing the received levels significantly below what is heard above the water's surface. Sound transmission from air to water is greatest in a sound cone 26 degrees directly under the aircraft.

There are fewer reports of reactions of odontocetes to aircraft than those of pinnipeds. Responses to aircraft include diving, slapping the water with pectoral fins or tail fluke, or swimming away from the track of the aircraft (Richardson *et al.,* 1995). The nature and degree of the response, or the lack thereof, are dependent upon the nature of the flight (*e.g.,* type of aircraft, altitude, straight vs. circular flight pattern). Wursig *et al.* (1998) assessed the responses of cetaceans to aerial surveys in the north central and western Gulf of Mexico using a DeHavilland Twin Otter fixed-wing airplane. The plane flew at an altitude of 229 m (751.3 ft) at 204 km/hr (126.7 mph) and maintained a minimum of 305 m (1,000 ft) straight line distance from the cetaceans. Water depth was 100 to 1,000 m (328 to 3,281 ft). Bottlenose dolphins most commonly responded by diving (48 percent), while 14 percent responded by moving away. Other species (*e.g.,* beluga (*Delphinapterus leucas*) and sperm whales) show considerable variation in reactions to aircraft but diving or swimming away from the aircraft are the most common reactions to low flights (less than 500 m; 1,640 ft).

Direct Strike by Ordnance

Another potential risk to marine mammals is direct strike by ordnance, in which the ordnance physically hits an animal. While strike from an item falling through the water column is possible, the potential risk of a direct hit to an animal within the target area would be so low because objects sink slowly and most projectiles fired at targets usually hit those targets.

Anticipated Effects on Habitat

Detonations of live ordnance would result in temporary changes to the water environment. Munitions could hit the targets and not explode in the water. However, because the targets are located over the water, in water explosions could occur. An underwater explosion from these weapons could send a shock wave and blast noise through the water, release gaseous by-products, create an oscillating bubble, and cause a plume of water to shoot up from the water surface. However, these effects would be temporary and not expected to last more than a few seconds.

Similarly, Eglin AFB does not expect any long-term impacts with regard to hazardous constituents to occur. Eglin AFB considered the introduction of fuel, debris, ordnance, and chemical materials into the water column within its EA and determined the potential effects of each to be insignificant. We summarize Eglin AFB's analyses in the following paragraphs (for a complete discussion of potential effects, please refer to section 3.3 in Eglin AFB's EA).

Metals typically used to construct bombs, missiles, and gunnery rounds include copper, aluminum, steel, and lead, among others. Aluminum is also present in some explosive materials. These materials would settle to the seafloor after munitions detonate. Metal ions would slowly leach into the substrate and the water column, causing elevated concentrations in a small area around the munitions fragments. Some of the metals, such as aluminum, occur naturally in the ocean at varying concentrations and would not necessarily impact the substrate or water column. Other metals, such as lead, could cause toxicity in microbial communities in the substrate. However, such effects would be localized to a very small distance around munitions fragments and would not significantly affect the overall habitat quality of sediments in the northeastern Gulf of Mexico. In addition, metal fragments would corrode, degrade, and become encrusted over time.

Chemical materials include explosive byproducts and also fuel, oil, and other fluids associated with remotely controlled target boats. Explosive byproducts would be introduced into the water column through detonation of live munitions. Explosive materials would include 2,4,6-trinitrotoluene (TNT) and Research Department Formula X (RDX), among others. Various byproducts are produced during and immediately after detonation of TNT and RDX. During the very brief time that a detonation is in progress, intermediate products may include carbon ions, nitrogen ions, oxygen ions, water, hydrogen cyanide, carbon monoxide, nitrogen gas, nitrous oxide, cyanic acid, and carbon dioxide (Becker 1995). However, reactions quickly occur between the intermediates, and the final products consist mainly of water, carbon monoxide, carbon dioxide, and nitrogen gas, although small amounts of other compounds are typically produced as well.

Chemicals introduced into the water column would be quickly dispersed by waves, currents, and tidal action, and eventually become uniformly distributed. A portion of the carbon compounds such as carbon monoxide and carbon dioxide would likely become integrated into the carbonate system (alkalinity and pH buffering capacity of seawater). Some of the nitrogen and carbon compounds, including petroleum products, would be metabolized or assimilated by phytoplankton and bacteria. Most of the gas products that do not react with the water or become assimilated by organisms would be released into the atmosphere. Due to dilution, mixing, and transformation, none of these chemicals are expected to have significant impacts on the marine environment.

Explosive material that is not consumed in a detonation could sink to the substrate and bind to sediments. However, the quantity of such materials is expected to be inconsequential. When munitions function properly, nearly full combustion of the explosive materials will occur, and only extremely small amounts of raw material will remain. In addition, any remaining materials would be naturally degraded. TNT decomposes when exposed to sunlight (ultraviolet radiation), and is also degraded by microbial activity (Becker, 1995). Several types of microorganisms have been shown to metabolize TNT. Similarly, RDX decomposes by hydrolysis, ultraviolet radiation exposure, and biodegradation.

While we anticipate that the specified activity may result in marine mammals avoiding certain areas due to temporary ensonification, this impact to habitat and prey resources would be temporary and reversible. The main impact associated with the proposed activity would be temporarily elevated noise levels and the associated direct effects on marine mammals, previously discussed in this notice. Marine mammals are anticipated to temporarily vacate the area of live fire events. However, these events usually do not last more than 90 to 120 minutes at a time, and animals are anticipated to return to the activity area during periods of non-activity. Thus, based on the preceding discussion, we do not anticipate that the proposed activity would have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or their populations.

Proposed Mitigation

In order to issue an Authorization under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and the availability of such species or stock for taking for certain subsistence uses (where relevant).

The NDAA of 2004 amended the MMPA as it relates to military-readiness activities and the incidental take authorization process such that ''least practicable adverse impact'' shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

NMFS and Eglin AFB have worked to identify potential practicable and effective mitigation measures, which include a careful balancing of the likely benefit of any particular measure to the marine mammals with the likely effect of that measure on personnel safety, practicality of implementation, and impact on the ''military-readiness activity.'' We refer the reader to Section 11 of Eglin AFB's application for more detailed information on the proposed mitigation measures which include the following:

Vessel-Based Monitoring

Eglin AFB would station a large number of range clearing boats (approximately 30 to 35) around the test site to prevent non-participating vessels from entering the human safety zone. Based on the composite footprint, range clearing boats will be located approximately 15.28 km (9.5 mi) from the detonation point (see Figure 11–1 in Eglin AFB's application). However, the actual distance will vary based on the size of the munition being deployed.

Trained protected species observers (PSO) would be aboard five of these boats and will conduct protected species surveys before and after each test. The protected species survey vessels will be dedicated solely to observing for marine species during the pre-mission surveys while the remaining safety boats clear the area of non-authorized vessels. The protected species survey vessels will begin surveying the area at sunrise. The area to be surveyed will encompass the zone of influence (ZOI), which is discussed in more detail below.

Because of human safety issues, observers will be required to leave the test area at least 30 minutes in advance of live weapon deployment and move to a position on the safety zone periphery, approximately 15.28 km (9.5 mi) from the detonation point. Observers will continue to scan for marine mammals from the periphery. Animals that may enter the area after Eglin AFB has completed the pre-mission surveys and prior to detonation would not reach the predicted smaller slight lung injury and/or mortality zones.

Determination of the Zone of Influence

Historically, Eglin AFB has conservatively used the number of live weapons deployed to estimate take of marine mammals. This method assumed a fresh population of marine mammals for each detonation to calculate the number taken. However, NMFS requested mission-day scenarios in order to be able to model accumulated energy. Therefore, each mission-day scenario is considered a separate event to model takes as opposed to modeling for each live detonation. Eglin developed three mission-day categories (Category A, which represents levels of activities considered a worst-case scenario consisting of ordnances with large explosive weights as well as surface and subsurface detonations; Category B, which represents a 'typical' mission day based on levels of weapons releases during past Maritime WSEP activities; and Category C, which represents munitions with smaller explosive weights and surface detonations only), and estimated the number of days each category would be executed during the 2017 Maritime WSEP missions (See Table 1–3 in Eglin AFB's application for the Mission Day Scenarios). Table 4 below provides the categorization of mission days (Table 1–3 in Eglin AFB's application), and Table 5 provides the maximum range of effects for all criteria and thresholds for mission-day Categories A, B, and C. These ranges were calculated based on explosive acoustic characteristics, sound propagation, and sound transmission loss in the study area (which incorporates water depth, sediment type, wind speed, bathymetry, and temperature/salinity profiles). Refer to Appendix A of Eglin AFB's application for a complete description of the acoustic modeling methodology used in the analysis.

TABLE 4—LIVE MUNITIONS CATEGORIZED AS REPRESENTATIVE MISSION DAYS

Mission category	Munition	NEW (lbs)	Detonation type	Munitions/day	Mission days/year	Total munitions/year
A	GBU–10/–24/–31	945	Subsurface (10′ depth)	1	2	2

TABLE 4—LIVE MUNITIONS CATEGORIZED AS REPRESENTATIVE MISSION DAYS—Continued

Mission category	Munition	NEW (lbs)	Detonation type	Munitions/ day	Mission days/year	Total munitions/ year
	GBU–49	500	Surface	2		4
	JASSM	255	Surface	2		4
	GBU–12 (PWII)/-54 (LJDAM)/-38/-32 (JDAM)	192	Subsurface (10′ depth)	3		6
B	AGM–65 (Maverick)	86	Surface	2	4	8
	CBU–105 (WCMD)	83	Airburst	1		4
	GBU–39 (Small Diameter Bomb)	37	Surface	1		4
	AGM–114 (Hellfire)	20	Subsurface (10′ depth)	5		20
C	AGM–176 (Griffin)	13	Surface	5	2	10
	2.75 rockets or AGR–20A/B	12	Surface	50		100
	AIM–9X	7.9	Surface	1		2
	PGU–12 HEI 30 mm	0.1	Surface	500		1,000

TABLE 5—CRITERIA AND THRESHOLD RADII (IN METERS) FOR MARITIME WSEP MISSION-DAY CATEGORIES

Mission-day category	Level A harassment	Level B harassment	
	PTS	ITS	Behavioral
	185 dB SEL		170 dB SEP
A	945 m	4,666 m	7,479 m.
B	248 m	2,225 m	3,959 m.
C	286 m	1,128 m	1,863 m.

Mortality and slight lung injury threshold ranges would extend from 47 to 216 m and 84 to 595 m, respectively, depending on the mission-day category. These ranges would fall within the Level A harassment ranges. Based on the planned activities on a given mission day, and the ranges presented in Table 4, Eglin AFB would ensure that the area equating to the Level A harassment threshold range is free of protected species. By clearing the Level A harassment threshold range of protected species, animals that may enter the area after the completed pre-mission surveys but prior to detonation would not reach the smaller slight lung injury or mortality zones. Because of human safety issues, Eglin AFB would require observers to leave the test area at least 30 minutes in advance of live weapon deployment and move to a position on the safety zone periphery, approximately 15 km (9.5 mi) from the detonation point. Observers would continue to scan for marine mammals from the periphery, but effectiveness would be limited as the boat would remain at a designated station.

Video Monitoring: In addition to vessel-based monitoring, Eglin AFB would position three high-definition video cameras on the GRATV anchored on-site, as described earlier, to allow for real-time monitoring for the duration of the mission. The camera configuration and actual number of cameras used would depend on specific mission requirements. In addition to monitoring the area for mission objective issues, the camera(s) would also monitor for the presence of protected species. A trained marine species observer from Eglin Natural Resources would be located in Eglin AFB's Central Control Facility, along with mission personnel, to view the video feed before and during test activities. The distance to which objects can be detected at the water surface by use of the cameras is considered generally comparable to that of the human eye.

The GRATV will be located about 183 m (600 ft) from the target. The larger mortality threshold ranges correspond to the modified Goertner model adjusted for the weight of an Atlantic spotted dolphin calf, and extend from 0 to 216 m (0 to 709 ft) from the target, depending on the ordnance, and the Level A ranges for both common bottlenose and Atlantic spotted dolphins extend up to 945 m (3,100 ft) from the target, depending on the ordnance and harassment criterion. Given these distances, observers could reasonably be expected to view a substantial portion of the mortality zone in front of the camera, although a small portion would be behind or to the side of the camera view. Based on previous monitoring reports for this activity, the pre-training surveys for delphinids and other protected species within the mission area are effective. Observers can view some portion of the Level A harassment zone, although the view window would be less than that of the mortality zone (a large percentage would be behind or to the side of the camera view).

In addition to the two types of visual monitoring discussed earlier in this section, Eglin AFB personnel are present within the mission area (on boats and the GRATV) on each day of testing well in advance of weapon deployment, typically near sunrise. They will perform a variety of tasks including target preparation, equipment checks, etc., and will opportunistically observe for marine mammals and indicators as feasible throughout test preparation. However, we consider these observations as supplemental to the proposed mitigation monitoring and would only occur as time and schedule permits. Eglin AFB personnel would relay information on these types of sightings to the Lead Biologist, as described in the following mitigation sections.

Pre-Mission Monitoring

The purposes of pre-mission monitoring are to: (1) Evaluate the mission site for environmental suitability, and (2) verify that the ZOI is free of visually detectable marine mammals, as well as potential indicators of these species. On the morning of the mission, the Test Director and Safety Officer will confirm that there are no issues that would preclude mission execution and that weather is adequate to support mitigation measures.

Sunrise or Two Hours Prior to Mission

Eglin AFB range clearing vessels and protected species survey vessels will be on site at least two hours prior to the mission. The Lead Biologist on board one survey vessel will assess the overall suitability of the mission site based on environmental conditions (sea state) and presence/absence of marine mammal indicators. Eglin AFB personnel will communicate this information to Tower Control and personnel will relay the information to the Safety Officer in Central Control Facility.

One and One-Half Hours Prior to Mission

Vessel-based surveys will begin approximately one and one-half hours prior to live weapons deployment. Surface vessel observers will survey the ZOI and relay all marine species and indicator sightings, including the time of sighting, GPS location, and direction of travel, if known, to the Lead Biologist. The Lead Biologist will document all sighting information on report forms which he/she will submit to Eglin Natural Resources after each mission. Surveys would continue for approximately one hour. During this time, Eglin AFB personnel in the mission area will also observe for marine species as feasible. If marine mammals or indicators are observed within the ZOI for that day's mission activities, the range will be declared ''fouled,'' a term that signifies to mission personnel that conditions are such that a live ordnance drop cannot occur (*e.g.,* protected species or civilian vessels are in the mission area). If there are no observations of marine mammals or indicators of marine mammals, Eglin AFB would declare the range clear of protected species.

One-Half Hour Prior to Mission

At approximately 30 minutes prior to live weapon deployment, marine species observers will be instructed to leave the mission site and remain outside the safety zone, which on average will be 15.28 km (9.5 mi) from the detonation point. The actual size is determined by weapon net explosive weight and method of delivery. The survey team will continue to monitor for protected species while leaving the area. As the survey vessels leave the area, marine species monitoring of the immediate target areas will continue at the Central Control Facility through the live video feed received from the high definition cameras on the GRATV. Once the survey vessels have arrived at the perimeter of the safety zone (approximately 30 minutes after leaving the area per instructions from Eglin AFB, depending on actual travel time), Eglin AFB will declare the range as ''green'' and the mission will proceed, assuming all non-participating vessels have left the safety zone as well.

Execution of Mission

Immediately prior to live weapons drop, the Test Director and Safety Officer will communicate to confirm the results of marine mammal surveys and the appropriateness of proceeding with the mission. The Safety Officer will have final authority to proceed with, postpone, or cancel the mission. Eglin AFB would postpone the mission if:

• Any of the high-definition video cameras are not operational for any reason;

• Any marine mammal is visually detected within the ZOI. Postponement would continue until the animal(s) that caused the postponement is: (1) Confirmed to be outside of the ZOI on a heading away from the targets; or (2) not seen again for 30 minutes and presumed to be outside the ZOI due to the animal swimming out of the range;

• Any large schools of fish or large flocks of birds feeding at the surface are within the ZOI. Postponement would continue until Eglin AFB personnel confirm that these potential indicators are outside the ZOI:

• Any technical or mechanical issues related to the aircraft or target boats; or

• Any non-participating vessel enters the human safety zone prior to weapon release.

In the event of a postponement, protected species monitoring would continue from the Central Control Facility through the live video feed. Observers would also continue to monitor from the vessels at the safety perimeter, with limited effectiveness due to the distance from the detonation site.

Post-Mission Monitoring

Post-mission monitoring determines the effectiveness of pre-mission mitigation by reporting sightings of any marine mammals. Post-detonation monitoring surveys will commence once the mission has ended or, if required, as soon as personnel declare the mission area safe. Vessels will move into the survey area from outside the safety zone and monitor for at least 30 minutes, concentrating on the area down-current of the test site. This area is easily identifiable because of the floating debris in the water from impacted targets. Up to 10 Eglin AFB support vessels will be cleaning debris and collecting damaged targets from this area thus spending several hours in the area once Eglin AFB completes the mission. Observers will document and report any marine mammal species, number, location, and behavior of any animals observed to Eglin Natural Resources.

Mission Delays Due to Weather

Eglin AFB would delay or reschedule Maritime WSEP missions if the Beaufort sea state is greater than number 4 at the time of the testing activities. The Lead Biologist aboard one of the survey vessels will make the final determination of whether conditions are conducive for sighting protected species or not.

We have carefully evaluated Eglin AFB's proposed mitigation measures in the context of ensuring that we prescribe the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

• The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts;

• The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and

• The practicability of the measure for applicant implementation.

Any mitigation measure(s) prescribed by NMFS should be able to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed here:

1. Avoidance or minimization of injury or death of marine mammals wherever possible (goals 2, 3, and 4 may contribute to this goal);

2. A reduction in the numbers of marine mammals (total number or number at biologically important time or location) exposed to stimuli expected to result in incidental take (this goal may contribute to 1, above, or to reducing takes by behavioral harassment only);

3. A reduction in the number of times (total number or number at biologically important time or location) individuals would be exposed to stimuli that we expect to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only);

4. A reduction in the intensity of exposures (either total number or number at biologically important time or location) to training exercises that we expect to result in the take of marine mammals (this goal may contribute to 1,

above, or to reducing the severity of harassment takes only);

5. Avoidance or minimization of adverse effects to marine mammal habitat, paying special attention to the food base, activities that block or limit passage to or from biologically important areas, permanent destruction of habitat, or temporary destruction/disturbance of habitat during a biologically important time; and

6. For monitoring directly related to mitigation—an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation.

Based on our evaluation of Eglin AFB's proposed measures, as well as other measures that may be relevant to the specified activity, we have preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance (while also considering personnel safety, practicality of implementation, and the impact of effectiveness of the military readiness activity).

Proposed Monitoring and Reporting

In order to issue an Authorization for an activity, section 101(a)(5)(D) of the MMPA states that we must set forth ''requirements pertaining to the monitoring and reporting of such taking.'' The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for an authorization must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and our expectations of the level of taking or impacts on populations of marine mammals present in the proposed action area.

Eglin AFB submitted a marine mammal monitoring plan in their Authorization application. We may modify or supplement the plan based on comments or new information received from the public during the public comment period. Any monitoring requirement we prescribe should improve our understanding of one or more of the following:

- Occurrence of marine mammal species in action area (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) Affected species (*e.g.,* life history, dive patterns); (3) Co-occurrence of marine mammal species with the action; or (4) Biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual responses to acute stressors, or impacts of chronic exposures (behavioral or physiological);
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of an individual; or (2) Population, species, or stock;
- Effects on marine mammal habitat and resultant impacts to marine mammals; and
- Mitigation and monitoring effectiveness.

NMFS proposes to include the following measures in the Maritime WSEP Authorization (if issued). They are:

(1) Eglin AFB will track the use of the EGTTR for test firing missions and protected species observations, through the use of mission reporting forms;

(2) Eglin AFB will submit a summary report of marine mammal observations and Maritime WSEP activities to the NMFS Southeast Regional Office (SERO) and the Office of Protected Resources 90 days after expiration of the current Authorization. This report must include the following information: (i) Date and time of each Maritime WSEP exercise; (ii) a complete description of the pre-exercise and post-exercise activities related to mitigating and monitoring the effects of Maritime WSEP exercises on marine mammal populations; and (iii) results of the Maritime WSEP exercise monitoring, including number of marine mammals (by species) that may have been harassed due to presence within the activity zone;

(3) Eglin AFB will monitor for marine mammals in the proposed action area. If Eglin AFB personnel observe or detect any dead or injured marine mammals prior to testing, or detects any injured or dead marine mammal during live fire exercises, Eglin AFB must cease operations and submit a report to NMFS within 24 hours and

(4) Eglin AFB must immediately report any unauthorized takes of marine mammals (*i.e.,* serious injury or mortality) to NMFS and to the respective Southeast Region stranding network representative. Eglin AFB must cease operations and submit a report to NMFS within 24 hours.

Monitoring Results From Previously Authorized Activities

Eglin AFB complied with the mitigation and monitoring required under the previous Authorization for 2016 WSEP activities. Marine mammal monitoring occurred before, during, and after each Maritime WSEP mission. During the course of these activities, Eglin AFB's monitoring did not suggest that they had exceeded the take levels authorized under Authorization. In accordance with the 2015 Authorization, Eglin AFB submitted a monitoring report (available at: *www.nmfs.noaa.gov/pr/permits/incidental/military.htm*).

Under the 2016 Authorization, Eglin AFB anticipated conducting Maritime WSEP training missions over approximately two to three weeks, but actually conducted a total of five mission days: February 11 and March 14–17 associated with live ordnance delivery. Due to weather conditions and high sea states, no live missions were conducted February 8–10. Munitions that were actually dropped accounted for only approximately 41 percent of what was authorized in the 2016 IHA.

During the February 2016 mission, Eglin AFB released one AGM–65 Maverick. The AGM–65 Maverick is a penetrating blast-fragment warhead that detonates at the surface, and has 86 lb NEW. Eglin AFB conducted the required monitoring for marine mammals or indicators of marine mammals (*e.g.,* flocks of birds, baitfish schools, or large fish schools) before, during, and after each mission and observed a mixture of six bottlenose and spotted dolphins approximately seven miles outside of the largest ZOI, so no action was required. No protected species were observed within the ZOI during pre-mission surveys, mission activities, or during post-mission surveys. Therefore, the mission resulted in no acoustic impacts to marine mammals.

During the March 2016 live fire missions, Eglin AFB expended two AGM–65 Mavericks and twelve AGM–114 Hellfire missiles. The NEW of the munitions that detonated at the water surface or up to 3 m (10 ft) below the surface are 86 lb for the AGM–65 Maverick missiles and 13 lb for the AGM–114 Hellfire missiles. Eglin AFB conducted the required monitoring for marine mammals or indicators of marine mammals (*e.g.,* flocks of birds, baitfish schools, or large fish schools) before, during, and after each mission and observed two species of marine mammals: the common bottlenose dolphin and Atlantic spotted dolphin; one sea turtle; and two flocks of approximately 10–20 birds on two separate occasions (upon investigation, there was no evidence of protected species associated with either flock of birds). Eglin AFB confirmed that all protected species observed were outside of the ZOI at the conclusion of each pre-mission survey.

After each mission, Eglin AFB re-entered the ZOI to begin post-mission surveys for marine mammals and debris-clean-up operations. Eglin AFB personnel did not observe reactions indicative of disturbance during the pre-mission surveys and did not observe any marine mammals during the post-mission surveys. In summary, Eglin AFB reports that no observable instances of take of marine mammals occurred incidental to the Maritime WSEP training activities under the 2016 Authorization.

Estimated Numbers of Marine Mammals Taken by Harassment

The definition of harassment as it applies to a ''military readiness activity'' is: (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A Harassment); or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered (Level B Harassment).

NMFS' analysis identified the physiological responses, and behavioral responses that could potentially result from exposure to underwater explosive detonations. In this section, we will relate the potential effects to marine mammals from underwater detonation of explosives to the MMPA regulatory definitions of Level A and Level B harassment. This section will also quantify the effects that might occur from the proposed military readiness activities in W–151.

At NMFS' recommendation, Eglin AFB updated the thresholds used for onset of temporary threshold shift (TTS; Level B Harassment) and onset of permanent threshold shift (PTS; Level A Harassment) to be consistent with the thresholds outlined in NMFS's new ''Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing'' (NMFS, 2016). NMFS believes that the thresholds outlined in the new Technical Guidance represent the best available science. The report is available on the internet at: *http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf.*

Level B Harassment

Of the potential effects described earlier in this document, the following are the types of effects that fall into the Level B harassment category:

Behavioral Harassment

Behavioral disturbance that rises to the level described in the above definition, when resulting from exposures to non-impulsive or impulsive sound, is Level B harassment. Some of the lower level physiological stress responses discussed earlier would also likely co-occur with the predicted harassments, although these responses are more difficult to detect and fewer data exist relating these responses to specific received levels of sound. When predicting Level B harassment based on estimated behavioral responses, those takes may have a stress-related physiological component.

Temporary Threshold Shift (TTS)

As discussed previously, TTS can affect how an animal behaves in response to the environment, including conspecifics, predators, and prey. NMFS classifies TTS (when resulting from exposure to explosives and other impulsive sources) as Level B harassment, not Level A harassment (injury).

Level A Harassment

Of the potential effects that were described earlier, the following are the types of effects that fall into the Level A Harassment category:

Permanent Threshold Shift (PTS)

PTS (resulting either from exposure to explosive detonations) is irreversible and NMFS considers this to be an injury.

Table 6 in this document outlines the acoustic thresholds used by NMFS for this Authorization when addressing noise impacts from explosives.

TABLE 6—IMPULSIVE SOUND EXPLOSIVE THRESHOLDS USED BY EGLIN AFB IN ITS CURRENT ACOUSTICS IMPACTS MODELING

Group	Level B harassment		Level A harassment			Mortality
	Behavioral	TTS	PTS	Gastro-intestinal tract	Lung	
Mid-frequency Cetaceans.	165 dB SEL ..	170 dB SEL ..	185 dB SEL ..	237 dB SPL ...	39.1 M⅓ (1+[D_{Rm}/10.081])½ Pa-sec. Where: M = mass of the animals in kg. D_{Rm} = depth of the receiver (animal) in meters.	91.4 M⅓ (1+D_{Rm}/10.081])½ Pa-sec Where: M = mass of the animals in kg D_{Rm} = depth of the receiver (animal) in meters.

TTS = temporary threshold shift; PTS = permanent threshold shift; dB = decibels; SEL = sound exposure level; SPL = sound pressure level.

Table 7 provides the estimated maximum range or radius, from the detonation point to the various thresholds described in Tables 4–6 (Note: for PTS and TTS dual metrics, the more conservative metric was used).

TABLE 7—DISTANCES (m) TO HARASSMENT THRESHOLDS FROM EGLIN AFB'S EXPLOSIVE ORDNANCE

Mission-day category	Mortality	Level A harassment						Level B Harass-ment
				PTS				
	Modified goertner model 1	Slight lung injury	GI tract in-jury	Modified goertner model 2	237 dB SPL	185 dB SEL	230 dB Peak SPL	TTS
Bottlenose Dolphin								
A	193	534	180	945	705	4,666	1,302	7,479
B	110	180	156	248	180	2,225	180	3,959
C	37	73	83	286	169	1,128	180	1,863
Atlantic Spotted Dolphin								
A	216	595	180	945	705	4,666	1,302	7,479
B	136	180	156	248	180	2,225	180	3,959
C	47	84	83	286	169	1,128	180	1,863

dB = decibels; GI = gastrointestinal; SEP = sound exposure level; SPL = sound pressure level; PTS = permanent threshold shift; TTS = temporary threshold shift.

The ranges presented above were used to calculate the ZOI for each criterion/threshold. To eliminate double counting of 'takes', impact areas from higher impact categories (*e.g.,* PTS) were subtracted from areas associated with lower impact categories (*e.g.,* TTS). The estimated number of marine mammals potentially exposed to the various impact thresholds was calculated with a two-dimensional approach using the product of the adjusted impact area, animal density, and annual number of events for each mission-day category. A 'take' is considered to occur for SEL metrics if the received level is equal to or above the associated threshold within the appropriate frequency band of the sound received, adjusted for the appropriate weighting function value of that frequency band. Similarly, a 'take' would occur for impulse and peak SPL metrics if the received level is equal to or above the associated threshold.

Density Estimation

Density estimates for bottlenose dolphin and spotted dolphin were obtained from Duke University Marine Geospatial Ecology Lab Reports (Roberts et al., 2016). Raster data from Duke University were imported into ArcGIS and overlaid onto the Maritime WSEP mission area. Density values were provided in 100 km^2 boxes. A 30-km by 30-km (900 km^2) area centered on the Maritime WSEP mission location was selected, which consisted of nine 100-km^2 blocks. Density values from those blocks were averaged and converted to number of animals per square kilometer to obtain average annual density estimates for the common bottlenose and Atlantic spotted dolphins used in this analysis (see Table 8 for the resultant densities for these species).

TABLE 8—MARINE MAMMAL DENSITY ESTIMATES WITHIN EGLIN AFB'S EGTTR

Species	Density (animals/km^2)
Bottlenose dolphin	0.433
Atlantic spotted dolphin	0.148

Take Estimation

Table 9 indicates the modeled potential for lethality, injury, and non-injurious harassment (including behavioral harassment) to marine mammals in the absence of mitigation measures. Eglin AFB and NMFS estimate that approximately three marine mammals could be exposed to injurious Level A harassment noise levels (187 dB SEL) and approximately 326 animals could be exposed to Level B harassment (TTS and Behavioral) noise levels in the absence of mitigation measures.

TABLE 9—MODELED NUMBER OF MARINE MAMMALS POTENTIALLY AFFECTED BY MARITIME WSEP OPERATIONS

Species	Mortality	Level A harassment (PTS only)	Level B harassment (TTS)	Level B harassment (behavioral)
Bottlenose dolphin	0	2	87	157
Atlantic spotted dolphin	0	1	29	53
Total	0	3	116	210

Based on the mortality exposure estimates calculated by the acoustic model and the anticipated effectiveness of mitigation measures, zero marine mammals are expected to be affected by pressure levels associated with mortality or serious injury. Zero marine mammals are expected to be exposed to pressure levels associated with slight lung injury or gastrointestinal tract injury.

NMFS generally considers PTS to fall under the injury category (Level A Harassment). An animal would need to stay very close to the sound source for an extended amount of time to incur a serious degree of PTS, which could increase the probability of mortality. In this case, it would be highly unlikely for this scenario to unfold given the nature of any anticipated acoustic exposures that could potentially result from a mobile marine mammal that NMFS generally expects to exhibit avoidance behavior to loud sounds within the EGTTR. NMFS concludes that possibility of minor PTS in the form of slight upward shift of hearing threshold at certain frequency bands by a few individuals of marine mammals is extremely low, but not unlikely. The majority of 'takes' resulting from Eglin AFB's WSEP activities would constitute Level B harassment, such as TTS and behavioral harassment.

Negligible Impact Analysis and Preliminary Determinations

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''. . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival'' (*i.e.,* population-level effects). An estimate of the number of Level B harassment takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through behavioral harassment, we consider other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as the number and nature of estimated Level A harassment takes, the number of estimated mortalities, and effects on habitat.

To avoid repetition, the discussion below applies to each of the species for which we propose to authorize incidental take for Eglin AFB's activities, given that expected impacts are expected to be the same for both species.

In making a negligible impact determination, we consider:

- The number of anticipated injuries, serious injuries, or mortalities;
- The number, nature, and intensity, and duration of Level B harassment;
- The context in which the takes occur (*e.g.,* impacts to areas of significance, impacts to local populations, and cumulative impacts when taking into account successive/contemporaneous actions when added to baseline data);
- The status of stock or species of marine mammals (*i.e.,* depleted, not depleted, decreasing, increasing, stable, impact relative to the size of the population);
- Impacts on habitat affecting rates of recruitment/survival; and
- The effectiveness of monitoring and mitigation measures to reduce the number or severity of incidental take.

For reasons stated previously in this document and based on the following factors, Eglin AFB's specified activities are not likely to cause long-term behavioral disturbance, serious injury, or death.

The takes from Level B harassment would be due to potential behavioral disturbance and TTS. The takes from Level A harassment would be due to some, likely lesser, degree of PTS. Activities would only occur over a timeframe of two to three weeks in beginning in February 2017, with one or two missions occurring per day. It is possible that some individuals may be taken more than once if those individuals are located in the exercise area on two different days when exercises are occurring.

Noise-induced threshold shifts (TS, which includes PTS) are defined as increases in the threshold of audibility (*i.e.,* the sound has to be louder to be detected) of the ear at a certain frequency or range of frequencies (ANSI 1995; Yost 2000). Several important factors relate to the magnitude of TS, such as level, duration, spectral content (frequency range), and temporal pattern (continuous, intermittent) of exposure (Yost 2000; Henderson *et al.,* 2008). TS occurs in terms of frequency range (Hz or kHz), hearing threshold level (dB), or both frequency and hearing threshold level (CDC 2004).

In addition, there are different degrees of PTS: ranging from slight/mild to moderate and from severe to profound (Clark 1981). Profound PTS or the complete loss of the ability to hear in one or both ears is commonly referred to as deafness (CDC 2004; WHO 2006). High-frequency PTS, presumably as a normal process of aging that occurs in humans and other terrestrial mammals, has also been demonstrated in captive cetaceans (Ridgway and Carder 1997; Yuen *et al.,* 2005; Finneran *et al.,* 2005; Houser and Finneran 2006; Finneran *et al.,* 2007; Schlundt *et al.,* 2011) and in stranded individuals (Mann *et al.,* 2010).

In terms of what is analyzed for the potential PTS (Level A harassment) in marine mammals as a result of Eglin AFB's Maritime WSEP operations, if it occurs, NMFS has determined that the levels would be slight/mild because most cetaceans would be expected to show relatively high levels of avoidance. Further, it is uncommon to sight marine mammals within the target area, especially for prolonged durations. Results from monitoring programs associated other Eglin AFB activities and for Eglin AFB's 2016 Maritime WSEP activities have shown the absence of marine mammals within the EGTTR during and after maritime operations. Avoidance varies among individuals and depends on their activities or reasons for being in the area.

NMFS' predicted estimates for Level A harassment take are likely overestimates of the likely injury that will occur. NMFS expects that successful implementation of the required vessel-based and video-based mitigation measures would avoid Level A take in some instances. Also, NMFS expects that some individuals would avoid the source at levels expected to result in injury. Nonetheless, although NMFS expects that Level A harassment is unlikely to occur at the numbers proposed to be authorized, because it is difficult to quantify the degree to which the mitigation and avoidance will reduce the number of animals that might incur PTS, we are proposing to authorize (and analyze) the modeled number of Level A takes (three), which does not take the mitigation or avoidance into consideration. However, we anticipate that any PTS incurred because of mitigation and the likely short duration of exposures, would be in the form of only a small degree of permanent threshold shift and not total deafness.

While animals may be impacted in the immediate vicinity of the activity, because of the short duration of the actual individual explosions themselves (versus continual sound source operation) combined with the short duration of the Maritime WSEP operations, NMFS has preliminarily determined that there will not be a substantial impact on marine mammals or on the normal functioning of the nearshore or offshore Gulf of Mexico ecosystems. We do not expect that the proposed activity would impact rates of recruitment or survival of marine mammals since we do not expect mortality (which would remove individuals from the population) or serious injury to occur. In addition, the proposed activity would not occur in areas (and/or times) of significance for the marine mammal populations potentially affected by the exercises (*e.g.,* feeding or resting areas, reproductive areas), and the activities would only occur in a small part of their overall range, so the impact of any potential temporary displacement would be negligible and animals would be expected to return to the area after the cessations of activities. Although the proposed activity could result in Level A (PTS only, not slight lung injury or gastrointestinal tract injury) and Level B (behavioral disturbance and TTS of lesser degree and shorter duration) harassment of marine mammals, the level of harassment is not anticipated to impact rates of recruitment or survival of marine mammals because the number of exposed animals is expected to be low due to the short-term (*i.e.,* four hours a day or less) and site-specific nature of the activity. We do not anticipate that the effects would be detrimental to rates of recruitment and survival because we do not expect serious of extended behavioral responses that would result in energetic effects at the level to impact fitness.

Moreover, the mitigation and monitoring measures proposed for the Authorization (described earlier in this document) are expected to further minimize the potential for harassment. The protected species surveys would require Eglin AFB to search the area for marine mammals, and if any are found in the live fire area, then the exercise would be suspended until the animal(s) has left the area or relocated. Moreover, marine species observers located in the Eglin control tower would monitor the high-definition video feed from cameras located on the instrument barge anchored on-site for the presence of protected species. Furthermore, Maritime WSEP missions would be delayed or rescheduled if the sea state is greater than a 4 on the Beaufort Scale at the time of the test. In addition, Maritime WSEP missions would occur no earlier than two hours after sunrise and no later than two hours prior to sunset to ensure adequate daylight for pre- and post-mission monitoring.

Based on the preliminary analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS finds that Eglin AFB's Maritime WSEP operations will result in the incidental take of marine mammals, by Level A and Level B harassment only, and that the taking from the Maritime WSEP exercises will not have an adverse effect on annual rates of recruitment or survival, and therefore will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has preliminarily determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

Due to the location of the activity and past experience with similar authorizations for these activities, no ESA-listed marine mammal species are likely to be affected. Therefore, NMFS has preliminarily determined that this proposed Authorization would have no effect on ESA-listed species. However, prior to the agency's decision on the issuance or denial of this Authorization, NMFS will make a final determination on whether additional consultation is necessary.

National Environmental Policy Act (NEPA)

In 2015, Eglin AFB provided NMFS with an EA titled, Maritime Weapon Systems Evaluation Program (WSEP) Operational Testing in the Eglin Gulf Testing and Training Range (EGTTR), Florida. The EA analyzed the direct, indirect, and cumulative environmental impacts of the specified activities on marine mammals. NMFS, after review and evaluation of the Eglin AFB EA for consistency with the regulations published by the Council of Environmental Quality (CEQ) and NOAA Administrative Order 216–6, Environmental Review Procedures for Implementing the National Environmental Policy Act, adopted the EA. After considering the EA, the information in the 2014 IHA application, and the **Federal Register** notice, as well as public comments, NMFS' issuance of the 2015 Authorization and determination that the activity was not likely to result in significant impacts on the human environment, NMFS adopted Eglin AFB's EA under 40 CFR 1506.3; and issued a FONSI statement on issuance of an Authorization under section 101(a)(5) of the MMPA.

In accordance with NOAA Administrative Order 216–6 (Environmental Review Procedures for Implementing the National Environmental Policy Act, May 20, 1999), NMFS will again review the information contained in Eglin AFB's EA and determine whether the EA accurately and completely describes the preferred action alternative and the potential impacts on marine mammals. Based on this review and analysis, NMFS may reaffirm the 2015 FONSI statement on issuance of an annual authorization under section 101(a)(5) of the MMPA or supplement the EA if necessary.

Proposed Authorization

As a result of these preliminary determinations, we propose to issue an Authorization to Eglin AFB for conducting Maritime WSEP activities, for a period of one year from the date of issuance, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. The proposed Authorization language is provided in the next section. The wording contained in this section is proposed for inclusion in the Authorization (if issued).

1. This Authorization is valid for a period of one year from February 4, 2017 through February 3, 2018.

2. This Authorization is valid only for activities associated with the Maritime WSEP operations utilizing munitions identified in the Attachment.

3. The incidental taking, by Level A and Level B harassment, is limited to: Atlantic bottlenose dolphin (*Tursiops truncatus*); and Atlantic spotted dolphin (*Stenella frontalis*) as specified in Table 1, below.

TABLE 1—MODELED NUMBER OF MARINE MAMMALS POTENTIALLY AFFECTED BY MARITIME WSEP OPERATIONS.

Species	Mortality	Level A harassment (PTS only)	Level B harassment (TTS)	Level B harassment (behavioral)
Bottlenose dolphin	0	2	87	157
Atlantic spotted dolphin	0	1	29	53
Total	0	3	116	210

The taking by serious injury or death of these species, the taking of these species in violation of the conditions of this Incidental Harassment Authorization, or the taking by harassment, serious injury or death of any other species of marine mammal is prohibited and may result in the modification, suspension or revocation of this Authorization.

4. Mitigation.

When conducting this activity, the following mitigation measures must be undertaken:

- If daytime weather and/or sea conditions preclude adequate monitoring for detecting marine mammals and other marine life, maritime strike operations must be delayed until adequate sea conditions exist for monitoring to be undertaken. Daytime maritime strike exercises will be conducted only when sea surface conditions do not exceed Beaufort sea state 4 (*i.e.,* wind speed 13–18 mph (11–16 knots); wave height 1 m (3.3 ft)), the visibility is 5.6 km (3 nm) or greater, and the ceiling is 305 m (1,000 ft) or greater;
- On the morning of the maritime strike mission, the test director and safety officer will confirm that there are no issues that would preclude mission execution and that the weather is adequate to support monitoring and mitigation measures.

Two Hours Prior to Mission

- Mission-related surface vessels will be stationed on site.
- Vessel-based observers on board at least one vessel will assess the overall suitability of the test site based on environmental conditions (*e.g.,* sea state) and presence/absence of marine mammal or marine mammal indicators (*e.g.,* large schools of fish, jellyfish, Sargassum rafts, and large flocks of birds feeding at the surface). Observers will relay this information to the safety officer.

One and One-half Hours Prior to Mission

- Vessel-based surveys and video camera surveillance will commence. Vessel-based observers will survey the zone of impact (ZOI) calculated for that day's mission category and relay all marine mammal and indicator sightings, including the time of sighting and direction of travel (if known) to the safety officer. Surveys will continue for approximately one hour.
- If marine mammals or marine mammal indicators are observed within the ZOI, the test range will be declared ''fouled,'' which will signify to mission personnel that conditions are such that a live ordnance drop cannot occur.
- If no marine mammals or marine mammal indicators are observed, the range will be declared ''green,'' which will signify to mission personnel that conditions are such that a live ordnance drop may occur.

One-half Hour Prior to Mission

- Approximately 30 minutes prior to live weapon deployment, vessel-based observers will be instructed to leave the test site and remain outside the safety zone, which will be approximately 9.5 miles from the detonation point (actual size will be determined by weapon net explosive weight (NEW) and method of delivery) during the conduct of the mission.
- Monitoring for marine mammals will continue from the periphery of the safety zone while the mission is in progress. Other safety boat crews will be instructed to observe for marine mammals during this time.
- After survey vessels have left the test site, marine species monitoring will continue for the Eglin control tower through the video feed received from the high definition cameras on the instrument barge.

Execution of Mission

- Immediately prior to live weapons drop, the Test Director and Safety Officer will communicate to confirm the results of the marine mammal survey and the appropriateness of proceeding with the mission. The Safety Ffficer will have final authority to proceed with, postpone, move, or cancel the mission.
- The mission will be postponed or moved if: Any marine mammal is visually detected within the ZOI, or large schools of fish, jellyfish, Sargassum rafts, or large flocks of birds feeding at the surface are observed within the ZOI. Postponement will continue until the animal(s) that caused the postponement is (1) confirmed to be outside of the ZOI due to swimming out of the range on a heading away from the targets; or (2) not seen again for 30 minutes and presumed to be outside the ZOI due to the animal swimming outside of the range. Postponement will continue until these potential indicators are confirmed to be outside the ZOI.
- In the event of a postponement, pre-mission monitoring will continue as long as weather and daylight hours allow (no later than two hours prior to sunset).

Post Mission

- Post-mission surveys will commence as soon as Explosive Ordnance Disposal (EOD) personnel declare the test area safe. These surveys will be conducted by the same vessel-based observers that conducted the pre-mission surveys.
- Survey vessels will move into the ZOI from outside the safety zone and monitor for at least 30 minutes, concentrating on the area down-current of the test site. Any marine mammals killed or injured as a result of the test will be documented and immediately reported to the National Marine Fisheries Service (NMFS) Southeast Region Marine Mammal Stranding Network at 877–433–8299 and the Florida Marine Mammal Stranding Hotline at 888–404–3922. The species, number, location, and behavior of any animals observed will be documented and reported.
- If post-mission surveys determine that an injury or lethal take of a marine mammal has occurred, the next maritime strike mission will be suspended until the test procedure and the monitoring methods have been reviewed with NMFS and appropriate changes made.

5. Monitoring.

The holder of this Authorization is required to cooperate with the National Marine Fisheries Service and any other Federal, state or local agency monitoring the impacts of the activity on marine mammals.

The holder of this Authorization will track their use of the EGTTR for the Maritime WSEP missions and marine mammal observations, through the use of mission reporting forms.

Maritime strike missions will coordinate with other activities conducted in the EGTTR (*e.g.,* Precision Strike Weapon and Air-to-Surface Gunnery missions) to provide supplemental post-mission observations of marine mammals in the operations area of the exercise.

Any dead or injured marine mammals observed or detected prior to testing or injured or killed during live drops, must be immediately reported to the NMFS Southeast Region Marine Mammal Stranding Network at 877–433–8299 and the Florida Marine Mammal Stranding Hotline at 888–404–3922.

Any unauthorized impacts on marine mammals must be immediately reported to the National Marine Fisheries Service's Southeast Regional Administrator, at 727–842–5312, and the Chief of the Permits and Conservation Division, Office of Protected Resources, at 301–427–8401.

The monitoring team will document any marine mammals that were killed or injured as a result of the test and, if practicable, coordinate with the local stranding network and NMFS to assist with recovery and examination of any dead animals, as needed.

Activities related to the monitoring described in this Authorization, including the retention of marine mammals, do not require a separate scientific research permit issued under

Section 104 of the Marine Mammal Protection Act.

6. Reporting.

A draft report of marine mammal observations and Maritime WSEP mission activities must be submitted to the National Marine Fisheries Service's Southeast Regional Office, Protected Resources Division, 263 13th Ave. South, St. Petersburg, FL 33701 and NMFS's Office of Protected Resources, 1315 East West Highway, Silver Spring, MD 20910. This draft report must include the following information:

• Date and time of each maritime strike mission;

• A complete description of the pre-exercise and post-exercise activities related to mitigating and monitoring the effects of maritime strike missions on marine mammal populations;

• Results of the monitoring program, including numbers by species/stock of any marine mammals noted injured or killed as a result of the maritime strike mission and number of marine mammals (by species if possible) that may have been harassed due to presence within the ZOI; and

• A detailed assessment of the effectiveness of sensor based monitoring in detecting marine mammals in the area of Maritime WSEP operations.

The draft report will be subject to review and comment by NMFS. Any recommendations made by NMFS must be addressed in the final report prior to acceptance by NMFS. The draft report will be considered the final report for this activity under this Authorization if NMFS has not provided comments and recommendations within 90 days of receipt of the draft report.

7. Additional Conditions.

• The maritime strike mission monitoring team will participate in the marine mammal species observation training. Designated crew members will be selected to receive training as protected species observers (PSO). PSOs will receive training in protected species survey and identification techniques through a NMFS-approved training program.

• The holder of this Authorization must inform the Director, Office of Protected Resources, National Marine Fisheries Service, (301–427–8400) or designee (301–427–8401) prior to the initiation of any changes to the monitoring plan for a specified mission activity.

• A copy of this Authorization must be in the possession of the Safety Officer on duty each day that maritime strike missions are conducted.

• Failure to abide by the Terms and Conditions contained in this Incidental Harassment Authorization may result in a modification, suspension or revocation of the Authorization.

Request for Public Comments

We request comment on our analysis, the draft authorization, and any other aspect of this **Federal Register** notice of proposed Authorization. Please include with your comments any supporting data or literature citations to help inform our final decision on Eglin AFB's renewal request for an MMPA authorization.

Dated: November 15, 2016.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–27881 Filed 11–18–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–C–2016–0047]

National Telecommunications and Information Administration; Notice of Public Meeting on Developing the Digital Marketplace for Copyrighted Works

AGENCY: United States Patent and Trademark Office, U.S. Department of Commerce; National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Department of Commerce's Internet Policy Task Force (Task Force) will hold a conference at the United States Patent and Trademark Office (USPTO) facility in Alexandria, Virginia, on December 9, 2016, to discuss current initiatives and technologies used to develop a more robust and collaborative digital marketplace for copyrighted works and to consider ways forward to help achieve that result. This follows up on an earlier public meeting held by the Task Force on April 1, 2015, which focused on how the Government can assist in facilitating the development and use of standard identifiers for all types of works of authorship.

DATES: The public meeting will be held on December 9, 2016, from 8:30 a.m. to 4:00 p.m., Eastern Standard Time. Registration will begin at 8:00 a.m.

ADDRESSES: The public meeting will be held at the United States Patent and Trademark Office in the Madison Auditorium, which is located at 600 Dulany Street, Alexandria, Virginia 22314. All major entrances to the building are accessible to people with disabilities. In addition, the meeting will be webcast for public viewing at the following USPTO Regional Offices: the Rocky Mountain Regional Office, 1961 Stout Street, Denver, Colorado 80294; the West Coast Regional Office, 26 S. Fourth Street, San Jose, California 95113; and the Texas Regional Office, 207 South Houston Street, Suite 159, Dallas, Texas 75202.

FOR FURTHER INFORMATION CONTACT: For further information regarding the meeting, contact Nadine Herbert or Susan Allen, Office of Policy and International Affairs, USPTO, Madison Building, 600 Dulany Street, Alexandria, Virginia 22314; telephone (571) 272–9300; email *Nadine.Herbert@uspto.gov*or *Susan.Allen@uspto.gov.* Please direct all media inquiries to the Office of the Chief Communications Officer, USPTO, at (571) 272–8400.

SUPPLEMENTARY INFORMATION:

Background

A. Ongoing Government Engagement Relating to Copyright in the Digital Economy

The Department of Commerce established the Internet Policy Task Force (Task Force) in 2010 to identify leading public policy and operational issues impacting the U.S. private sector's ability to realize the potential for economic growth and job creation through the Internet. The Task Force's July 2013 report, *Copyright Policy, Creativity, and Innovation in the Digital Economy* (Green Paper),[1] was the product of extensive public consultations led by the United States Patent and Trademark Office (USPTO) and the National Telecommunications and Information Administration (NTIA).

In October 2013, the USPTO and NTIA published a request for public comments [2] relating to three areas of work flowing out of the Green Paper, including whether and how the Government can facilitate the further development of a robust online licensing environment. The request for comments noted that building the online marketplace is fundamentally a function of the private sector and described how that process has been progressing. It noted the Green Paper's conclusion that, while much progress

[1] The Green Paper is available at *http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf.*

[2] Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, 78 FR 61337–61341, *available at https://www.ntia.doc.gov/files/ntia/publications/ntia_pto_rfc_10032013.pdf.*

had been made in the licensing of creative content for online uses, there remained a need for more comprehensive and reliable ownership data, interoperable standards enabling communication among databases, and more streamlined licensing mechanisms. It posed a number of questions regarding access to and standardization of rights ownership information, facilitating the effectiveness of the online marketplace, and the role of the Government in such matters.

At a subsequent public meeting in December 2013, two panels addressed issues related to this topic: access to rights information and online licensing transactions. An archive of the webcast of the public meeting is available at *http://new.livestream.com/uspto/copyright.* A transcript of the public meeting is available at *https://www.uspto.gov/ip/global/copyrights/121213-USPTO-Green_Paper_Hearing-Transcript.pdf.* Copies of the comments received are available at *http://www.uspto.gov/ip/global/copyrights/green_paper_public_comments.jsp.*

In April 2015, the Task Force held another public meeting to discuss: The potential for the enhanced use and interoperability of standard identifiers across different sectors and geographical borders; whether the United States should develop or participate in an online licensing platform such as the U.K.'s Copyright Hub; and what the role of the Government should be in furthering any of these efforts. A transcript and videos of the public meeting are available at *http://www.uspto.gov/learning-and-resources/ip-policy/copyright/facilitating-development-online-licensing-environment.*

The Copyright Office also has solicited public comments and held public meetings on related issues, notably on strategies for the electronic recordation of documents relating to transfers of copyright ownership, including the use of standard identifiers and other metadata standards, and sought comments on how visual works, particularly photographs, graphic artworks, and illustrations, are monetized, enforced, and registered under the Copyright Act.[3] In a December 2014 report, Professor Robert Brauneis, then serving as the Kaminstein Scholar in Residence at the Copyright Office, made a number of recommendations, including accommodating standard identifiers in registration and recordation documents to enable interoperability with other databases and developing an application programming interface (API) allowing third parties to develop software to retrieve data from Copyright Office records. In February 2015, the Copyright Office issued a Report on Copyright and the Music Marketplace, which recommended a restructured music licensing marketplace that included a publicly accessible database of musical works and incentivized the use of standard identifiers. The Copyright Office also raised the possibility that its copyright registration database could be modified to incorporate standard identifiers and stated the belief that the best strategy to address data issues would be to incentivize strongly the universal adoption and dissemination of several data standards.

[3] *See* Copyright Office Policy Studies, *available at http://www.copyright.gov/policy.*

B. The Focus of This Meeting

In the previous public comments and meetings, the Task Force heard from stakeholders that the government can play a useful role by facilitating dialogues between and among industry sectors and by convening stakeholder groups to make recommendations on specific issues. Building upon this feedback, and in light of significant marketplace and technological developments that have taken place since the April 2015 public meeting, the Task Force is organizing this meeting to facilitate constructive, cross-industry dialogue among stakeholders about ways to promote a more robust and collaborative online marketplace for copyrighted works. We will discuss the potential for interoperability across digital registries and standards work in this field, and consider the relevant emerging technologies (*e.g.,* blockchain technology, open source platforms). We will also explore potential approaches to guide their future adoption and integration into the online marketplace.

Topics to be covered will include: (1) Initiatives to take forward the digital content marketplace, with a focus on standards, interoperability, and digital registries and database initiatives to track ownership and usage rights; (2) innovative technologies designed to improve the ways consumers access and use different types of digital content (*e.g.,* photos, film, music); (3) ways that different sectors can collaborate to build a more robust and interconnected digital content marketplace; and (4) the role of government in facilitating such initiatives and technological development. Members of the public will have opportunities to participate at the meeting. One outcome could be to establish working groups to tackle specific issues through a multistakeholder process.

Public Meeting

On December 9, 2016, the Task Force will hold a public meeting to hear stakeholder input and to consider future work in this area. The event will seek participation and comments from interested stakeholders, including creators, right holders, and online services that produce and distribute copyright protected digital content, as well as technology providers, cultural heritage institutions, public interest groups, and academics.

The meeting will be webcast. The agenda and webcast information will be available no later than the week prior to the meeting on the Internet Policy Task Force Web site, at *http://www.ntia.doc.gov/internetpolicytaskforce,* and the USPTO's Web site, *http://www.uspto.gov.*

The meeting will be open to members of the public to attend, space permitting, on a first-come, first-served basis. Online registration for the meeting, which is not mandatory, is available at *https://www.uspto.gov/learning-and-resources/ip-policy/department-commerce-internet-policy-task-force-public-meeting.* The meeting will be physically accessible to people with disabilities. Individuals requiring accommodation, such as sign language interpretation, real-time captioning of the webcast or other ancillary aids, should communicate their needs to Nadine Herbert, Office of Policy and International Affairs, United States Patent and Trademark Office, Madison Building, 600 Dulany Street, Alexandria, Virginia 22314; telephone (571) 272–9300; email *Nadine.Herbert@USPTO.gov,* at least seven business days prior to the meeting. Attendees should arrive at least one-half hour prior to the start of the meeting and must present a valid government-issued photo identification upon arrival. Persons who have pre-registered (and received confirmation) will have seating held until 15 minutes before the program begins.

Dated: November 15, 2016.

Michelle K. Lee,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

Angela M. Simpson,

Deputy Assistant Secretary of Commerce for Communications and Information, National Telecommunications and Information Administration.

[FR Doc. 2016–27934 Filed 11–18–16; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Charter Renewal of Department of Defense Federal Advisory Committees

AGENCY: Department of Defense.

ACTION: Renewal of Federal Advisory Committee.

SUMMARY: The Department of Defense (DoD) is publishing this notice to announce that it is renewing the charter for the Defense Health Board (''the Board'').

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Advisory Committee Management Officer for the Department of Defense, 703–692–5952.

SUPPLEMENTARY INFORMATION: The Board's charter is being renewed in accordance with the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended) and 41 CFR 102–3.50(d). The Board's charter and contact information for the Board's Designated Federal Officer (DFO) can be found at *http://www.facadatabase.gov/.*

The Board provides the Secretary of Defense and the Deputy Secretary of Defense, through the Under Secretary of Defense for Personnel and Readiness, independent advice and recommendations to maximize the safety and quality of, as well as the access to, health care for DoD health care beneficiaries.

The Board is composed of no more than 19 members who are eminent authorities in one or more of the following disciplines: Health care research/academia, infectious disease, occupational/environmental health, public health, health care policy, trauma medicine/systems, clinical health care, strategic decision making, bioethics or ethics, beneficiary representative, neuroscience, and behavioral health. Except for reimbursement of official Board-related travel and per diem, Board members serve without compensation.

The public or interested organizations may submit written statements to the Board membership about the Board's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Board. All written statements shall be submitted to the DFO for the Board, and this individual will ensure that the written statements are provided to the membership for their consideration.

Dated: November 16, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–27968 Filed 11–18–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Charter Renewal of Department of Defense Federal Advisory Committee

AGENCY: Department of Defense.

ACTION: Renewal of Federal Advisory Committee.

SUMMARY: The Department of Defense (DoD) is publishing this notice to announce that it is renewing the charter for the Department of Defense Military Family Readiness Council (''the Council'').

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Advisory Committee Management Officer for the Department of Defense, 703–692–5952.

SUPPLEMENTARY INFORMATION: The Council's charter is being renewed under the provisions of 10 U.S.C. 1781a, as amended and in accordance with the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended) and 41 CFR 102–3.50(a). The Council's charter and contact information for the Council's Designated Federal Officer (DFO) can be found at *http://www.facadatabase.gov/.*

The Council shall review and provide independent advice and recommendations to the Secretary of Defense and the Deputy Secretary of Defense, through the Under Secretary of Defense for Personnel and Readiness, regarding the plans required under 10 U.S.C. 1781b, monitor requirements for the support of military family readiness by the DoD, and evaluate and assess the effectiveness of the military family readiness programs and activities of the DoD.

The Council is composed of 18 members as specified in 10 U.S.C. 1781a(b), as amended. All members of the Council are appointed to provide advice on behalf of the Government on the basis of their best judgment without representing any particular point of view and in a manner that is free from conflict of interest. Except for reimbursement of official Council-related travel and per diem, Council members serve without compensation.

The public or interested organizations may submit written statements to the Council membership about the Council's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Council. All written statements shall be submitted to the DFO for the Council, and this individual will ensure that the written statements are provided to the membership for their consideration.

Dated: November 16, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–27970 Filed 11–18–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

President's Advisory Commission on Asian Americans and Pacific Islanders

AGENCY: President's Advisory Commission on Asian Americans and Pacific Islanders, Department of Education.

ACTION: Announcement of open meetings.

SUMMARY: This notice sets forth the schedule and agenda of the meeting of the President's Advisory Commission on Asian Americans and Pacific Islanders (Commission). The notice also describes the functions of the Commission. Notice of the meeting is required by § 10 (a) (2) of the Federal Advisory Committee Act and is intended to notify the public of its opportunity to attend.

DATES: The Commission meetings will be held on Tuesday, December 6, 2016 from 1:00 p.m.—5:30 p.m. EST and Wednesday, December 7, 2016 from 8:30 a.m.—12:30 p.m. EST at the U.S. Department of Education, 550 12th SW., 10th Floor, Washington, DC 20202. On Thursday, December 8, the Commission will be convening with the White House Initiative on AAPIs Regional Network (RN) from 9:00am—5:00pm at the U.S. Department of Education, 550 12th SW., 10th Floor, Washington, DC 20202.

PLEASE NOTE: To enter the Department of Education, visitors must present a valid, unexpired photo ID issued by a Federal or state government.

FOR FURTHER INFORMATION CONTACT: Justin Trinidad, White House Initiative on Asian Americans and Pacific Islanders, Potomac Center Plaza, 550 12th Street SW., Washington, DC 20202; email: *Justin.Trinidad@ed.gov;* telephone: 202–245–6321, fax: 202–245–7166.

SUPPLEMENTARY INFORMATION:

The AAPI Commission's Statutory Authority and Function: The President's Advisory Commission on Asian

Americans and Pacific Islanders is established under Executive Order 13515, dated October 14, 2009 and subsequently continued and amended by Executive Order 13708. The Commission is also governed by the provisions of the Federal Advisory Committee Act (FACA), (P.L 92–463; as amended, 5 U.S.C.A. App.2) which sets forth standards for the formation and use of advisory committees. According to Executive Order 13515, the Commission shall provide advice to the President, through the Secretary of Education and a senior official designated by the President, on: (i) The development, monitoring, and coordination of executive branch efforts to improve the quality of life of Asian Americans and Pacific Islanders (AAPIs) through increased participation in Federal programs in which such persons may be underserved; (ii) the compilation of research and data related to AAPI populations and subpopulations; (iii) the development, monitoring, and coordination of Federal efforts to improve the economic and community development of AAPI businesses; and (iv) strategies to increase public and private-sector collaboration, and community involvement in improving the health, education, environment, and well-being of AAPIs.

Meeting Agenda: The purpose of this meeting is to discuss current and future endeavors of the White House Initiative on Asian Americans and Pacific Islanders and key issues and concerns impacting the AAPI community; review the work of the White House Initiative on Asian Americans and Pacific Islanders; and determine key strategies to help meet the Commission's charge as outlined in Executive Order 13515. On Thursday, December 8th, the Commission will meet with the Regional Network to determine regional engagement strategies and deliverables.

Members of the public who wish to attend the meetings must RSVP to Justin Trinidad via email at *Justin.Trinidad@ed.gov* no later than November 28, 2016 at 3:00 p.m. ET. The RSVP must include name, title, organization/affiliation, email address, and telephone number of the person attending the meeting.

Submission of Written Comments: Due to time constraints, there will not be a public comment period at these meetings. However, individuals wishing to provide written comments regarding the meeting agenda or the Commission's work may send comments to Justin Trinidad via email at *Justin.Trinidad@ed.gov.* Please include in the subject line the wording, ''Public Comment—Commission Meeting.''

Access to Records of the Meeting: The Department will post the official report of the meeting on its Department of Education Web site no later than 90 days after the meeting. Pursuant to the FACA, the public may also inspect the materials at 550 12th Street SW., Washington, DC 20202 by emailing *Justin.Trinidad@ed.gov* or by calling (202) 245–6321 to schedule an appointment.

Reasonable Accommodations: The meeting sites are accessible to individuals with disabilities. Individuals who will need accommodations for a disability in order to attend the meetings (*e.g.,* interpreting services, assistive listening devices, or material in alternative format) should notify Justin Trinidad by emailing *Justin.Trinidad@ed.gov* or by calling (202) 245–6321, no later than November 28, 2016. We will make every attempt to meet requests for accommodations after this date, but cannot guarantee their availability.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Authority: Executive Order No. 13515, as amended by Executive Orders 13585 and extended by 13708.

Ted Mitchell,

Under Secretary, U.S. Department of Education.

[FR Doc. 2016–27882 Filed 11–18–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Bonneville Power Administration

Availability of the Bonneville Purchasing Instructions (BPI) and Bonneville Financial Assistance Instructions (BFAI)

AGENCY: Bonneville Power Administration (BPA), DOE

ACTION: Notice of document availability.

SUMMARY: Copies of the Bonneville Purchasing Instructions (BPI), which contain the policy and establish the procedures that BPA uses in the solicitation, award, and administration of its purchases of goods and services, including construction, are available in printed form or at the following Internet address: *http://www.bpa.gov/corporate/business/bpi.*

Copies of the Bonneville Financial Assistance Instructions (BFAI), which contain the policy and establish the procedures that BPA uses in the solicitation, award, and administration of financial assistance instruments (principally grants and cooperative agreements), are available in printed form or available at the following Internet address: *http://www.bpa.gov/corporate/business/bfai.*

ADDRESSES: Unbound copies of the BPI or BFAI may be obtained by sending a request to the Head of the Contracting Activity, Routing CGP–7, Bonneville Power Administration, P.O. Box 3621, Portland, Oregon 97208–3621.

FOR FURTHER INFORMATION CONTACT: Head of Contracting Activity (503) 230–5498.

SUPPLEMENTARY INFORMATION: BPA was established in 1937 as a Federal Power Marketing Agency in the Pacific Northwest. BPA operations are financed from power revenues rather than annual appropriations. BPA's purchasing operations are conducted under 16 U.S.C. 832 *et seq.* and related statutes. Pursuant to these special authorities, the BPI is promulgated as a statement of purchasing policy and as a body of interpretative regulations governing the conduct of BPA purchasing activities, and reflects BPA's private sector approach to purchasing the goods and services that it requires. BPA's financial assistance operations are conducted under 16 U.S.C. 832 *et seq.* and 16 U.S.C. 839 *et seq.* The BFAI express BPA's financial assistance policy. The BFAI also comprise BPA's rules governing implementation of the principles provided in 2 CFR 200.

BPA's solicitations and contracts include notice of applicability and availability of the BPI and the BFAI, as appropriate, for the information for offerors on particular purchases or financial assistance transactions.

Issued in Portland, Oregon, on November 10, 2016.

Nicholas M. Jenkins,

Manager, Purchasing/Property Governance.

[FR Doc. 2016–27933 Filed 11–18–16; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[FE Docket No. 16–141–LNG]

Chevron U.S.A. Inc.; Application for Blanket Authorization To Export Previously Imported Liquefied Natural Gas on a Short-Term Basis

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of an application (Application), filed on September 22, 2016, by Chevron U.S.A. Inc. (Chevron), requesting blanket authorization to export liquefied natural gas (LNG) previously imported into the United States from foreign sources in an amount up to the equivalent of 72 billion cubic feet (Bcf) of natural gas on a short-term or spot market basis for a two-year period commencing on December 8, 2016 or as soon thereafter as the authorization is granted. The LNG would be exported from the Sabine Pass LNG Terminal owned by Sabine Pass LNG, L.P., in Cameron Parish, Louisiana, to any country with the capacity to import LNG via ocean-going carrier and with which trade is not prohibited by U.S. law or policy. Chevron states that it has contracted for 1.0 Bcf/day of terminal capacity from Sabine Pass LNG, L.P., for an initial term of 20 years that will expire June 30, 2029, with the option to extend the term for another 20 years. Chevron states that it does not seek authorization to export domestically-produced natural gas supplies, and notes that it currently holds a blanket authorization to import LNG from various international sources by vessel in an amount up to the equivalent of 800 Bcf of natural gas. The Application was filed under section 3 of the Natural Gas Act (NGA). Additional details can be found in Chevron's Application, posted on the DOE/FE Web site at: *http://www.energy.gov/fe/chevron-usa-inc-16-141-lng-re-export.* Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed using procedures detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, December 21, 2016.

ADDRESSES:

Electronic Filing by email: fergas@hq.doe.gov.

Regular Mail: U.S. Department of Energy (FE–34), Office of Regulation and International Engagement, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026–4375.

Hand Delivery or Private Delivery Services (*e.g., FedEx, UPS, etc.*)*:* U.S. Department of Energy (FE–34), Office of Regulation and International Engagement, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Larine Moore or Kyle W. Moorman, U.S. Department of Energy (FE–34), Office of Regulation and International Engagement, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478; (202) 586–9387.

Edward Myers, U.S. Department of Energy (GC–76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–3397.

SUPPLEMENTARY INFORMATION:

DOE/FE Evaluation

The Application will be reviewed pursuant to section 3 of the NGA, as amended, and the authority contained in DOE Delegation Order No. 00–002.00N (July 11, 2013) and DOE Redelegation Order No. 00–002.04F (July 11, 2013). In reviewing this LNG export application, DOE will consider domestic need for the gas, as well as any other issues determined to be appropriate, including whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Parties that may oppose this application should comment in their responses on these issues.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4231, *et seq.,* requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its NEPA responsibilities.

Public Comment Procedures

In response to this Notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable. Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention. The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene, or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590.

Filings may be submitted using one of the following methods: (1) Emailing the filing to *fergas@hq.doe.gov,* with FE Docket No. 16–141–LNG in the title line; (2) mailing an original and three paper copies of the filing to the Office of Regulation and International Engagement at the address listed in **ADDRESSES**; or (3) hand delivering an original and three paper copies of the filing to the Office of Regulation and International Engagement at the address listed in **ADDRESSES**. All filings must include a reference to FE Docket No. 16–141–LNG.

Please Note: If submitting a filing via email, please include all related documents and attachments (*e.g.,* exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner. Any hardcopy filing submitted greater in length than 50 pages must also include, at the time of the filing, a digital copy on disk of the entire submission.

A decisional record on the Application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The Application is available for inspection and copying in the Division of Natural Gas Regulatory Activities docket room, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The Application and any filed protests, motions to intervene or notice of interventions, and comments will also be available electronically by going to the following DOE/FE Web address: *http://www.fe.doe.gov/programs/gasregulation/index.html.*

Issued in Washington, DC, on November 15, 2016.

John A. Anderson,

Director, Office of Regulation and International Engagement, Office of Oil and Natural Gas.

[FR Doc. 2016–27935 Filed 11–18–16; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Nuclear Energy Advisory Committee

AGENCY: Office of Nuclear Energy, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Nuclear Energy Advisory Committee (NEAC). Federal Advisory Committee Act (Pub. L. 94–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Friday, December 9, 2016, 9:00 a.m.–4:30 p.m.

ADDRESSES: Westin Crystal City, 1800 Jefferson Davis Highway, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Bob Rova, Designated Federal Officer, U.S. Department of Energy, 19901 Germantown Rd., Germantown, MD 20874; telephone (301) 903–9096; email *robert.rova@nuclear.energy.gov.*

SUPPLEMENTARY INFORMATION:

Background: The Nuclear Energy Advisory Committee (NEAC), formerly the Nuclear Energy Research Advisory Committee (NERAC), was established in 1998 by the U.S. Department of Energy (DOE) to provide advice on complex scientific, technical, and policy issues that arise in the planning, managing, and implementation of DOE's civilian nuclear energy research programs. The committee is composed of individuals of diverse backgrounds selected for their technical expertise and experience, established records of distinguished professional service, and their knowledge of issues that pertain to nuclear energy.

Purpose of the Meeting: To inform the committee of recent developments and current status of research programs and projects pursued by the Department of Energy's Office of Nuclear Energy and receive advice and comments in return from the committee.

Tentative Agenda: The meeting is expected to include presentations that provide the committee updates on activities for the Office of Nuclear Energy. In addition, there will be presentations by Nuclear Energy Advisory Committee subcommittees. The agenda may change to accommodate committee business. For updates, one is directed the NEAC Web site: *http://energy.gov/ne/services/nuclear-energy-advisory-committee.*

Public Participation: Individuals and representatives of organizations who would like to offer comments and suggestions may do so on the day of the meeting December 9, 2016. Approximately thirty minutes will be reserved for public comments. Time allotted per speaker will depend on the number who wish to speak but is not expected to exceed 5 minutes. Anyone who is not able to make the meeting or has had insufficient time to address the committee is invited to send a written statement to Bob Rova, U.S. Department of Energy 1000 Independence Avenue SW., Washington DC 20585, or email *robert.rova@nuclear.energy.gov.*

Minutes: The minutes of the meeting will be available by contacting Mr. Rova at the address above or on the Department of Energy, Office of Nuclear Energy Web site at *http://energy.gov/ne/services/nuclear-energy-advisory-committee.*

Issued in Washington, DC on November 15, 2016.

LaTayna R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2016–27936 Filed 11–18–16; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Secretary of Energy Advisory Board

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open meeting of the Secretary of Energy Advisory Board (SEAB). SEAB was reestablished pursuant to the Federal Advisory Committee Act. This notice is provided in accordance with the Act.

DATES: December 12, 2016, 4:00 p.m.–5:00 p.m.

ADDRESSES: Department of Energy, 1000 Independence Avenue SW., Room 1E–245, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Karen Gibson, Designated Federal Officer, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585; *seab@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Background: The Board was established to provide advice and recommendations to the Secretary on the Department's basic and applied research, economic and national security policy, educational issues, operational issues, and other activities as directed by the Secretary.

Purpose of the Meeting: This meeting is the quarterly meeting of the Board.

Tentative Agenda: The meeting will start at 4:00 p.m. on December 12th. The tentative meeting agenda will be a SEAB discussion of its advice to the Department and an opportunity for comments from the public. The meeting will conclude at 5:00 p.m. Agenda updates will be posted on the SEAB Web site prior to the meeting: *www.energy.gov/seab.*

Public Participation: The meeting is open to the public. Individuals who would like to attend must RSVP to Karen Gibson no later than 5:00 p.m. on Thursday, December 8, 2016, by email at: *seab@hq.doe.gov.* Please provide your name, organization, citizenship, and contact information. Anyone attending the meeting will be required to present government issued identification. Please note that the Department of Homeland Security (DHS) has determined that regular driver's licenses (and ID cards) from the following jurisdictions are not acceptable: American Samoa, Missouri, Washington and Wisconsin. Acceptable alternate forms of Photo-ID include:

- U.S. Passport or Passport Card
- An Enhanced Driver's License or Enhanced ID-Card issued by the state of Washington (Enhanced licenses issued by these states are clearly marked Enhanced or Enhanced Driver's License)
- A military ID or other government issued Photo-ID card

Individuals and representatives of organizations who would like to offer comments and suggestions may do so during the meeting. Approximately 15 minutes will be reserved for public comments. Time allotted per speaker will depend on the number who wish to speak but will not exceed 5 minutes.

The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Those wishing to speak should register to do so beginning at 3:45 p.m. on December 12th.

Those not able to attend the meeting or who have insufficient time to address the committee are invited to send a written statement to Karen Gibson, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, email to *seab@hq.doe.gov.*

Minutes: The minutes of the meeting will be available on the SEAB Web site or by contacting Ms. Gibson. She may be reached at the postal address or email address above, or by visiting SEAB's Web site at *www.energy.gov/seab.*

Issued in Washington, DC, on November 15, 2016.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2016–27937 Filed 11–18–16; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Proposed Agency Information Collection Extension

AGENCY: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy (DOE).

ACTION: Submission for Office of Management and Budget (OMB) review; comment request.

SUMMARY: The Department of Energy has submitted to the OMB for clearance, a proposal to amend an information collection request by adding an additional collection to an ICR that already includes two previously approved collections. The two previously approved collections address DOE's Plug-in Electric Vehicle (PEV) Scorecard, and the National Clean Fleets Partnership. DOE is not proposing to expand the scope of these information collection efforts. The proposed new collection is entitled ''Ride and Drive Surveys for PEV Showcases''. DOE's Clean Cities initiative has developed a three-part voluntary ride-and-drive survey to assist its coalitions and stakeholders in assessing the level of interest, understanding, and acceptance of PEVs and alternative fuel vehicles (AFV) by the purchasing public. The principal objective of the Survey is to provide DOE and stakeholders with an objective assessment and estimate of how ready the purchasing public is for PEVs, and to help DOE's Clean Cities coalitions prepare for the successful deployment of these vehicles. DOE intends the surveys to be completed by individuals who are participating in one of many ride-and-drive events.

DATES: Comments regarding this proposed information collection must be received on or before December 21, 2016. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Written comments should be sent to:

Desk Officer for the Department of Energy, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, 735 17th Street NW., Washington, DC 20503.

And to

Mr. Dennis Smith, Office of Energy Efficiency and Renewable Energy (EE–3V), U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585–0121, or by fax at 202–586–1600, or by email at *cleancitiesinfo@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Dennis Smith at the address listed above in **ADDRESSES**.

SUPPLEMENTARY INFORMATION: The amended information collection request contains (1) OMB No. 1910–5171; (2) Information Collection Request Title: Clean Cities Vehicle Programs; (3) Type of Review: Amended collection; (4) Purpose: As part of DOE's Office of Vehicle Technologies 2016 Funding Opportunity Announcement (FOA) awards, DOE is awarding entities funding to run PEV showcases where drivers can experience driving a variety of PEVs and learn about charging electric vehicles. These awards are 50 percent cost share awards, meaning that recipients of an award under this FOA must supply 50 percent of the funds to complete each awarded project. Projects undertaken pursuant to this FOA are expected to include a survey component related to potential vehicle driver behavior. Thus, the DOE Clean Cities program has developed an initiative, the Ride and Drive Surveys for PEV Showcases, that includes a three-part voluntary ride-and-drive survey to assist its coalitions and stakeholders in assessing the level of interest, understanding, and acceptance of AFVs by the purchasing public. The principal objective of the Surveys is to provide DOE and stakeholders with an objective assessment and estimate of how ready the purchasing public is for PEVs, and to help DOE's Clean Cities coalitions prepare for the successful deployment of these vehicles.

For the Ride and Drive Surveys for PEV Showcases collection, the effort will target public citizens who are participating in one of many Ride-and-Drive events. There are three phases to the Survey: (1) Pre Ride-and-Drive; (2) post Ride-and-Drive; and (3) a few months/some time later to discern if the respondent followed through with acquisition of a PEV or another AFV. Respondents would provide answers in the first two phases through a user-friendly paper survey and on-line survey, and in the third phase they would answer questions via an electronic interface, although a paper survey may be used for those lacking access to an electronic device or computer.

The Surveys' effort will rely on responses to questions the respondent chooses to answer. The multiple-choice questions will address the following topic areas: (1) Demographics; (2) Current vehicle background; (3) How they learned about ride and drive event; (3) Perceptions of PEVs before and after driving; (4) Post-drive vehicle experience; (5) Purchase expectations; (6) Follow-up survey on purchases; (7) Purchase information; (8) Barriers; and (9) Future intentions.

DOE expects a total respondent population for the amended collection (which would include the three collections) of approximately 16,250 respondents (an increase of 15,000 over the number of respondents for the two currently approved collections). Selecting the multiple choice answers in completing the three components of the Survey is expected to take 30 minutes, leading to a total burden of approximately 28,250 hours (an increase 2,500 hours above the total burden in hours for the two currently approved collections).

(5) *Type of Respondents:* Public; (6) *Annual Estimated Number of Respondents for all three information collections:* 16,250; (7) *Annual Estimated Number of Total Responses:* 16,300; (7) *Annual Estimated Number of Burden Hours:* 28,250 (25,625 for PEV Scorecard, 125 for Clean Fleets Partnership, and 2,500 for the Ride and Drive Surveys for PEV Showcases); and (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* There is no cost associated with reporting and recordkeeping.

Statutory Authority: 42 U.S.C. 13233; 42 U.S.C. 13252 (a)–(b); 42 U.S.C. 13255.

Issued in Washington, DC, on November 15, 2016.

Michael Berube,

Director, Vehicle Technologies Office, Energy Efficiency and Renewable Energy.

[FR Doc. 2016–27939 Filed 11–18–16; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9955–42-Region 9]

Section 9 Lease Site, Coconino County, AZ; Notice of Proposed CERCLA Settlement Agreement for Recovery of Past Response Costs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for comment.

SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. 9622(i), notice is hereby given of a proposed administrative settlement with two parties for recovery of response costs concerning the Section 9 Lease Site in Coconino County, Arizona. The settlement is entered into pursuant to Section 122(h)(1) of CERCLA, 42 U.S.C. 9622(h)(1), and it requires the settling parties to pay $230,000 to the United States Environmental Protection Agency (EPA). The settlement includes a covenant not to sue the settling parties for certain costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. 9606 or 9607(a). For thirty (30) days following the date of publication of this Notice in the **Federal Register**, the Agency will receive written comments relating to the settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at 75 Hawthorne Street, San Francisco, CA 94105.

DATES: Pursuant to Section 122(i) of CERCLA, EPA will receive written comments relating to this proposed settlement for thirty (30) days following the date of publication of this Notice in the **Federal Register**.

ADDRESSES: The proposed settlement is available for public inspection at EPA Region IX, 75 Hawthorne Street, San Francisco, California. A copy of the proposed settlement may be obtained from Joshua Wirtschafter, EPA Region IX, 75 Hawthorne Street, ORC–3, San Francisco, CA 94105, telephone number 415–972–3912. Comments should reference the Section 9 Lease Site, Coconino County, Arizona, and should be addressed to Joshua Wirtschafter at the above address.

FOR FURTHER INFORMATION CONTACT: Joshua Wirtschafter, Assistant Regional Counsel (ORC–3), Office of Regional Counsel, U.S. EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105; phone: (415) 972–3912; fax: (417) 947–3570; email: *wirtschafter.joshua@epa.gov.*

SUPPLEMENTARY INFORMATION:

Parties to the Proposed Settlement: Babbitt Ranches, LLC and C.O. Bar, Inc.

Dated: November 4, 2016.

Enrique Manzanilla,

Director, Superfund Division, U.S. EPA, Region IX.

[FR Doc. 2016–27978 Filed 11–18–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2016–0643; FRL 9955–41–OGC]

Proposed Consent Decree, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed consent decree; request for public comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended (''CAA'' or the ''Act''), notice is hereby given of a proposed consent decree to address a lawsuit filed by Donald van der Vaart, in his official capacity as Secretary of North Carolina Department of Environmental Quality (''NCDEQ''), and by NCDEQ (collectively ''Plaintiffs'') in the United States District Court for the Eastern District of North Carolina: *Donald van der Vaart, et al.* v. *McCarthy, et al.,* No. 4:16–cv–01946–SBA (E.D. N.C.). On June 24, 2016, Plaintiffs filed an amended complaint alleging that Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency (''EPA'') failed to perform duties mandated by CAA to take final action to approve or disapprove the December 9, 2013 Petition submitted by several states within the Ozone Transport Region (''OTR'') requesting EPA to expand the OTR to include North Carolina, among other states. The proposed consent decree would establish deadlines for EPA to take certain specified actions with respect to the December 9, 2013 Petition related to North Carolina.

DATES: Written comments on the proposed consent decree must be received by December 21, 2016.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2016–0643, online at *www.regulations.gov.* For comments submitted at *www.regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *www.regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA generally will not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Alexander Bond, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (202) 564–3822; fax number: (202) 564–5603; email address: *Bond.Alexander@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Consent Decree

On June 24, 2016, Plaintiffs filed an amended complaint alleging that EPA failed to perform duties mandated by CAA to take final action to approve or disapprove the December 9, 2013 Petition submitted by several states within the OTR requesting EPA to expand the OTR pursuant to 42 U.S.C 7506a(a) to include North Carolina and several other states. Under the terms of the proposed consent decree, EPA must sign a notice for public comment that proposes certain actions regarding the December 9, 2013 Petition as to the State of North Carolina, no later than January 18, 2017, and must sign a final notice of final action regarding the petition as to North Carolina thereon no later than October 27, 2017. See the proposed consent decree for the specific details.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed consent decree from persons who are not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines that consent to this proposed consent decree should be withdrawn, the terms of the consent decree will be affirmed.

II. Additional Information About Commenting on the Proposed Consent Decree.

A. How can I get a copy of the proposed consent decree?

The official public docket for this action (identified by EPA–HQ–OGC–2016–0643) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *www.regulations.gov*. You may use *www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search''.

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at *www.regulations.gov* without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *www.regulations.gov* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an ''anonymous access'' system. If you send an email comment directly to the Docket without going through *www.regulations.gov,* your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: November 7, 2016.

Lorie J. Schmidt,

Associate General Counsel.

[FR Doc. 2016–27983 Filed 11–18–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[CERCLA–04–2017–3750; FRL–9955–46–Region 4]

Crowders Mountain Site, Kings Mountain, Gaston County, North Carolina; Notice of Settlement

AGENCY: Environmental Protection Agency.

ACTION: Notice of settlement.

SUMMARY: Under 122(h) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the United States Environmental Protection Agency has entered into a settlement with North Carolina Department of Natural and Cultural Resources, concerning the Crowders Mountain Superfund Site located in Kings Mountain, Gaston County, North Carolina. The settlement addresses recovery of CERCLA costs for a cleanup action performed by the EPA at the Site.

DATES: The Agency will consider public comments on the settlement until December 21, 2016. The Agency will consider all comments received and may modify or withdraw its consent to the proposed settlement if comments received disclose facts or considerations which indicate that the proposed settlement is inappropriate, improper, or inadequate.

ADDRESSES: Copies of the settlement are available from the Agency by contacting Ms. Paula V. Painter, Program Analyst, using the contact information provided in this notice. Comments may also be submitted by referencing the Site's name through one of the following methods:

Internet: https://www.epa.gov/aboutepa/about-epa-region-4-southeast#r4-public-notices.

- *U.S. Mail:* U.S. Environmental Protection Agency, Superfund Division, Attn: Paula V. Painter, 61 Forsyth Street SW., Atlanta, Georgia 30303.
- *Email: Painter.Paula@epa.gov.*

FOR FURTHER INFORMATION CONTACT: Paula V. Painter at 404/562–8887.

Dated: October 26, 2016.

Greg Armstrong,

Acting Chief, Enforcement and Community Engagement Branch, Superfund Division.

[FR Doc. 2016–27979 Filed 11–18–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2016–0517; FRL–9953–56]

Notice of Receipt of Requests to Voluntarily Cancel Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is issuing a notice of receipt of requests by registrants to voluntarily cancel certain pesticide registrations. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the requests, or unless the registrants withdraw its requests. If these requests are granted, any sale, distribution, or use of products listed in this notice will be permitted after the registrations have been cancelled only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before May 22, 2017.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2016–0517, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.

Submit written withdrawal request by mail to: Information Technology and Resources Management Division (7502P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001. ATTN: Christopher Green.

- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.* Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Christopher Green, Information Technology and Resources Management Division (7502P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 347–0367; email address: *Green.Christopher@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

II. What action is the Agency taking?

This notice announces receipt by the Agency of requests from registrants to cancel 18 pesticide products registered under FIFRA section 3 (7 U.S.C. 136a) or 24(c) (7 U.S.C. 136v(c)). These registrations are listed in sequence by registration number (or company number and 24(c) number) in Table 1 of this unit.

Unless the Agency determines that there are substantive comments that warrant further review of the requests or the registrants withdraw their requests, EPA intends to issue an order in the **Federal Register** canceling all of the affected registrations.

TABLE 1—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Company No.	Product name	Active ingredient
100–991	100	Clipper 50 WP	Paclobutrazol.
100–992	100	Bonzi 50 WP	Paclobutrazol.
432–1563	432	Throttle XP Herbicide	Sulfentrazone, Sulfometuron & Chlorsulfuron.
66222–65	66222	Apollo 42% Ovicide/Miticide	Clofentezine.
AR–130002	241	Pursuit Herbicide	Imazethapyr, ammonium salt.
CA–150005	62719	Closer SC	Sulfoxaflor.
FL–140008	100	Revus Fungicide	Mandipropamide Technical.
GA–080004	100	Reward Landscape and Aquatic Herbicide	Diquat dibromide.
ID–150005	264	Oberon 4 SC Insecticide/Miticide	Spiromesifen.
OR–050002	264	Rovral 4 Flowable Fungicide	Iprodione.
OR–150005	264	Oberon 4 SC Insecticide/Miticide	Spiromesifen.
OR–150006	264	Oberon 4 SC Insecticide/Miticide	Spiromesifen.
OR–990010	2935	Supreme Oil	Mineral oil—includes paraffin oil from 063503.
PA–150003	100	Heritage Fungicide	Azoxystrobin.
TX–090010	56228	Compound DRC–1339 Concentrate-Feedlots	Starlicide.
WA–150009	62719	Transform WG	Sulfoxaflor.
WA–150010	264	Oberon 4 SC Insecticide/Miticide	Spiromesifen.
WA–980023	2935	Supreme Oil	Mineral oil—includes paraffin oil from 063503.

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Table 1 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in this unit.

TABLE 2—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

EPA Company No.	Company name and address
100	Syngenta Crop Protection, LLC, 410 Swing Road, P.O. Box 18300, Greensboro, NC 27419–8300.
241	BASF Corporation, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, NC 27709–3528.
264	Bayer CropScience, LP, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709.
432	Bayer Environmental Science, A Division of Bayer CropScience, LP, 2 T. W. Alexander Drive, Research Triangle Park, NC 27709.
2935	Wilbur-Ellis Company, LLC, 2903 S. Cedar Ave., Fresno, CA 93725.
56228	U.S. Department of Agriculture, Animal and Plant Health Inspection Service, 4700 River Road, Unit 149, Riverdale, MD 20737.
62719	Dow AgroSciences, LLC, 9330 Zionsville Rd. 308/2E, Indianapolis, IN 46268–1054.
66222	Makhteshim Agan of North America, Inc., D/B/A Adama, 3120 Highwoods Blvd., Suite 100, Raleigh, NC 27604.

III. What is the Agency's authority for taking this Action?

Section 6(f)(1) of FIFRA (7 U.S.C. 136d(f)(1)) provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. EPA will provide a 180-day comment period on the proposed requests. Thereafter, the EPA Administrator may approve such a request.

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation should submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

V. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Because the Agency has identified no significant potential risk concerns associated with these pesticide products, upon cancellation of the products identified in Table 1 of Unit II., EPA anticipates allowing registrants to sell and distribute existing stocks of these products for 1 year after publication of the Cancellation Order in the **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing the pesticides identified in Table 1 of Unit II., except for export consistent with FIFRA section 17 (7 U.S.C. 136o) or for proper disposal. Persons other than registrants will generally be allowed to sell, distribute, or use existing stocks until such stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

Authority: 7 U.S.C. 136 *et seq.*

Dated: October 18, 2016.

Delores J. Barber,

Director, Information Technology and Resources Management Division, Office of Pesticide Programs.

[FR Doc. 2016–27982 Filed 11–18–16; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

2017 Exim Bank Advisory Committee Nomination Process

Nominations are now being accepted for EXIM Bank's 2017 Advisory Committee. The Congressionally-established Advisory Committee holds quarterly meetings in which its primary task is to advise the Bank concerning its policy and programs, in particular on the extent to which the Bank is meeting its mandate to provide competitive financing that equips U.S. exporters to compete for business in the global marketplace. Pending approval by EXIM's Board of Directors, the first meeting of the 2017 Advisory Committee is scheduled to be held in late January 2017.

The nomination period will be open for four weeks beginning Wednesday, November 16–Friday, December 16, 2016.

Companies and supporters of potential nominees must submit a letter on company letterhead stating reasons why their candidate should be considered for the Advisory Committee. Self-nominations are permitted. All nomination forms must be completed and signed by all potential candidates.

All nominations are due COB Friday, December 16, 2016. Please email the candidate questionnaire form and additional information including supporter letters on letterhead to: *tia.pitt@exim.gov.*

Attachment

Candidate Questionnaire Form

Export-Import Bank of the United States
Advisory Committee Candidate Background Questionnaire

1. Name (Last, First, Middle):

2. Residence Address:

3. Telephone Numbers

   Home:

   Office:

   E-Mail Address:

4. Place of Birth (City, State/Province, Country):

5. Date of Birth:

6. Name and Address of Current Employer/Place of Business:

7. Title/Position:

8. Name(s) and Address(es) of Previous Employer(s)/Place(s) of Business (within previous 5 years):

9. Title(s)/Position(s):

10. Additional positions held within past 5 years (including, but not limited to, acting as a corporate officer, director, trustee, consultant, or advisor to any corporation, partnership, government, or other entity):

11. Please list all corporations, partnerships, trusts, or other business entities in which you, individually, hold a significant equity interest (greater than 5%):

12. To the best of your knowledge, have you individually, or as Principal of an entity listed under questions six or eight, been suspended or debarred, or proposed for suspension or debarment, from participation in federal contracts with the United States of America?

☐ Yes ☐ No

If yes, please provide a brief explanation:

13. To the best of your knowledge, have you individually, or as Principal of an entity listed under questions six or eight, been charged with or convicted of any offense in connection with your business or professional activities?

☐ Yes ☐ No

If yes, please provide a brief explanation:

14. As of the date of this Questionnaire, are you current on all of your federal, state, and local income taxes?

☐ Yes ☐ No

______________________________ Signed

______________ Date

July 2007

Privacy Act Notice

The information requested on this form is for the purpose of determining suitability for service on an Export-Import Bank of the United States advisory committee. The information you submit will be protected from unauthorized disclosure. The information on this form may, however, be disclosed as permitted by the Privacy Act (5 USC 552a(b))

Joyce B. Stone,

Program Specialist, Office of the General Counsel.

[FR Doc. 2016–27870 Filed 11–18–16; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK

[Public Notice 2016–3026]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the U.S.

ACTION: Submission for OMB Review and Comments Request.

Form Title: EIB 92–34, Application for Short-Term Letter of Credit Insurance Policy.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the paperwork Reduction Act of 1995.

By neutralizing the effect of export credit insurance and guarantees offered by foreign governments and by absorbing credit risks that the private section will not accept, Ex-Im Bank enables U.S. exporters to compete fairly in foreign markets on the basis of price and product. This collection of information is necessary, pursuant to 12 U.S.C. 635(a)(1), to determine eligibility of the applicant for Ex-Im Bank support.

This form is used by a financial institution (or broker acting on its behalf) in order to obtain approval for non-honoring coverage of short-term letters of credit. The information received provides Ex-Im Bank staff with the information necessary to make a determination of the eligibility of the applicant and transaction for Ex-Im Bank assistance under its programs.

The application can be viewed at *http://www.exim.gov/sites/default/files/pub/pending/eib92-34.pdf.*

DATES: Comments should be received on or before December 21, 2016 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *WWW.REGULATIONS.GOV* or by mail to Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street NW., Washington, DC 20038 attn: OMB–3048–0009

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 92–34 Application for Short-Term Letter of Credit Insurance Policy.

OMB Number: 3048–0009.

Type of Review: Regular.

Need and Use: The information collected will provide information needed to determine compliance and creditworthiness for transaction requests submitted to the Export Import Bank.

Affected Public: This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 48.

Estimated Time per Respondent: 1 hours.

Annual Burden Hours: 48 hours.

Frequency of Reporting or Use: As needed.

Government Expenses:

Reviewing Time per Year: 48 hours.

Average Wages per Hour: $42.50.

Average Cost per Year: $2,040 (time*wages).

Benefits and Overhead: 20%.

Total Government Cost: $2,448.

Bassam Doughman,

Project Manager, Agency Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2016–27930 Filed 11–18–16; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

Sunshine Act Meeting; Deletion of Items from Meeting

November 16, 2016.

The following Agenda items have been deleted from the list of items scheduled for consideration at the Thursday, November 17, 2016, Open Meeting and previously listed in the Commission's Notice of November 10, 2016. The items remain on circulation.

* * * * *

1	Wireless Telecommunications	*Title:* Universal Service Reform—Mobility Fund (WT Docket No. 10–208); Connect America Fund (WC Docket No. 10–90); A National Broadband Plan for Out Future (GN Docket No. 09–51); Establishing Just and Reasonable Rates for Local Exchange Carriers (WC Docket No. 07–135); High-Cost Universal Service Support (WC Docket No. 05–337); Developing an Unified Intercarrier Compensation Regime (CC Docket No. 01–92); Federal-State Joint Board on Universal Service (CC Docket No. 96–45); Lifeline and Link-Up (WC Docket No. 03–109) *Summary:* The Commission will consider a Report and Order that would adopt rules for the second phase of the Mobility Fund, which would provide ongoing universal service support dedicated to expanding the availability of mobile broadband networks.
2	Wireless Telecommunications	*Title:* Roaming Obligations of Commercial Mobile Service Providers and Regulatory Classification of Voice over LTE Service (WT Docket No. 16–356) *Summary:* The Commission will consider a Notice of Proposed Rulemaking that would seek comment on proposals to implement a unified roaming standard and to classify Voice over LTE.
3	Wireline Competition	*Title:* Business Data Services in an Internet Protocol Environment (WC Docket No. 16–143); Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans (WC Docket No. 15–247); Technology Transitions (GN Docket No. 13–5); Special Access for Price Cap Local Exchange Carriers (WC Docket No. 05–25); AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services (RM–10593) *Summary:*The Commission will consider a Report and Order and Second Further Notice of Proposed Rulemaking that would allow for light-touch regulation of packet-based Business Data Services and retain and update price cap regulation for lower-bandwidth TDM-based Business Data Services to ensure that lack of competition does not unfairly harm commercial customers or the consumers who rely upon these services.
4	Media	*Title:* Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010 (MB Docket No. 11–43) *Summary:*The Commission will consider a Report and Order which addresses the amount of video described programming required to be made available to consumers.

The following Consent Agenda item has been deleted from the list of items scheduled for consideration at the Thursday, November 17, 2016, Open Meeting and previously listed in the

Commission's Notice of November 10, 2016. The item remains on circulation.

* * * * *

1	Enforcement	*Title:* Enforcement Bureau Action. *Summary:*The Commission will consider an enforcement action.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2016–28115 Filed 11–17–16; 4:15 pm]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request (3064–0200)

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the renewal of existing information collections, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). On August 24, 2016, (81 FR 57908), the FDIC requested comment for 60 days on a proposal to revise the ''Joint Standards for Assessing the Diversity Policies and Practices'' information collection by adding a form to the information collection entitled ''Diversity Self-Assessment Template for Entities Regulated by the FDIC.'' No comments were received. The FDIC hereby gives notice of its plan to submit to OMB a request to approve the renewal of these collections, and again invites comment on this renewal.

DATES: Comments must be submitted on or before December 21, 2016.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html.*
- *Email: comments@fdic.gov.* Include the name and number of the collection in the subject line of the message.
- *Mail:* Manny Cabeza (202–898–3767), Counsel, MB–3007, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Manny Cabeza, at the FDIC address above.

SUPPLEMENTARY INFORMATION: Proposal to renew the following currently approved collections of information:

1. *Title:* Joint Standards for Assessing Diversity Policies and Practices.

OMB Number: 3064–0200.

Form Number: FDIC 2710/05.

Affected Public: Insured financial institutions supervised by the FDIC.

Annual Number of Respondents: 398.

Frequency of Response: Annual.

Average Response Time per Respondent: 8 hours.

Estimated Total Annual Burden Hours: 3,184 hours.

General Description of Collection: This voluntary information collection applies to entities regulated by the FDIC for purposes of assessing their diversity policies and practices as described in the final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies.[1] This revision to the previously approved collection adds a form entitled *Diversity Self-Assessment Template for Entities Regulated by the FDIC* intended to facilitate responders' self-assessment process. The FDIC estimates that the use of the template will result in a reduction in the average response time per respondent from 12 hours to 8 hours with a corresponding reduction in the estimated total annual burden hours for this collection of information from 4,778 hours to 3,184 hours. The *Diversity Self-Assessment Template for Entities Regulated by the FDIC* can be viewed at *www.fdic.gov/about/diversity/dsa_template.docx.* This revision to the previously approved collection of information: (1) Asks for general information about a respondent; (2) includes a checklist of the standards set forth in the Policy Statement; (3) seeks additional diversity data; and (4) provides an opportunity for a respondent to give other information regarding or comment on the self-assessment of its diversity policies and practices.

The FDIC may use the information submitted by the entities it regulates to monitor progress and trends in the financial services industry with regard to diversity and inclusion in employment and contracting activities and to identify and highlight those policies and practices that have been successful. The FDIC will continue to reach out to the regulated entities and other interested parties to discuss diversity and inclusion in the financial services industry and share leading practices. The FDIC may also publish information disclosed by the entity, such as any identified leading practices, in any form that does not identify a particular institution or individual or disclose confidential business information.

Request for Comment

Comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collections, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collections of information on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 16th day of November, 2016.

Federal Deposit Insurance Corporation

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 2016–27962 Filed 11–18–16; 8:45 am]

BILLING CODE 6714–01–P

[1] 80 FR 33016 (June 10, 2015).

FEDERAL MARITIME COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Federal Maritime Commission.

TIME AND DATE: November 17, 2016—10 a.m.

PLACE: 800 North Capitol Street NW., First Floor Hearing Room, Washington, DC.

STATUS: The meeting agenda originally published November 15, 2016, 81 FR 80055, is revised to add item 4 in the Closed Session. The change was made upon a unanimous vote of the Commission. The first portion of the meeting will be held in Open Session and will be streamed live at *http://fmc.capitolconnection.org/;* the second portion in closed session.

MATTERS TO BE CONSIDERED:

Open Session

1. Briefing by the Chairman on the World Shipping Summit
2. Staff Briefing on OTI License Renewals

Closed Session

1. Staff Briefing on Hanjin Bankruptcy and Shipping Disruptions
2. Update on the PierPASS Third-party Audit and Extended Gate Workshop
3. Empirical Analysis of Changing Alliance Structures in the Transpacific Trade
4. THE Alliance Agreement, FMC Agreement No. 012439

CONTACT PERSON FOR MORE INFORMATION: Rachel E. Dickon, Assistant Secretary, (202) 523 5725.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2016–28051 Filed 11–17–16; 12:00 pm]

BILLING CODE 6731–AA–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than December 6, 2016.

A. Federal Reserve Bank of St. Louis (David L. Hubbard, Senior Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org:*

1. *Jeffrey Harris Lowery, M.D.,* Eads, Tennessee; to acquire more than 10 percent of the shares of Germantown Capital Corporation, Inc., and thereby indirectly control more than 10 percent of the voting shares of First Capital Bank, both in Germantown, Tennessee.

Board of Governors of the Federal Reserve System, November 16, 2016.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2016–27956 Filed 11–18–16; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 13, 2016.

A. Federal Reserve Bank of St. Louis (David L. Hubbard, Senior Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org:*

1. *Central Bank and Central Acquisition Sub, Inc.,* both in Little Rock, Arkansas; to become bank holding companies through the merger of Central Acquisition Sub, Inc. with and into Pinnacle Bancshares, Inc., Rogers, Arkansas. Simultaneously with the merger, Pinnacle Bank, Rogers, Arkansas, will be merged with and into Central Bank.

B. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Equity Bancshares, Inc. and Prairie Merger Sub, Inc.,* both in Wichita, Kansas; for Prairie Merger Sub, Inc. to become a bank holding company for a moment in time by acquiring Prairie State Bancshares, Inc., and thereby indirectly acquiring State Bank, both in Hoxie, Kansas. Immediately thereafter, Prairie State Bancshares, Inc. will merge into Equity Bancshares, Inc.

Board of Governors of the Federal Reserve System, November 16, 2016.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2016–27955 Filed 11–18–16; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–D–2241]

Substantiation for Structure/Function Claims Made in Infant Formula Labels and Labeling: Draft Guidance for Industry; Reopening of the Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability; reopening of the comment period.

SUMMARY: The Food and Drug Administration (FDA or we) is reopening the comment period for the notice, published in the **Federal Register** of September 9, 2016 (81 FR 62509), announcing the availability of the draft guidance for industry entitled ''Substantiation for Structure/Function Claims Made in Infant Formula Labels and Labeling.'' We are reopening the comment period in response to a request

for an extension to allow interested persons additional time to submit comments.

DATES: Submit either electronic or written comments by February 21, 2017.

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–2016–D–2241 for ''Substantiation for Structure/Function Claims Made in Infant Formula Labels and Labeling.'' 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.'' We will review this copy, including the claimed confidential information, in our 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: Gillian Robert-Baldo, Center for Food Safety and Applied Nutrition (HFS–850), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–1451.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of September 9, 2016 (81 FR 62509), we published a notice announcing the availability of a draft guidance entitled, ''Substantiation for Structure/Function Claims Made in Infant Formula Labels and Labeling.'' Although you can comment on any guidance at any time, to ensure that we consider comments on this draft guidance before we begin work on the final version, interested persons were originally given until November 8, 2016, to comment on the draft guidance.

Following publication of the September 9, 2016, notice of availability, we received a request for a 90-day extension of the comment period. The request expressed concern that the current 60-day comment period does not allow sufficient time to develop a thoughtful and comprehensive response to the draft guidance. We have considered the request and are reopening the comment period for an additional 90 days, until February 21, 2017. We believe that this reopening allows adequate time for interested persons to submit comments without significantly delaying finalizing the guidance.

Dated: November 15, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–27941 Filed 11–18–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–1050]

Report of the Center for Veterinary Medicine Working Group on the Regulation of Animal Drug Availability Act Combination Drug Medicated Feeds; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a report of a Center for Veterinary Medicine (CVM) working group proposing possible changes to the current review processes for new animal drug applications (NADAs) providing for the use of multiple new animal drugs in combination drug medicated feeds. This report was developed for the use of the CVM committee that will be participating in discussions concerning the reauthorization of the animal drug user fee program for 5 additional years through fiscal year 2023 (per the Animal Drug User Fee Amendments (ADUFA) IV).

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

Submit written requests for single copies of the report to the Policy and Regulations Staff (HFV–6), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the document.

FOR FURTHER INFORMATION CONTACT: Linda M. Wilmot, Center for Veterinary Medicine (HFV–120), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–402–0829, *linda.wilmot@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of September 9, 2014 (79 FR 53431), CVM announced that it was beginning to explore possible changes to the current review processes for NADAs for the use of multiple new animal drugs in combination drug medicated feeds. In the same **Federal Register** notice, FDA announced the opening of a docket to receive input from the public on this issue. This effort is consistent with the stated performance goal in the Animal Drug User Fee Amendments of 2013 (ADUFA III) goals letter.

In the **Federal Register** of April 29, 2016 (81 FR 25677), FDA published a notice of availability of a draft CVM report, giving interested persons until July 29, 2016, to comment. Those comments were considered as the CVM working group report was finalized without substantive changes. This report was developed for the discussions with the regulated industry for reauthorization of ADUFA.

Persons with access to the Internet may obtain this document on the CVM ADUFA Meetings Web page: *http://www.fda.gov/ForIndustry/UserFees/AnimalDrugUserFeeActADUFA/ucm042891.htm.*

Dated: November 15, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–27942 Filed 11–18–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–1147]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Preparing a Claim of Categorical Exclusion or an Environmental Assessment for Submission to the Center for Food Safety and Applied Nutrition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) 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 December 21, 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 *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0541. 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.*

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.

Preparing a Claim of Categorical Exclusion or an Environmental Assessment for Submission to the Center for Food Safety and Applied Nutrition—OMB Control Number 0910–0541—Extension

As an integral part of its decision making process, we are obligated under the National Environmental Policy Act of 1969 (NEPA) to consider the environmental impact of our actions, including allowing notifications for food contact substances to become effective and approving food additive petitions, color additive petitions, GRAS affirmation petitions, requests for exemption from regulation as a food additive, and actions on certain food labeling citizen petitions, nutrient content claims petitions, and health claims petitions. In 1997, we amended our regulations in part 25 (21 CFR part 25) to provide for categorical exclusions for additional classes of actions that do not individually or cumulatively have a significant effect on the human environment (62 FR 40570, July 29, 1997). As a result of that rulemaking, we no longer routinely require submission of information about the manufacturing and production of our regulated articles. We also have eliminated the previously required Environmental Assessment (EA) and abbreviated EA formats from the amended regulations. Instead, we have provided guidance that contains sample formats to help industry submit a claim of categorical exclusion or an EA to the Center for Food Safety and Applied Nutrition (CFSAN). The guidance document entitled ''Preparing a Claim of Categorical Exclusion or an Environmental Assessment for Submission to the Center for Food Safety and Applied Nutrition'' identifies, interprets, and clarifies existing requirements imposed by statute and regulation, consistent with the Council on Environmental Quality regulations (40 CFR 1507.3). It consists of recommendations that do not themselves create requirements; rather, they are explanatory guidance for our own procedures in order to ensure full compliance with the purposes and provisions of NEPA.

The guidance provides information to assist in the preparation of claims of categorical exclusion and EAs for submission to CFSAN. The following questions are covered in this guidance: (1) What types of industry-initiated actions are subject to a claim of categorical exclusion? (2) What must a claim of categorical exclusion include by regulation? (3) What is an EA? (4) When is an EA required by regulation and what format should be used? (5) What are extraordinary circumstances? and (6) What suggestions does CFSAN have for preparing an EA? Although CFSAN encourages industry to use the EA formats described in the guidance because standardized documentation submitted by industry increases the efficiency of the review process, alternative approaches may be used if these approaches satisfy the requirements of the applicable statutes and regulations. We are requesting the extension of OMB approval for the information collection provisions in the guidance.

Description of Respondents: The likely respondents include businesses engaged in the manufacture or sale of food, food ingredients, and substances used in materials that come into contact with food.

In the **Federal Register** of August 25, 2016 (81 FR 58517), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
25.15 (a) & (d) (to cover CEs under 25.32(i))	47	1	47	8	376
25.15 (a) &(d) (to cover CEs under 25.32(o))	1	1	1	8	8
25.15 (a) &(d) (to cover CEs under 25.32(q))	3	1	3	8	24
25.40 (a) & (c) EAs	57	1	57	180	10,260
Total					10,668

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The estimates for respondents and numbers of responses are based on the annualized numbers of petitions and notifications qualifying for categorical exclusions listed under § 25.32(i) and (q) that the Agency has received in the past 3 years. Please note that, in the past 3 years, there have been no submissions that requested an action that would have been subject to the categorical exclusion in § 25.32(o). To avoid counting this burden as zero, we have estimated the burden for this categorical exclusion at one respondent making one submission a year for a total of one annual submission. The burden for submitting a categorical exclusion is captured under § 25.15(a) and (d).

To calculate the estimate for the hours per response values, we assumed that the information requested in this guidance for each of these three categorical exclusions is readily available to the submitter. For the information requested for the exclusion in § 25.32(i), we expect that submitter will need to gather information from appropriate persons in the submitter's company and prepare this information for attachment to the claim for categorical exclusion. We believe that this effort should take no longer than 8 hours per submission. For the information requested for the categorical exclusions in § 25.32(o) and (q), the submitters will almost always merely need to copy existing documentation and attach it to the claim for categorical exclusion. We believe that collecting this information should also take no longer than 8 hours per submission.

For the information requested for the environmental assessments in § 25.40(a) and (c), we believe that submitters will submit an average of 57 environmental assessments annually. We estimate that each submitter will prepare an EA within 3 weeks (120 hours) and revise the EA based on Agency comments (between 40 to 60 hours), for a total preparation time of 180 hours. The burden relating to this collection has been previously approved under OMB control number 0910–0322, ''Environmental Impact Consideration—21 CFR part 25''. Upon approval of this collection of information by OMB, FDA will revise OMB control number 0910–0322 to remove the annual reporting burden for categorical exclusions and environmental assessment requests related to food additive petitions, color additive petitions, requests for exemption from regulation as a food additive, and submission of a food contact notification for a food contact substance. The future burden for categorical exclusion or environmental assessments for these requests will be captured under OMB control number 0910–0541, this collection of information.

Dated: November 15, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–27943 Filed 11–18–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Privacy Act of 1974; System of Records Notice

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

ACTION: Notice to establish a new system of records, and to delete related systems.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, HHS is establishing a new, department-wide system of records, System No. 09–90–1601 ''Outside Experts Recruited for Non-FACA Activities,'' and deleting four related systems of records that are obsolete or that will be rendered duplicative by the new system. The new system will cover recruitment and other administrative records about individuals outside the HHS workforce who serve or are considered for service on HHS mission-related committees and other assignments requiring specific outside expertise or experience (excluding those that are subject to the Federal Advisory Committee Act (FACA), which are covered under System No. 09–90–0059). The new department-wide System No. 09–90–1601 and the related system deletions are more fully explained in the **SUPPLEMENTARY INFORMATION** section of this Notice.

DATES: The new system of records established in this Notice is effective upon publication, with the exception of the routine uses. The routine uses will be effective 30 days after publication of this Notice, unless comments are received that warrant a revision to this Notice. Written comments on the Notice should be submitted within 30 days. The deletion of System Numbers 09–20–0168, 09–30–0049, 09–37–0022, and 09–90–0080 will be effective 30 days after publication of this Notice.

ADDRESSES: The public should address written comments to: Beth Kramer, HHS Privacy Act Officer, FOIA/PA Division, Hubert H. Humphrey Building—Suite 729H, 200 Independence Avenue SW., Washington, DC 20201, *beth.kramer@hhs.gov.*

FOR FURTHER INFORMATION CONTACT: Beth Kramer, HHS Privacy Act Officer, FOIA/PA Division, Hubert H. Humphrey Building—Suite 729H, 200 Independence Avenue SW., Washington, DC 20201, *beth.kramer@hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Explanation of New System No. 09–90–1601

The records to be covered in the new system of records are similar in type and function to the records covered in System No. 09–90–0059, which pertain to individuals who serve or are considered for service on committees that are subject to the Federal Advisory Committee Act (FACA), 5 U.S.C. App., *et seq.;* the key difference is that they will be about outside individuals serving or considered for service on mission-related committees and other activities that are not subject to FACA. Following are the non-FACA-related programs at HHS that recruit and utilize individuals with outside expertise or experience and maintain records about the outside individuals in systems that retrieve the records by personal identifier:

- *Curricula Vitae of Consultants to the National Center for Health Statistics (NCHS) within the Centers for Disease Control and Prevention (CDC) (formerly covered under SORN 09–20–0168).* This program maintains records about individuals with special expertise, training, and professional experience who may be enlisted to assist CDC/NCHS as consultants. The records are used by CDC/NCHS to select individuals to participate in assignments such as: planning and conducting surveys, studies, statistical reporting programs, and statistical analyses of data; providing training and technical assistance; and planning and conducting conferences. These records currently are covered under SORN No. 09–20–0168, which is being deleted and subsumed under the new department-wide SORN No. 09–90–1601.
- *The Food and Drug Administration (FDA) Patient Representative Program.* This program enlists individuals with patient advocacy experience to serve as patient representatives on both FACA committees and non-FACA assignments. For example, patient representatives may provide input that is used in making decisions to approve devices or drugs, or may contribute to discussions at presentations and conferences. Records about patient representatives are retrieved by the representatives' names, and will be covered under either SORN No. 09–90–0059 or the new department-wide SORN No. 09–90–1601, depending on whether the records pertain to service on a FACA committee or service on a non-FACA assignment.
- *Peer Review Programs at the Administration for Children and Families (ACF), Health Resources and Services Administration (HRSA), and Substance Abuse and Mental Health Services Administration (SAMHSA) that recruit and use outside individuals to serve on peer review committees formed to review applications for grants and cooperative agreements.* These programs exist in several HHS components, but only ACF, HRSA, and SAMHSA sometimes use a personal identifier (*i.e.,* name) to retrieve administrative records about the outside individuals they recruit and use. Other components (including the Office of the Assistant Secretary for Health (OASH), Centers for Medicare & Medicaid Services (CMS), and National Institutes of Health (NIH)) use only non-personal identifiers (*e.g.,* expertise type, or funding opportunity announcement number) for retrieval.
- *Consultants on Other SAMHSA Projects (formerly covered under SORN 09–30–0049).* SAMHSA contractors arrange for outside consultants to be used in other SAMHSA programs (besides peer review programs) when technical assistance is needed in conferences, meetings, and evaluation projects that involve a specialized area of research, review, or advice.

A report on the new system of records has been sent to Congress and OMB in accordance with 5 U.S.C. 552a(r).

II. Deletion of Four Related Systems of Records

The following systems of records are being deleted as duplicative of new department-wide System No. 09–90–1601:

- 09–20–0168 Curricula Vitae of Consultants to the National Center for Health Statistics
- 09–30–0049 Consultant Records Maintained by SAMHSA Contractors

The following system of records is being deleted as duplicative of System No. 09–90–0059 Federal Advisory Committee Membership Files as to files that pertain to candidates for FACA committees, and as duplicative of new department-wide System No. 09–90–1601 as to files that pertain to candidates for non-FACA committees and other activities:

- 09–90–0080 The Secretary's Advisory Committee Candidate Files

The following system of records is being deleted because it is obsolete and the records no longer exist:

- 9–37–0022 Records of Health Experts Maintained by the Office of International Health

III. 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.

Dated: November 1, 2016.

Beth Kramer,

Privacy Act Officer, FOIA/Privacy Act Division, Assistant Secretary for Public Affairs, Department of Health and Human Services.

Notice of Deletion of Related Systems

The following systems of record are deleted, effective 30 days after publication of this Notice:

1. 09–20–0168 Curricula Vitae of Consultants to the National Center for Health Statistics
2. 09–30–0049 Consultant Records Maintained by SAMHSA Contractors
3. 09–90–0080 The Secretary's Advisory Committee Candidate Files
4. 09–37–0022 Records of Health Experts Maintained by the Office of International Health

SYSTEM NUMBER:

09–90–1601

SYSTEM NAME:

Outside Experts Recruited for Non-FACA Activities

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Physical locations include:

- CDC program offices that recruit consultants to assist in statistical projects and reporting programs conducted or sponsored by NCHS, in Atlanta, GA and Hyattsville, MD;
- FDA's committee management office in Silver Spring, MD;
- Program offices at ACF in Washington, DC, at HRSA in Rockville, MD, and at SAMHSA in Rockville, MD,

that recruit individuals to serve as peer reviewers; and

• Locations of SAMHSA contractors that arrange use of consultants on SAMHSA projects.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Records in this system pertain to individuals outside the HHS workforce who serve or are considered for service on HHS mission-related committees or other assignments that require specific outside expertise or experience (for example, medical, scientific, or manufacturing expertise, or patient advocacy experience), but that are not subject to the Federal Advisory Committee Act (FACA), 5 U.S.C. App., *et seq.*

CATEGORIES OF RECORDS IN THE SYSTEM:

The records consist of recruitment and other administrative records, including:

• An application and resume or curricula vitae, describing the individual's qualifications;

• Nomination/recommendation records, or other records used in evaluating an individual's qualifications and any potential conflicts of interest and selecting an individual for a specific assignment; and

• Records used to plan and arrange the individual's participation in the assigned activities, including scheduling records and records used to coordinate parking, badging, and payment of any stipend or honorarium.

The records may contain these data elements:

• The individual's name and other identifying information (*e.g.,* sex, place and date of birth);

• Contact information (*e.g.,* home and business addresses, telephone numbers, email addresses);

• Occupation, job titles, employers, employment status and history, and whether currently employed by the federal government;

• Work and organizational affiliations, memberships, credentials, and licenses;

• Degrees held, and general educational and/or experience background;

• Racial classification or ethnic background;

• Areas of specialization, expertise, or experience, and special qualifications (*e.g.,* language or technical skills, ability to drive to an assignment);

• Dates and descriptions of past assignments or past experience;

• Sources and references, and any information provided by sources/references; and

• Information about availability and any special needs.

Any special needs, medical condition, or similar information contained in an individual's records is maintained and used in accordance with relevant provisions of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 *et seq.,* and implementing regulations at 29 CFR parts 1614 and 1630, and the Genetic Information Nondiscrimination Act of 2008 at 42 U.S.C. 2000ff *et seq.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

For CDC/NCHS Consultant Records: 42 U.S.C. 242b(b)(3).

For FDA Patient Representative Records: 21 U.S.C. 360bbb–8c, 371 *et seq.,* 379d–1(b)(1)(A).

For ACF Peer Reviewer Records: 42 U.S.C. 799(f), 806(e).

For HRSA Peer Reviewer Records: 42 U.S.C. 799(f), 806(e).

For SAMHSA Peer Reviewer and Other Consultant Records: 42 U.S.C. 241, 249(c), 290aa *et seq.,* 290aa–5, 290bb *et seq.,* 290bb–21 *et seq.,* 290bb–31 *et seq.,* 5121 *et seq.,* 10801 *et seq.;* 8 U.S.C. 1522 note; Executive Order 12341.

See also: 5 U.S.C. 3109.

PURPOSE(S):

The records will be used within the agency on a need-to-know basis for the purpose of staffing committees and other assignments and managing administrative matters pertaining to individuals serving on committees and other assignments, including to:

• Prepare reports and lists of past, present, and recommended members, vacancies, acceptances, and separations;

• Send recruitment notices to individual prospective candidates, and send informational notices to selectees;

• Identify qualified candidates and document the selections; and

• Manage and coordinate the selected individuals' participation in assignment activities (including sharing information within the agency to coordinate aspects such as badging, parking, travel, training, and payment of any stipend or honorarium).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to the statutory disclosures of information permitted in the Privacy Act at 5 U.S.C. 552a(b)(2) and (b)(4)–(11), HHS may make the following disclosures of information about an individual from this system of records to parties outside the agency without the individual's prior, written consent:

1. Disclosures may be made to federal agencies and Department contractors that have been engaged by HHS to assist in accomplishment of an HHS function relating to the purposes of this system of records and that have a need to have access to the records in order to assist HHS in performing the activity. Any contractor will be required to comply with the requirements of the Privacy Act.

2. Records may be disclosed to parties such as educational institutions, current and former employers, and qualified experts, when necessary to check or obtain an opinion about a candidate's qualifications.

3. Records about consultants and patient advocates may be disclosed to parties organizing or hosting assignment activities, such as grantee institutions and federal, foreign, state, tribal, local, and other government agencies and public authorities (*e.g.,* U.S. Embassies and Ministries of Health), when necessary to apprise them of an individual's qualifications for the assignment or coordinate the individual's participation in the activities.

4. Records may be disclosed to supervisors and administrative assistants at the individual's place of employment, for administrative purposes such as coordinating the individual's participation in the activities.

5. Records may be disclosed to external parties that audit committee or assignment activities.

6. Relevant information will be included in any required reports to the President, the Office of Management and Budget (OMB), and the General Services Administration (GSA) about committees and other assignments that are mission-related.

7. Information may be disclosed to the U.S. Department of Justice (DOJ) or to a court or other tribunal, when:

a. The agency or any component thereof, or

b. Any employee of the agency in his or her official capacity, or

c. Any employee of the agency in his or her individual capacity where DOJ has agreed to represent the employee, or

d. The United States Government,

is a party to litigation or has an interest in such litigation and, by careful review, HHS determines that the records are both relevant and necessary to the litigation and that, therefore, the use of such records by the DOJ, court or other tribunal is deemed by HHS to be compatible with the purpose for which the agency collected the records.

8. Records may be disclosed to student volunteers and other individuals performing functions for the

Department but technically not having the status of agency employees, if they need access to the records in order to perform their assigned agency functions.

9. Disclosures may be made to the National Archives and Records Administration (NARA) and/or the General Services Administration (GSA) for the purpose of records management inspections conducted under 44 U.S.C. 2904 and 2906.

10. Information may be disclosed to a Member of Congress or a Congressional staff member in response to a written inquiry of the Congressional office made at the written request of the constituent about whom the record is maintained. The Congressional office does not have any greater authority to obtain records than the individual would have if requesting the records directly.

11. Records may be disclosed to the U.S. Department of Homeland Security (DHS) if captured in an intrusion detection system used by HHS and DHS pursuant to a DHS cybersecurity program that monitors Internet traffic to and from federal government computer networks to prevent a variety of types of cybersecurity incidents.

12. Disclosures may be made to appropriate federal agencies and Department contractors that have a need to know the information for the purpose of assisting the Department's efforts to respond to a suspected or confirmed breach of the security or confidentiality of information maintained in this system of records, when the information disclosed is relevant and necessary to that assistance.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM—

STORAGE:

Records are stored in hard-copy files and electronic media.

RETRIEVABILITY:

Records are retrieved by the individual's name.

SAFEGUARDS:

Safeguards conform to the HHS Information Security and Privacy Program, *http://www.hhs.gov/ocio/securityprivacy/index.html.* Information is safeguarded in accordance with applicable laws, rules and policies, including the HHS Information Technology Security Program Handbook, all pertinent National Institutes of Standards and Technology (NIST) publications, and OMB Circular A–130, Management of Federal Resources. Records are protected from unauthorized access through appropriate administrative, physical, and technical safeguards. These safeguards include protecting the facilities where records are stored or accessed with security guards, badges and cameras, securing hard-copy records in locked file cabinets, file rooms or offices during off-duty hours, limiting access to electronic databases to authorized users based on roles and two-factor authentication (user ID and password), using a secured operating system protected by encryption, firewalls, and intrusion detection systems, requiring encryption for records stored on removable media, and training personnel in Privacy Act and information security requirements. Records that are eligible for destruction are disposed of using destruction methods prescribed by NIST SP 800–88.

RETENTION AND DISPOSAL:

Records pertaining to recruitment and use of outside peer reviewers are destroyed three years after final action; they are retained longer if required for business use (see General Records Schedule (GRS) 1.2, Item 010, Grant and Cooperative Agreement Program Management Records). Records pertaining to recruitment and use of other outside individuals (*e.g.,* experts, patient advocates, and members of mission-related non-FACA committees) are currently unscheduled. Unscheduled records must be retained indefinitely pending the agency's submission, and NARA's approval, of a disposition schedule. HHS anticipates proposing to NARA, as an appropriate retention period for these records, ''three years after final action, or longer if required for business use'' (similar to the period provided in GRS 1.2, Item 010) or ''when no longer needed for administrative purposes'' (similar to the periods applicable to similar records not retrieved by personal identifier which are not covered under this SORN; *i.e.:* N1–442–93–1, Item 37 for the Agency for Toxic Substances and Disease Registry's Curriculum Vitae Files, and NC1–235–82–1, Item 100–3 for the Office of the Secretary's Advisory Committee Candidate Resume Files).

SYSTEM MANAGER(S) AND ADDRESS(ES):

For CDC/NCHS Consultant Records:

- Centers for Disease Control and Prevention (CDC), Director, National Center for Health Statistics, OPHSS, Prince George's Metro IV Bldg., Rm. 7209, MS P08, Centers for Disease Control and Prevention, 3311 Toledo Road, Hyattsville, MD 20782

For FDA Patient Representative Records:

- Food and Drug Administration (FDA), Advisory Committee Oversight & Management Staff, 10903 New Hampshire Avenue, Bldg. WO32, Rm. 5129, Silver Spring, MD 20993–002

For ACF Peer Reviewer Records:

- Administration for Children and Families (ACF), Privacy Act Contact, Office of Information Systems 330 C Street, NW., Washington, DC 20201

For HRSA Peer Reviewer Records:

- Health Resources and Services Administration (HRSA), Chief, Policy, Analysis & Training Branch, Division of Independent Review, Office of Federal Assistance Management, 5600 Fishers Lane, Rockville, MD 20857

For SAMHSA Peer Reviewer Records:

- Substance Abuse and Mental Health Services Administration (SAMHSA), Director, Division of Grant Review, 5600 Fishers lane, Rockville, MD 20852

For Other Consultant Records, Maintained by SAMHSA Contractors:

- Substance Abuse and Mental Health Services Administration (SAMHSA), Director, Division of Contracts Management, Office of Program Services, 5600 Fishers Lane, Rockville, MD 20852

NOTIFICATION PROCEDURE:

An individual who wishes to know if this system contains records about him or her should submit a written request to the relevant System Manager indicated above. The individual must verify his or her identity by providing either a notarization of the request or a written certification that the requester is who he or she claims to be and understands that the knowing and willful request for acquisition of a record pertaining to an individual under false pretenses is a criminal offense under the Privacy Act, subject to a five thousand dollar fine.

RECORD ACCESS PROCEDURE:

An individual seeking access to records about him in this system should submit a request following the same procedure indicated under ''Notification Procedure.''

CONTESTING RECORD PROCEDURE:

An individual seeking to amend the content of information about him or her in this system should contact the relevant System Manager indicated above and reasonably identify the record, specify the information contested, state the corrective action sought, and provide the reasons for the amendment, with supporting justification.

RECORD SOURCE CATEGORIES:

Most information is obtained directly from the individual record subject.

Information pertaining to references and recommendations is obtained from other private individuals, educational institutions, current and former employers, HHS program personnel, biographical reference books, private organizations, Members of Congress, and other government sources.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2016–27959 Filed 11–18–16; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; 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: National Heart, Lung, and Blood Institute Special Emphasis Panel; Human Virome in Heart, Lung, and Blood Health and Resilience.

Date: December 9, 2016.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Kristen Page, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7185, Bethesda, MD 20892, 301–496–2434, *kristen.page@nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; T32—Training Programs for Institutions that Promote Diversity.

Date: December 9, 2016.

Time: 11:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Room 7189, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Stephanie L. Constant, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7189, Bethesda, MD 20892, 301–443–8784, *constantsl@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: November 15, 2016.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–27876 Filed 11–18–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meeting

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 meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, Multi-site Clinical Trials SEP III.

Date: December 9, 2016.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Susan O. McGuire, Ph.D., Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Blvd., Room 4245, Rockville, MD 20852, (301) 827–5817, *mcguireso@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: November 15, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–27878 Filed 11–18–16; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

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 meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group, NHLBI Institutional Training Mechanism Review Committee.

Date: December 9, 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, Room 7194, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Charles Joyce, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7194, Bethesda, MD 20892–7924, 301–435–0288, *cjoyce@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: November 15, 2016.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–27875 Filed 11–18–16; 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; Member Conflicts: Pulmonary Diseases.

Date: December 6–7, 2016.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Bradley Nuss, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4142, MSC7814, Bethesda, MD 20892, 301–451–8754, *nussb@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Biophysics.

Date: December 6, 2016.

Time: 1:30 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: Richard D. Crosland, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4190, MSC 7850, Bethesda, MD 20892, 301–435–1220, *crosland@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: November 15, 2016.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–27871 Filed 11–18–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2); notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The purpose of this meeting is to evaluate requests for preclinical development resources for potential new therapeutics for the treatment of cancer. The outcome of the evaluation will provide information to internal NCI committees that will decide whether NCI should support requests and make available contract resources for development of the potential therapeutic to improve the treatment of various forms of cancer. The research proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the proposed research projects, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Oct2016 Cycle 24 NExT SEP Committee Meeting.

Date: December 15, 2016.

Time: 8:30 a.m. to 4:30 p.m.

Agenda: To evaluate the NCI Experimental Therapeutics Program Portfolio.

Place: National Institutes of Health, 9000 Rockville Pike, Campus Building 31, Conference Room 6C10, Bethesda, MD 20892.

Contact Persons: Barbara Mroczkowski, Ph.D., Executive Secretary, Discovery Experimental Therapeutics Program, National Cancer Institute, NIH, 31 Center Drive, Room 3A44, Bethesda, MD 20817, (301) 496–4291, *mroczkoskib@mail.nih.gov.*

Toby Hecht, Ph.D., Executive Secretary, Development Experimental Therapeutics Program, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 3W110, Rockville, MD 20850, (240) 276–5683, *toby.hecht2@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: November 14, 2016.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–27874 Filed 11–18–16; 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 Meeting

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 meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–15–308: Innovative Basic Research on Adducts in Cancer Risk Identification and Prevention.

Date: November 21, 2016.

Time: 1:00 p.m. to 3:30 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: Malaya Chatterjee, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6192, MSC 7804, Bethesda, MD 20892, (301) 806–2515, *chatterm@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.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 15, 2016.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–27873 Filed 11–18–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Recombinant DNA Advisory Committee.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the contact person listed below in advance of the meeting.

Name of Committee: Recombinant DNA Advisory Committee.

Date: December 14, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: The NIH Recombinant DNA Advisory Committee (RAC) will review and discuss selected human gene transfer protocols and related data management activities. For more information, please check the meeting agenda at the OSP Web site, RAC Meetings Page (available at the following URL: *http://osp.od.nih.gov/office-biotechnology-activities/event/2016-12-13-130000-2016-12-15-220000/rac-meeting*).

Place: National Institutes of Health, Building 35, Conference Room 620/630, 9000 Rockville Pike, Bethesda, MD 20852.

Contact Person: Shayla Beckham, Extramural Support Assistant, Office of Science Policy, National Institutes of Health, 6705 Rockledge Drive, Room 750, Bethesda, MD 20892–9606, 301–496–9838, *beckhams@mail.nih.gov*.

Information is also available on the Institute's/Center's home page: *http://oba.od.nih.gov/rdna/rdna.html,* where an agenda and any additional information for the meeting will be posted when available.

OMB's ''Mandatory Information Requirements for Federal Assistance Program Announcements'' (45 FR 39592, June 11, 1980) requires a statement concerning the official government programs contained in the Catalog of Federal Domestic Assistance. Normally NIH lists in its announcements the number and title of affected individual programs for the guidance of the public. Because the guidance in this notice covers virtually every NIH and Federal research program in which DNA recombinant molecule techniques could be used, it has been determined not to be cost effective or in the public interest to attempt to list these programs. Such a list would likely require several additional pages. In addition, NIH could not be certain that every Federal program would be included as many Federal agencies, as well as private organizations, both national and international, have elected to follow the NIH Guidelines. In lieu of the individual program listing, NIH invites readers to direct questions to the information address above about whether individual programs listed in the Catalog of Federal Domestic Assistance are affected.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: November 15, 2016.

Michelle Trout,

Program Specialist, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–27880 Filed 11–18–16; 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; AREA: Oncological Sciences Grant Applications.

Date: November 30, 2016.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Agenda: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Svetlana Kotliarova, Ph.D., Scientific Review Officer, Center For Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6214, Bethesda, MD 20892, 301–594–7945, *kotliars@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Glia Differentiation and Communication.

Date: December 14, 2016.

Time: 1:00 p.m. to 3:00 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: Carol Hamelink, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4192, MSC 7850, Bethesda, MD 20892, (301) 213–9887, *hamelinc@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: November 15, 2016.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–27872 Filed 11–18–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

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 meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel, R13 Conference Grant Applications Review Meeting Group 2.

Date: December 2, 2016.

Time: 11:30 a.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: NIEHS/National Institutes of Health, Keystone Building, Room 3003, 530 Davis Drive, Research Triangle Park, NC 27709, (Telephone Conference Call).

Contact Person: Laura A Thomas, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research and Training, NIEHS/National Institutes of Health, Research Triangle Park, NC 27709, 919–541–2824, *laura.thomas@nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to

Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: November 15, 2016.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–27879 Filed 11–18–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed 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: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Understanding HIV Rebound (P01).

Date: December 13–16, 2016.

Time: 10:00 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Robert C. Unfer, Ph.D., Scientific Review Officer, Scientific Review Program, DEA/NIAID/NIH/DHHS, 5601 Fishers Lane, Room 3F40, MSC 9823, Rockville, MD 20892–9823, 240–669–5035, *unferrc@nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel, NIAID Transplantation Tolerance (U01 and U19).

Date: December 14–15, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: James T. Snyder, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities/ Room 3G31B, National Institutes of Health, NIAID, 5601 Fishers Lane, MSC 9823, Rockville, MD 20892, (240) 669–5060, *james.snyder@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: November 14, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–27877 Filed 11–18–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5909–N–77]

30-Day Notice of Proposed Information Collection: Monthly Report of Excess Income and Annual Report of Uses of Excess Income

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* December 21, 2016.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QMAC, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on August 16, 2016 at 81 FR 54586.

A. Overview of Information Collection

Title of Information Collection: Monthly Report of Excess Income and Annual Report of Uses of Excess Income.

OMB Approval Number: 2502–0086.

Type of Request: Extension of currently approved collection.

Form Number: Web form e-93104 Monthly Report of Excess Income.

Description of the need for the information and proposed use: Project owners are permitted to retain excess income for projects under the terms and conditions established by HUD. Owners must submit a written request to retain some or all of their excess income. The request must be submitted at least 90 days before the beginning of each fiscal year, or 90 days before any other time during a fiscal year that the owner plans to begin retaining excess income for that fiscal year. HUD uses the information to ensure that required excess rents are remitted to the Department and/or retained by the owner for project use.

Respondents: (*i.e.* affected public): Multifamily Project Owners.

Estimated Number of Respondents: 834.

Estimated Number of Responses: 19,361.

Frequency of Response: Monthly.

Average Hours per Response: Three-quarters of an hour.

Total Estimated Burden: 5,585.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond: Including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: November 10, 2016.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2016–27909 Filed 11–18–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5989–N–01]

Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Disaster Recovery Grantees

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This notice allocates $500 million in Community Development Block Grant disaster recovery (CDBG–DR) funds appropriated by the Continuing Appropriations Act, 2017 for the purpose of assisting long-term recovery in Louisiana, Texas and West Virginia. This notice describes applicable waivers and alternative requirements, relevant statutory provisions for grants provided under this notice, the grant award process, criteria for plan approval, and eligible disaster recovery activities. Given the extent of damage to housing in the largest eligible disaster and the very limited data at present on unmet infrastructure and economic revitalization needs, this notice requires each grantee to primarily consider and address its unmet housing recovery needs.

DATES: *Effective Date:* November 28, 2016.

FOR FURTHER INFORMATION CONTACT: Jessie Handforth Kome, Acting Director, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 7th Street SW., Room 7286, Washington, DC 20410, telephone number 202–708–3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Relay Service at 800–877–8339. Facsimile inquiries may be sent to Ms. Kome at 202–401–2044. (Except for the''800'' number, these telephone numbers are not toll-free.). Email inquiries may be sent to *disaster_recovery@hud.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Allocations

Section 145 of the Continuing Appropriations Act, 2017 (Pub. L. 114–223, approved September 29, 2016) (Appropriations Act) makes available $500 million in Community Development Block Grant (CDBG) funds for necessary expenses for activities authorized under title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 *et seq.*) related to disaster relief, long-term recovery, restoration of infrastructure and housing, and economic revitalization in the most impacted and distressed areas resulting from a major disaster declared in 2016 and occurring prior to enactment of the Appropriations Act, pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (42 U.S.C. 5121 *et seq.*) (Stafford Act). Given the extent of damage to housing in the largest eligible disaster and the very limited data at present on unmet infrastructure and economic revitalization needs, HUD is requiring each grantee to primarily consider and address its unmet housing recovery needs. This notice allows grantees to allocate funds to address unmet economic revitalization and infrastructure needs, but in doing so, the grantee must identify how unmet housing needs will be addressed or how its economic revitalization or infrastructure activities will contribute to the long-term recovery and restoration of housing in the most impacted and distressed areas. The law provides that grants shall be awarded directly to a State or unit of general local government at the discretion of the Secretary. The Secretary has elected to award funds only to States in this allocation. Unless noted otherwise, the term ''grantee'' refers to the State receiving a direct award from HUD under this notice. To comply with statutory direction that funds be used for disaster-related expenses in the most impacted and distressed areas, HUD allocates funds using the best available data that cover all of the eligible affected areas.

Based on a review of the impacts from these disasters, and estimates of unmet need, HUD is making the following allocations:

TABLE 1—ALLOCATIONS UNDER PUBLIC LAW 114–223

Disaster No.	State	Grantee	Allocation	Minimum amount that must be expended for recovery in the HUD-identified ''most impacted'' areas
4277, 4263, 4272	Louisiana	State of Louisiana	$437,800,000	($350,240,000) East Baton Rouge, Livingston, Ascension, Tangipahoa, Ouachita, Lafayette (Parishes).
4269, 4266	Texas	State of Texas	45,200,000	($36,160,000) Harris, Newton, Montgomery (Counties).
4273	West Virginia	State of West Virginia	17,000,000	($13,600,000) Kanawha, Greenbrier (Counties).
Total			500,000,000	

Table 1 also shows the HUD-identified ''most impacted and distressed'' areas impacted by the disasters that did not receive a direct award. At least 80 percent of the total funds provided within each State under this notice must address unmet needs within the HUD-identified ''most impacted and distressed'' areas, as identified in the last column in Table 1. Grantees may determine where the remaining 20 percent may be spent by identifying areas it determines to be ''most impacted and distressed.'' A detailed explanation of HUD's allocation methodology is provided at Appendix A.

Each grantee receiving an allocation under this notice must submit an action plan for disaster recovery, or ''action plan,'' no later than 90 days after the effective date of this notice. HUD will only approve action plans that meet the specific requirements identified in this notice under section VI, ''Applicable Rules, Statutes, Waivers, and Alternative Requirements.''

II. Use of Funds

The Appropriations Act requires that prior to the obligation of CDBG–DR funds a grantee shall submit a plan detailing the proposed use of all funds, including criteria for eligibility, and how the use of these funds will address long-term recovery and restoration of infrastructure and housing and economic revitalization in the most impacted and distressed areas. This action plan for disaster recovery must describe uses and activities that: (1) Are authorized under title I of the Housing and Community Development Act of 1974 (HCD Act) or allowed by a waiver or alternative requirement published in this notice; and (2) respond to disaster-related impact to infrastructure, housing, and economic revitalization in the most impacted and distressed areas. To inform the plan, grantees must conduct an assessment of community impacts and unmet needs to guide the development and prioritization of planned recovery activities, pursuant to paragraph A.2.a. in section VI below.

In accordance with the HCD Act, funds may be used to meet a matching, share, or contribution requirement for any other Federal program when used to carry out an eligible CDBG–DR activity. This includes programs or activities administered by the Federal Emergency Management Agency (FEMA) and the U.S. Army Corps of Engineers (USACE), among other Federal sources. CDBG–DR funds, however, may not be used for activities reimbursable by or for which funds are made available by FEMA or USACE.

This notice also requires each grantee to expend 100 percent of its allocation of CDBG–DR funds on eligible activities within 6 years of HUD's execution of the grant agreement.

III. Management and Oversight of Funds

The Appropriations Act requires the Secretary to certify, in advance of signing a grant agreement, that the grantee has in place proficient financial controls and procurement processes and has established adequate procedures to prevent any duplication of benefits as defined by section 312 of the Stafford Act, ensure timely expenditure of funds, maintain comprehensive Web sites regarding all disaster recovery activities assisted with these funds, and detect and prevent waste, fraud, and abuse of funds. To provide a basis for the certification, each grantee must submit documentation to the Department demonstrating its compliance with the above requirements. For a complete list of the required certification documentation, see paragraph A.1.a. under section VI of this notice. The certification documentation must be submitted within 60 days of the effective date of this notice, or with the grantee's submission of its action plan, whichever is earlier.

In advance of signing a grant agreement and consistent with 2 CFR 200.205 of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Requirements), HUD will evaluate each grantee's capacity to effectively manage the funds and the associated risks they pose through a review of supplemental risk analysis documentation. This notice requires each grantee to submit risk analysis documentation demonstrating that it can effectively manage the funds, ensure timely communication of application status to applicants for disaster recovery assistance, and that it has adequate capacity to manage the funds and address any capacity needs. For a complete listing of the required risk analysis documentation, see paragraph A.1.b. under section VI of this notice. Documentation applicable to the risk analysis must be submitted within 60 days of the effective date of this notice, or with the grantee's submission of its action plan, whichever is earlier.

Additionally, this notice requires grantees to submit to the Department for approval a projection of expenditures and outcomes as part of its action plan. Any subsequent changes, updates or revision of the projections will require the grantee to amend its action plan to reflect the new projections. This will enable HUD, the public, and the grantee to track planned versus actual performance.

Grantees must also enter expected completion dates for each activity in HUD's Disaster Recovery Grant Reporting (DRGR) system. When target dates are not met or are extended, a grantee is required to explain the reason for the delay in the Quarterly Performance Report (QPR) activity narrative. For additional guidance on DRGR system reporting requirements, see paragraph A.3 under section VI of this notice. More information on the timely expenditure of funds is included in paragraphs A.24 of section VI of this notice. Other reporting, procedural, and monitoring requirements are discussed under ''Grant Administration'' in section VI of this notice.

The grant terms and specific conditions of the award will reflect HUD's risk assessment of the grantee and will require the grantee to adhere to the description of its implementation plan submitted in its certification and risk analysis documentation. HUD will also institute an annual risk analysis as well as on-site monitoring of grantee management to further guide oversight of these funds.

IV. Authority To Grant Waivers

The Appropriations Act authorizes the Secretary to waive or specify alternative requirements for any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary, or use by the recipient, of these funds, except for requirements related to fair housing, nondiscrimination, labor standards, and the environment. Waivers and alternative requirements are based upon a determination by the Secretary that good cause exists and that the waiver or alternative requirement is not inconsistent with the overall purposes of title I of the HCD Act. HUD also has regulatory waiver authority under 24 CFR 5.110, 91.600, and 570.5. Grantees may request waivers as described in section VI of this notice.

V. Overview of Grant Process

To begin expenditure of CDBG–DR funds, the following expedited steps are necessary:

- Grantee follows citizen participation plan for disaster recovery in accordance with the requirements in paragraph A.4 of section VI of this notice.
- Grantee consults with stakeholders, including required consultation with affected local governments and public housing authorities (as identified in section VI of this notice).
- Within 60 days of the effective date of this notice (or when the grantee submits its action plan, whichever is earlier), the grantee submits certification documentation providing a basis for the Secretary's certification that the grantee has in place proficient financial controls and procurement processes and has established adequate procedures to prevent any duplication of benefits as defined by section 312 of the Stafford

Act, ensure timely expenditure of funds, maintain comprehensive Web sites regarding all disaster recovery activities assisted with these funds, and detect and prevent waste, fraud, and abuse of funds;

- Within 60 days of the effective date of this notice (or when the grantee submits its action plan, whichever is earlier) the grantee submits its risk analysis documentation allowing HUD to evaluate the grantee's risk and capacity to effectively manage the funds.
- Grantee publishes its action plan for disaster recovery on the grantee's required disaster recovery Web site for no less than 14 calendar days to solicit public comment.
- Grantee responds to public comment and submits its action plan (which includes Standard Form 424 (SF–424) and certifications) to HUD no later than 90 days after the date of this notice.
- HUD expedites review (allotted 60 days from date of receipt) and approves the action plan according to criteria identified in this notice.
- HUD sends an action plan approval letter, grant terms and conditions, and grant agreement to the grantee. If the action plan is not approved, a letter will be sent identifying its deficiencies; the grantee must then resubmit the action plan within 45 days of the notification letter.
- Grantee signs and returns the grant agreement.
- Grantee ensures that the final HUD-approved action plan is posted on its official Web site.
- HUD establishes the grantee's line of credit.
- Grantee requests and receives DRGR system access (if the grantee does not already have DRGR access).
- Grantee enters the activities from its published action plan into the DRGR system and submits its DRGR action plan to HUD (funds can be drawn from the line of credit only for activities that are established in the DRGR system).
- The grantee may draw down funds from the line of credit after the Responsible Entity completes applicable environmental review(s) pursuant to 24 CFR part 58 or as authorized by the Appropriations Act and, as applicable, receives from HUD or the State an approved Request for Release of Funds and certification.
- The grantee must begin to draw down funds no later than 180 days after the effective date of this notice.

VI. Applicable Rules, Statutes, Waivers, and Alternative Requirements

This section of the notice describes requirements imposed by the Appropriations Act, as well as applicable waivers and alternative requirements. For each waiver and alternative requirement, the Secretary has determined that good cause exists and is consistent with the overall purpose of the HCD Act. The waivers and alternative requirements provide additional flexibility in program design and implementation to support full and swift recovery following the disasters, while also ensuring that statutory requirements are met. The following requirements apply only to the CDBG–DR funds appropriated in the Appropriations Act, and not to funds provided under the annual formula State or Entitlement CDBG programs, or those provided under any other component of the CDBG program, such as the Section 108 Loan Guarantee Program, or any prior CDBG–DR appropriation.

Grantees may request additional waivers and alternative requirements from the Department as needed to address specific needs related to their recovery activities. Except where noted, waivers and alternative requirements described below apply to all grantees under this notice. Under the requirements of the Appropriations Act, waivers and alternative requirements are effective five days after they are published in the **Federal Register**.

Except as described in this notice, statutory and regulatory provisions governing the State CDBG program shall apply to grantees receiving an allocation under this notice. Applicable statutory provisions can be found at 42 U.S.C. 5301 *et seq.* Applicable State CDBG regulations can be found at 24 CFR part 570. References to the action plan in these regulations shall refer to the action plan required by this notice. All references in this notice pertaining to timelines and/or deadlines are in terms of calendar days unless otherwise noted. The date of this notice shall mean the effective date of this notice unless otherwise noted.

A. Grant Administration.

1. *Preaward Evaluation of Management and Oversight of Funds.*

a. *Certification of proficient controls, processes and procedures.* The Appropriations Act requires that the Secretary certify, in advance of signing a grant agreement, that the grantee has in place proficient financial controls and procurement processes and has established adequate procedures to prevent any duplication of benefits as defined by section 312 of the Stafford Act, ensure timely expenditure of funds, maintain comprehensive Web sites regarding all disaster recovery activities assisted with these funds, and detect and prevent waste, fraud, and abuse of funds. To enable the Secretary to make this certification, each grantee must submit to HUD the certification documentation listed below. This information must be submitted within 60 days of the effective date of this notice, or with the grantee's submission of its action plan, whichever date is earlier. Grant agreements will not be executed until HUD has issued a certification in response to the grantee's submission. For each of the items (1) through (6) below, the grantee must also provide a table that clearly indicates which unit and personnel are responsible for each task along with contact information. The grantee must certify to the accuracy of its certification documentation as required by paragraph E.47 of section VI of this notice.

(1) Financial Controls. A grantee has proficient financial controls if each of the following criteria is satisfied:

a. The grantee's most recent single audit and consolidated annual financial report (CAFR) indicates that the grantee has no material weaknesses, deficiencies, or concerns that HUD considers to be relevant to the financial management of the CDBG program. If the single audit or CAFR identified weaknesses or deficiencies, the grantee must provide documentation showing how those weaknesses have been removed or are being addressed; and

b. The grantee has assessed its financial standards and has completed the HUD monitoring guide for financial standards (FY2017 Guide for Review of Financial Management (the Financial Management Guide), available on the HUD Exchange Web site at *https://www.hudexchange.info/cdbg-dr/cdbg-dr-laws-regulations-and-federal-register-notices/*). The grantee's standards must conform to the requirements of the Financial Management Guide. The grantee must identify which sections of its financial standards address each of the questions in the guide.

(2) Procurement. A grantee has in place a proficient procurement process if it has either: (a) Adopted 2 CFR 200.318 through 200.326 (subject to 2 CFR 200.110, as applicable); or (b) the effect of the grantee's procurement process/standards are equivalent to the effect of procurements under 2 CFR 200.318 through 200.326, meaning that the process/standards, while not identical, operate in a manner that provides for full and open competition.

The grantee must provide its procurement process/standards for HUD review so HUD may evaluate the overall effect of the grantee's procurement/process standards. The grantee's provided procurement process/standards must comply with the procurement requirements at 24 CFR 570.489(g), as provided in paragraph A.22 of Section VI of this notice.

(3) Duplication of benefits. A grantee has adequate procedures to prevent the duplication of benefits where the grantee identifies its uniform processes for each of the following: (a) Verifying all sources of disaster assistance received by the grantee or applicant, as applicable; (b) determining an applicant's unmet need(s) before awarding assistance; and (c) ensuring beneficiaries agree to repay the assistance if they later receive other disaster assistance for the same purpose. Grantee procedures shall provide that prior to the award of assistance, the grantee will use the best, most recent available data from FEMA, the Small Business Administration (SBA), insurers, and other sources of funding to prevent the duplication of benefits. Departmental guidance to assist in preventing a duplication of benefits is provided in a notice published in the **Federal Register** at 76 FR 71060 (November 16, 2011), in HUD Guidance on Duplication of Benefits Requirements and Provision of CDBG Disaster Recovery (DR) Assistance, as amended, (*https://www.hudexchange.info/resource/3137/cdbg-dr-duplication-of-benefit-requirements-and-provision-of-assistance-with-sba-funds/*) and in paragraph A.21 of section VI of this notice.

(4) Timely expenditures. A grantee has adequate procedures to determine timely expenditures if it indicates to HUD how the grantee will track expenditures each month, how it will monitor expenditures of its recipients and subrecipients, how it will reprogram funds in a timely manner for activities that are stalled, and how it will project expenditures to provide for the expenditure of all CDBG–DR funds within the period provided for in paragraph A.24 of section VI of this notice.

(5) Comprehensive disaster recovery Web site. A grantee has adequate procedures to maintain a comprehensive Web site regarding all disaster recovery activities if its procedures indicate that the grantee will have a separate page dedicated to its disaster recovery that includes the information described at paragraph A.23 of section VI of this notice. The procedures should also indicate the frequency of Web site updates. At minimum, grantees must update their Web site quarterly.

(6) Procedures to detect fraud, waste and abuse. A grantee has adequate procedures to detect fraud, waste and abuse if its procedures indicate how the grantee will verify the accuracy of information provided by applicants; if it provides a monitoring policy indicating how and why monitoring is conducted, the frequency of monitoring, and which items are monitored; and if it demonstrates that it has an internal auditor and includes a document signed by the internal auditor that describes his or her role in detecting fraud, waste, and abuse.

b. *Evaluation of Risk and Management Capacity.* Before signing a grant agreement, HUD is requiring each grantee to demonstrate that it has sufficient capacity to manage these funds and the associated risks.

Evidence of grantee management capacity will be provided through the grantee's risk analysis documentation which must be submitted within 60 days of the effective date of this notice or with the grantee's submission of its action plan, whichever date is earlier. The grantee must certify to the accuracy of its risk analysis documentation submissions as required by paragraph E.47 in section VI of this notice. A grantee has sufficient management capacity if each of the following criteria is satisfied:

(1) Timely information on application status. A grantee has adequate procedures to inform applicants of the status of their applications for recovery assistance, at all phases, if its procedures indicate methods for communication (*i.e.,* Web site, telephone, case managers, letters, etc.), ensure the accessibility and privacy of individualized information for all applicants, indicate the frequency of applicant status updates and identify which personnel or unit is responsible.

(2) Preaward Implementation Plan. To enable HUD to assess risk as described in 2 CFR 200.205(c), the grantee will submit an implementation plan to the Department. The plan must describe the grantee's capacity to carry out the recovery and how it will address any capacity gaps. HUD will determine a plan is adequate to reduce risk if, at a minimum it addresses:

a. Capacity Assessment. The grantee has conducted an assessment of its capacity to carry out recovery efforts, and has developed a timeline with milestones describing when and how the grantee will address all capacity gaps that are identified.

b. Staffing. The plan shows that the grantee has assessed staff capacity and identified personnel for the purpose of case management in proportion to the applicant population; program managers who will be assigned responsibility for each primary recovery area (*i.e.,* housing, economic revitalization, and infrastructure, as applicable); and staff responsible for procurement/contract management, environmental compliance, as well as staff responsible for monitoring and quality assurance, and financial management. An adequate plan will also provide for an internal audit function with responsible audit staff reporting independently to the chief elected or executive officer or board of the governing body of any designated administering entity.

c. Internal and Interagency Coordination. The grantee's plan describes how it will ensure effective communication between different departments and divisions within the grantee's organizational structure that are involved in CDBG–DR–funded recovery efforts; between its lead agency and subrecipients responsible for implementing the grantee's action plan; and with other local and regional planning efforts to ensure consistency.

d. Technical Assistance. The grantee's implementation plan describes how it will procure and provide technical assistance for any personnel that the grantee does not employ at the time of action plan submission, and to fill gaps in knowledge or technical expertise required for successful and timely recovery implementation where identified in the capacity assessment.

e. Accountability. The grantee's plan identifies the principal lead agency responsible for implementation of the State's CDBG–DR award and indicates that the head of that agency will report directly to the Governor of the State.

2. *Action Plan for Disaster Recovery waiver and alternative requirement.* Requirements for CDBG actions plans, located at 42 U.S.C. 12705(a)(2), 42 U.S.C. 5304(a)(1), 42 U.S.C. 5304(m), 42 U.S.C. 5306(d)(2)(C)(iii), and 24 CFR 91.320, are waived for these disaster recovery grants. Instead, grantees must submit to HUD an action plan for disaster recovery which will describe disaster recovery programs that conform to applicable requirements as specified in this notice. During the course of the grant, HUD will monitor the grantee's actions and use of funds for consistency with the plan, as well as meeting the performance and timeliness objectives therein. The Secretary may disapprove an action plan as substantially incomplete if it is determined that the

plan does not satisfy all of the required elements identified in this notice.

a. *Action Plan.* The action plan must identify the proposed use of all funds, including criteria for eligibility, and how the uses address long-term recovery needs. Funds dedicated for uses not described in accordance with paragraphs b. or c. under this section will not be obligated until the grantee submits, and HUD approves, an action plan amendment programming the use of those funds, at the necessary level of detail.

The action plan must contain:

1. An impact and unmet needs assessment. Each grantee must develop a needs assessment to understand the type and location of community needs and to target limited resources to those areas with the greatest need. Grantees receiving an award under this notice must conduct a needs assessment to inform the allocation of CDBG–DR resources. At a minimum, the needs assessment must:

- Evaluate all aspects of recovery including housing (interim and permanent, owner and rental, single-family and multifamily, affordable and market rate, and housing to meet the needs of persons who were homeless pre-disaster), infrastructure, and economic revitalization;
- Account for the various forms of assistance available to, or likely to be available to, affected communities (*e.g.,* projected FEMA funds) and individuals (*e.g.,* estimated insurance) to ensure CDBG–DR funds meet needs that are not likely to be addressed by other sources of funds;
- Assess whether public services (*e.g.,* housing counseling, legal counseling, job training, mental health, and general health services) are necessary to complement activities intended to address housing, infrastructure and economic revitalization;
- Use the most recent available data (cite data sources) to inform the action plan, particularly with regard to estimating the portion of need likely to be addressed by insurance proceeds, other Federal assistance, or any other funding sources (thus producing an estimate of unmet need);
- Describe impacts geographically by type at the lowest level practicable (*e.g.,* county level or lower if available for States, and neighborhood or census tract level for cities); and
- Take into account the costs of incorporating mitigation and resilience measures to protect against future hazards, including the anticipated effects of climate change on those hazards.

CDBG–DR funds may be used to reimburse costs for developing the action plan, including the needs assessment, environmental review, and citizen participation requirements. HUD has developed a Disaster Impact and Unmet Needs Assessment Kit to guide CDBG–DR grantees through a process for identifying and prioritizing critical unmet needs for long-term community recovery, and it is available on the HUD Exchange Web site at *https://www.hudexchange.info/resources/documents/Disaster_Recovery_Disaster_Impact_Needs_Assessment_Kit.pdf.*

Disaster recovery needs evolve over time and the needs assessment and action plan are expected to be amended as conditions change and additional needs are identified.

2. A description of the connection between identified unmet needs and the allocation of CDBG–DR resources. Grantees must propose an allocation of CDBG–DR funds that primarily considers and addresses unmet housing needs. Grantees may also allocate funds for economic revitalization and infrastructure activities, but in doing so, must identify how any remaining unmet housing needs will be addressed or how its economic revitalization and infrastructure activities will contribute to the long-term recovery and restoration of housing in the most impacted and distressed areas. Grantee action plans may provide for the allocation of funds for administration and planning activities and for public service activities, subject to the caps on such activities as described below.

3. Each grantee must include a description of how it will identify and address the rehabilitation (as defined at 24 CFR 570.202), reconstruction, replacement, and new construction of housing and shelters in the areas affected by the disaster. This includes any rental housing that is affordable to low or moderate income households (as defined by the grantee as provided in B.31 of section VI of this notice); public housing (including administrative offices); emergency shelters and housing for the homeless; private market units receiving project-based assistance or with tenants that participate in the Section 8 Housing Choice Voucher Program; and any other housing that is assisted under a HUD program.

4. A description of how the grantee's programs will promote housing for vulnerable populations, including a description of activities it plans to address: (a) The transitional housing, permanent supportive housing, and permanent housing needs of individuals and families (including subpopulations) that are homeless and at-risk of homelessness; (b) the prevention of low-income individuals and families with children (especially those with incomes below 30 percent of the area median) from becoming homeless; and (c) the special needs of persons who are not homeless but require supportive housing (*e.g.,* elderly, persons with disabilities, persons with alcohol or other drug addiction, persons with HIV/AIDS and their families, and public housing residents, as identified in 24 CFR 91.315(e)). Grantees are reminded that the use of recovery funds must meet accessibility standards, provide reasonable accommodations to persons with disabilities, and take into consideration the functional needs of persons with disabilities in the relocation process. A checklist of relocation considerations for persons with disabilities may be found in Chapter 3 of HUD's Relocation Handbook 1378.0. Grantees must also assess how planning decisions may affect racial, ethnic, and low-income concentrations, and ways to promote the availability of affordable housing in low-poverty, nonminority areas where appropriate and in response to natural hazard-related impacts.

5. A description of how the grantee plans to minimize displacement of persons or entities, and assist any persons or entities displaced.

6. A description of the maximum amount of assistance available to a beneficiary under each of the grantee's disaster recovery programs. A grantee may find it necessary to provide exceptions on a case-by-case basis to the maximum amount of assistance and must describe the process it will use to make such exceptions in its action plan. At minimum, each grantee must adopt policies and procedures that communicate how it will analyze the circumstances under which an exception is needed and how it will demonstrate that the amount of assistance is necessary and reasonable.

7. A description of how the grantee plans to: (a) Adhere to the advanced elevation requirements established in paragraph B.28 of section VI of this notice; (b) promote sound, sustainable long-term recovery planning informed by a post-disaster evaluation of hazard risk, especially land-use decisions that reflect responsible flood plain management and take into account continued sea level rise, if applicable; and (c) coordinate with other local and regional planning efforts to ensure consistency. This information should be based on the history of FEMA flood mitigation efforts, and take into account projected increase in sea level (if applicable) and frequency and intensity

of precipitation events, which are not considered in current FEMA maps and National Flood Insurance Program premiums.

Additionally, a grantee proposing an allocation of grant funds for infrastructure must include a description of how the proposed infrastructure activities will advance long-term resilience to natural hazards and how the grantee intends to align these investments with other planned state or local capital improvements. Grantees should describe how preparedness and mitigation measures will be integrated into rebuilding activities and how the grantee will promote community-level and/or regional (*e.g.* multiple local jurisdictions) post-disaster recovery and mitigation planning.

The action plan must provide for the use of CDBG–DR funds to develop a disaster recovery and response plan that addresses long-term recovery and pre- and post-disaster hazard mitigation, if one does not currently exist.

8. A description of how the grantee will leverage CDBG–DR funds with funding provided by other Federal, State, local, private, and nonprofit sources to generate a more effective and comprehensive recovery. Examples of other Federal sources are those provided by HUD, FEMA (specifically the Public Assistance Program, Individual Assistance Program, and Hazard Mitigation Grant Program), SBA (specifically the Disaster Loans program), Economic Development Administration, USACE, and the U.S. Department of Agriculture. The grantee should seek to maximize the number of activities and the degree to which CDBG funds are leveraged. Grantees shall identify leveraged funds for each activity, as applicable, in the DRGR system.

9. A description of how the grantee will: (a) Design and implement programs or activities with the goal of protecting people and property from harm; (b) emphasize high quality, durability, energy efficiency, sustainability, and mold resistance; (c) support adoption and enforcement of modern building codes and mitigation of hazard risk, including possible sea level rise, high winds, storm surge, and flooding, where appropriate; and (d) implement and ensure compliance with the Green Building standards required in paragraph B.28 of section VI of this notice. All rehabilitation, reconstruction, and new construction should be designed to incorporate principles of sustainability, including water and energy efficiency, resilience, and mitigating the impact of future disasters. Whenever feasible, grantees should follow best practices such as those provided by the U.S. Department of Energy's Guidelines for Home Energy Professionals—Professional Certifications and Standard Work Specifications. HUD also encourages grantees to implement green infrastructure policies to the extent practicable. Additional tools for green infrastructure are available at the Environmental Protection Agency's Web site *https://www.epa.gov/green-infrastructure;* the Indoor AirPlus Web site *https://www.epa.gov/indoorairplus;* the Healthy Indoor Environment Protocols for Home Energy Upgrades Web site *https://www.epa.gov/sites/production/files/2014-12/documents/epa_retrofit_protocols.pdf;* and the ENERGY STAR Web site *www.epa.gov/greenbuilding.*

10. A description of the standards to be established for construction contractors performing work in the jurisdiction and a mechanism for homeowners and small business owners to appeal rehabilitation contractor work. HUD strongly encourages the grantee to require a warranty period post-construction, with formal notification to homeowners on a periodic basis (*e.g.,* 6 months and one month prior to expiration date of the warranty).

11. A description of how the grantee will manage program income, and the purpose(s) for which it may be used. Waivers and alternative requirements related to program income can be found in this notice at paragraph A.17 of section VI.

12. A description of monitoring standards and procedures that are sufficient to ensure program requirements, including an analysis for duplication of benefits, are met and that provide for continual quality assurance and adequate program oversight.

b. *Method of Distribution.* The action plan shall describe the method of distribution of funds to units of general local government (UGLG) and/or descriptions of specific programs or activities the State will carry out directly. The description must include:

1. How the needs assessment informed allocation determinations, including the rationale behind the decision(s) to provide funds to State-identified ''most impacted and distressed'' areas that were not defined by HUD as being ''most impacted and distressed,'' if applicable.

2. The threshold factors and grant size limits that are to be applied.

3. The projected uses for the CDBG–DR funds, by responsible entity, activity, and geographic area, when the State carries out an activity directly.

4. For each proposed program and/or activity carried out directly, its respective CDBG activity eligibility category (or categories) as well as national objective(s).

5. How the method of distribution to local governments or programs/activities carried out directly will result in long-term recovery from specific impacts of the disaster.

6. When funds are allocated to UGLGs, all criteria used to distribute funds to local governments including the relative importance of each criterion.

7. When applications are solicited for programs carried out directly, all criteria used to select applications for funding, including the relative importance of each criterion.

c. Clarification of disaster-related activities. All CDBG–DR funded activities must clearly address an impact of the disaster for which funding was allocated. Given standard CDBG requirements, this means each activity must: (1) Be a CDBG-eligible activity (or be eligible under a waiver or alternative requirement in this notice); (2) meet a national objective; and (3) address a direct or indirect impact from the disaster in a Presidentially-declared county. A disaster-related impact can be addressed through any eligible CDBG–DR activity. Additional details on disaster-related activities are provided under section VI, parts B through D. Additionally, HUD has developed a series of CDBG–DR toolkits that guide grantees through specific grant implementation activities. These can be found on the HUD Exchange Web site at *https://www.hudexchange.info/programs/cdbg-dr/toolkits/.*

1. Housing. Typical housing activities include new construction and rehabilitation of single-family or multifamily units. Most often, grantees use CDBG–DR funds to rehabilitate damaged homes and rental units. However, grantees may also fund new construction (see paragraph B.28 of section VI of this notice) or rehabilitate units *not* damaged by the disaster if the activity clearly addresses a disaster-related impact and is located in a disaster-affected area. This impact can be demonstrated by the disaster's overall effect on the quality, quantity, and affordability of the housing stock and the resulting inability of that stock to meet post-disaster needs and population demands.

a. *Prohibition on forced mortgage payoff.* In some instances, homeowners with an outstanding mortgage balance are required, under the terms of their loan agreement, to repay the balance of the mortgage loan prior to using assistance to rehabilitate or reconstruct their homes. *CDBG–DR funds, however, may not be used for a forced mortgage payoff.* The ineligibility of a forced mortgage payoff with CDBG–DR funds does not affect HUD's longstanding guidance that when other non-CDBG disaster assistance is taken by lenders for a forced mortgage payoff, those funds are not considered to be available to the homeowner and do not constitute a duplication of benefits for the purpose of housing rehabilitation or reconstruction.

b. *Housing Counseling Services.* Grantees are encouraged to coordinate with HUD-approved housing counseling services to ensure that information and services are made available to both renters and homeowners. Additional information is available for Louisiana at: *http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm?&webListAction=search&searchstate=LA,* for Texas at: *http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm?webListAction=search&searchstate=TX,* and for West Virginia at: http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm?webListAction=search&searchstate=WV.

2. Economic Revitalization. For CDBG–DR purposes, economic revitalization may include any CDBG–DR eligible activity that demonstrably restores and improves some aspect of the local economy. The activity may address job losses, or negative impacts to tax revenues or businesses. Examples of eligible activities include providing loans and grants to businesses, funding job training, making improvements to commercial/retail districts, and financing other efforts that attract/retain workers in devastated communities.

All economic revitalization activities must address an economic impact(s) caused by the disaster (*e.g.,* loss of jobs, loss of public revenue). Through its needs assessment and action plan, the grantee must clearly identify the economic loss or need resulting from the disaster, and how the proposed activities will address that loss or need. In proposing an allocation of CDBG–DR funds for economic revitalization under this notice, a grantee must identify how any remaining unmet housing needs will be addressed or how its economic revitalization activities will contribute to the long-term recovery and restoration of housing in the most impacted and distressed areas.

3. Infrastructure. Typical infrastructure activities include the repair, replacement, or relocation of damaged public facilities and improvements including, but not limited to, bridges, water treatment facilities, roads, and sewer and water lines. In proposing an allocation of CDBG–DR funds under this notice for infrastructure, a grantee must identify how any remaining unmet housing needs will be addressed or how its infrastructure activities will contribute to the long-term recovery and restoration of housing in the most impacted and distressed areas.

Grantees that use CDBG–DR funds to assist flood control structures (*i.e.,* dams and levees) are prohibited from using CDBG–DR funds to enlarge a dam or levee beyond the original footprint of the structure that existed prior to the disaster event. Grantees that use CDBG–DR funds for levees and dams are required to: (1) Register and maintain entries regarding such structures with the U.S. Army Corps of Engineers National Levee Database or National Inventory of Dams; (2) ensure that the structure is admitted in the U.S. Army Corps of Engineers PL 84–99 Program (Levee Rehabilitation and Improvement Program); (3) ensure the structure is accredited under the FEMA National Flood Insurance Program; (4) upload into DRGR the exact location of the structure and the area served and protected by the structure; and (5) maintain file documentation demonstrating that the grantee has both conducted a risk assessment prior to funding the flood control structure and that the investment includes risk reduction measures.

4. Preparedness and Mitigation. The Appropriations Act states that funds shall be used for recovering from a Presidentially declared major disaster and all assisted activities must respond to the impacts of the declared disaster. HUD encourages grantees to incorporate preparedness and mitigation measures into the aforementioned rebuilding activities, to rebuild communities that are more resilient to future disasters. Mitigation measures that are not incorporated into those rebuilding activities must be a necessary expense related to disaster relief or long-term recovery that responds to the eligible disaster. Furthermore, the costs associated with these measures may not prevent the grantee from meeting unmet needs.

5. Connection to the Disaster. Grantees must maintain records about each activity funded, as described in paragraph A.14 of section VI of this notice. In regard to physical losses, damage or rebuilding estimates are often the most effective tools for demonstrating the connection to the disaster. For housing market, economic, and/or nonphysical losses, post-disaster analyses or assessments may best document the relationship between the loss and the disaster.

d. *Clarity of Action Plan.* All grantees must include sufficient information so that all interested parties will be able to understand and comment on the action plan and, if applicable, be able to prepare responsive applications to the grantee. The action plan (and subsequent amendments) must include a single chart or table that illustrates, at the most practical level, how all funds are budgeted (*e.g.,* by program, subrecipient, grantee-administered activity, or other category).

e. *Review and Approval of Action Plan.* For funds provided under the Appropriations Act, the action plan must be submitted to HUD (including SF–424 and certifications) within 90 days of the date of the effective date this notice. HUD will review each action plan within 60 days from the date of receipt. The Secretary may disapprove an action plan as substantially incomplete if it is determined that the action plan does not meet the requirements of this notice.

f. *Obligation and expenditure of funds.* Once HUD approves the action plan, it will then issue a grant agreement obligating all funds to the grantee. In addition, HUD will establish the line of credit and the grantee will receive DRGR system access (if it does not already have DRGR system access). The grantee must also enter its action plan activities into the DRGR system in order to draw funds for those activities. Each activity must meet the applicable environmental requirements prior to the use of funds. After the Responsible Entity (usually the grantee) completes environmental review(s) pursuant to 24 CFR part 58 (as applicable) or as authorized by the Appropriations Act and receives from HUD or the State an approved Request for Release of Funds and certification (as applicable), the grantee may draw down funds from the line of credit for an activity. The disbursement of grant funds must begin no later than 180 days after the effective date of this notice.

g. *Amending the Action Plan.* The grantee must amend its action plan to update its needs assessment, modify or create new activities, or reprogram funds, as necessary. Each amendment must be highlighted, or otherwise identified, within the context of the entire action plan. The beginning of every action plan amendment must include a: (1) Section that identifies exactly what content is being added, deleted, or changed; (2) chart or table that clearly illustrates where funds are coming from and where they are moving to; and (3) revised budget allocation table that reflects the entirety of all funds, as amended. A grantee's current version of its entire action plan must be accessible for viewing as a single document at any given point in time, rather than the public or HUD having to view and cross-reference changes among multiple amendments.

h. *Projection of expenditures and outcomes.* Each grantee must amend its published action plan to project expenditures and outcomes within 90 days of action plan approval. The projections must be based on each quarter's expected performance—beginning with the quarter funds are available to the grantee and continuing each quarter until all funds are expended. The projections will enable HUD, the public, and the grantee to track proposed versus actual performance. The published action plan must be amended for any subsequent changes, updates or revision of the projections. Guidance on the preparation of projection is available on the HUD Web site.

3. *HUD performance review authorities and grantee reporting requirements in the Disaster Recovery Grant Reporting (DRGR) System.*

a. *Performance review authorities.* 42 U.S.C. 5304(e) requires that the Secretary shall, at least on an annual basis, make such reviews and audits as may be necessary or appropriate to determine whether the grantee has carried out its activities in a timely manner, whether the grantee's activities and certifications are carried out in accordance with the requirements and the primary objectives of the HCD Act and other applicable laws, and whether the grantee has the continuing capacity to carry out those activities in a timely manner.

This notice waives the requirements for submission of a performance report pursuant to 42 U.S.C. 12708 and 24 CFR 91.520. Alternatively, HUD is requiring that grantees enter information in the DRGR system in sufficient detail to permit the Department's review of grantee performance on a quarterly basis through the Quarterly Performance Report (QPR) and to enable remote review of grantee data to allow HUD to assess compliance and risk. HUD-issued general and appropriation-specific guidance for DRGR reporting requirements can be found on the HUD exchange at *https://www.hudexchange.info/programs/drgr/.*

b. *DRGR Action Plan.* Each grantee must enter its action plan for disaster recovery, including performance measures, into HUD's DRGR system. As more detailed information about uses of funds is identified by the grantee, it must be entered into the DRGR system at a level of detail that is sufficient to serve as the basis for acceptable performance reports and permit HUD review of compliance requirements.

The action plan must also be entered into the DRGR system so that the grantee is able to draw its CDBG–DR funds. The grantee may enter activities into the DRGR system before or after submission of the action plan to HUD. To enter an activity into the DRGR system, the grantee must know the activity type, national objective, and the organization that will be responsible for the activity.

All funds programmed or budgeted at a general level in the DRGR system will be restricted from access on the grantee's line of credit. Grantees must describe activities in DRGR at the necessary level of detail in order for HUD to release funds and make them available for use by the grantee.

Each activity entered into the DRGR system must also be categorized under a ''project.'' Typically, projects are based on groups of activities that accomplish a similar, broad purpose (*e.g.,* housing, infrastructure, or economic revitalization) or are based on an area of service (*e.g.,* Community A). If a grantee describes just one program within a broader category (*e.g.,* single family rehabilitation), that program is entered as a project in the DRGR system. Further, the budget of the program would be identified as the project's budget. If a State grantee has only identified the Method of Distribution (MOD) upon HUD's approval of the published action plan, the MOD itself typically serves as the projects in the DRGR system, rather than activity groupings. Activities are added to MOD projects as subrecipients decide which specific CDBG–DR programs and projects will be funded.

c. *Tracking oversight activities in the DRGR system; use of DRGR data for HUD review and dissemination.* Each grantee must also enter into the DRGR system summary information on monitoring visits and reports, audits, and technical assistance it conducts as part of its oversight of its disaster recovery programs. The grantee's QPR will include a summary indicating the number of grantee oversight visits and reports (see subparagraph e for more information on the QPR). HUD will use data entered into the DRGR action plan and the QPR, transactional data from the DRGR system, and other information provided by the grantee, to provide reports to Congress and the public, as well as to: (1) Monitor for anomalies or performance problems that suggest fraud, abuse of funds, and duplication of benefits; (2) reconcile budgets, obligations, funding draws, and expenditures; (3) calculate expenditures to determine compliance with administrative and public service caps and the overall percentage of funds that benefit low- and moderate-income persons; and (4) analyze the risk of grantee programs to determine priorities for the Department's monitoring. No personally identifiable information shall be reported in DRGR.

d. *Tracking program income in the DRGR system.* Grantees must use the DRGR system to draw grant funds for each activity. Grantees must also use the DRGR system to track program income receipts, disbursements, revolving loan funds, and leveraged funds (if applicable). If a grantee permits local governments or subrecipients to retain program income, the grantee must establish program income accounts in the DRGR system. The DRGR system requires grantees to use program income before drawing additional grant funds, and ensures that program income retained by one organization will not affect grant draw requests for other organizations.

e. *DRGR system Quarterly Performance Report (QPR).* Each grantee must submit a QPR through the DRGR system no later than 30 days following the end of each calendar quarter. Within 3 days of submission to HUD, each QPR must be posted on the grantee's official Web site. In the event the QPR is rejected by HUD, the grantee must post the revised version, as approved by HUD, within 3 days of HUD approval. The grantee's first QPR is due after the first full calendar year quarter after HUD enters the grant award into the DRGR system. For example, a grant award made in April requires a QPR to be submitted by October 30. QPRs must be submitted on a quarterly basis until all funds have been expended and all expenditures and accomplishments have been reported. If a satisfactory report is not submitted in a timely manner, HUD may suspend access to CDBG–DR funds until a satisfactory report is submitted, or may withdraw and reallocate funding if HUD determines, after notice and opportunity for a hearing, that the jurisdiction did not submit a satisfactory report.

Each QPR will include information about the uses of funds in activities identified in the DRGR action plan during the applicable quarter. This includes, but is not limited to, the project name, activity, location, and national objective; funds budgeted, obligated, drawn down, and expended; the funding source and total amount of any non–CDBG–DR funds to be expended on each activity; beginning and actual completion dates of completed activities; achieved performance outcomes, such as number of housing units completed or number of low- and moderate-income persons served; and the race and ethnicity of persons assisted under direct-benefit activities. For all housing and economic development activities, the address of each CDBG–DR assisted property must be recorded in the QPR. Grantees must not include such addresses in its public QPR; when entering addresses in the QPR, grantees must select ''Not Visible on PDF'' to exclude them from the report required to be posted on its Web site. The DRGR system will automatically display the amount of program income receipted, the amount of program income reported as disbursed, and the amount of grant funds disbursed. Grantees must include a description of actions taken in that quarter to affirmatively further fair housing, within the section titled ''Overall Progress Narrative'' in the DRGR system.

4. *Citizen participation waiver and alternative requirement.* To permit a more streamlined process, and ensure disaster recovery grants are awarded in a timely manner, provisions of 42 U.S.C. 5304(a)(2) and (3), 42 U.S.C. 12707, 24 CFR 570.486, and 24 CFR 91.115(b) and (c), with respect to citizen participation requirements, are waived and replaced by the requirements below. The streamlined requirements do not mandate public hearings but do require providing a reasonable opportunity (at least 14 days) for citizen comment and ongoing citizen access to information about the use of grant funds. The streamlined citizen participation requirements for a grant under this notice are:

a. *Publication of the action plan, opportunity for public comment, and substantial amendment criteria.* Before the grantee adopts the action plan for this grant or any substantial amendment to the action plan, the grantee will publish the proposed plan or amendment. The manner of publication must include prominent posting on the grantee's official Web site and must afford citizens, affected local governments, and other interested parties a reasonable opportunity to examine the plan or amendment's contents. The topic of disaster recovery should be navigable by citizens from the grantee (or relevant agency) homepage. Grantees are also encouraged to notify affected citizens through electronic mailings, press releases, statements by public officials, media advertisements, public service announcements, and/or contacts with neighborhood organizations.

Grantees are responsible for ensuring that all citizens have equal access to information about the programs, including persons with disabilities and limited English proficiency (LEP). Each grantee must ensure that program information is available in the appropriate languages for the geographic areas to be served. Since State grantees under this notice may make grants throughout the State, including to entitlement communities, States should carefully evaluate the needs of disabled persons and those with limited English proficiency. For assistance in ensuring that this information is available to LEP populations, recipients should consult the *Final Guidance to Federal Financial Assistance Recipients Regarding Title VI, Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,* published on January 22, 2007, in the **Federal Register** (72 FR 2732).

Subsequent to publication of the action plan, the grantee must provide a reasonable time frame (again, no less than 14 days) and method(s) (including electronic submission) for receiving comments on the plan or substantial amendment. In its action plan, each grantee must specify criteria for determining what changes in the grantee's plan constitute a substantial amendment to the plan. At a minimum, the following modifications will constitute a substantial amendment: A change in program benefit or eligibility criteria; the addition or deletion of an activity; or the allocation or reallocation of a monetary threshold specified by the grantee in their action plan. The grantee may substantially amend the action plan if it follows the same procedures required in this notice for the preparation and submission of an action plan for disaster recovery.

b. *Nonsubstantial amendment.* The grantee must notify HUD, but is not required to undertake public comment, when it makes any plan amendment that is not substantial. HUD must be notified at least 5 business days before the amendment becomes effective. However, every amendment to the action plan (substantial and nonsubstantial) must be numbered sequentially and posted on the grantee's Web site. The Department will acknowledge receipt of the notification of nonsubstantial amendments via email within 5 business days.

c. *Consideration of public comments.* The grantee must consider all comments, received orally or in writing, on the action plan or any substantial amendment. A summary of these comments or views, and the grantee's response to each must be submitted to HUD with the action plan or substantial amendment.

d. *Availability and accessibility of the Action Plan.* The grantee must make the action plan, any substantial amendments, and all performance reports available to the public on its Web site and on request. In addition, the grantee must make these documents available in a form accessible to persons with disabilities and those with limited English proficiency. During the term of the grant, the grantee will provide citizens, affected local governments, and other interested parties with reasonable and timely access to information and records relating to the action plan and to the grantee's use of grant funds.

e. *Public Web site.* HUD is requiring grantees to maintain a public Web site that provides information accounting for how all grant funds are used and managed/administered, including links to all action plans, action plan amendments, performance reports, citizen participation requirements, and activity/program information for activities described in the action plan, including details of all contracts and ongoing procurement policies. To meet this requirement, each grantee must have a separate page dedicated to its disaster recovery that includes the information described at paragraph A.23 of section VI of this notice.

f. *Application status.* HUD is requiring grantees to provide multiple methods of communication, such as Web sites, toll-free numbers, or other means that provide applicants for recovery assistance with timely information on the status of their application, as provided for in paragraph A.1.b(2) in section VI of this notice.

g. *Citizen complaints.* The grantee will provide a timely written response to every citizen complaint. The response will be provided within 15 working days of the receipt of the complaint.

5. *Direct grant administration and means of carrying out eligible activities.* Requirements at 42 U.S.C. 5306 are waived to the extent necessary to allow a State to use its disaster recovery grant allocation directly to carry out State-administered activities eligible under this notice, rather than distribute all funds to local governments. Pursuant to this waiver, the standard at 24 CFR 570.480(c) and the provisions at 42 U.S.C. 5304(e)(2) will also include activities that the State carries out directly. Activities eligible under this notice may be carried out, subject to State law, by the State through its employees, through procurement

contracts, or through assistance provided under agreements with subrecipients or recipients. State grantees continue to be responsible for civil rights, labor standards, and environmental protection requirements, for compliance with 24 CFR 570.489 relating to conflicts of interest and for compliance with 24 CFR 570.489(m) relating to monitoring and management of subrecipients.

For activities carried out by entities eligible under section 105(a)(15) of the HCD Act, such entity will be subject to the definition of a nonprofit under that section rather than the definition located in 24 CFR 570.204, even in cases where the entity is receiving assistance through a local government that is an Entitlement jurisdiction.

6. *Consolidated Plan waiver.* HUD is temporarily waiving the requirement for consistency with the consolidated plan (requirements at 42 U.S.C. 12706, 24 CFR 91.325(a)(5) and 24 CFR 91.325(b)(2)), because the effects of a major disaster alter a grantee's priorities for meeting housing, employment, and infrastructure needs. In conjunction, 42 U.S.C. 5304(e), to the extent that it would require HUD to annually review grantee performance under the consistency criteria, is also waived. However, this waiver applies only until the grantee submits its next full (3–5 year) consolidated plan, or for 24 months after the effective date of this notice, whichever is less. If the grantee is not scheduled to submit a new 3–5 year consolidated plan within the next 2 years, HUD expects each grantee to update its existing 3–5 year consolidated plan to reflect disaster-related needs no later than 24 months after the effective date of this notice. Additionally, grantees are encouraged to incorporate disaster-recovery needs into their consolidated plan updates as soon as practicable, but any unmet disaster-related needs and associated priorities must be incorporated into the grantee's next consolidated plan update no later than its Fiscal Year 2019 update. HUD has issued guidance for incorporating CDBG–DR funds into consolidated plans via HUD's eCon Planning Suite. This guidance is on the HUD Exchange at: *https://www.hudexchange.info/resource/4400/updating-the-consolidated-plan-to-reflect-disaster-recovery-needs-and-associated-priorities/.* This waiver does not affect the requirements of HUD's July 16, 2015, final rule on Affirmatively Furthering Fair Housing (80 FR 42272), which requires grantees, among other requirements, to complete an Assessment of Fair Housing in accordance with the requirements of 24 CFR 5.160 and incorporate fair housing strategies and actions consistent with the AFH into the Consolidated Plan.

7. *Requirement for consultation during plan preparation.* Currently, the HCD Act and regulations require States to consult with affected local governments in nonentitlement areas of the State in determining the State's proposed method of distribution. HUD is waiving 42 U.S.C. 5306(d)(2)(C)(iv), 42 U.S.C. 5306(d)(2)(D), 24 CFR 91.325(b), and 24 CFR 91.110, with the alternative requirement that States receiving an allocation under this notice consult with all disaster-affected local governments (including any CDBG-entitlement communities and any local public housing authorities) in determining the use of funds. This ensures that State grantees sufficiently assess the recovery needs of all areas affected by the disaster. Additional guidance on consultation with local stakeholders can be found in the National Disaster Recovery Framework and its discussion of pre- and post-disaster planning, at: *https://www.fema.gov/national-disaster-recovery-framework.*

Consistent with the approach encouraged through the National Disaster Recovery Framework and National Preparedness Goal, all grantees must consult with States, tribes, local governments, Federal partners, nongovernmental organizations, the private sector, and other stakeholders and affected parties in the surrounding geographic area to ensure consistency of the action plan with applicable regional redevelopment plans. Grantees are encouraged to establish a recovery task force with representative members of each sector to advise the grantee on how its recovery activities can best contribute towards the goals of regional redevelopment plans.

8. *Overall benefit requirement.* The primary objective of the HCD Act is the ''development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income'' (42 U.S.C. 5301(c)). To carry out this objective, the statute requires that 70 percent of the aggregate of CDBG program funds be used to support activities benefitting low- and moderate-income persons. To ensure that maximum assistance is provided initially to low- and moderate-income persons, the 70 percent overall benefit requirement shall remain in effect for this allocation, subject to a waiver request by an individual grantee to authorize a lower overall benefit for its CDBG–DR grant based on a determination by HUD of compelling need for the reduction.

A grantee may seek to reduce the overall benefit requirement below 70 percent of the total grant, but must submit a justification that, at a minimum: (a) Identifies the planned activities that meet the needs of its low- and moderate-income population; (b) describes proposed activity(ies) and/or program(s) that will be affected by the alternative requirement, including their proposed location(s) and role(s) in the grantee's long-term disaster recovery plan; (c) describes how the activities/programs identified in (b) prevent the grantee from meeting the 70 percent requirement; and (d) demonstrates that low- and moderate-income persons' disaster-related needs have been sufficiently met and that the needs of non–low- and moderate-income persons or areas are disproportionately greater, and that the jurisdiction lacks other resources to serve them.

9. *Use of the* ''*upper quartile*'' *or* ''*exception criteria*'' *for low- and moderate-income area benefit activities.* Section 101(c) of the HCD Act requires each funded activity to meet a national objective of the CDBG program, including the national objective of benefiting low- and moderate-income persons. Grantees may meet this national objective on an area basis, through an activity which is available to benefit all of the residents of an area where at least 51 percent of the residents are low- and moderate income. In some cases, HUD permits an exception to the low- and moderate-income area benefit requirement that an area contain at least 51 percent low- and moderate-income residents. This exception applies to entitlement communities that have few, if any, areas within their jurisdiction that have 51 percent or more low- and moderate-income residents. These communities are allowed to use a percentage less than 51 percent to qualify activities under the low- and moderate-income area benefit category. This exception is referred to as the ''exception criteria'' or the ''upper quartile.'' A grantee qualifies for this exception when less than one quarter of the populated-block groups in its jurisdictions contain 51 percent or more low- and moderate-income persons. In such communities, activities must serve an area that contains a percentage of low- and moderate-income residents that is within the upper quartile of all census-block groups within its jurisdiction in terms of the degree of concentration of low- and moderate-income residents. HUD assesses each grantee's census-block groups to determine whether a grantee qualifies to

use this exception and identifies the alternative percentage the grantee may use instead of 51 percent for the purpose of qualifying activities under the low- and moderate-income area benefit. HUD determines the lowest proportion a grantee may use to qualify an area for this purpose and advises the grantee, accordingly. Disaster recovery grantees are required to use the most recent data available in implementing the exception criteria. The ''exception criteria'' apply to disaster recovery activities funded pursuant to this notice in jurisdictions covered by such criteria, including jurisdictions that receive disaster recovery funds from a State.

10. *Grant administration responsibilities and general administration cap.*

a. *Grantee responsibilities.* Each grantee shall administer its award in compliance with all applicable laws and regulations and shall be financially accountable for the use of all funds provided in this notice.

b. *General administration cap.* For all grantees under this notice, the annual CDBG program administration requirements must be modified to be consistent with the Appropriations Act, which allows up to 5 percent of the grant (plus program income) to be used for administrative costs, by the grantee, UGLGs or by subrecipients. Thus, the total of all costs classified as administrative must be less than or equal to the 5 percent cap.

(1) *Combined technical assistance and administrative expenditures cap.* The provisions of 42 U.S.C. 5306(d) and 24 CFR 570.489(a)(1)(i) and (iii) will not apply to the extent that they cap administration and technical assistance expenditures, limit a State's ability to charge a nominal application fee for grant applications for activities the State carries out directly, and require a dollar-for-dollar match of State funds for administrative costs exceeding $100,000. 42 U.S.C. 5306(d)(5) and (6) are waived and replaced with the alternative requirement that the aggregate total for administrative and technical assistance expenditures must not exceed 5 percent of the grant plus program income. A State remains limited to spending a maximum of 20 percent of its total grant amount on a combination of planning and program administration costs. Planning costs subject to the 20 percent cap are those defined in 42 U.S.C. 5305(a)(12).

11. *Planning-only activities.* The annual State CDBG program requires that local government grant recipients for planning-only grants must document that the use of funds meets a national objective. In the State CDBG program, these planning grants are typically used for individual project plans. By contrast, planning activities carried out by entitlement communities are more likely to include non-project-specific plans such as functional land-use plans, master plans, historic preservation plans, comprehensive plans, community recovery plans, development of housing codes, zoning ordinances, and neighborhood plans. These plans may guide long-term community development efforts comprising multiple activities funded by multiple sources. In the CDBG Entitlement program, these more general planning activities are presumed to meet a national objective under the requirements at 24 CFR 570.208(d)(4).

The Department notes that almost all effective recoveries in the past have relied on some form of area-wide or comprehensive planning activity to guide overall redevelopment independent of the ultimate source of implementation funds. To assist grantees, the Department is waiving the requirements at 24 CFR 570.483(b)(5) or (c)(3), which limit the circumstances under which the planning activity can meet a low- and moderate-income or slum-and-blight national objective. Instead, States must comply with 24 CFR 570.208(d)(4) when funding disaster recovery-assisted, planning-only grants, or directly administering planning activities that guide recovery in accordance with the Appropriations Act. In addition, the types of planning activities that States may fund or undertake are expanded to be consistent with those of entitlement communities identified at 24 CFR 570.205.

As provided in paragraph A.2 of section VI of this notice, grantees are required to use their planning funds to develop a disaster recovery and response plan that addresses long-term recovery and pre- and post-disaster hazard mitigation.

Plans should include an assessment of natural hazard risks, including risks expected to increase due to climate change, to low- and moderate-income residents based on an analysis of data and findings in (1) the National Climate Assessment (NCA),[1] the U.S. Climate Resilience Toolkit,[2] The Impact of Climate Change and Population Growth on the National Flood Insurance Program Through 2100,[3] or the Community Resilience Planning Guide for Buildings and Infrastructure Systems prepared by the National Institute of Standards and Technology (NIST);[4] or (2) other climate risk related data published by the Federal Government, or other State or local government climate risk related data, including FEMA-approved hazard mitigation plans that incorporate climate change; and (3) other climate risk data identified by the jurisdiction. For additional guidance also see: The Coastal Hazards Center's *State Disaster Recovery Planning Guide*[5] and FEMA's *Guide on Effective Coordination of Recovery Resources for State, Tribal, Territorial and Local Incidents*.[6]

12. *Use of the urgent need national objective.* The CDBG certification requirements for documentation of urgent need, located at 24 CFR 570.483(d), are waived for the grants under this notice and replaced with the following alternative requirement. In the context of disaster recovery, the standard urgent need certification requirements may impede recovery. Since the Department only provides CDBG–DR awards to grantees with documented disaster-related impacts and each grantee is limited to spending funds only in the most impacted and distressed areas, the following streamlined alternative requirement recognizes the urgency in addressing serious threats to community welfare following a major disaster.

Grantees need not issue formal certification statements to qualify an activity as meeting the urgent need national objective. Instead, grantees must document how each program and/or activity funded under the urgent need national objective responds to a disaster-related impact. For each activity that will meet an urgent need national objective, grantees must reference in their action plan needs assessment the type, scale, and location of the disaster-related impacts that each program and/or activity is addressing within 24-months of its first obligation of grant funds. Following this 24-month period, no new program or activity intended to meet the urgent need national objective may be introduced and allocated funds without a waiver from HUD. Grantees are advised to use the low- and moderate-income benefit national objective for all activities that qualify under the criteria for that national objective. At least 70 percent of the entire CDBG–DR grant award must

[1] See *http://nca2014.globalchange.gov/highlights#submenu-highlights-overview*.

[2] See *https://toolkit.climate.gov*.

[3] See *http://www.acclimatise.uk.com/login/uploaded/resources/FEMA_NFIP_report.pdf*.

[4] See *http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1197.pdf*.

[5] *http://coastalhazardscenter.org/dev/wp-content/uploads/2012/05/State-Disaster-Recovery-Planning-Guide_2012.pdf*.

[6] *https://www.fema.gov/media-library/assets/documents/101940*.

be used for activities that benefit low- and moderate-income persons.

13. *Waiver and alternative requirement for distribution to CDBG metropolitan cities and urban counties.* 42 U.S.C 5302(a)(7) (definition of ''nonentitlement area'') and provisions of 24 CFR part 570, including 24 CFR 570.480, are waived to permit a State to distribute CDBG–DR funds to units of local government and tribes.

14. *Recordkeeping.* When a State carries out activities directly, 24 CFR 570.490(b) is waived and the following alternative provision shall apply: The State shall establish and maintain such records as may be necessary to facilitate review and audit by HUD of the State's administration of CDBG–DR funds, under 24 CFR 570.493. Consistent with applicable statutes, regulations, waivers and alternative requirements, and other Federal requirements, the content of records maintained by the State shall be sufficient to: (1) Enable HUD to make the applicable determinations described at 24 CFR 570.493; (2) make compliance determinations for activities carried out directly by the State; and (3) show how activities funded are consistent with the descriptions of activities proposed for funding in the action plan and/or DRGR system. For fair housing and equal opportunity purposes, and as applicable, such records shall include data on the racial, ethnic, and gender characteristics of persons who are applicants for, participants in, or beneficiaries of the program.

15. *Change of use of real property.* This waiver conforms to the change of use of real property rule to the waiver allowing a State to carry out activities directly. For purposes of this program, all references to ''unit of general local government'' in 24 CFR 570.489(j), shall be read as ''unit of general local government (UGLG) or State.''

16. *Responsibility for review and handling of noncompliance.* This change is in conformance with the waiver allowing the State to carry out activities directly. 24 CFR 570.492 is waived and the following alternative requirement applies for any State receiving a direct award under this notice: The State shall make reviews and audits, including on-site reviews of any subrecipients, designated public agencies, and UGLGs, as may be necessary or appropriate to meet the requirements of section 104(e)(2) of the HCD Act, as amended, as modified by this notice. In the case of noncompliance with these requirements, the State shall take such actions as may be appropriate to prevent a continuance of the deficiency, mitigate any adverse effects or consequences, and prevent a recurrence. The State shall establish remedies for noncompliance by any designated subrecipients, public agencies, or UGLGs.

17. *Program income alternative requirement.* The Department is waiving applicable program income rules at 42 U.S.C. 5304(j) and 570.489(e) to the extent necessary to provide additional flexibility as described under this notice. The alternative requirements provide guidance regarding the use of program income received before and after grant close out and address revolving loan funds.

a. *Definition of program income.*

(1) For purposes of this subpart, ''program income'' is defined as gross income generated from the use of CDBG–DR funds, except as provided in subparagraph (d) of this paragraph, and received by a State, local government, tribe or a subrecipient of a State, local government, or tribe. When income is generated by an activity that is only partially assisted with CDBG–DR funds, the income shall be prorated to reflect the percentage of CDBG–DR funds used (*e.g.,* a single loan supported by CDBG–DR funds and other funds; a single parcel of land purchased with CDBG funds and other funds). Program income includes, but is not limited to, the following:

(a) Proceeds from the disposition by sale or long-term lease of real property purchased or improved with CDBG–DR funds.

(b) Proceeds from the disposition of equipment purchased with CDBG–DR funds.

(c) Gross income from the use or rental of real or personal property acquired by a State, UGLG, or tribe or subrecipient of a State, local government, or tribe with CDBG–DR funds, less costs incidental to generation of the income (*i.e.,* net income).

(d) Net income from the use or rental of real property owned by a State, local government, or tribe or subrecipient of a State, local government, or tribe, that was constructed or improved with CDBG–DR funds.

(e) Payments of principal and interest on loans made using CDBG–DR funds.

(f) Proceeds from the sale of loans made with CDBG–DR funds.

(g) Proceeds from the sale of obligations secured by loans made with CDBG–DR funds.

(h) Interest earned on program income pending disposition of the income, including interest earned on funds held in a revolving fund account.

(i) Funds collected through special assessments made against nonresidential properties and properties owned and occupied by households not of low- and moderate-income, where the special assessments are used to recover all or part of the CDBG–DR portion of a public improvement.

(j) Gross income paid to a State, local government, or tribe, or paid to a subrecipient thereof, from the ownership interest in a for-profit entity in which the income is in return for the provision of CDBG–DR assistance.

(2) ''Program income'' does not include the following:

(a) The total amount of funds that is less than $35,000 received in a single year and retained by a State, local government, tribe, or retained by a subrecipient thereof.

(b) Amounts generated by activities eligible under section 105(a)(15) of the HCD Act and carried out by an entity under the authority of section 105(a)(15) of the HCD Act.

b. *Retention of program income.* State grantees may permit a local government or tribe that receives or will receive program income to retain the program income, but are not required to do so.

c. *Program income—use, close out, and transfer.*

(1) Program income received (and retained, if applicable) before or after close out of the grant that generated the program income, and used to continue disaster recovery activities, is treated as additional disaster recovery CDBG funds subject to the requirements of this notice and must be used in accordance with the grantee's action plan for disaster recovery. To the maximum extent feasible, program income shall be used or distributed before additional withdrawals from the U.S. Treasury are made, except as provided in subparagraph D of this paragraph.

(2) In addition to the regulations dealing with program income found at 24 CFR 570.489(e) and 570.504, the following rules apply: A grantee may transfer program income before close out of the grant that generated the program income to its annual CDBG program. In addition, State grantees may transfer program income before close out to any annual CDBG-funded activities carried out by a local government or tribe within the State. Program income received by a grantee, or received and retained by a subrecipient, after close out of the grant that generated the program income, may also be transferred to a grantee's annual CDBG award. In all cases, any program income received that is *not* used to continue the disaster recovery activity will not be subject to the waivers and alternative requirements of this notice. Rather, those funds will be subject to

the grantee's regular CDBG program rules.

d. Revolving loan funds. State grantees, and local governments or tribes (provided assistance by a State grantee) may establish revolving funds to carry out specific, identified activities. A revolving fund, for this purpose, is a separate fund (with a set of accounts that are independent of other program accounts) established to carry out specific activities. These activities generate payments, which will be used to support similar activities going forward. These payments to the revolving fund are program income and must be substantially disbursed from the revolving fund before additional grant funds are drawn from the U.S. Treasury for payments that could be funded from the revolving fund. Such program income is not required to be disbursed for nonrevolving fund activities.

State grantees may also establish a revolving fund to distribute funds to local governments or tribes to carry out specific, identified activities. The same requirements, outlined above, apply to this type of revolving loan fund. Note that no revolving fund established per this notice shall be directly funded or capitalized with CDBG–DR grant funds, pursuant to 24 CFR 570.489(f)(3).

18. *Reimbursement of disaster recovery expenses.* The provisions of 24 CFR 570.489(b) are applied to permit a State to charge to the grant otherwise allowable costs incurred by itself, its recipients or subrecipients (including public housing authorities (PHAs)) on or after the incident date of the covered disaster. The Department expects State grantees to include all preagreement activities in their action plans. Additionally, grantees are permitted to charge to grants the preaward and preapplication costs of homeowners, businesses, and other qualifying entities for eligible costs they have incurred in response to an eligible disaster covered under this notice. However, a grantee may not charge such preaward or preapplication costs to grants if the preaward or preapplication action results in an adverse impact to the environment. Grantees receiving an allocation under this notice are also subject to HUD's guidance on preaward expenses published in CPD Notice 2015–07, ''Guidance for Charging Pre-Application Costs of Homeowners, Businesses, and Other Qualifying Entities to CDBG Disaster Recovery Grants,'' as amended (*https://www.hudexchange.info/resource/4777/notice-cpd-1507-guidance-for-charging-preapplication-costs-to-cdbg-disaster-recovery-grants/*). Grantees are required to consult with the State Historic Preservation Officer, Fish and Wildlife Service and National Marine Fisheries Service, to obtain formal agreements for compliance with section 106 of the National Historic Preservation Act (54 U.S.C. 306108) and section 7 of the Endangered Species Act (16 U.S.C. 1536) when designing a reimbursement program. Grantees may also not use CDBG–DR funds to provide compensation to beneficiaries.

19. *One-for-One Replacement Housing, Relocation, and Real Property Acquisition Requirements.* Activities and projects assisted by CDBG–DR are subject to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (42 U.S.C. 4601 *et seq.*) (''URA'') and section 104(d) of the HCD Act (42 U.S.C. 5304(d)) (Section 104(d)). The implementing regulations for the URA are at 49 CFR part 24. The regulations for Section 104(d) are at 24 CFR part 42, subpart C. For the purpose of promoting the availability of decent, safe, and sanitary housing, HUD is waiving the following URA and Section 104(d) requirements for grantees under this notice:

a. *One-for-one replacement.* One-for-one replacement requirements at section 104(d)(2)(A)(i) and (ii) and (d)(3) and 24 CFR 42.375 are waived in connection with funds allocated under this notice for lower-income dwelling units that are damaged by the disaster and not suitable for rehabilitation. The section 104(d) one-for-one replacement requirements generally apply to demolished or converted occupied and vacant occupiable lower-income dwelling units. This waiver exempts disaster-damaged units that meet the grantee's definition of ''not suitable for rehabilitation'' from the one-for-one replacement requirements. Before carrying out a program or activity that may be subject to the one-for-one replacement requirements, the grantee must define ''not suitable for rehabilitation'' in its action plan or in policies/procedures governing these programs and activities. Grantees with questions about the one-for-one replacement requirements are encouraged to contact the HUD regional relocation specialist responsible for their State.

HUD is waiving the one-for-one replacement requirements because they do not account for the large, sudden changes that a major disaster may cause to the local housing stock, population, or economy. Further, the requirement may discourage grantees from converting or demolishing disaster-damaged housing when excessive costs would result from replacing all such units. Disaster-damaged housing structures that are not suitable for rehabilitation can pose a threat to public health and safety and to economic revitalization. Grantees should reassess post-disaster population and housing needs to determine the appropriate type and amount of lower-income dwelling units to rehabilitate and/or rebuild. Grantees should note, however, that the demolition and/or disposition of PHA-owned public housing units is covered by section 18 of the United States Housing Act of 1937, as amended, and 24 CFR part 970.

b. *Relocation assistance.* The relocation assistance requirements at section 104(d)(2)(A) of the HCD Act and 24 CFR 42.350 are waived to the extent that they differ from the requirements of the URA and implementing regulations at 49 CFR part 24, as modified by this notice, for activities related to disaster recovery. Without this waiver, disparities exist in relocation assistance associated with activities typically funded by HUD and FEMA (*e.g.,* buyouts and relocation). Both FEMA and CDBG funds are subject to the requirements of the URA; however, CDBG funds are subject to Section 104(d), while FEMA funds are not. The URA provides that a displaced person is eligible to receive a rental assistance payment that covers a period of 42 months. By contrast, Section 104(d) allows a lower-income displaced person to choose between the URA rental assistance payment and a rental assistance payment calculated over a period of 60 months. This waiver of the Section 104(d) requirements assures uniform and equitable treatment by setting the URA and its implementing regulations as the sole standard for relocation assistance under this notice.

c. *Arm's length voluntary purchase.* The requirements at 49 CFR 24.101(b)(2)(i) and (ii) are waived to the extent that they apply to an arm's length voluntary purchase carried out by a person who uses funds allocated under this notice and does not have the power of eminent domain, in connection with the purchase and occupancy of a principal residence by that person. Given the often large-scale acquisition needs of grantees, this waiver is necessary to reduce burdensome administrative requirements following a disaster. Grantees are reminded that tenants occupying real property acquired through voluntary purchase may be eligible for relocation assistance.

d. *Rental assistance to a displaced person.* The requirements at sections 204(a) and 206 of the URA, 49 CFR 24.2(a)(6)(viii), 24.402(b)(2), and 24.404

are waived to the extent that they require the grantee to use 30 percent of a low-income, displaced person's household income in computing a rental assistance payment if the person had been paying rent in excess of 30 percent of household income without ''demonstrable hardship'' before the project. Thus, if a tenant has been paying rent in excess of 30 percent of household income without demonstrable hardship, using 30 percent of household income to calculate the rental assistance would not be required. Before carrying out a program or activity in which the grantee provides rental assistance payments to displaced persons, the grantee must define ''demonstrable hardship'' in its action plan or in the policies and procedures governing these programs and activities. The grantee's definition of demonstrable hardship applies when implementing these alternative requirements.

e. *Tenant-based rental assistance.* The requirements of sections 204 and 205 of the URA, and 49 CFR 24.2(a)(6)(vii), 24.2(a)(6)(ix), and 24.402(b) are waived to the extent necessary to permit a grantee to meet all or a portion of a grantee's replacement housing financial assistance obligation to a displaced tenant by offering rental housing through a tenant-based rental assistance (TBRA) housing program subsidy (*e.g.,* Section 8 rental voucher or certificate), provided that the tenant is provided referrals to comparable replacement dwellings in accordance with 49 CFR 24.204(a) where the owner is willing to participate in the TBRA program, and the period of authorized assistance is at least 42 months. Failure to grant this waiver would impede disaster recovery whenever TBRA program subsidies are available but funds for cash relocation assistance are limited.

f. *Moving expenses.* The requirements at section 202(b) of the URA and 49 CFR 24.302, which require that a grantee offer a displaced person the option to receive a fixed moving-cost payment based on the Federal Highway Administration's Fixed Residential Moving Cost Schedule instead of receiving payment for actual moving and related expenses, are waived. As an alternative, the grantee must establish and offer the person a ''moving expense and dislocation allowance'' under a schedule of allowances that is reasonable for the jurisdiction and that takes into account the number of rooms in the displacement dwelling, whether the person owns and must move the furniture, and, at a minimum, the kinds of expenses described in 49 CFR 24.301. Without this waiver and alternative requirement, disaster recovery may be impeded by requiring grantees to offer allowances that do not reflect current local labor and transportation costs. Persons displaced from a dwelling remain entitled to choose a payment for actual reasonable moving and related expenses if they find that approach preferable to the locally established ''moving expense and dislocation allowance.''

g. *Optional relocation policies.* The regulation at 24 CFR 570.606(d) is waived to the extent that it requires optional relocation policies to be established at the grantee level. Unlike the regular CDBG program, States may carry out disaster recovery activities directly or through subrecipients but 24 CFR 570.606(d) does not account for this distinction. This waiver makes clear grantees, including subrecipients, receiving CDBG disaster funds may establish separate optional relocation policies. This waiver is intended to provide States with maximum flexibility in developing optional relocation policies with CDBG–DR funds.

20. *Environmental requirements.*

a. *Clarifying note on the process for environmental release of funds when a State carries out activities directly.* Usually, a State distributes CDBG funds to local governments and takes on HUD's role in receiving environmental certifications from the grant recipients and approving releases of funds. For this grant, HUD will allow a State grantee to also carry out activities directly, in addition to distributing funds to subrecipients. Thus, per 24 CFR 58.4, when a State carries out activities directly, the State must submit the Certification and Request for Release of Funds to HUD for approval.

b. *Adoption of another agency's environmental review.* In accordance with the Appropriations Act, recipients of Federal funds that use such funds to supplement Federal assistance provided under sections 402, 403, 404, 406, 407, or 502 of the Stafford Act may adopt, without review or public comment, any environmental review, approval, or permit performed by a Federal agency, and such adoption shall satisfy the responsibilities of the recipient with respect to such environmental review, approval, or permit that is required by the HCD Act. The grantee must notify HUD in writing of its decision to adopt another agency's environmental review. The grantee must retain a copy of the review in the grantee's environmental records.

c. *Unified Federal Review.* The Sandy Recovery Improvement Act was signed into law on January 29, 2013, and directed the Administration to ''establish an expedited and unified interagency review process (UFR) to ensure compliance with environmental and historic requirements under Federal law relating to disaster recovery projects, in order to expedite the recovery process, consistent with applicable law.'' The process aims to coordinate environmental and historic preservation reviews to expedite planning and decision-making for disaster recovery projects. This can improve the Federal Government's assistance to States, local, and tribal governments; communities; families; and individual citizens as they recover from future presidentially declared disasters. Grantees receiving and allocation of funds under this notice are encouraged to in this process as one means of expediting recovery. Tools for the UFR process can be found at here: *http://www.fema.gov/unified-federal-environmental-and-historic-preservation-review-presidentially-declared-disasters.*

d. *Release of funds.* In accordance with the Appropriations Act, and notwithstanding 42 U.S.C. 5304(g)(2), the Secretary may, upon receipt of a Request for Release of Funds and Certification, immediately approve the release of funds for an activity or project assisted with allocations under this notice if the recipient has adopted an environmental review, approval, or permit under subparagraph b above, or the activity or project is categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

e. *Historic preservation reviews.* To facilitate expedited historic preservation reviews under section 106 of the National Historic Preservation Act of 1966 (54 U.S.C. Section 306108), HUD strongly encourages grantees to allocate general administration funds to retain a qualified historic preservation professional, and support the capacity of the State Historic Preservation Officer/Tribal Historic Preservation Officer to review CDBG–DR projects. For more information on qualified historic preservation professional standards see *https://www.nps.gov/history/local-law/arch_stnds_9.htm.*

21. *Duplication of benefits.* Section 312 of the Stafford Act, as amended, generally prohibits any person, business concern, or other entity from receiving financial assistance with respect to any part of a loss resulting from a major disaster for which such person, business concern, or other entity has received financial assistance under any other program or from insurance or any other source. To comply with Section 312 and the limitation on the use of CDBG–DR

funds under the Appropriations Act for necessary expenses, each grantee must ensure that each activity provides assistance to a person or entity only to the extent that the person or entity has a disaster recovery need that has not been fully met. Grantees are subject to the requirements of a separate notice explaining the duplication of benefit requirements (76 FR 71060, published November 16, 2011). As a reminder, and as noted in the November 16, 2011, notice, in paragraph B of section VI, *CDBG–DR funds may not be used to pay an SBA home or business loan.* Additionally, this notice does not require households and businesses to apply for SBA assistance prior to applying for CDBG–DR assistance. However, CDBG–DR grantees may institute such a requirement in order to target assistance to households and businesses with the greatest need. In addition to the requirements described here and in the November 16, 2011 notice, grantees must comply with HUD's guidance published on July 25, 2013, ''HUD Guidance on Duplication of Benefits and CDBG Disaster Recovery (DR) Assistance,'' as amended, in regards to declined SBA loans (*https://www.hudexchange.info/resource/3137/cdbg-dr-duplication-of-benefit-requirements-and-provision-of-assistance-with-sba-funds/*).

22. *Procurement.* States must comply with the procurement requirements at 24 CFR 570.489(g).

Additionally, if a State grantee chooses to provide funding to another State agency, the State may specify in its procurement policies and procedures whether that State agency must follow the procurement policies and procedures that the State is subject to, or whether the State agency must follow the same policies and procedures to which all other subrecipients are subject.

HUD may request periodic updates from grantees that employ contractors. A contractor is a third-party firm that the grantee acquires through a procurement process to perform specific functions, consistent with the procurement requirements in the CDBG program regulations. For contractors employed to provide discrete services or deliverables only, HUD is establishing an additional alternative requirement to expand on existing provisions of 2 CFR 200.317 through 200.326 and 24 CFR 570.489(g) as follows:

a. Grantees are also required to ensure all contracts and agreements (with subrecipients, recipients, and contractors) clearly state the period of performance or date of completion;

b. Grantees must incorporate performance requirements and liquidated damages into each procured contract or agreement. Contracts that describe work performed by general management consulting services need not adhere to this requirement; and

c. Grantees may contract for administrative support but may not delegate or contract to any other party any inherently governmental responsibilities related to management of the funds, such as oversight, policy development, and financial management. Technical assistance resources for procurement are available to grantees either through HUD staff or through technical assistance providers engaged by HUD or the grantee.

23. *Public Web site.* HUD is requiring grantees to maintain a public Web site that provides information accounting for how all grant funds are used and managed/administered, including links to all action plans, action plan amendments, performance reports, citizen participation requirements, and activity/program information for activities described in the action plan, including details of all contracts and ongoing procurement policies. The creation and maintenance of the public Web site is one component of the Department's certification of a grantee's proficient financial controls and procurement processes as provided in paragraph A.1.a. of section VI of this notice. To meet this requirement, each grantee must make the following items available on its Web site: The action plan (including all amendments); each QPR (as created using the DRGR system); procurement policies and procedures; description of services or goods currently being procured by the grantee; a copy of contracts the grantee has procured directly; and a summary of all procured contracts, including those procured by the grantee, recipients, or subrecipients (*e.g.,* a summary list of procurements, the phase of the procurement, requirements for proposals, and any liquidation of damages associated with a contractor's failure or inability to implement the contract, etc.). Grantees should post only contracts as defined in 2 CFR 200.22. To assist grantees in preparing this summary, HUD has developed a template. The template can be accessed at: *https://www.hudexchange.info/cdbg-dr/cdbg-dr-laws-regulations-and-federal-register-notices/.* Grantees are required to use this template, and attach an updated version to the DRGR system each quarter as part of their QPR submissions. Updated summaries must also be posted quarterly on each grantee's Web site.

24. *Timely distribution of funds.* The provisions at 24 CFR 570.494 and 24 CFR 570.902 regarding timely distribution of funds are waived and replaced with alternative requirements under this notice. Each grantee must expend 100 percent of its allocation of CDBG–DR funds on eligible activities within 6 years of HUD's execution of the grant agreement.

25. *Review of continuing capacity to carry out CDBG-funded activities in a timely manner.* If HUD determines that the grantee has not carried out its CDBG activities and certifications in accordance with the requirements in this notice, HUD will undertake a further review to determine whether or not the grantee has the continuing capacity to carry out its activities in a timely manner. In making the determination, the Department will consider the nature and extent of the recipient's performance deficiencies, types of corrective actions the recipient has undertaken, and the success or likely success of such actions, and apply the corrective and remedial actions specified in paragraph A.26 of section VI of this notice.

26. *Corrective and remedial actions.* To ensure compliance with the requirements of the Appropriations Act and to effectively administer the CDBG–DR program in a manner that facilitates recovery, particularly the alternative requirements permitting States to act directly to carry out eligible activities, HUD is waiving 42 U.S.C. 5304(e) to the extent necessary to establish the following alternative requirement: HUD may undertake corrective and remedial actions for States in accordance with the authorities applicable to entitlement grantees in subpart O (including corrective and remedial actions in 24 CFR 570.910, 570.911, and 570.913) or under subpart I of the CDBG regulations at 24 CFR part 570. This may include the termination, reduction or limitation of payments to State grantees receiving funds under this notice.

27. *Reduction, withdrawal, or adjustment of a grant, or other appropriate action.*

Prior to a reduction, withdrawal, or adjustment of a CDBG–DR grant, or other actions taken pursuant to this section, the recipient shall be notified of the proposed action and be given an opportunity for an informal consultation.

Consistent with the procedures described in this notice, the Department may adjust, reduce, or withdraw the CDBG–DR grant or take other actions as appropriate, except for funds that have been expended for eligible approved activities.

B. Housing and Related Floodplain Issues

28. *Housing-related eligibility waivers.* The broadening of eligible activities under the HCD Act is necessary following major disasters in which large numbers of affordable housing units have been damaged or destroyed, as is the case of the disasters eligible under this notice.

Therefore, 42 U.S.C. 5305(a)(24) is waived to the extent necessary to allow: (1) Homeownership assistance for households with up to 120 percent of the area median income; and (2) down payment assistance for up to 100 percent of the down payment (42 U.S.C. 5305(a)(24)(D)). While homeownership assistance may be provided to households with up to 120 percent of the area median income, only those funds used to serve households with up to 80 percent of the area median income may qualify as meeting the low- and moderate-income person benefit national objective.

In addition, 42 U.S.C. 5305(a) is waived and alternative requirements adopted to the extent necessary to permit new housing construction, and to require the following construction standards on structures constructed or rehabilitated with CDBG–DR funds as part of activities eligible under 42 U.S.C. 5305(a). All references to ''substantial damage'' and ''substantial improvement'' shall be as defined in 44 CFR 59.1 unless otherwise noted:

a. *Green Building Standard for Replacement and New Construction of Residential Housing.* Grantees must meet the Green Building Standard in this subparagraph for: (i) All new construction of residential buildings and (ii) all replacement of substantially damaged residential buildings. Replacement of residential buildings may include reconstruction (*i.e.,* demolishing and rebuilding a housing unit on the same lot in substantially the same manner) and may include changes to structural elements such as flooring systems, columns, or load bearing interior or exterior walls.

b. *Meaning of Green Building Standard.* For purposes of this notice, the Green Building Standard means the grantee will require that all construction covered by subparagraph a, above, meet an industry-recognized standard that has achieved certification under at least one of the following programs: (i) ENERGY STAR (Certified Homes or Multifamily High-Rise), (ii) Enterprise Green Communities; (iii) LEED (New Construction, Homes, Midrise, Existing Buildings Operations and Maintenance, or Neighborhood Development), (iv) ICC–700 National Green Building Standard, (v) EPA Indoor AirPlus (ENERGY STAR a prerequisite), or (vi) any other equivalent comprehensive green building program acceptable to HUD.

c. *Standards for rehabilitation of nonsubstantially damaged residential buildings.* For rehabilitation other than that described in subparagraph (a), above, grantees must follow the guidelines specified in the HUD CPD Green Building Retrofit Checklist, available at *https://www.hudexchange.info/resource/3684/guidance-on-the-cpd-green-building-checklist/.* Grantees must apply these guidelines to the extent applicable to the rehabilitation work undertaken, including the use of mold resistant products when replacing surfaces such as drywall. When older or obsolete products are replaced as part of the rehabilitation work, rehabilitation is required to use ENERGY STAR-labeled, WaterSense-labeled, or Federal Energy Management Program (FEMP)-designated products and appliances. For example, if the furnace, air conditioner, windows, and appliances are replaced, the replacements must be ENERGY STAR-labeled or FEMP-designated products; WaterSense-labeled products (*e.g.,* faucets, toilets, showerheads) must be used when water products are replaced. Rehabilitated housing may also implement measures recommended in a Physical Condition Assessment (PCA) or Green Physical Needs Assessment (GPNA).

d. *Implementation of green building standards.* (i) For construction projects completed, under construction, or under contract prior to the date that assistance is approved for the project, the grantee is encouraged to apply the applicable standards to the extent feasible, but the Green Building Standard is not required; (ii) for specific required equipment or materials for which an ENERGY STAR- or WaterSense-labeled or FEMP-designated product does not exist, the requirement to use such products does not apply.

e. *Elevation standards for new construction, repair of substantial damage, or substantial improvement.* The following elevation standards apply to new construction, repair of substantial damage, or substantial improvement of structures located in an area delineated as a flood hazard area or equivalent in FEMA's data source identified in 24 CFR 55.2(b)(1). All structures, defined at 44 CFR 59.1, designed principally for residential use and located in the 1 percent annual (or 100-year) floodplain that receive assistance for new construction, repair of substantial damage, or substantial improvement, as defined at 24 CFR 55.2(b)(10), must be elevated with the lowest floor, including the basement, at least two feet above the 1 percent annual floodplain elevation. Residential structures with no dwelling units and no residents below two feet above the 1 percent annual floodplain, must be elevated or floodproofed, in accordance with FEMA floodproofing standards at 44 CFR 60.3(c)(3)(ii) or successor standard, up to at least two feet above the 1 percent annual floodplain.

All Critical Actions, as defined at 24 CFR 55.2(b)(3), within the 0.2 percent annual floodplain (or 500-year) floodplain must be elevated or floodproofed (in accordance with the FEMA standards) to the higher of the 0.2 percent annual floodplain flood elevation or three feet above the 1 percent annual floodplain. If the 0.2 percent annual floodplain or elevation is unavailable for Critical Actions, and the structure is in the 1 percent annual floodplain, then the structure must be elevated or floodproofed at least three feet above the 1 percent annual floodplain level. Applicable State, local, and tribal codes and standards for floodplain management that exceed these requirements, including elevation, setbacks, and cumulative substantial damage requirements, will be followed.

f. *Broadband infrastructure in housing.* Any new construction or substantial rehabilitation, as defined by 24 CFR 5.100, of a building with more than four rental units must include installation of broadband infrastructure, except where the grantee documents that: (a) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible; (b) the cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or (c) the structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

g. *Resilient Home Construction Standard.* Grantees are strongly encouraged to incorporate a Resilient Home Construction Standard, meaning that all construction covered by subparagraph (a) meet an industry-recognized standard such as those set by the FORTIFIED Home™ Gold level for new construction of single-family, detached homes; and FORTIFIED Home™ Silver level for reconstruction of the roof, windows and doors; or FORTIFIED Home™ Bronze level for repair or reconstruction of the roof; or any other equivalent comprehensive resilient or disaster resistant building program. Further, grantees are strongly encouraged to meet the FORTIFIED Home™ Bronze level standard for roof repair or reconstruction, for all construction covered under subparagraph c. FORTIFIED Home™ is a risk-reduction program providing construction standards for new homes and retrofit standards for existing homes, which will increase a home's resilience to natural hazards, including high wind, hail, and tropical storms. Insurers can provide discounts for homeowner's insurance for properties certified as FORTIFIED. Grantees should advise property owners to contact their insurance agent for current information on what discounts may be available. More information is also available at *https://disastersafety.org/fortified/fortified-home/*.

29. *Primary Consideration of Unmet Housing Needs.* Grantees must propose an allocation of CDBG–DR funds that gives primary consideration to addressing unmet housing needs. Grantees may also allocate funds for infrastructure or economic revitalization, but in doing so grantees must identify how any remaining unmet housing needs will be addressed or how the economic revitalization or infrastructure activities will contribute to the long-term recovery and restoration of housing in the most impacted and distressed areas.

30. *Addressing Unmet Public Housing Needs.* The grantee must identify how it will address the rehabilitation, mitigation, and new construction needs of each disaster-impacted PHA within its jurisdiction, if applicable. The grantee must work directly with impacted PHAs in identifying necessary and reasonable costs and ensure that adequate funding from all available sources is dedicated to addressing the unmet needs of damaged public housing (*e.g.,* FEMA, insurance, and funds available from HUD's Office of Public and Indian Housing. In the rehabilitation, reconstruction and replacement of public housing provided for in the action plan pursuant to paragraph A.2.a.3 of section VI of this notice, each grantee must identify funding to specifically address the unmet needs described in this subparagraph. Grantees are reminded that public housing is eligible for FEMA Public Assistance and must ensure that there is no duplication of benefits when using CDBG–DR funds to assist public housing. Information on the PHAs impacted by the disaster is available on the Department's Web site.

31. *Addressing Unmet Affordable Rental Housing Needs.* As part of the requirement to give primary consideration to unmet housing needs, the grantee must identify how it will address the rehabilitation, reconstruction, replacement, and new construction of rental housing that is affordable to low or moderate income households in the most impacted and distressed areas and identify funding to specifically address the unmet needs identified in its action plan pursuant to paragraph A.2.a.3 of section VI of this notice. In order to meet the low-moderate housing national objective, affordable rental housing funded under this notice must be rented to a low and moderate income person at affordable rents. The period that the rental housing is affordable must be reasonably related to the amount of CDBG–DR funding used for the rental housing. The grantee should impose the minimum period of affordability through recorded use restrictions or other mechanisms to ensure that rental housing remains affordable for a stated period of time. The action plan must, at a minimum, provide (1) a definition of ''affordable rents''; (2) the income limits for tenants of rental housing; (3) and a minimum period of affordability. Grantees may adopt the HOME program standards at 24 CFR 92.252(a), (c), (e), and (f) to comply with this requirement.

32. *Housing incentives in disaster-affected communities.* Incentive payments are generally offered in addition to other programs or funding (such as insurance), to encourage households to relocate in a suitable housing development or an area promoted by the community's comprehensive recovery plan. For example, a grantee may offer an incentive payment (possibly in addition to a buyout payment) for households that volunteer to relocate outside of floodplain or to a lower-risk area.

Therefore, 42 U.S.C. 5305(a) and associated regulations are waived to the extent necessary to allow the provision of housing incentives. These grantees must maintain documentation, at least at a programmatic level, describing how the amount of assistance was determined to be necessary and reasonable, and the incentives must be in accordance with the grantee's approved action plan and published program design(s). This waiver does not permit a compensation program. If the grantee requires the incentives to be used for a particular purpose by the household receiving the assistance, then the eligible use for that activity will be that required use, not an incentive.

In undertaking a larger scale migration or relocation recovery effort that is intended to move households out of high-risk areas, the grantee should consider how it can protect and sustain the impacted community and its assets. Grantees must also weigh the benefits and costs, including anticipated insurance costs, of redeveloping high-risk areas that were impacted by a disaster. Accordingly, grantees are prohibited from offering incentives to return households to disaster-impacted floodplains, unless the grantee can demonstrate to HUD how it will resettle such areas in a way that mitigates the risks of future disasters and increasing insurance costs resulting from continued occupation of high-risk areas, through mechanisms that can reduce risks and insurance costs, such as new land use development plans, building codes or construction requirements, protective infrastructure development, or through restrictions on future disaster assistance to such properties.

33. *Limitation on emergency grant payments—interim mortgage assistance.* 42 U.S.C. 5305(a)(8) is modified to extend interim mortgage assistance to qualified individuals from 3 months to up to 20 months. Interim mortgage assistance is typically used in conjunction with a buyout program, or the rehabilitation or reconstruction of single-family housing, during which mortgage payments may be due but the home is uninhabitable. The time required for a household to complete the rebuilding process may often extend beyond 3 months, during which mortgage payments may be due but the home is inhabitable. Thus, this interim assistance will be critical for many households facing financial hardship during this period. Grantees may use interim housing rehabilitation payments to expedite recovery assistance to homeowners, but must establish performance milestones for the rehabilitation that are to be met by the homeowner in order to receive such payments. A grantee using this alternative requirement must document, in its policies and procedures, how it will determine the amount of assistance to be provided is necessary and reasonable.

34. *Rental assistance to displaced homeowners.* The requirement of 42 U.S.C. 5305(a)(8) are modified to authorize grantees to extend rental assistance payments on behalf of qualified homeowners for up to 24 months. After a disaster, many homeowners encounter unanticipated delays and scarcity of available construction and/or elevation contractors in their area. While undergoing rehabilitation of their homes, most of these homeowners are forced to pay not only a mortgage, but

a rental payment as well since their homes are not inhabitable. In other cases, homeowners who have paid off their mortgages must accommodate this additional rental expense into their budgets. In order to provide temporary financial assistance to these families, many of whom are low- or moderate-income households, HUD is modifying the requirements at 42 U.S.C. 5305(a)(8) to the extent necessary to allow grantees to provide up to 24 months of homeowner rental assistance to eligible applicants within the grantee's single-family rehabilitation/reconstruction programs. In the case of rehabilitation programs in which the homeowner is responsible for construction oversight, the grantee must establish performance milestones for the rehabilitation that are to be met by the homeowner in order to receive such payments. A grantee using this alternative requirement must document, in its policies and procedures, how it will determine the amount of assistance to be provided is necessary and reasonable. Homeowners receiving interim mortgage assistance are not eligible for rental assistance.

35. *Acquisition of real property; flood and other buyouts.* Grantees under this notice are able to carry out property acquisition for a variety of purposes. However, the term ''buyouts'' as referenced in this notice refers to acquisition of properties located in a floodway or floodplain that is intended to reduce risk from future flooding or the acquisition of properties in Disaster Risk Reduction Areas as designated by the grantee and defined below. HUD is providing alternative requirements for consistency with the application of other Federal resources commonly used for this type of activity.

Grantees are encouraged to use buyouts strategically, as a means of acquiring contiguous parcels of land for uses compatible with open space, recreational, natural floodplain functions, other ecosystem restoration, or wetlands management practices. To the maximum extent practicable, grantees should avoid circumstances in which parcels that could not be acquired through a buyout remain alongside parcels that have been acquired through the grantee's buyout program.

a. Clarification of ''Buyout'' and ''Real Property Acquisition'' activities. Grantees that choose to undertake a buyout program have the discretion to determine the appropriate valuation method, including paying either pre-disaster or post-disaster fair market value (FMV). In most cases, a program that provides pre-disaster FMV to buyout applicants provides compensation at an amount greater than the post-disaster FMV. When the purchase price exceeds the current FMV, any CDBG–DR funds in excess of the FMV are considered assistance to the seller, thus making the seller a beneficiary of CDBG–DR assistance. If the seller receives assistance as part of the purchase price, this may have implications for duplication of benefits calculations or for demonstrating national objective criteria, as discussed below. However, a program that provides *post*-disaster FMV to buyout applicants merely provides the actual value of the property; thus, the seller is not considered a beneficiary of CDBG–DR assistance.

Regardless of purchase price, all buyout activities are a type of acquisition of real property (as permitted by 42 U.S.C. 5305(a)(1)). However, only acquisitions that meet the definition of a ''buyout'' are subject to the post-acquisition land use restrictions imposed by the applicable prior notices. The key factor in determining whether the acquisition is a buyout is whether the intent of the purchase is to reduce risk from future flooding or to reduce the risk from the hazard that lead to the property's Disaster Risk Reduction Area designation. To conduct a buyout in a Disaster Risk Reduction Area, the grantee must establish criteria in its policies and procedures to designate the area subject to the buyout, pursuant to the following requirements: (1) The hazard must have been caused or exacerbated by the Presidentially declared disaster for which the grantee received its CDBG–DR allocation; (2) the hazard must be a predictable environmental threat to the safety and well-being of program beneficiaries, as evidenced by the best available data and science; and (3) the Disaster Risk Reduction Area must be clearly delineated so that HUD and the public may easily determine which properties are located within the designated area.

The distinction between buyouts and other types of acquisitions is important, because grantees may only redevelop an acquired property if the property is not acquired through a buyout program (*i.e.,* the purpose of acquisition was something other than risk reduction). When acquisitions are not acquired through a buyout program, the purchase price must be consistent with applicable uniform cost principles (and the pre-disaster FMV may not be used).

b. Buyout requirements:

1. Any property acquired, accepted, or from which a structure will be removed pursuant to the project will be dedicated and maintained in perpetuity for a use that is compatible with open space, recreational, or floodplain and wetlands management practices.

2. No new structure will be erected on property acquired, accepted, or from which a structure was removed under the acquisition or relocation program other than: (a) A public facility that is open on all sides and functionally related to a designated open space (*e.g.,* a park, campground, or outdoor recreation area); (b) a rest room; or (c) a flood control structure, provided that structure does not reduce valley storage, increase erosive velocities, or increase flood heights on the opposite bank, upstream, or downstream and that the local floodplain manager approves, in writing, before the commencement of the construction of the structure.

3. After receipt of the assistance, with respect to any property acquired, accepted, or from which a structure was removed under the acquisition or relocation program, no subsequent application for additional disaster assistance for any purpose or to repair damage or make improvements of any sort will be made by the recipient to any Federal entity in perpetuity.

The entity acquiring the property may lease it to adjacent property owners or other parties for compatible uses in return for a maintenance agreement. Although Federal policy encourages leasing rather than selling such property, the property may also be sold.

In all cases, a deed restriction or covenant running with the property must require that the buyout property be dedicated and maintained for compatible uses in perpetuity.

4. Grantees have the discretion to determine an appropriate valuation method (including the use of pre-flood value or post-flood value as a basis for property value). However, in using CDBG–DR funds for buyouts, the grantee must uniformly apply whichever valuation method it chooses.

5. All buyout activities must be classified using the ''buyout'' activity type in the DRGR system.

6. Any State grantee implementing a buyout program or activity must consult with affected UGLGs.

7. When undertaking buyout activities, in order to demonstrate that a buyout meets the low- and moderate-income housing national objective, grantees must meet all requirements of the HCD Act and applicable regulatory criteria described below. Grantees are encouraged to consult with HUD prior to undertaking a buyout program with the intent of using the low- and moderate-income housing (LMH) national objective. 42 U.S.C. 5305(c)(3) provides that any assisted activity under

this chapter that involves the acquisition or rehabilitation of property to provide housing shall be considered to benefit persons of low- and moderate-income only to the extent such housing will, upon completion, be occupied by such persons. In addition, the State CDBG regulations at 24 CFR 570.483(b)(3) and entitlement CDBG regulations at 24 CFR 570.208(a)(3) apply the LMH national objective to an eligible activity carried out for the purpose of providing or improving permanent residential structures that, upon completion, will be occupied by low- and moderate-income households. Therefore, a buyout program that merely pays homeowners to leave their existing homes does not result in a low- and moderate-income household occupying a residential structure and, thus, cannot meet the requirements of the LMH national objective. Buyout programs that assist low- and moderate-income persons can be structured in one of the following ways:

(a) The buyout program combines the acquisition of properties with another direct benefit—Low- and Moderate-Income housing activity, such as down payment assistance—that results in occupancy and otherwise meets the applicable LMH national objective criteria in 24 CFR part 570 (*e.g.,* if the structure contains more than two dwelling units, at least 51 percent of the units must be occupied by low- and moderate-income households;

(b) The program meets the low- and moderate income area benefit criteria to demonstrate national objective compliance, provided that the grantee can document that the properties acquired through buyouts will be used in a way that benefits all of the residents in a particular area where at least 51 percent of the residents are low- and moderate-income persons. When using the area benefit approach, grantees must define the service area based on the end use of the buyout properties; or

(c) The program meets the criteria for the low- and moderate-income limited clientele national objective, including the prohibition on the use of the limited clientele national objective when an activity's benefits are available to all residents of the area. A buyout program could meet the national objective criteria for the limited clientele national objective if it restricts buyout program eligibility to exclusively low- and moderate-income persons, and the buyout provides an actual benefit to the low- and moderate income sellers by providing pre-disaster valuation uniformly to those who participate in the program.

c. *Redevelopment of acquired properties.*

1. Properties purchased through a buyout program may not typically be redeveloped, with a few exceptions. (see subparagraph a.2 above).

2. Grantees may redevelop an acquired property if the property is not acquired through a buyout program and the purchase price is based on the property's post-disaster value, consistent with applicable cost principles (the pre-disaster value may not be used). In addition to the purchase price, grantees may opt to provide relocation assistance to the owner of a property that will be redeveloped if the property is purchased by the grantee or subrecipient through voluntary acquisition, and the owner's need for additional assistance is documented.

3. In carrying out acquisition activities, grantees must ensure they are in compliance with their long-term redevelopment plans.

36. *Alternative requirement for housing rehabilitation—assistance for second homes.* The Department is instituting an alternative requirement to the rehabilitation provisions at 42 U.S.C. 5305(a) as follows: Properties that served as second homes at the time of the disaster, or following the disaster, are not eligible for rehabilitation assistance, residential incentives, or to participate in a CDBG–DR buyout program (as defined by this notice). ''Second homes'' are defined in Internal Revenue Service (IRS) Publication 936 (Mortgage Interest Deductions).

37. *Flood insurance.* Grantees, recipients, and subrecipients must implement procedures and mechanisms to ensure that assisted property owners comply with all flood insurance requirements, including the purchase and notification requirements described below, prior to providing assistance. For additional information, please consult with the field environmental officer in the local HUD field office or review the guidance on flood insurance requirements on HUD's Web site.

a. *Flood insurance purchase requirements.* HUD does not prohibit the use of CDBG–DR funds for existing residential buildings in a Special Flood Hazard Area (or 100-year floodplain). However, Federal, State, local, and tribal laws and regulations related to both flood insurance and floodplain management must be followed, as applicable. With respect to flood insurance, a HUD-assisted homeowner for a property located in a Special Flood Hazard Area must obtain and maintain flood insurance in the amount and duration prescribed by FEMA's National Flood Insurance Program. Section 102(a) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a) mandates the purchase of flood insurance protection for any HUD-assisted property within a Special Flood Hazard Area. HUD also recommends the purchase of flood insurance outside of a Special Flood Hazard Area for properties that have been damaged by a flood, to better protect property owners from the economic risks of future floods and reduce dependence on Federal disaster assistance in the future, but this is not a requirement.

b. *Future Federal assistance to owners remaining in a floodplain.*

1. Section 582 of the National Flood Insurance Reform Act of 1994, as amended, (42 U.S.C. 5154a) prohibits flood disaster assistance in certain circumstances. In general, it provides that no Federal disaster relief assistance made available in a flood disaster area may be used to make a payment (including any loan assistance payment) to a person for repair, replacement, or restoration for damage to any personal, residential, or commercial property if that person at any time has received Federal flood disaster assistance that was conditioned on the person first having obtained flood insurance under applicable Federal law and the person has subsequently failed to obtain and maintain flood insurance as required under applicable Federal law on such property. This means that a grantee may not provide disaster assistance for the repair, replacement, or restoration to a person who has failed to meet this requirement and must implement a process to check and monitor for compliance.

2. Section 582 also imposes a responsibility on a grantee that receives CDBG–DR funds or that designates annually appropriated CDBG funds for disaster recovery. That responsibility is to inform property owners receiving disaster assistance that triggers the flood insurance purchase requirement that they have a statutory responsibility to notify any transferee of the requirement to obtain and maintain flood insurance, and that the transferring owner may be liable if he or she fails to do so. These requirements are enumerated at *http://uscode.house.gov/view.xhtml?req=granuleid:U.S.C.-prelim-title42-section5154a&num=0&edition=prelim.*

C. Infrastructure (Public Facilities, Public Improvements, Public Buildings)

38. *Buildings for the general conduct of government.* 42 U.S.C. 5305(a) is waived to the extent necessary to allow grantees to fund the rehabilitation or reconstruction of public buildings that are otherwise ineligible. HUD believes

this waiver is consistent with the overall purposes of the HCD Act, and is necessary for many grantees to adequately address critical infrastructure needs created by the disaster.

39. *Elevation of Nonresidential Structures.* Nonresidential structures must be elevated or floodproofed, in accordance with FEMA floodproofing standards at 44 CFR 60.3(c)(3)(ii) or successor standard, up to at least two feet above the 1 percent annual floodplain. All Critical Actions, as defined at 24 CFR 55.2(b)(3), within the 0.2 percent annual floodplain (or 500-year) floodplain must be elevated or floodproofed (in accordance with the FEMA standards) to the higher of the 0.2 percent annual floodplain flood elevation or three feet above the 1 percent annual floodplain. If the 0.2 percent annual floodplain or elevation is unavailable for Critical Actions, and the structure is in the 1 percent annual floodplain, then the structure must be elevated or floodproofed at least three feet above the 1 percent annual floodplain level. Applicable State, local, and tribal codes and standards for floodplain management that exceed these requirements, including elevation, setbacks, and cumulative substantial damage requirements, will be followed.

40. *Use of CDBG as Match.* Additionally, as provided by the HCD Act, funds may be used to meet a matching, share, or contribution requirement for any other Federal program when used to carry out an eligible CDBG–DR activity. This includes programs or activities administered by the Federal Emergency Management Agency (FEMA) or the U.S. Army Corps of Engineers (USACE). By law, the amount of CDBG–DR funds that may be contributed to a USACE project is $250,000 or less. Note that the Appropriations Act prohibits the use of CDBG–DR funds for any activity reimbursable by, or for which funds are also made available by FEMA or USACE.

D. Economic Revitalization.

41. *National Objective Documentation for Economic Revitalization Activities.* 24 CFR 570.483(b)(4)(i) is waived to allow the grantees under this notice to identify the low- and moderate-income jobs benefit by documenting, for each person employed, the name of the business, type of job, and the annual wages or salary of the job. HUD will consider the person income-qualified if the annual wages or salary of the job is at or under the HUD-established income limit for a one-person family. This method replaces the standard CDBG requirement—in which grantees must review the annual wages or salary of a job in comparison to the person's total household income and size (*i.e.,* the number of persons). Thus, it streamlines the documentation process because it allows the collection of wage data for each position created or retained from the assisted businesses, rather than from each individual household.

42. *Public benefit for certain Economic Revitalization activities.* The public benefit provisions set standards for individual economic revitalization activities (such as a single loan to a business) and for economic revitalization activities in the aggregate. Currently, public benefit standards limit the amount of CDBG assistance per job retained or created, or the amount of CDBG assistance per low- and moderate-income person to which goods or services are provided by the activity. These dollar thresholds were set two decades ago and can impede recovery by limiting the amount of assistance the grantee may provide to a critical activity.

This notice waives the public benefit standards at 42 U.S.C. 5305(e)(3), 24 CFR 570.482(f)(1), (f)(2), (f)(3), (f)(4)(i), (f)(5), and (f)(6) for economic revitalization activities designed to create or retain jobs or businesses (including, but not limited to, long-term, short-term, and infrastructure projects). However, grantees shall report and maintain documentation on the creation and retention of total jobs; the number of jobs within certain salary ranges; the average amount of assistance provided per job, by activity or program; and the types of jobs. Paragraph (g) of 24 CFR 570.482 is also waived to the extent these provisions are related to public benefit.

43. *Clarifying note on Section 3 resident eligibility and documentation requirements.* The definition of ''low-income persons'' in 12 U.S.C. 1701u and 24 CFR 135.5 is the basis for eligibility as a section 3 resident. This notice authorizes grantees to determine that an individual is eligible to be considered a section 3 resident if the annual wages or salary of the person are at, or under, the HUD-established income limit for a one-person family for the jurisdiction. This authority does not impact other section 3 resident eligibility requirements in 24 CFR 135.5. All direct recipients of CDBG–DR funding must submit form HUD–60002 annually through the Section 3 Performance Evaluation and Registry System (SPEARS) which can be found on HUD's Web site: *http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/section3/section3/spears*.

44. *Waiver and modification of the job relocation clause to permit assistance to help a business return.* CDBG requirements prevent program participants from providing assistance to a business to relocate from one labor market area to another if the relocation is likely to result in a significant loss of jobs in the labor market from which the business moved. This prohibition can be a critical barrier to reestablishing and rebuilding a displaced employment base after a major disaster. Therefore, 42 U.S.C. 5305(h), 24 CFR 570.210, and 24 CFR 570.482 are waived to allow a grantee to provide assistance to any business that was operating in the disaster-declared labor market area before the incident date of the applicable disaster and has since moved, in whole or in part, from the affected area to another State or to a labor market area within the same State to continue business.

45. *Prioritizing small businesses.* To target assistance to small businesses, the Department is instituting an alternative requirement to the provisions at 42 U.S.C. 5305(a) to require grantees to prioritize assisting businesses that meet the definition of a small business as defined by SBA at 13 CFR part 121 or, for businesses engaged in ''farming operations'' as defined at 7 CFR 1400.3, and that meet the United States Department of Agriculture Farm Service Agency (FSA), criteria that are described at 7 CFR 1400.500, which are used by the FSA to determine eligibility for certain assistance programs.

46. *Prohibiting assistance to private utilities.* Funds made available under this notice may not be used to assist a privately owned utility for any purpose.

E. Certifications and Collection of Information

47. *Certifications waiver and alternative requirement.* 24 CFR 91.325 is waived. Each State receiving a direct allocation under this notice must make the following certifications with its action plan:

a. The grantee certifies that it has in effect and is following a residential anti-displacement and relocation assistance plan in connection with any activity assisted with funding under the CDBG program.

b. The grantee certifies its compliance with restrictions on lobbying required by 24 CFR part 87, together with disclosure forms, if required by part 87.

c. The grantee certifies that the action plan for disaster recovery is authorized under State and local law (as applicable) and that the grantee, and any entity or entities designated by the grantee, and any contractor, subrecipient, or designated public agency carrying out an activity with CDBG–DR funds, possess(es) the legal authority to carry out the program for which it is seeking funding, in accordance with applicable HUD regulations and this notice. The grantee certifies that activities to be undertaken with funds under this notice are consistent with its action plan.

d. The grantee certifies that it will comply with the acquisition and relocation requirements of the URA, as amended, and implementing regulations at 49 CFR part 24, except where waivers or alternative requirements are provided for in this notice.

e. The grantee certifies that it will comply with section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u), and implementing regulations at 24 CFR part 135.

f. The grantee certifies that it is following a detailed citizen participation plan that satisfies the requirements of 24 CFR 91.115 (except as provided for in notices providing waivers and alternative requirements for this grant). Also, each UGLG receiving assistance from a State grantee must follow a detailed citizen participation plan that satisfies the requirements of 24 CFR 570.486 (except as provided for in notices providing waivers and alternative requirements for this grant).

g. The grantee certifies that it has consulted with affected UGLGs in counties designated in covered major disaster declarations in the non-entitlement, entitlement, and tribal areas of the State in determining the uses of funds, including the method of distribution of funding, or activities carried out directly by the State.

h. The grantee certifies that it is complying with each of the following criteria:

1. Funds will be used solely for necessary expenses related to disaster relief, long-term recovery, restoration of infrastructure and housing and economic revitalization in the most impacted and distressed areas for which the President declared a major disaster in 2016 pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (42 U.S.C. 5121 *et seq.*) but prior to September 29, 2016.

2. With respect to activities expected to be assisted with CDBG–DR funds, the action plan has been developed so as to give the maximum feasible priority to activities that will benefit low- and moderate-income families.

3. The aggregate use of CDBG–DR funds shall principally benefit low- and moderate-income families in a manner that ensures that at least 70 percent (or another percentage permitted by HUD in a waiver published in an applicable **Federal Register** notice) of the grant amount is expended for activities that benefit such persons.

4. The grantee will not attempt to recover any capital costs of public improvements assisted with CDBG–DR grant funds, by assessing any amount against properties owned and occupied by persons of low- and moderate-income, including any fee charged or assessment made as a condition of obtaining access to such public improvements, unless: (a) Disaster recovery grant funds are used to pay the proportion of such fee or assessment that relates to the capital costs of such public improvements that are financed from revenue sources other than under this title; or (b) for purposes of assessing any amount against properties owned and occupied by persons of moderate income, the grantee certifies to the Secretary that it lacks sufficient CDBG funds (in any form) to comply with the requirements of clause (a).

i. The grantee certifies that the grant will be conducted and administered in conformity with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d).

j. The grantee certifies that the grant will be conducted and administered in conformity with the Fair Housing Act (42 U.S.C. 3601–3619) and implementing regulations, and that it will affirmatively further fair housing, which means that it will take meaningful actions to further the goals identified in an AFH conducted in accordance with the requirements of 24 CFR 5.150 through 5.180, and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.

k. The grantee certifies that it has adopted and is enforcing the following policies, and, in addition, States receiving a direct award must certify that they will require UGLGs that receive grant funds to certify that they have adopted and are enforcing:

1. A policy prohibiting the use of excessive force by law enforcement agencies within its jurisdiction against any individuals engaged in nonviolent civil rights demonstrations; and

2. A policy of enforcing applicable State and local laws against physically barring entrance to or exit from a facility or location that is the subject of such nonviolent civil rights demonstrations within its jurisdiction.

l. The grantee certifies that it (and any subrecipient or administering entity) currently has or will develop and maintain the capacity to carry out disaster recovery activities in a timely manner and that the grantee has reviewed the requirements of this notice and requirements of the Appropriations Act applicable to funds allocated by this notice, and certifies to the accuracy of its certification documentation referenced at A.1.a. under section VI and its risk analysis document referenced at A.1.b. under section VI.

m. The grantee certifies that it will not use CDBG–DR funds for any activity in an area identified as flood prone for land use or hazard mitigation planning purposes by the State, local, or tribal government or delineated as a Special Flood Hazard Area in FEMA's most current flood advisory maps, unless it also ensures that the action is designed or modified to minimize harm to or within the floodplain, in accordance with Executive Order 11988 and 24 CFR part 55. The relevant data source for this provision is the State, local, and tribal government land use regulations and hazard mitigation plans and the latest-issued FEMA data or guidance, which includes advisory data (such as Advisory Base Flood Elevations) or preliminary and final Flood Insurance Rate Maps.

n. The grantee certifies that its activities concerning lead-based paint will comply with the requirements of 24 CFR part 35, subparts A, B, J, K, and R.

o. The grantee certifies that it will comply with environmental requirements at 24 CFR part 58.

p. The grantee certifies that it will comply with applicable laws.

VII. Duration of Funding

The Appropriations Act directs that these funds be available until expended. However, in accordance with 31 U.S.C. 1555, HUD shall close the appropriation account and cancel any remaining obligated or unobligated balance if the Secretary or the President determines that the purposes for which the appropriation has been made have been carried out and no disbursements have been made against the appropriation for two consecutive fiscal years. In such case, the funds shall not be available for obligation or expenditure for any purpose after the account is closed.

VIII. Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers for the disaster recovery grants under this notice are as follows: 14.218; 14.228.

IX. Finding of No Significant Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C.

4332(2)(C)). The FONSI is available for public inspection between 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 20410–0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the docket file must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number through TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll-free number).

Dated: November 15, 2016.

Nani A. Coloretti,

Deputy Secretary.

Appendix A—Allocation of CDBG–DR Funds to Most Impacted and Distressed Areas Due to 2016 Federally Declared Disasters Thru September 29, 2016

This section describes the methods behind HUD's allocation of $500 million in the 2016 CDBG–DR Funds. Section 145(a) of Division C of the Continuing Appropriations Act, Public Law 114–223, enacted on September 29, 2016, appropriates $500 million through the Community Development Block Grant (CDBG) program for necessary expenses for authorized activities related to disaster relief, long-term recovery, restoration of infrastructure and housing, and economic revitalization in the most impacted and distressed areas resulting from a major disaster declared in 2016 and occurring prior to September 29, 2016.

This section requires that funds be awarded directly to the State or unit of general local government at the discretion of the Secretary. The key underlying metric used in the allocation process is the unmet need that remains to be addressed from qualifying disasters. Although funds may be used to address infrastructure and economic revitalization needs in addition to housing, this allocation only uses unmet needs related to housing to determine the most impacted and distressed areas that are eligible for grants and then to determine the amount of funding to be made available to each grantee. HUD only uses unmet housing needs for two reasons: (1) There is very limited data on infrastructure and economic revitalization unmet needs for the largest of the eligible disasters, and (2) the total funding provided through this allocation is limited relative to need.

Methods for estimating unmet housing needs. The data HUD staff have identified as being available to calculate unmet needs for qualifying disasters come from the FEMA Individual Assistance program data on housing-unit damage as of September 28, 2016.

The core data on housing damage for both the unmet housing needs calculation and the concentrated damage are based on home inspection data for FEMA's Individual Assistance program. HUD calculates ''unmet housing needs'' as the number of housing units with unmet needs times the estimated cost to repair those units less repair funds already provided by FEMA, where:

Each of the FEMA inspected owner units are categorized by HUD into one of five categories:

- *Minor-Low:* Less than $3,000 of FEMA inspected real property damage.
- *Minor-High:* $3,000 to $7,999 of FEMA inspected real property damage.
- *Major-Low:* $8,000 to $14,999 of FEMA inspected real property damage.
- *Major-High:* $15,000 to $28,800 of FEMA inspected real property damage and/or 4 to 6 feet of flooding on the first floor.
- *Severe:* Greater than $28,800 of FEMA inspected real property damage or determined destroyed and/or 6 or more feet of flooding on the first floor.

To meet the statutory requirement of ''most impacted'' in this legislative language, homes are determined to have a high level of damage if they have damage of ''major-low'' or higher. That is, they have a real property FEMA inspected damage of $8,000 or flooding over 1 foot. Furthermore, a homeowner is determined to have unmet needs if they reported damage and no insurance to cover that damage.

FEMA does not inspect rental units for real property damage so personal property damage is used as a proxy for unit damage. Each of the FEMA inspected renter units are categorized by HUD into one of five categories:

- *Minor-Low:* Less than $1,000 of FEMA inspected personal property damage.
- *Minor-High:* $1,000 to $1,999 of FEMA inspected personal property damage.
- *Major-Low:* $2,000 to $3,499 of FEMA inspected personal property damage.
- *Major-High:* $3,500 to $7,499 of FEMA inspected personal property damage or 4 to 6 feet of flooding on the first floor.
- *Severe:* Greater than $7,500 of FEMA inspected personal property damage or determined destroyed and/or 6 or more feet of flooding on the first floor.

For rental properties, to meet the statutory requirement of ''most impacted'' in this legislative language, homes are determined to have a high level of damage if they have damage of ''major-low'' or higher. That is, they have a FEMA personal property damage assessment of $2,000 or greater or flooding over 1 foot. Furthermore, landlords are presumed to have adequate insurance coverage unless the unit is occupied by a renter with income of $20,000 or less. Units that are occupied by a tenant with income less than $20,000 are used to calculate likely unmet needs for affordable rental housing.

The average cost to fully repair a home for a specific disaster to code within each of the damage categories noted above is calculated using the average real property damage repair costs determined by the Small Business Administration for its disaster loan program for the subset of homes inspected by both SBA and FEMA for 2011 to 2013 disasters. Because SBA is inspecting for full repair costs, it is presumed to reflect the full cost to repair the home, which is generally more than the FEMA estimates on the cost to make the home habitable.

For each household determined to have unmet housing needs (as described above), their estimated average unmet housing need less assumed assistance from FEMA, SBA, and Insurance was calculated at $27,455 for major damage (low); $45,688 for major damage (high); and $59,493 for severe damage.

Most Impacted and Distressed Designation. President Obama signed the Continuing Resolution into law on September 29, 2016 and 33 disasters had received major declarations in calendar year 2016 by that date. To meet the statutory requirement that the funds be targeted to ''the most impacted or distressed areas,'' this allocation:

(1) Limits allocations to those disasters where FEMA had determined the damage was sufficient to declare the disaster as eligible to receive Individual and Households Program (IHP) funding. Only 11 of 33 disasters that were declared in 2016 have an IHP designation.

(2) Limits the allocations to data from counties with high levels of damage. For this allocation, HUD is using the amount of serious unmet housing need as its measure of concentrated damage and limits the data used for the allocation only to counties exceeding a ''natural break'' in the data for their total amount of serious unmet housing needs. For the 2016 events, the serious unmet housing needs break at the county level occurs at $25 million.

(3) Among disasters with data meeting the first two thresholds, HUD limits the allocation to jurisdictions that have substantially higher unmet needs than other jurisdictions. Louisiana, Texas, and West Virginia have far greater unmet needs than other jurisdictions affected by major disasters declared since January 1, 2016.

[FR Doc. 2016–27969 Filed 11–18–16; 8:45 am]

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR- 5849–N–10]

Notice of a Federal Advisory Committee; Manufactured Housing Consensus Committee; Teleconference

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (HUD).

ACTION: Notice of a Federal Advisory Committee Meeting: Manufactured Housing Consensus Committee (MHCC).

SUMMARY: This notice sets forth the schedule and proposed agenda for a teleconference meeting of the MHCC. The teleconference meeting is open to the public. The agenda provides an opportunity for citizens to comment on the business before the MHCC.

DATES: The teleconference meeting will be held on December 12, 2016, 1:00 p.m. to 4:00 p.m. Eastern Standard Time

(EST). The teleconference numbers are: U.S. toll-free: 1–866–628–5137, and Participant Code: 4325435. To access the webinar use the following link: *https://zoom.us/j/516259960.*

FOR FURTHER INFORMATION CONTACT: Pamela Beck Danner, Administrator and Designated Federal Official (DFO), Office of Manufactured Housing Programs, Department of Housing and Urban Development, 451 Seventh Street SW., Room 9168, Washington, DC 20410, telephone 202–708–6423 (this is not a toll-free number). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: Notice of this meeting is provided in accordance with the Federal Advisory Committee Act, 5. U.S.C. App. 10(a)(2) through implementing regulations at 41 CFR 102–3.150. The MHCC was established by the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. 5403(a)(3), as amended by the Manufactured Housing Improvement Act of 2000 (Pub. L. 106–569). According to 42 U.S.C. 5403, as amended, the purposes of the MHCC are to:

- Provide periodic recommendations to the Secretary to adopt, revise, and interpret the Federal manufactured housing construction and safety standards in accordance with this subsection;
- Provide periodic recommendations to the Secretary to adopt, revise, and interpret the procedural and enforcement regulations, including regulations specifying the permissible scope and conduct of monitoring in accordance with subsection (b);
- Be organized and carry out its business in a manner that guarantees a fair opportunity for the expression and consideration of various positions and for public participation.

The MHCC is deemed an advisory committee not composed of Federal employees.

Public Comment: Citizens wishing to make oral comments on the business of the MHCC are encouraged to register by or before December 8, 2016, by contacting Home Innovation Research Labs, Attention: Kevin Kauffman, 400 Prince Georges Boulevard, Upper Marlboro, MD 20774; or email to: *mhcc@homeinnovation.com* or call 1–888–602–4663. Written comments are encouraged. The MHCC strives to accommodate citizen comments to the extent possible within the time constraints of the meeting agenda. Advance registration is strongly encouraged. The MHCC will also provide an opportunity for public comment on specific matters before the MHCC.

Tentative Agenda:

December 12, 2016, from 1:00 p.m. to 4:00 p.m., Eastern Standard Time, (EST)

I. Call to Order—Chair & Designated Federal Officer (DFO)
II. Opening Remarks—Chair
III. Roll Call—Administering Organization (AO)
IV. Administrative Announcements—DFO and AO
V. Approval of Minutes from October 25–27, MHCC Meeting
VI. Regulatory Enforcement Subcommittee Report:
- Action Item 8: Foundation Systems Requirements in Freezing Climates

VII. Open Discussion
VIII. Public Comments
IX. Wrap Up—DFO/AO
X. Adjourn 4:00 p.m.

Dated: November 16, 2016.

Pamela Beck Danner,

Administrator, Office of Manufactured Housing Programs.

[FR Doc. 2016–27967 Filed 11–18–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5909–N–78]

30-Day Notice of Proposed Information Collection: Federal Labor Standards Questionnaire Complaint Intake Form

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 30 days of public comment.

DATES: *Comments Due Date:* December 21, 2016.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax:202–395–5806, Email: *OIRA Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Anna P. Guido, Reports Management Officer, QMAC, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email Anna P. Guido at Anna P. *Guido@hud.gov* or telephone 202–402–5535. This is not a toll-free number. Person with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on September 8, 2016 at 81 FR 62170.

A. Overview of Information Collection

Title of Information Collection: Federal Labor Standards Questionnaire; and Complaint Intake Form.

OMB Approval Number: 2501–0018.

Type of Request: Revision of a currently approved collection.

Form Number: HUD Forms 4730, HUD 430SP; HUD 4731.

Information collection	Number of respondents	Annual response	Total responses	Burden hour per response	Total annual burden hours	Hourly * cost per response	Total cost
HUD–4730	650	1	650	.50	325	$45.00	$14,625
HUD–4730 SP	650	1	650	.50	325	45.00	14,625
HUD–4731	500	1	500	.50	250	45.00	11,250
Total			1800	1.50	900		40,500

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: November 10, 2016.

Anna P. Guido,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2016–27908 Filed 11–18–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5909–N–76]

30-Day Notice of Proposed Information Collection: Multifamily Family Self-Sufficiency (MF FSS) Program Escrow Credit Data

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* December 21, 2016.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QMAC, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on December 10, 2015 at 80 FR 76704.

A. Overview of Information Collection

Title of Information Collection: Multifamily Family Self-Sufficiency (MF FSS) Program Escrow Credit Data.

OMB Approval Number: 2502—New.

Type of Request: New collection.

Form Number: None.

Description of the need for the information and proposed use: Multifamily Family Self-Sufficiency (MF FSS) is a HUD program that enables families living multifamily assisted housing to increase their earned income and reduce their dependence on public assistance programs. MF FSS promotes the development of local strategies to coordinate the use of HUD rental assistance programs with public and private resources, to enable eligible families to achieve economic independence and self-sufficiency. HUD's Appropriations Act of 2015 allows owners of privately owned multifamily properties with a Section 8 contract to voluntarily make a Family Self-Sufficiency program available to assisted tenants in accordance with procedures established by the Secretary, including those procedures permitting tenants to accrue escrow funds in accordance with section 23(d)(2) of the U.S. Housing Act of 1937. Owners of privately-owned HUD assisted multifamily housing can voluntarily establish and operate a MF FSS program at their housing sites. Participation in the MF FSS program is voluntary for families living in these properties. FSS families are referred to services and educational opportunities that can lead to improved employment and earned income. Such services might include child care, transportation, education, job training, employment counseling, financial literacy, and homeownership counseling. Families entering the FSS program work with a case manager to develop goals that will lead to self-sufficiency within a 5-year period. These goals may include education, specialized training, and job readiness, placement, and career advancement activities. Families sign a five year contract of participation (CoP) with the owner. Goals for each participating family member are set out in Individual Training and Services plans (ITSP) that are part of the CoP. When the family meets its goals and completes its FSS contract, the family becomes eligible to receive funds deposited in an escrow account. The owner establishes an interest-bearing escrow account for each participating family. If a family's earned income and rental payments increase as a result of participation in the FSS, the owner will credit the incremental earned income amount to the family's escrow account. Once a family successfully graduates from the program, they may access the escrow funds and use them for any purpose.

Respondents: Owners of privately-owned HUD assisted multifamily housing who voluntarily establish and operate a MF FSS program at their housing sites.

Estimated Number of Respondents: 2000.

Estimated Number of Annual Responses: 8000.

Frequency of Response: Quarterly.

Average Hours per Response: 1 hour.

Total Estimated Burdens: 8000.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of

information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: November 8, 2016.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2016–27910 Filed 11–18–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–FHC–2016–N200]; [FXFR1334088TWG0W4–123–FF08EACT00]

Trinity River Adaptive Management Working Group; Public Meeting, Teleconference, and Web-Based Meeting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce a public meeting of the Trinity River Adaptive Management Working Group (TAMWG). The TAMWG is a Federal advisory committee that affords stakeholders the opportunity to give policy, management, and technical input concerning Trinity River (California) restoration efforts to the Trinity Management Council (TMC). The TMC interprets and recommends policy, coordinates and reviews management actions, and provides organizational budget oversight.

DATES: *Public meeting, Teleconference, and Web-based meeting:* TAMWG will meet from 9:30 a.m. to 4 p.m. Pacific Time on Wednesday, December 7, 2016. *Submitting Information:* If you wish to submit written information or questions for the TAMWG to consider during the meeting, you must contact Elizabeth Hadley (**FOR FURTHER INFORMATION CONTACT**) no later than November 29, 2016.

ADDRESSES: *Meeting:* The meeting will be held at the Trinity River Restoration Program Office, 1313 South Main Street, Weaverville, CA 96093.

Teleconference: The call-in number is 866–715–1246, and the participant passcode is 4251781.

Web-based meeting: To join the web-based meeting, go to *http://www.mymeetings.com/nc/join.php?sigKey=mymeetings&i=442336293&p=&t=c*

FOR FURTHER INFORMATION CONTACT: Joseph C. Polos, by mail at U.S. Fish and Wildlife Service, 1655 Heindon Road, Arcata, CA 95521; by telephone at 707–822–7201; or by email at *joe_polos@fws.gov;* or Elizabeth W. Hadley, Redding Electric Utility, by mail at 777 Cypress Avenue, Redding, CA 96001; by telephone at 530–339–7308; or by email at *ehadley@reupower.com.* Individuals with a disability may request an accommodation by sending an email to either point of contact.

SUPPLEMENTARY INFORMATION: In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App., we announce that the Trinity River Adaptive Management Working Group will hold a meeting. The TAMWG affords stakeholders the opportunity to give policy, management, and technical input concerning Trinity River (California) restoration efforts to the TMC. The TMC interprets and recommends policy, coordinates and reviews management actions, and provides organizational budget oversight.

Meeting Agenda

- Agenda/Minutes
- Designated Federal Officer (DFO) update;
- TMC Chair Update;
- Executive Director Update;
- Wells and Water Supply Along Upper Trinity River;
- WY 2017 Flow Management;
- Tributary Access for Fish in Upper Trinity River;
- Weir at Tish Tang on the Mainstem Trinity River;
- Current TMC Issues; and
- Public comment.

The final agenda will be posted on the Internet at *http://www.fws.gov/arcata.*

Public Input

Interested members of the public may submit relevant information or questions for the TAMWG to consider during the meeting. Written statements must be received by the date listed in **DATES**, so that the information may be available to the TAMWG for their consideration prior to this meeting. Written statements must be supplied to Elizabeth Hadley in one of the following formats: One hard copy with original signature, one electronic copy with original signature, and one electronic copy via email (acceptable file formats are Adobe Acrobat PDF, MS Word, PowerPoint, or rich text file).

Registered speakers who wish to expand on their oral statements, or those who wished to speak but could not be accommodated on the agenda, may submit written statements to Elizabeth Hadley up to 7 days after the meeting.

Meeting Minutes

Summary minutes of the meeting will be maintained by Elizabeth Hadley (see **FOR FURTHER INFORMATION CONTACT**). The minutes will be available for public inspection within 14 days after the meeting, and will be posted on the TAMWG Web site at *http://www.fws.gov/arcata.*

Dated: November 15, 2016.

Joseph C. Polos,

Supervisory Fish Biologist, Arcata Fish and Wildlife Office, Arcata, California.

[FR Doc. 2016–27927 Filed 11–18–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–IA–2016–0139; FXIA16710900000–178–FF09A30000]

Endangered Species; Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (ESA) prohibit activities with listed species unless Federal authorization is acquired that allows such activities.

DATES: We must receive comments or requests for documents on or before December 21, 2016.

ADDRESSES: *Submitting Comments:* You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–HQ–IA–2016–0139.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Docket No. FWS–HQ–IA–2016–0139; U.S. Fish and Wildlife Service Headquarters, MS: BPHC; 5275 Leesburg Pike, Falls Church, VA 22041–3803.

When submitting comments, please indicate the name of the applicant and the PRT# you are commenting on. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

Viewing Comments: Comments and materials we receive will be available for public inspection on *http://www.regulations.gov,* or by appointment, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays, at the U.S. Fish and Wildlife Service, Division of Management Authority, 5275 Leesburg Pike, Falls Church, VA 22041–3803; telephone 703–358–2095.

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2281 (fax); *DMAFR@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I request copies of applications or comment on submitted applications?

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an email or address not listed under **ADDRESSES**. If you provide an email address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the street address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. 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.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), along with Executive Order 13576, ''Delivering an Efficient, Effective, and Accountable Government,'' and the President's Memorandum for the Heads of Executive Departments and Agencies of January 21, 2009—Transparency and Open Government (74 FR 4685; January 26, 2009), which call on all Federal agencies to promote openness and transparency in Government by disclosing information to the public, we invite public comment on these permit applications before final action is taken.

III. Permit Applications

Endangered Species

Applicant: Maire Malone, Ann Arbor, MI; PRT–04978C

The applicant requests a permit to import scientific specimens of wild chimpanzees (*Pan troglodytes*) from Makerere University, Kampala, Uganda, for the purpose of scientific research.

Applicant: Museum of Wildlife and Fish Biology, Davis CA; PRT–02129C

The applicant requests a permit to export and reimport nonliving museum specimens of endangered and threatened species previously accessioned into the applicant's collection for scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Multiple Applicants

The following applicants each request a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Spencer Albright, Burlington, NC; PRT–10488C

Applicant: Dallas Munroe, Houston, TX; PRT–11486C

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2016–27931 Filed 11–18–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX17EN05ESB0500]

Announcement of Public Briefing on Development of a Database of Greenhouse Gas Emissions Associated With Fossil Fuel Extraction From Federal Lands

AGENCY: U.S. Geological Survey, Department of the Interior.

ACTION: Notice of Meeting.

SUMMARY: USGS will conduct a public briefing on its work to develop a publicly accessible database on the greenhouse gas emissions associated with extraction of fossil fuels from federal lands.

DATES: The meeting will be held on Friday, December 2, 2016 from 9 a.m. to 11 a.m. ET.

ADDRESSES: The meeting will be held in the USGS Auditorium (1C111), USGS National Center, 12201 Sunrise Valley Drive, Reston, VA 20192.

FOR FURTHER INFORMATION CONTACT: Mr. Robin O'Malley, Climate and Land Use Change Mission Area, U.S. Geological Survey, 12201 Sunrise Valley Drive, Mail Stop 516, Reston, VA 20192, *romalley@usgs.gov,* (703) 648–4086.

SUPPLEMENTARY INFORMATION: In January 2015, Interior Secretary Jewell requested that the U.S. Geological Survey ''establish and maintain a public database to account for the annual carbon emissions from fossil fuels developed on federal lands.'' This meeting will provide a briefing on the basic methods, data sources, and likely format and content of project output. Results and data will not be presented; these will be contained in reports that undergo full USGS peer review and are expected in mid-2017. Note: In addition to carbon dioxide (CO_2) and methane (CH_4) emissions, the USGS project team was also able to obtain data for nitrous oxide (N_2O) emissions.

Meeting Agenda: The objective of this meeting is to provide the public with a basic understanding of the methods being employed in this project and to ask questions. There will be several presentations followed by a question and answer period. Members of the public will be asked to state questions succinctly; written materials may be provided after the meeting (see contact information above) to expand upon any questions or comments.

The meeting location is open to the public and is wheel-chair accessible. Please contact USGS (see above) if additional assistive/interpretive or other services are required. We will do our best to meet any such needs. Public parking is available without charge in the USGS Visitor Lot.

Robin O'Malley,

Designated Federal Officer.

[FR Doc. 2016–27912 Filed 11–18–16; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–22266; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting comments on the significance of properties nominated before October 22, 2016, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted by December 6, 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 22, 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.

ALABAMA

Baldwin County

Swift—Coles House, 1 Swift Coles Ln., Bon Secour, 16000814

Mobile County

Isle Dauphine Club, 100 Orleans Dr., Dauphin Island, 16000815

GEORGIA

Fulton County

Medical Arts Building, 384 Peachtree St. NE., Atlanta, 16000816

MASSACHUSETTS

Worcester County

Fitchburg Yarn Mill, 1428 Main St., Fitchburg, 16000817

MICHIGAN

Cass County

Criffield—Whiteley House, 601 Main St., Doawgiac, 16000818

Presque Isle County

NORMAN (shipwreck), L. Huron, 10.35 mi. ESE. of Presque Isle Museum, Presque Isle Township, 16000819

NEW HAMPSHIRE

Rockingham County

Portsmouth Downtown Historic District, Multiple, Portsmouth, 16000820

NORTH DAKOTA

Cass County

Black Building, 114 Broadway N., Fargo, 16000821

OREGON

Malheur County

Vale Independent Order of Odd Fellows Hall, 122 Main St. S., Vale, 16000822

SOUTH DAKOTA

Butte County

Belle Fourche Band Shell, Hermann Park, Belle Fourche, 16000823

Clark County

Raymond Farmers and Citizens State Bank, 202 Flower St., Raymond, 16000824

Lake County

Herschell—Spillman Steam Riding Gallery, 45205 US 83, Madison, 16000825

Lincoln County

Canton Carnegie Library, 225 E. 4th St., Canton, 16000826

Meade County

Sturgis Water Works Company Supply Works Site, 2835 Davenport St., Sturgis, 16000827

Pennington County

Rapid City Masonic Temple, 618 Kansas City St., Rapid City, 16000828

WASHINGTON

King County

1926 Model Brick Home, 2600 E. Montlake Pl., Seattle, 16000829

Bon Marche Department Store, 300 Pine St., Seattle, 16000830

WISCONSIN

Dane County

Belleville Illinois Central Railroad Depot, 109 S. Park St., Belleville, 16000831

A request for removal has been received for the following resources:

NORTH DAKOTA

Cass County

Burlington Northern Depot, Woodard Ave., Amenia, 77001024

Emmons County

Goldade, Johannes, House, SE. of Linton off ND 13, Linton, 83001932

Authority: 60.13 of 36 CFR part 60.

Dated: October 25, 2016.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

[FR Doc. 2016–27902 Filed 11–18–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR03210000, XXXR4079V4, RX.12256210.2029600]

Notice To Extend the Public Comment Period for the Draft Environmental Impact Statement for the Navajo Generating Station-Kayenta Mine Complex Project, Arizona

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of extension.

SUMMARY: The Bureau of Reclamation is extending the public comment period for the Draft Environmental Impact Statement (EIS) for the Navajo Generating Station-Kayenta Mine Complex Project to Thursday, December 29, 2016. The Notice of Availability and Notice of Public Meetings for the Draft EIS was published in the **Federal Register** on Friday, September 30, 2016 (81 FR 67384). The public comment period for the Draft EIS was originally scheduled to end on Tuesday, November 29, 2016.

DATES: Comments on the Draft EIS will be accepted until close of business on Thursday, December 29, 2016.

ADDRESSES: You may submit written comments by the following methods:

- *Email: NGSKMC-EIS@usbr.gov.*
- *Mail:* NGS–KMC Project Manager, PXAO–1500, Bureau of Reclamation, Phoenix Area Office, 6150 W. Thunderbird Road, Glendale, AZ 85306–4001.
- Facsimile: (623) 773–6483.
- At the public meetings.

FOR FURTHER INFORMATION CONTACT: Ms. Sandra Eto, (623) 773–6254, or by email at *NGSKMC-EIS@usbr.gov.* Additional information is available online at *http://www.ngskmc-eis.net.*

SUPPLEMENTARY INFORMATION: In response to a formal request for an extension, the Bureau of Reclamation is extending the close of the public comment period for the Draft EIS to Thursday, December 29, 2016.

Public Disclosure

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.

Dated: October 28, 2016.

Leslie Meyers,

Manager, Phoenix Area Office.

[FR Doc. 2016–27926 Filed 11–18–16; 8:45 am]

BILLING CODE 4332–90–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0056]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Special Agent Medical Preplacement (ATF F 2300.10)

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 60-day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until January 20, 2017.

FOR FURTHER INFORMATION CONTACT: If you have additional comments, particularly with respect to the estimated public burden or associated response time, have suggestions, need a copy of the proposed information collection instrument with instructions, or desire any additional information, please contact Danielle Thompson Murray, Special Agent/Industry Operations Investigator Recruitment, Diversity and Hiring Division, either by mail at Bureau of Alcohol, Tobacco and Firearms, 99 New York Ave. NE., Washington, DC 20226, or by telephone at 202–648–9098.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection (*check justification or form 83–I): Revision of a currently approved collection.

2. *The Title of the Form/Collection:* Special Agent Medical Preplacement.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number (if applicable): ATF F 2300.10.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Individuals or households.

Other (if applicable): Federal Government.

Abstract: The ATF F 2300.10 Special Agent Medical Preplacement form is used by special agents and explosives enforcement officers who are applying for a specific criminal investigator or explosives enforcement officer position with ATF. This position has specific medical standards and physical requirements. The information on the form is used to determine medical suitability for the position.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 120 respondents will utilize the form, and it will take each respondent approximately 45 minutes to complete the form.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 90 hours.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 3E–405B, Washington, DC 20530.

Dated: November 16, 2016.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2016–27951 Filed 11–18–16; 8:45 am]

BILLING CODE 4410–FY–P

NATIONAL CREDIT UNION ADMINISTRATION

Privacy Act of 1974: System of Records

AGENCY: National Credit Union Administration (NCUA)

ACTION: Notice of a new system of records.

SUMMARY: Pursuant to the Privacy Act of 1974, the National Credit Union Administration (NCUA) is proposing to establish a new system of records, and add three routine uses to NCUA's Standard Routine Uses.

DATES: This action will be effective without further notice on January 3, 2017 unless comments are received that would result in a contrary determination.

ADDRESSES: You may submit comments to NCUA by any of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *NCUA Web site: http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html.* Follow the instructions for submitting comments.

• *Email:* Address to *regcomments@ncua.gov.* Include ''[Your name]—Comments on NCUA 19 SORN'' in the email subject line.

• *Fax:* (703) 518–6319. Use the subject line described above for email.

• *Mail:* Address to Gerard Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

• *Hand Delivery/Courier:* Same as mail address.

FOR FURTHER INFORMATION CONTACT: Michael Mcneill, Office of the Chief Financial Officer, Division of Financial Control, Director, 1775 Duke Street St. Alexandria, VA 22314, or telephone: (703) 518–6572, or Linda Dent, Senior Agency Official for Privacy, Office of General Counsel, at the National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314, or telephone: (703) 518–6567.

SUPPLEMENTARY INFORMATION:

(1) NCUA Is Proposing To Establish a New System of Records

In accordance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended, NCUA is issuing public notice of its intent to establish a new system of records, NCUA Financial and Acquisition Management System, NCUA–19. The system of records described in this notice maintains records related to NCUA's core financial and acquisition system, and is used to ensure that all of NCUA's obligations and expenditures conform with laws, existing rules and regulations, and good business practices.

(2) NCUA Is Proposing To Add Three Routine Uses to its Standard Routine Uses

As a part of NCUA's ongoing privacy program efforts, NCUA has determined that its Standard Routine Uses should be updated to include three new routine uses. The first new routine use, which will be Standard Routine Use #10, will permit NCUA to share information with contractors, grantees, and interns, when necessary to accomplish an agency function. Individuals provided information under this routine use will be subject to the same Privacy Act requirements and limitations on disclosure as are applicable to NCUA employees.

The second new routine use, which will be Standard Routine Use #11, will permit NCUA to share information with appropriate parties in response to a federal data breach. The addition of this routine use increases NCUA's compliance with OMB M–07–16.

The third routine use, which will be Standard Routine Use #12, will permit NCUA to share information with the Office of Management and Budget pursuant to OMB Circular A–19.

For convenience, the proposed new system of records, ''NCUA Financial and Acquisition Management System, NCUA–19,'' and NCUA's Standard Routine Uses, with the proposed new routine uses italicized, are published below.

National Credit Union Administration.

Gerard Poliquin,

Secretary of the Board.

SYSTEM NAME AND NUMBER:

NCUA Financial and Acquisition Management System, NCUA–19

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Enterprise Services Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169; NCUA, 1775 Duke Street, Alexandria, VA 22314.

SYSTEM MANAGER(S):

Chief Financial Officer, Office of the Chief Financial Officer, NCUA, 1775 Duke Street, Alexandria, VA 22314.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

12 U.S.C. 1751; 31 U.S.C. 3501, *et seq.* and 31 U.S.C. 7701(c). Where the employee identification number is the social security number, collection of this information is authorized by Executive Order 9397.

PURPOSE(S) OF THE SYSTEM:

This system serves as the core financial and acquisition system and integrates program, financial, and budgetary information. Records are collected to ensure that all obligations and expenditures (other than those in the pay and leave system) are in conformance with laws, existing rules and regulations, and good business practices, and to maintain subsidiary records at the proper account and/or organizational level where responsibility for control of costs exists.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

NCUA employees, contractors, suppliers, vendors, interns, and customers.

CATEGORIES OF RECORDS IN THE SYSTEM:

Employee personnel information: Limited to current and former NCUA employees, and includes name, address, Social Security number (SSN). Business-related information: Limited to contractors/vendors, customers, and credit unions (but not their members), and includes name of the company/agency, point of contact, telephone number, mailing address, email address, contract number, vendor number (system unique identifier), DUNS number, and TIN, which could be a SSN in the case of individuals set up as sole proprietors, and total assets and insured shares. Financial information: Includes financial institution name, lockbox number, routing transit number, deposit account number, account type, debts (*e.g.,* unpaid bills/invoices, overpayments, etc.), and remittance address.

RECORD SOURCE CATEGORIES:

The information maintained in Department of Transportation, (DOT)/Enterprise Service Center (ESC) systems including: Purchase orders, contracts, vouchers, invoices, contracts, disbursements, receipts/collections, *Pay.Gov* transactions, and related records; U.S. General Services Administration (GSA) Federal personnel payroll system (for payroll disbursement postings): Concur (for travel disbursements); JPMorgan Chase (for charge card payments; travel advance applications; other records submitted by individuals, employees, vendors, and other sources.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside NCUA as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

1. NCUA's Standard Routine Uses apply to this system of records (see below).

2. Records may be shared with a vendor that NCUA is doing business with if a dispute about payments or amounts due arises. In such a situation, only the minimum amount of information need to resolve the dispute will be shared with the vendor.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are maintained in paper and/or electronic form. Records are also maintained on NCUA's network back-up tapes. Electronic records are stored in computerized databases. Records are stored in locked file rooms and/or file cabinets.

POLICIES AND PRACTICES FOR RETRIEVABILITY OF RECORDS:

Records are retrieved by any one or more of the following: Records may be retrieved by a name of employee, employee ID, employee NCUA email address, social security number (SSN) for employees, SSN/Tax Identification Number (TIN) for vendors doing business with the NCUA, name for both employees and vendors, supplier number (system unique) for both employees and vendors, DUNS and DUNS + 4.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are maintained in accordance with the General Records Retention Schedules issued by the National Archives and Records Administration (NARA) or a NCUA records disposition schedule approved by NARA.

Records existing on paper are destroyed beyond recognition. Records existing on computer storage media are destroyed according to the applicable NCUA media sanitization practice.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

NCUA has adopted appropriate administrative, technical, and physical controls in accordance with NCUA's information security policies to protect the security, integrity, and availability of the information, and to ensure that records are not disclosed to or accessed by unauthorized individuals.

Records are safeguarded in a secured environment. Buildings where records are stored have security cameras and 24 hour security guard service. The records are kept in limited access areas during duty hours and in locked file cabinets and/or locked offices or file rooms at all other times. Access is limited to those personnel whose official duties require access. Computerized records are safeguarded through use of access codes and information technology security. Contractors and other recipients providing supplies and/or services to the NCUA are contractually obligated to maintain equivalent safeguards.

RECORD ACCESS PROCEDURES:

Individuals should submit a written request to the Privacy Officer, NCUA, 1775 Duke Street, Alexandria, VA 22314, and provide the following information:

a. Full name.

b. Any available information regarding the type of record involved, and the name of the system containing the record.

c. The address to which the record information should be sent.

d. You must sign your request.

Attorneys or other persons acting on behalf of an individual must provide written authorization from that individual for the representative to act on their behalf.

Individuals requesting access must also comply with NCUA's Privacy Act regulations regarding verification of identity and access to records (12 CFR 792.55).

CONTESTING RECORD PROCEDURES:

Individuals wishing to request an amendment to their records should submit a written request to the Privacy Officer, NCUA, 1775 Duke Street, Alexandria, VA 22314, and provide the following information:

a. Full name.

b. Any available information regarding the type of record involved.

c. A statement specifying the changes to be made in the records and the justification therefor.

d. The address to which the response should be sent.

e. You must sign your request.

Attorneys or other persons acting on behalf of an individual must provide written authorization from that individual for the representative to act on their behalf.

NOTIFICATION PROCEDURE:

Individuals wishing to learn whether this system of records contains information about them should submit a written request to the Privacy Officer, NCUA, 1775 Duke Street, Alexandria, VA 22314, and provide the following information:

a. Full name.

b. Any available information regarding the type of record involved.

c. The address to which the record information should be sent.

d. You must sign your request.

Attorneys or other persons acting on behalf of an individual must provide written authorization from that individual for the representative to act on their behalf.

Individuals requesting access must also comply with NCUA's Privacy Act regulations regarding verification of identity and access to records (12 CFR 792.55).

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

NCUA'S STANDARD ROUTINE USES:

1. If a record in a system of records indicates a violation or potential violation of civil or criminal law or a regulation, and whether arising by general statute or particular program statute, or by regulation, rule, or order, the relevant records in the system or records may be disclosed as a routine use to the appropriate agency, whether federal, state, local, or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto.

2. A record from a system of records may be disclosed as a routine use to a federal, state, or local agency which maintains civil, criminal, or other relevant enforcement information or other pertinent information, such as current licenses, if necessary, to obtain information relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit.

3. A record from a system of records may be disclosed as a routine use to a federal agency, in response to its request, for a matter concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision in the matter.

4. A record from a system of records may be disclosed as a routine use to an authorized appeal grievance examiner, formal complaints examiner, equal employment opportunity investigator, arbitrator or other duly authorized official engaged in investigation or settlement of a grievance, complaint, or appeal filed by an employee. Further, a record from any system of records may be disclosed as a routine use to the Office of Personnel Management in accordance with the agency's responsibility for evaluation and oversight of federal personnel management.

5. A record from a system of records may be disclosed as a routine use to officers and employees of a federal agency for purposes of audit.

6. A record from a system of records may be disclosed as a routine use to a member of Congress or to a congressional staff member in response to an inquiry from the congressional office made at the request of the

individual about whom the record is maintained.

7. A record from a system of records may be disclosed as a routine use to the officers and employees of the General Services Administration (GSA) in connection with administrative services provided to this Agency under agreement with GSA.

8. Records in a system of records may be disclosed as a routine use to the Department of Justice, when: (a) NCUA, or any of its components or employees acting in their official capacities, is a party to litigation; or (b) Any employee of NCUA in his or her individual capacity is a party to litigation and where the Department of Justice has agreed to represent the employee; or (c) The United States is a party in litigation, where NCUA determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and NCUA determines that use of such records is relevant and necessary to the litigation, provided, however, that in each case, NCUA determines that disclosure of the records to the Department of Justice is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

9. Records in a system of records may be disclosed as a routine use in a proceeding before a court or adjudicative body before which NCUA is authorized to appear (a) when NCUA or any of its components or employees are acting in their official capacities; (b) where NCUA or any employee of NCUA in his or her individual capacity has agreed to represent the employee; or (c) where NCUA determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and NCUA determines that use of such records is relevant and necessary to the litigation, provided, however, NCUA determines that disclosure of the records to the Department of Justice is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

10. A record from a system of records may be disclosed to contractors, experts, consultants, and the agents thereof, and others performing or working on a contract, service, cooperative agreement, or other assignment for NCUA when necessary to accomplish an agency function or administer an employee benefit program. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to NCUA employees.

11. A record from a system of records may be disclosed to appropriate agencies, entities, and persons when (1) NCUA suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) NCUA has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by NCUA or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with NCUA's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

12. A record from a system of records may be shared with the Office of Management and Budget (OMB) in connection with the review of private relief legislation as set forth in OMB Circular A–19 at any stage of the legislative coordination and clearance process as set forth in that circular.

[FR Doc. 2016–27948 Filed 11–18–16; 8:45 am]

BILLING CODE 4510–FW–P

NATIONAL LABOR RELATIONS BOARD

Privacy Act System of Records, Amended System of Records

AGENCY: National Labor Relations Board.

ACTION: Notice of an Amended Privacy Act System of Records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, 5 U.S.C. 552a, the Agency publishes this notice of its intention to amend a system of records, NLRB–17, Personnel Security Records. All persons are advised that, in the absence of submitted comments considered by the Agency as warranting modification of the notice as here proposed, it is the intention of the Agency that the notice shall be effective upon expiration of the comment period without further action.

DATES: Written comments must be submitted no later than December 21, 2016.

ADDRESSES: All persons who desire to submit written comments for consideration by the Agency in connection with this proposed notice of the amended system of records shall mail them to the Agency's Senior Agency Official for Privacy, National Labor Relations Board, 1015 Half Street SE., Third Floor, Washington, DC 20570–0001, or submit them electronically to *pac@nlrb.gov.* Comments may also be submitted electronically through *http://www.regulations.gov,* which contains a copy of this proposed notice and any submitted comments.

FOR FURTHER INFORMATION CONTACT: Virginia Ephraim, IT Security and Privacy Compliance Specialist, National Labor Relations Board, 1015 Half Street SE., Third Floor, Washington, DC 20570–0001, (855)-209–9394, *pac@nlrb.gov.*

SUPPLEMENTARY INFORMATION: The Agency exempts an amended system of records, NLRB–17, Personnel Security Records, from the following provisions of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). The Agency is claiming exemptions pursuant to Sections 5 U.S.C. 552a(k)(1), (2), (3), (5), (6), and (7) of that Act. The Agency's direct final rule setting forth these exemptions appears elsewhere in today's issue of the **Federal Register**.

A report of the proposal to establish these systems of records was filed pursuant to 5 U.S.C. 552a(r) with Congress and the Office of Management and Budget.

Dated: Washington, DC November 9, 2016.

By direction of the Board.

William B. Cowen,

Federal Register Liaison, National Labor Relations Board.

NLRB–17

SYSTEM NAME:

Personnel Security Records

SECURITY CLASSIFICATION:

Most personnel security records are not classified. However, in some cases, records of certain individuals, or portions of some records, may be classified in the interest of national security.

SYSTEM LOCATION:

National Labor Relations Board, Division of Administration, Security Branch; the current street address of the NLRB can be found at *www.nlrb.gov.*

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who may require regular, ongoing access to National Labor Relations Board facilities and its information technology systems, or information classified in the interest of national security, including applicants for employment or contracts, federal employees, contractors, students, interns, volunteers, affiliates, and individuals authorized to perform or use services provided at National Labor Relations Board facilities. Individuals formerly in any of these positions may also have records in this system.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in the system include the following:

A. Copies of investigative information (*i.e.,* SF–85/85P/86/87) regarding an individual that were created by the Office of Personnel Management, the FBI, the Department of Defense, the Department of Homeland Security, or other agencies that provide the NLRB with information.

B. Correspondence relating to adjudication matters and results of suitability decisions in cases adjudicated by the Office of Personnel Management, Federal Investigative Services in accordance with 5 CFR 731.

C. Records of personnel background investigations regarding suitability that have been provided by other Federal agencies.

D. Records of adjudicative and HSPD–12 decisions by other Federal agencies, including clearance determinations and/or polygraph results.

E. Assorted government-wide forms that are routinely used by the Agency in making suitability determinations and granting clearances.

Categories A–E above may include the following types of information about individuals: name, former names, birth date, birth place, Social Security number, home address, phone numbers, employment history, residential history, education and degrees earned, names of associates and references and their contact information, citizenship, names of relatives, birthdates and places of relatives, citizenship of relatives, names of relatives who work for the federal government, criminal history, mental health history, drug use, financial information, fingerprints, summary report of investigation, results of suitability decisions, level of security clearance, date of issuance of security clearance, requests for appeal, witness statements, investigator's notes, tax return information, credit reports, NLRB identification cards, and employee photographs, security violations, circumstances of violation, and agency action taken.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Exec. Order 10450 Security requirement for Government Employment; Exec. Order 10865 Safeguarding classified information within industry; Exec. Order 12333 (amended) US Intelligence Activities; Exec. Order 12356 National Security Information; Homeland Security Presidential Directive (HSPD) 12, Policy for a Common Identification Standard for Federal Employees and Contractors; OMB Memo M–05–24, August 2005 Implementation of HSPD–12-policy for a Common Identification Standard for Federal Employees and Contractors; OPM Memo, July 2008, Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD–12; FIPS PUB 201–2, August 2013, Federal Information Processing Standards Publication, Personal Identity Verification (PIV) of Federal Employees and Contractors; Title 5 U.S.C. Sec 3301 Civil Service—Generally; Title 5 U.S.C. Sec 9101 Access to Criminal History Records for National Security and Other Purposes; Title 5 U.S.C. Parts 1400 National Security Positions ; Title 5 U.S.C. Parts 736 Personnel Investigations; Title 42 U.S.C. Sec 2165 Security Restrictions; Title 42 U.S.C. Sec 2201 General Duties of Commission; Title 50 U.S.C. Sec 781–858 Internal Security; Title 50 U.S.C. Sec 881—887 National Defense Facilities ; NLRB Administrative Policies and Procedures Manual, Sec–1(B) Suitability and Security Regulations.

PURPOSE(S):

Records in this system are used by the NLRB Security Branch staff for documentation and support of decisions regarding clearance for access to classified information, and determining suitability, eligibility, and fitness for service of applicants for federal employment and contract positions, as well as current employees undergoing reinvestigation at the National Labor Relations Board. The records in this system may be used to document security violations and supervisory actions in response to such violations.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Records and/or information are disclosed to:

1. Designated officers and employees of agencies (excluding the National Labor Relations Board) and offices in the executive, legislative, or judicial branches of the Federal government, with a need to evaluate qualifications, suitability, or loyalty to the United States Government, as well as the granting of a security clearance or access to classified information or restricted areas.

2. A Federal, state, local, tribal, or other charged agency maintaining civil, criminal, or other relevant enforcement information, if necessary to obtain information relevant to an NLRB decision concerning the hiring or retention of an employee, or the issuance of a security clearance, contract, grant, license, or other benefit, to the extent necessary to identify the individual, inform the source of the nature and purpose of the investigation, and to identify the type of information requested.

3. A Federal, state, local, tribal, or other charged agency in response to its request in connection with the hiring or retention of an employee or the issuance of a security clearance, to the extent that the information is relevant and necessary to the requesting agency's decisions on that matter.

4. Except as noted on Forms SF 85, 85–P, 86, and 87, when a record on its face, or in conjunction with other records, indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order issued, disclosure may be made to the appropriate public authority, whether Federal, state, local, tribal, or other authority charged with the responsibility of investigating or prosecuting such violation, or to any agency in connection with its oversight review responsibility.

5. A Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office made at the written request of the constituent about whom the record is maintained. However, the investigative file, or parts thereof, will only be released to a Congressional office if the Agency receives a signed statement under 28 U.S.C. 1746 from the subject of the investigation.

6. The Department of Justice for use in litigation when either (a) the Agency or any component thereof, (b) any employee of the Agency in his or her official capacity, (c) any employee of the Agency in his or her individual capacity where the Department of Justice has agreed to represent the employee, or (d) the United States Government is a party to litigation or has an interest in such litigation, and the Agency determines that the records are both relevant and necessary to the litigation.

7. A court or other adjudicative body before which the Agency is authorized to appear, when either (a) the Agency or any component thereof, (b) any employee of the Agency in his or her official capacity, (c) any employee of the

Agency in his or her individual capacity, where the Agency has agreed to represent the employee, or (d) the United States Government is a party to litigation or has an interest in such litigation, and the Agency determines that the records are both relevant and necessary to the litigation.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in paper format in file folders, on digital images, and in electronic databases.

RETRIEVABILITY:

Data may be retrieved by name, Social Security number, or date of birth.

SAFEGUARDS:

Paper—Paper files are stored in a locked file cabinet or a secure facility with an intrusion alarm system at NLRB Headquarters in the Security branch. Access is limited to personnel security officers and their duly authorized representatives who have a need to know the information for the performance of their official duties. The U.S. Postal Service and other postal providers are used to transmit hard copy records sent to and from field offices, other agencies, and designated individuals.

Electronic—Comprehensive electronic records are maintained in the Security Branch and on the NLRB network. Electronic records are maintained in computer databases in a secure room accessible only by a personal identity verification card reader which is limited to Office of Chief Information Officer designated employees. Information that is transmitted electronically from field offices is encrypted. Access to the records is restricted to security staff with a specific role in the Personal Identity Verification (PIV) program and Personnel Security process requiring access to background investigation information to perform their duties, and who have been given access rights to that part of the system, including background investigation records. An audit trail is maintained and reviewed periodically to identify unauthorized access for both programs. Persons given roles in the PIV program must complete training specific to their roles to ensure they are knowledgeable about how to protect personally identifiable information.

RETENTION AND DISPOSAL:

Personnel Security Clearance Files, Case Files are disposed in accordance with General Records Schedule 18, Item 22a. Files are destroyed upon notification of death, or no later than 5 years after separation or transfer of employee or no later than 5 years after the applicable contractual relationship with the Agency expires, whichever is applicable.

Investigative Documents Furnished to the Agency are disposed in accordance with General Records Schedule 18, Item 22b. Files are destroyed in accordance with the investigating agency instructions.

SYSTEM MANAGER(S) AND ADDRESS:

Chief Security Officer, National Labor Relations Board; the current street address of the NLRB can be found at *www.nlrb.gov.*

NOTIFICATION PROCEDURE:

For records not exempted under 5 U.S.C. 552a(k)(1), (2), (3), (5), (6), and (7) of the Privacy Act, an individual may inquire as to whether this system contains a record pertaining to such individual by sending a request in writing, signed, to the System Manager at the address above, in accordance with the procedures set forth in 29 CFR 102.119(a).

When an individual requests notification whether the system of records covered by this Notice contains records pertaining to that individual, the request should provide the individual's full name, date of birth, agency name, and work location. An individual requesting notification of records in person must provide identity documents sufficient to satisfy the custodian of the records that the requester is entitled to such notification, such as a government-issued photo ID. Individuals requesting notification via mail must furnish, at minimum, name, date of birth, Social Security number, and home address in order to establish identity.

RECORD ACCESS PROCEDURES:

For records not exempted under 5 U.S.C. 552a(k)(1), (2), (3), (5), (6), and (7) of the Privacy Act, an individual seeking to gain access to records in this system pertaining to him or her should contact the System Manager at the address above, in accordance with the procedures set forth in 29 CFR 102.119(b) and (c).

When an individual requests access to records contained within the system of records covered by this Notice pertaining to that individual, the request should provide the individual's full name, date of birth, agency name, and work location. An individual requesting access in person must provide identity documents sufficient to satisfy the custodian of the records that the requester is entitled to such access, such as a government-issued photo ID. Individuals requesting access via mail must furnish, at minimum, name, date of birth, Social Security number, and home address in order to establish identity. Requesters should also reasonably specify the record contents being sought. Investigative information created by other agencies (Record Category A, above) remain the property of those agencies and requests regarding such material must be directed to them.

Current NLRB employees employed in bargaining units covered by a collective-bargaining agreement should refer to the applicable provisions of that agreement.

CONTESTING RECORD PROCEDURES:

For records not exempted under 5 U.S.C. 552a(k)(1), (2), (3), (5), (6), and (7) of the Privacy Act, an individual may request amendment of a record pertaining to such individual maintained in this system by directing a request to the System Manager at the address above, in accordance with the procedures set forth in 29 CFR 102.119(d).

When an individual seeks to contest records contained within the system of records covered by this Notice pertaining to that individual, the request should provide the individual's full name, date of birth, agency name, and work location. An individual seeking to contest records in person must provide identity documents sufficient to satisfy the custodian of the records that the requester is entitled to contest such records, such as a government-issued photo ID. Individuals seeking to contest records via mail must furnish, at minimum, name, date of birth, social security number, and home address in order to establish identity. Requesters should also reasonably identify the record, specify the information they are contesting, state the corrective action sought and the reasons for the correction along with supporting justification showing why the record is not accurate, timely, relevant, or complete. Investigative information created by other agencies (Record Category A, above) remain the property of those agencies and requests regarding such material must be directed to them.

RECORD SOURCE CATEGORIES:

For records not exempted under 5 U.S.C. 552a(k)(1), (2), (3), (5), (6), and (7) of the Privacy Act, record source categories include the following: the employee, contractor, or applicant via use of the SF–85, SF–85P, SF–86, or SF–87 and personal interviews; employers' and former employers' records; FBI criminal history records and other databases; financial institutions and credit reports; medical records and health care providers; educational institutions; interviews of witnesses such as neighbors, friends, co-workers, business associates, teachers, landlords, or family members; tax records; and other public records. Security violation information is obtained from a variety of sources, including security inspections, witnesses, supervisors' reports, audit reports.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Pursuant to 5 U.S.C. 552a(k)(1), (2), (3), (5), (6), and (7) of the Privacy Act, the Agency has exempted portions of this system that relate to providing an accounting of disclosures to the data subject, and access to and amendment of records (5 U.S.C. 552a(c)(3),(d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f)). This system may contain the following types of information:

1. Properly classified information subject to the provisions of section 552(b)(1), which states as follows: (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.

2. Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: provided, however, that if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

3. Information maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18 of the U.S. Code.

4. Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment and Federal contact or access to classified information. Materials may be exempted to the extent that release of the material to the individual whom the information is about would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence or, prior to September 27, 1975, furnished information to the Government under an implied promise that the identity of the source would be held in confidence.

5. Testing and examination materials, compiled during the course of a personnel investigation, that are used solely to determine individual qualifications for appointment or promotion in the Federal service, when disclosure of the material would compromise the objectivity or fairness of the testing or examination process.

6. Evaluation materials, compiled during the course of a personnel investigation, that are used solely to determine potential for promotion in the armed services may be exempted to the extent that the disclosure of the data would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

[FR Doc. 2016–27488 Filed 11–18–16; 8:45 am]

BILLING CODE 7545–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2016–0220]

Report on Changes to Low-Level Waste Burial Charges

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft NUREG; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment draft NUREG–1307 Revision 16, ''Report on Waste Burial Charges: Changes in Decommissioning Waste Disposal Costs at Low-Level Waste Burial Facilities.'' This report, which is revised periodically, explains the formula acceptable to the NRC for determining the minimum decommissioning fund requirements for nuclear power reactors. Specifically, this report provides adjustment factors, and updates to these values, for the labor, energy, and waste components of the minimum formula.

DATES: Submit comments by December 20, 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 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–2016–0220. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• Mail comments to: Cindy Bladey, Office of Administration, Mail Stop: OWFN–12–H08, 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: Emil Tabakov, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6814, email: *Emil.Tabakov@.nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2016–0220 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–2016–0220.

• 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.* NUREG–1307 Revision 16, ''Report on Waste Burial Charges: Changes in Decommissioning Waste Disposal Costs at Low-Level Waste Burial Facilities, is available in ADAMS under Accession No. ML16315A300.

• 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.

B. Submitting Comments

Please include Docket ID NRC–2016–0220 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, 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 the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Discussion

NUREG–1307, Revision 16, ''Report on Waste Burial Charges: Changes in Decommissioning Waste Disposal Costs at Low-Level Waste Burial Facilities,'' modifies the previous revision to this report issued in January 2013 (ADAMS Accession No. ML13023A030), and incorporates updates to the adjustment factors for the labor, energy, and waste components of the NRC minimum decommissioning fund formula. This revision also incorporates changes resulting from newly available low-level waste disposal capacity at the Andrews County, Texas facility established in 2012, and changes made to waste disposal costs resulting from a contractor reassessment of the assumptions for LLW classification. As a result of these changes, the minimum decommissioning fund formula amounts calculated by licensees, based on revised low-level waste burial factors presented in this report, will likely reflect (on average) lower minimum decommissioning fund requirements than those previously reported by licensees in 2015.

Dated at Rockville, Maryland, this 10th day of November 2016.

For the Nuclear Regulatory Commission.

Anthony R. Bowers,

Chief, Financial Analysis and International Projects Branch, Division of Inspection and Regional Support, Office of Nuclear Reactor Regulation.

[FR Doc. 2016–27945 Filed 11–18–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2016–0233]

Pressurized Water Reactor Control Rod Ejection and Boiling Water Reactor Control Rod Drop Accidents

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft regulatory guide; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment draft regulatory guide (DG) DG–1327, ''Pressurized Water Reactor Control Rod Ejection and Boiling Water Reactor Control Rod Drop Accidents.'' This DG proposes new guidance for analyzing accidents such as control rod ejection for pressurized water reactors and control rod drop for boiling-water reactors. It defines fuel cladding failure thresholds for ductile failure, brittle failure, and pellet-clad mechanical interaction and provides radionuclide release fractions for use in assessing radiological consequences. It also describes analytical limits and guidance for demonstrating compliance with regulations governing reactivity limits.

DATES: Submit comments by February 21, 2017. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specified subject):

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0233. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *Mail comments to:* Cindy Bladey, Office of Administration, Mail Stop: OWFN–12H–08, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on accessing information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Paul Clifford, Office of Nuclear Reactor Regulation, telephone: 301–415–4043, email: *Paul.Clifford@nrc.gov* and Edward O'Donnell, Office of Nuclear Regulatory Research, telephone: 301–415–3317 email: *Edward.ODonnell@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2016–0233 when contacting the NRC about the availability of information regarding this action. You may obtain publically-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–2016–0233.

• *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.* The DG is electronically available in ADAMS under Accession No. ML16124A200.

• *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.

B. Submitting Comments

Please include Docket ID NRC–2016–0233 in your comment submission. The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC posts all comment submissions at *http://www.regulations.gov* as well as enters the comment submissions into ADAMS.

The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, 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 the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Additional Information

The NRC is issuing for public comment a DG in the NRC's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information regarding methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific issues or postulated events, and data that the staff needs in its review of applications for permits and licenses.

The DG, entitled ''Pressurized Water Reactor Control Rod Ejection and Boiling Water Reactor Control Rod Drop Accidents,'' is a proposed new guide temporarily identified by its task number, DG–1327. DG–1327 proposes new guidance for analyzing reactivity-initiated accidents such as control rod ejection for pressurized water reactors and control rod drop for boiling-water reactors. It defines fuel cladding failure thresholds for ductile failure, brittle failure, and pellet-clad mechanical interaction and provides radionuclide release reactions for use in assessing radiological consequences. It also describes analytical limits and guidance for demonstrating compliance with regulations governing reactivity limits.

The draft guide also incorporates new empirical data from in-pile, prompt power pulse test programs and analyses from several international publications on fuel rod performance under reactivity initiated accident conditions to provide guidance on acceptable analytical methods, assumptions, and limits for evaluating a pressurized water reactor control rod ejection accident.

The draft guide expands the existing guidance for control rod ejection accidents in Regulatory Guide (RG) 1.77, ''Assumptions Used for Evaluation a Control Rod Ejection Accident for Pressurized Water Reactors.'' However, the NRC intends to maintain RG 1.77 for existing licensees who do not make any design changes within the scope of RG 1.77.

III. Backfitting and Issue Finality

Draft regulatory guide DG–1327 describes one acceptable method for demonstrating compliance with Appendix A of part 50 of title 10 of the Code of Federal Regulations (10 CFR), ''General Design Criteria 28, *Reactivity Limit,*'' with respect to control rod ejection (CRE) for pressurized-water reactors (PWRs) and a control rod drop (CRD) for boiling-water reactors (BWRs). It addresses fuel cladding failure thresholds for ductile failure, brittle failure, and pellet-clad mechanical interaction (PCMI), provides radionuclide release fractions for use in assessing radiological consequences, and describes analytical limits and guidance for demonstrating compliance with GDC 28 governing reactivity limits.

This draft regulatory guide, if finalized, would not constitute backfitting as defined in 10 CFR 50.109 (the Backfit Rule) and is not otherwise inconsistent with the issue finality provisions in 10 CFR part 52, ''Licenses, Certifications and Approvals for Nuclear Power Plants.'' Existing licensees and applicants of final design certification rules will not be required to comply with the positions set forth in this draft regulatory guide, unless the licensee or design certification rule applicant seeks a voluntary change to its licensing basis with respect to CRE for PWRs or CRD for BWRs, and where the NRC determines that the safety review must include consideration of these events. Further information on the staff's use of the draft regulatory guide, if finalized, is contained in the draft regulatory guide under Section D. Implementation.

Applicants and potential applicants are not, with certain exceptions, protected by either the Backfit Rule or any issue finality provisions under part 52. Neither the Backfit Rule nor the issue finality provisions under part 52—with certain exclusions discussed below—were intended to apply to every NRC action which substantially changes the expectations of current and future applicants. Therefore, the positions in any final draft regulatory guide, if imposed on applicants, would not represent backfitting (except as discussed below).

The exceptions to the general principle are applicable whenever a combined license applicant references a part 52 license (*i.e.,* an early site permit or a manufacturing license) and/or part 52 regulatory approval (*i.e.,* a design certification rule or design approval. The staff does not, at this time, intend to impose the positions represented in the draft regulatory guide in a manner that is inconsistent with any issue finality provisions in these part 52 licenses and regulatory approvals. If, in the future, the staff seeks to impose a position in this regulatory guide in a manner which does not provide issue finality as described in the applicable issue finality provision, then the staff will address the criteria for avoiding issue finality as described in the applicable issue finality provision.

Dated at Rockville, Maryland, this 10th day of November 2016.

For the Nuclear Regulatory Commission.

Thomas H. Boyce,

Chief, Regulatory Guidance and Generic Issues Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2016–27903 Filed 11–18–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 040–08943; NRC–2008–0208]

Crow Butte Resources, Inc.

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an exemption to Crow Butte Resources, Inc. (CBR) for the purpose of complying with occupational dose limits in response to a request from CBR dated September 21, 2015. Issuance of this exemption will allow CBR to disregard certain radionuclides that contribute to the total activity of a mixture when determining internal dose to assess compliance with occupational dose equivalent limits at its in situ uranium recovery (ISR) facility in Crawford, Nebraska.

ADDRESSES: Please refer to Docket ID NRC–2008–0208 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2008–0208. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the

ADAMS Public Documents collection at *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.* The ADAMS accession number for each document referenced (if that document is available in ADAMS) is provided the first time that a document is referenced.

• *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.

FOR FURTHER INFORMATION CONTACT:

Ronald A. Burrows, Office of Nuclear Material Safety and Safeguards; U.S. Nuclear Regulatory Commission, Washington DC 20555–0001; telephone: 301–415–6443; email: *Ronald.Burrows@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Crow Butte Resources, Inc. operates the Crow Butte ISR facility in Crawford, Nebraska (the Crow Butte Project) under NRC source materials license SUA–1534 (ADAMS Accession No. ML13324A101). At the Crow Butte Project, CBR performs airborne uranium particulate monitoring in the plant in accordance with Section 5.8.3.1 of its Technical Report (ADAMS Accession No. ML091470116). As described in its Technical Report, CBR measures airborne uranium by taking samples of particulate matter in air at locations within the plant using glass fiber filters and air pumps. The measurement of airborne uranium is performed by gross alpha counting of air filters.

In Section 5.7.4.3.1, ''Airborne Particulate Uranium Monitoring,'' of the NRC staff's 2014 Safety Evaluation Report (SER) for the renewal of CBR's license for the Crow Butte Project (ADAMS Accession No. ML14149A433), the NRC staff stated that CBR did not demonstrate that gross alpha counting would differentiate all airborne radioactivity in air samples, including radionuclides that are not uranium, some of which may not emit alpha particles and, therefore, will not be detected. As a result, the NRC staff imposed license condition 10.8 in CBR's license SUA–1534, which states that the licensee shall conduct isotopic analyses for alpha- and beta-emitting radionuclides on airborne samples at each in-plant air particulate sampling location at a frequency of once every 6 months for the first 2 years and annually thereafter to ensure compliance with section 20.1204(g) of title 10 of the Code of Federal Regulations (10 CFR). The license condition also states that for any changes to operations, the licensee shall conduct an evaluation to determine if more frequent isotopic analyses are required for compliance with 10 CFR 20.1204(g).

In its September 21, 2015, response to NRC staff requests for additional information (RAIs), CBR clarified its approach to determining internal dose by air sampling, including an analysis of how CBR meets the requirement in 10 CFR 20.1204(g) for disregarding certain radionuclides contained in mixtures of radionuclides in air (ADAMS Accession No. ML15310A373). As part of its analysis, CBR stated that it accounts for all of the alpha-emitting radioactive material in air when measuring uranium, as described in its Technical Report, but it does not account for total activity (*i.e.,* the sum of all alpha-emitting and beta-emitting radioactive material in air) when determining internal dose. In accordance with 10 CFR 20.1204(g)(1), a licensee may only disregard certain radionuclides in a mixture if it uses the total activity of the mixture, which includes both alpha-emitting and beta-emitting radionuclides, to demonstrate compliance with the dose limits in 10 CFR 20.1201 and to comply with the monitoring requirements in 10 CFR 20.1502(b). In addition to meeting the condition of 10 CFR 20.1204(g)(1), a licensee must also show that the concentration of any radionuclide disregarded is less than 10 percent of its derived air concentration (DAC), and the sum of these percentages for all of the radionuclides disregarded in the mixture does not exceed 30 percent, in accordance with 10 CFR 20.1204(g)(2) and 10 CFR 20.1204(g)(3), respectively, in order to disregard certain radionuclides in a mixture.

In its September 21, 2015, RAI response, CBR requested an exemption from including the internal dose from beta-emitting radionuclides in occupational dose calculations. In support of this request, CBR provided the following information: (1) CBR accounts for all alpha activity on the sample filters used in its air sampling program, which accounts for nearly all of the internal dose received from airborne radionuclides typically present at an in-situ recovery facility other than radon-222 (radon) and its short-lived progeny; (2) the contribution to occupational dose from internal exposure to airborne beta-emitting radionuclides (other than radon-222 and its short-lived progeny) is very small relative to other sources of occupational dose (such as external dose and internal dose from inhalation of radon-222 and its short-lived progeny, which are accounted for separately); and (3) it would be administratively complex to attempt to track, and account for, a comparatively small internal dose from airborne non-radon beta-emitting radionuclides at the Crow Butte Project.

II. Description of Action

The NRC may, under 10 CFR 20.2301, upon application by a licensee or upon its own initiative, grant an exemption from the requirements of the regulations in 10 CFR part 20, if the NRC determines the exemption is authorized by law and would not result in undue hazard to life or property. As described in the NRC staff's safety evaluation report for this exemption request (ADAMS Accession No. ML16078A238), the NRC staff found that this exemption is authorized by law and will not result in undue hazard to life or property. Therefore, the NRC is granting CBR an exemption from the requirement in 10 CFR 20.1204(g)(1) to use the total activity of the mixture in demonstrating compliance with the dose limits specified in § 20.1201. The licensee must still consider all radionuclides in demonstrating compliance with the requirements in § 20.1502(b). In conjunction with granting this exemption, the NRC is revising license condition 10.8 of CBR's license SUA–1534 to reflect the terms of the exemption.

III. Discussion

A. The Exemption Is Authorized by Law

The NRC staff concluded that the exemption is authorized by law as 10 CFR 20.2301 expressly allows for an exemption to the requirements in 10 CFR part 20, and the exemption will not be contrary to any provision of the Atomic Energy Act of 1954, as amended.

B. The Exemption Presents No Undue Hazard to Life or Property

The exemption is related to the requirement in 10 CFR 20.1501(a) for licensees to make, or cause to be made, appropriate surveys. In accordance with 10 CFR 20.1204(g), when concentrations of radioactive material in air are relied upon to determine internal dose, a licensee may disregard certain radionuclides contained in a mixture of radionuclides in air if the following three conditions are met: (1) the licensee uses the total activity of the mixture in demonstrating compliance with the dose limits in § 20.1201 and in complying with the monitoring requirements in § 20.1502(b); (2) the concentration of any radionuclide disregarded is less than 10 percent of its DAC; and (3) the sum of these percentages for all of the radionuclides disregarded in the mixture does not exceed 30 percent.

CBR has demonstrated, and the NRC staff has verified, that its surveys under § 20.1501(a) and its method of determination under § 20.1204 account for nearly all of the occupational dose and that any additional contribution to occupational dose from internal exposure to airborne non-radon beta-emitting radionuclides is very small. Furthermore, in conjunction with granting this exemption, the NRC staff is revising CBR license condition 10.8 to require CBR to periodically assess the mixture of airborne radionuclides present at its facility against a specific regulatory limit. This will ensure that CBR will be aware of changes in the mixture of airborne radionuclides at the Crow Butte Project and that the contribution to occupational dose from internal exposure to beta-emitting radionuclides will remain small. Therefore, granting this exemption presents no undue hazard to life or property.

C. Environmental Considerations

The NRC staff has determined that granting of an exemption from the requirements of 10 CFR 20.1204(g)(1) belongs to a category of regulatory actions which the NRC, by regulation, has determined do not individually or cumulatively have a significant effect on the environment, and as such do not require an environmental assessment or environmental impact statement. Specifically, the exemption from the requirement to include all radionuclides that contribute to total activity under 10 CFR 20.1204(g)(1) is eligible for categorical exclusion under 10 CFR 51.22(c)(25) based on the NRC staff's determinations that requirements from which exemption is sought involve inspection or surveillance requirements (a survey under 10 CFR 20.1501(a)), and that the exemption will result in no significant change in the types or significant increase the amount of any offsite effluents; no significant increase to individual or cumulative public or occupational radiation exposure; no significant construction impact; and no significant increase to the potential for, or consequence from, radiological accidents.

Section 7 of the Endangered Species Act (the Act) [16 U.S.C. 1531 *et seq.*] outlines the procedures for Federal interagency cooperation to conserve Federally-listed species and designated critical habitats. Section 7(a)(2) of the Act states that each Federal agency shall, in consultation with the Secretary, insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. The NRC staff has determined that a Section 7 consultation is not required because the proposed action is administrative/procedural in nature and will not affect listed species or critical habitat. The NRC staff has also determined that the proposed action is not a type of activity that has potential to cause effects on historic properties because it is an administrative/procedural action. Therefore, no further consultation is required under Section 106 of the National Historic Preservation Act [54 U.S.C. 300101 *et seq.*].

IV. Conclusion

Accordingly, the NRC has determined that, pursuant to 10 CFR 20.2301, the exemption is authorized by law and will not present an undue hazard to life or property. The NRC hereby grants CBR an exemption from the requirement in 10 CFR 20.1204(g)(1) to use the total activity of the mixture in demonstrating compliance with the dose limits in § 20.1201.

Dated at Rockville, Maryland, this 14th day of November 2016.

For the Nuclear Regulatory Commission.

Andrea Kock,

Deputy Director, Division of Decommissioning, Uranium Recovery and Environmental Programs, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2016–27946 Filed 11–18–16; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service

AGENCY: U.S. Office of Personnel Management (OPM).

ACTION: Notice.

SUMMARY: This notice identifies Schedule A, B, and C appointing authorities applicable to a single agency that were established or revoked from March 1, 2016, to March 31, 2016.

FOR FURTHER INFORMATION CONTACT: Senior Executive Resources Services, Senior Executive Services and Performance Management, Employee Services, 202–606–2246.

SUPPLEMENTARY INFORMATION: In accordance with 5 CFR 213.103, Schedule A, B, and C appointing authorities available for use by all agencies are codified in the Code of Federal Regulations (CFR). Schedule A, B, and C appointing authorities applicable to a single agency are not codified in the CFR, but the Office of Personnel Management (OPM) publishes a notice of agency-specific authorities established or revoked each month in the **Federal Register** at *www.gpo.gov/fdsys/.* OPM also publishes an annual notice of the consolidated listing of all Schedule A, B, and C appointing authorities, current as of June 30, in the **Federal Register**.

Schedule A

No Schedule A Authorities to report during March 2016.

Schedule B

No Schedule B Authorities to report during March 2016.

Schedule C

The following Schedule C appointing authorities were approved during March 2016.

Agency name	Organization name	Position title	Authorization No.	Effective date
Department of Agriculture	Farm Service Agency	State Executive Director—Rhode Island.	DA160077	3/4/2016
		State Executive Director	DA160091	3/30/2016
	Rural Housing Service	Senior Advisor	DA160081	3/17/2016
		State Director	DA160090	3/30/2016
	Office of Communications	Senior Advisor for Strategic Communications.	DA160083	3/17/2016

Agency name	Organization name	Position title	Authorization No.	Effective date
	Office of the Under Secretary for Rural Development.	Confidential Assistant	DA160087	3/17/2016
		Chief of Staff	DA160084	3/28/2016
	Office of Communications	Deputy Press Secretary	DA160080	3/18/2016
	Office of the Under Secretary for Research, Education, and Economics.	Senior Advisor	DA160085	3/18/2016
	Office of the Under Secretary for Marketing and Regulatory Programs.	Chief of Staff	DA160082	3/30/2016
	Rural Business Service	Senior Advisor	DA160089	3/30/2016
Department of Commerce	Office of the Under Secretary	Deputy Chief Communications Officer for Strategic Communications.	DC160095	3/2/2016
		Special Assistant	DC160103	3/17/2016
		Senior Advisor	DC160111	3/18/2016
	Office of the Assistant Secretary for Industry and Analysis.	Senior Director	DC160101	3/7/2016
	Office of Legislative and Intergovernmental Affairs.	Confidential Assistant	DC160105	3/14/2016
		Associate Director	DC160108	3/17/2016
	Office of Public Affairs	Deputy Director of Public Affairs and Director of Speechwriting.	DC160106	3/14/2016
		Deputy Director of Speechwriting	DC160107	3/18/2016
	Office of Business Liaison	Associate Director	DC160102	3/7/2016
		Special Assistant	DC160110	3/21/2016
	Office of the Director	Senior Advisor	DC160117	3/21/2016
	Economic Development Administration.	Special Advisor	DC160116	3/30/2016
Department of Defense	Office of the Assistant Secretary of Defense (Legislative Affairs).	Special Assistant(Legislative Affairs) (Chief, Policy).	DD160068	3/1/2016
	Office of the Assistant Secretary of Defense (Homeland Defense and America's Security Affairs).	Special Assistant for Cyber Policy	DD160077	3/2/2016
	Office of the Assistant Secretary of Defense (Special Operations/Low Intensity Conflict and Interdependent Capabilities).	Special Assistant (Special Operations and Low-Intensity Conflict).	DD160071	3/3/2016
	Office of the Assistant Secretary of Defense (International Security Affairs).	Senior Advisor (Europe/North Atlantic Treaty Organization).	DD160002	3/4/2016
	Office of the Assistant Secretary of Defense (Legislative Affairs).	Special Assistant (Policy)	DD160080	3/4/2016
	Office of the Secretary	Special Assistant (2)	DD160067	3/17/2016
			DD160084	3/18/2016
		Director of Operations	DD160085	3/18/2016
	Office of Assistant Secretary of Defense (Public Affairs).	Speechwriter (2)	DD160078	3/17/2016
			DD160089	3/23/2016
	Office of the Under Secretary of Defense (Personnel and Readiness).	Special Assistant for Personnel and Readiness.	DD160083	3/17/2016
Department of the Navy	Office of the Under Secretary of the Navy.	Senior Advisor	DN160012	3/18/2016
Department of Education	Office of the Under Secretary	Assistant Director, White House—Educational Excellence for African Americans.	DB160041	3/2/2016
	Office of Planning, Evaluation and Policy Development.	Special Assistant	DB160048	3/2/2016
	Office of the Secretary	Special Advisor	DB160038	3/9/2016
		Director, White House Liaison	DB160053	3/17/2016
		Deputy Director, White House Liaison.	DB160060	3/21/2016
		Deputy Director of Advance	DB160059	3/24/2016
	Office of Communications and Outreach.	Assistant Press Secretary	DB160055	3/17/2016
	Office of the General Counsel	Deputy Chief of Staff	DB160056	3/17/2016
	Office of Career Technical and Adult Education.	Chief of Staff	DB160063	3/24/2016
	Office of Elementary and Secondary Education.	Special Assistant	DB160064	3/29/2016
	Office of the Deputy Secretary	Senior Policy Advisor	DB160065	3/29/2016
Department of Energy	Office of the Secretary	Special Advisor for Finance and Clean Energy Investment.	DE160072	3/1/2016
	Office of Public Affairs	Special Advisor for Digital Communications.	DE160075	3/8/2016

Agency name	Organization name	Position title	Authorization No.	Effective date
	Office of Assistant Secretary for Energy Efficiency and Renewable Energy.	Special Advisor for External Affairs	DE160076	3/8/2016
	Office of Technology Transition	Chief of Staff	DE160078	3/9/2016
	Office of Energy Policy and Systems Analysis.	Special Advisor	DE160079	3/9/2016
	Office of Assistant Secretary for Congressional and Intergovernmental Affairs.	Legislative Affairs Advisor	DE160070	3/4/2016
		Advisor for Intergovernmental and External Affairs.	DE160082	3/23/2016
	Office of Science	Special Advisor	DE160086	3/30/2016
Environmental Protection Agency	Scheduling Staff	Scheduler	EP160018	3/1/2016
	Office of Public Affairs	Deputy Press Secretary	EP160027	3/30/2016
Executive Office of the President	Council on Environmental Quality	Special Assistant, Climate Preparedness.	OP160003	3/17/2016
Department of Health and Human Services.	Office of the National Coordinator for Health Information Technology.	Director of Communications	DH160056	3/3/2016
	Office of the Assistant Secretary for Public Affairs.	Director of Speechwriting and Senior Advisor.	DH160078	3/17/2016
		Director of Specialty Media	DH160079	3/18/2016
		Senior Advisor	DH160080	3/22/2016
Department of Homeland Security	Office of the Under Secretary for Science and Technology.	Counselor for Export Controls	DM160107	3/1/2016
	Office of the Under Secretary for National Protection and Programs Directorate.	External Engagement Coordinator	DM160140	3/4/2016
	Office of the Executive Secretariat	Senior Advisor	DM160148	3/4/2016
	United States Customs and Border Protection.	Senior Advisor for Strategic Communication.	DM160136	3/7/2016
	Office of the Assistant Secretary for Policy.	Special Assistant In Information Sharing Policy.	DM160149	3/7/2016
	Office of the Chief of Staff	Deputy White House Liaison	DM160145	3/10/2016
	Office of Assistant Secretary for Legislative Affairs.	Legislative Director	DM160164	3/17/2016
		Associate Director (2)	DM160165	3/17/2016
			DM160182	3/30/2016
	Ombudsman, Citizenship and Immigration Services.	Special Assistant	DM160172	3/23/2016
	Office of the Executive Secretariat	Deputy Secretary Briefing Book Coordinator.	DM160169	3/24/2016
		Special Assistant	DM160170	3/24/2016
	Office of the Assistant Secretary for Intergovernmental Affairs.	Intergovernmental Affairs Coordinator.	DM160171	3/29/2016
	United States Immigration and Customs Enforcement.	Special Assistant	DM160181	3/30/2016
	Office of the Assistant Secretary for Public Affairs.	Assistant Press Secretary	DM160183	3/30/2016
Department of Housing and Urban Development.	Office of Congressional and Intergovernmental Relations.	Congressional Relations Specialist	DU160014	3/11/2016
	Office of Fair Housing and Equal Opportunity.	Special Policy Advisor	DU160021	3/29/2016
	Office of Public Affairs	Press Secretary	DU160019	3/30/2016
Department of Justice	Executive Office for United States Attorneys.	Counsel	DJ160063	3/8/2016
	Office of Legislative Affairs	Confidential Assistant	DJ160066	3/10/2016
Department of Labor	Office of the Secretary	Advisor	DL160046	3/1/2016
	Office of the Deputy Secretary	Counselor	DL160050	3/8/2016
	Office of Congressional and Intergovernmental Affairs.	Associate Counselor	DL160036	3/10/2016
	Office of Congressional and Intergovernmental Affairs.	Legislative Officer	DL160054	3/18/2016
	Women's Bureau	Chief of Staff	DL160047	3/10/2016
	Office of Congressional and Intergovernmental Affairs.	Senior Legislative Officer and Counselor.	DL160035	3/17/2016
	Office of Public Affairs	Digital Engagement Director	DL160053	3/18/2016
National Endowment for the Humanities.	Office of Communications	Digital Communications Strategist	NH160004	3/29/2016
Office of Management and Budget	Office of the Director	Confidential Assistant	BO160022	3/3/2016
	Office of Legislative Affairs	Deputy for Legislative Affairs	BO160025	3/14/2016
	National Security Programs	Confidential Assistant	BO160027	3/17/2016
	Office of the General Counsel	Confidential Assistant	BO160029	3/29/2016
	Office of the Director	Confidential Assistant	BO160030	3/29/2016
	Natural Resource Programs	Confidential Assistant	BO160031	3/29/2016

Agency name	Organization name	Position title	Authorization No.	Effective date
Office of National Drug Control Policy.	Office of Intergovernmental Public Liaison.	Digital Engagement Specialist	QQ160001	3/11/2016
Office of Personnel Management	Employee Services	Senior Advisor for Workforce Planning and Talent Development.	PM160017	3/8/2016
	Office of Congressional, Legislative, and Intergovernmental Affairs.	Senior Advisor	PM160018	3/8/2016
	Office of Communications	Deputy Director of Communication	PM160019	3/11/2016
Overseas Private Investment Corporation.	Overseas Private Investment Corporation.	Senior Advisor	PQ160007	3/1/2016
Small Business Administration	Office of the Administrator	Special Assistant to the Administrator.	SB160016	3/4/2016
		Senior Advisor	SB160018	3/8/2016
	Office of Communications and Public Liaison.	Speech Writer	SB160020	3/21/2016
Department of State	Office of the Deputy Secretary for Management and Resources.	Senior Advisor	DS160056	3/3/2016
	Bureau of Economic and Business Affairs.	Senior Advisor (Speechwriter)	DS160057	3/4/2016
	Bureau of East Asian and Pacific Affairs.	Deputy Assistant Secretary for Multilateral Affairs and Strategy.	DS160054	3/4/2016
	Office of International Information Programs.	Staff Assistant	DS160058	3/14/2016
	Bureau of Legislative Affairs	Principal Deputy Assistant Secretary.	DS160060	3/18/2016
	Office of the Under Secretary for Public Diplomacy and Public Affairs.	Staff Assistant	DS160061	3/18/2016
	Foreign Policy Planning Staff	Senior Advisor	DS160064	3/30/2016
Department of Transportation	Office of Public Affairs	Chief Speechwriter	DT160038	3/4/2016
		Deputy Press Secretary	DT160045	3/11/2016
	Office of Assistant Secretary for Governmental Affairs.	Director of Governmental Affairs	DT160041	3/11/2016
	Office of General Counsel	Special Counsel	DT160044	3/11/2016
	National Highway Traffic Safety Administration.	Director of Communications	DT160043	3/18/2016
Department of the Treasury	Office of the Secretary of the Treasury.	Senior Advisor (2)	DY160060	3/1/2016
			DY160062	3/1/2016
	Office of Assistant Secretary (Public Affairs).	Spokesperson (2)	DY160061	3/1/2016
			DY160063	3/25/2016
		Senior Speechwriter	DY160065	3/24/2016
Department of Veterans Affairs	Office of Intergovernmental Affairs	Special Assistant	DV160025	3/10/2016

The following Schedule C appointing authorities were revoked during March 2016.

Agency name	Organization name	Position title	Request number	Date vacated
Department of Agriculture	Office of the Secretary	Special Advisor	DA150118	03/11/2016
	Office of the Assistant Secretary for Congressional Relations.	Senior Legislative Analyst	DA150035	03/19/2016
	Office of the Chief Financial Officer	Chief of Staff	DA150031	03/19/2016
	Office of the Under Secretary for Rural Development.	Special Assistant	DA150150	03/19/2016
Department of Commerce	Office of Public Affairs	Deputy Director of Public Affairs and Director of Speechwriting.	DC160015	03/05/2016
Office of the Secretary of Defense	Office of the Assistant Secretary of Defense (International Security Affairs).	Special Assistant to the Assistant Secretary of Defense for International Security Affairs.	DD150037	03/05/2016
	Office of the Assistant Secretary of Defense (Legislative Affairs).	Special Assistant (2)	DD150141	03/06/2016
			DD150034	03/19/2016
	Washington Headquarters Services.	Defense Fellow	DD140024	03/06/2016
	Office of Assistant Secretary of Defense (Public Affairs).	Research Assistant	DD150012	03/19/2016
	Office of the Secretary	Special Assistant to the Secretary of Defense.	DD150155	03/19/2016
Department of the Air Force	Office of the Under Secretary	Special Assistant	DF140031	03/05/2016
	Office of the Secretary	Executive Speechwriter	DF110016	03/19/2016

Agency name	Organization name	Position title	Request number	Date vacated
Department of Education	Office of the Secretary	Director, White House Liaison	DB110105	03/04/2016
		Deputy White House Liaison	DB150050	03/19/2016
	Office of Communications and Outreach.	Strategic Advisor to the Secretary, Communications.	DB150087	03/05/2016
	Office of Planning, Evaluation and Policy Development.	Special Assistant	DB150002	03/05/2016
	Office of the Deputy Secretary	Director for Strategic Communications and Scheduling.	DB150088	03/05/2016
	Office of the Under Secretary	Special Assistant	DB150113	03/05/2016
Department of Energy	Office of the Secretary	Special Advisor for Finance	DE140003	03/05/2016
Department of Health and Human Services.	Office of Intergovernmental and External Affairs.	Confidential Assistant	DH140050	03/05/2016
	Office of the Assistant Secretary for Public Affairs.	Director of Speechwriting	DH150128	03/19/2016
Department of Homeland Security	Office of the Assistant Secretary for Public Affairs.	Deputy Press Secretary	DM150222	03/04/2016
		Deputy Director of Speechwriting	DM140142	03/19/2016
		Press Secretary	DM150225	03/19/2016
	Office of the Executive Secretariat	Special Projects Coordinator	DM150265	03/05/2016
	Office of the Under Secretary for National Protection and Programs Directorate.	Confidential Assistant	DM150063	03/05/2016
	Office of the Under Secretary for Science and Technology.	Special Assistant to the Under Secretary and Deputy Secretary for Science and Technology.	DM150193	03/05/2016
	United States Customs and Border Protection.	Advisor to the commissioner	DM140213	03/05/2016
	Office of the Assistant Secretary for Intergovernmental Affairs.	External Engagement Coordinator	DM150035	03/11/2016
	Office of the Assistant Secretary for Policy.	Special Assistant in Information Sharing Policy.	DM150051	03/19/2016
	Office of the Chief of Staff	Deputy White House Liaison	DM160001	03/19/2016
Department of Justice	Office of Legislative Affairs	Confidential Assistant	DJ140110	03/05/2016
	Office of Public Affairs	Chief Speechwriter	DJ150093	03/05/2016
	Office on Violence Against Women	Special Assistant	DJ150071	03/05/2016
	Executive Office for United States Attorneys.	Counsel	DJ150016	03/19/2016
	Office of the Associate Attorney General.	Senior Counsel	DJ150012	03/19/2016
Office of Personnel Management	Office of the Director	Director of Scheduling and Advance.	PM140032	03/19/2016
Department of Transportation	Office of the General Counsel	Associate General Counsel	DT160017	03/04/2016
	Office of the Assistant Secretary for Governmental Affairs.	Deputy Assistant Secretary for Governmental Affairs.	DT140029	03/05/2016
	Office of the Assistant Secretary for Governmental Affairs.	Associate Director for State and Local Governmental Affairs.	DT150013	03/19/2016
	Office of Public Affairs	Deputy Director for Public Affairs	DT150042	03/05/2016
		Assistant Press Secretary	DT150048	03/19/2016
	Office of the Administrator	Director of Communications	DT150018	03/19/2016
	Office of the Assistant Secretary for Budget and Programs.	Special Assistant	DT140039	03/19/2016
Department of the Treasury	Office of the Assistant Secretary (Public Affairs).	Senior Speechwriter	DY160012	03/26/2016

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218.

U.S. Office of Personnel Management.

Beth F. Cobert,

Acting Director.

[FR Doc. 2016–27900 Filed 11–18–16; 8:45 am]

BILLING CODE 6325–39–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2017–40; MC2017–21 and CP2017–41]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* November 23, 2016 (Comment due date applies to all Docket Nos. listed above).

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's Web site (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.40.

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2017–40; *Filing Title:* Notice of the United States Postal Service of Filing a Functionally Equivalent Global Plus 1D Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* November 15, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Curtis E. Kidd; *Comments Due:* November 23, 2016.

2. *Docket No(s).:* MC2017–21 and CP2017–41; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Express, Priority Mail & First-Class Package Service Contract 12 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* November 15, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Curtis E. Kidd; *Comments Due:* November 23, 2016.

This notice will be published in the **Federal Register**.

Stacy L. Ruble,

Secretary.

[FR Doc. 2016–27972 Filed 11–18–16; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* November 21, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 14, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 258 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–19, CP2017–38.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–27889 Filed 11–18–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* November 21, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 14, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add First-Class Package Service Contract 66 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–20, CP2017–39.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–27888 Filed 11–18–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* November 21, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 14, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 257 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–18, CP2017–37.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–27890 Filed 11–18–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* November 21, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 14, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 256 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–17, CP2017–36.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–27899 Filed 11–18–16; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79313; File No. SR–NYSE–2016–74]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Fees for NYSE BBO and NYSE Trades To Lower the Enterprise Fee

November 15, 2016.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 1, 2016, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the fees for NYSE BBO and NYSE Trades to lower the Enterprise Fee. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the fees for NYSE BBO and NYSE Trades market data products,[4] as set forth on the NYSE Proprietary Market Data Fee Schedule (''Fee Schedule''). Specifically, the Exchange proposes to lower the Enterprise Fee. The Exchange proposes to make the fee change effective November 1, 2016.

The Exchange currently charges an enterprise fee of $185,000 per month for an unlimited number of professional and non-professional users for each of NYSE BBO and NYSE Trades.[5] A single Enterprise Fee applies for clients receiving both NYSE BBO and NYSE Trades.[6] The Exchange proposes to lower the enterprise fee to $37,500 per month.

As an example, under the current fee structure for per user fees, if a firm had 40,000 professional users who each received NYSE Trades at $4 per month and NYSE BBO at $4 per month, without the Enterprise Fee, the firm would be subject to $320,000 per month in professional user fees. Under the current pricing structure, the charge would be capped at $185,000 and effective November 1, 2016 it would be capped at $37,500.

Under the proposed enterprise fee, the firm would pay a flat fee of $37,500 for an unlimited number of professional and non-professional users for both products. As is the case currently, a data recipient that pays the enterprise fee would not have to report the number of such users on a monthly basis.[7] However, every six months, a data recipient must provide the Exchange with a count of the total number of natural person users of each product, including both professional and non-professional users.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[8] in general, and Sections 6(b)(4) and 6(b)(5) of the Act,[9] in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of the data and is not designed to permit unfair discrimination among customers, issuers, and brokers.

The proposed fee change is also equitable and not unfairly discriminatory because it would apply to all data recipients that choose to subscribe to NYSE BBO and NYSE Trades.

The proposed enterprise fees for NYSE BBO and NYSE Trades are reasonable because they could result in a fee reduction for data recipients with a large number of professional and nonprofessional users, as described in the example above. If a data recipient

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release Nos. 61914 (Apr. 14, 2010), 74 [sic] FR 21077 (Apr. 22, 2010) (SR–NYSE–2010–30) (notice—NYSE BBO); 62181 (May 26, 2010), 75 FR 31488 (June 3, 2010) (SR–NYSE–2010–30) (approval order—NYSE BBO); 59309 (Jan. 28, 2009), 74 FR 6073 (Feb. 4, 2009) (SR–NYSE–2009–04) (notice—NYSE Trades); and 59309 (Mar. 19, 2009), 74 FR 13293 (Mar. 26, 2009) (approval order—NYSE Trades) (SR–NYSE–2009–04) and 62038 (May 5, 2010), 75 FR 26825 (May 12, 2010) (SR–NYSE–2010–22).

[5] *See* Securities Exchange Act Release No. 76912 (January 14, 2016), 81 FR 3490 (January 21, 2016) (SR–NYSE–2016–03).

[6] *See* Securities Exchange Act Release No. 70211 (August 15, 2013), 78 FR 51781 (August 21, 2013) (SR–NYSE–2013–58).

[7] Professional users currently are subject to a per display device count. *See* Securities [sic] Act Release No. 73985 (January 5, 2015), 80 FR 1456 (January 9, 2015) (SR–NYSE–2014–75).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4), (5).

has a smaller number of professional users of NYSE BBO and/or NYSE Trades, then it may continue to use the per user fee structure. By reducing prices for data recipient with a large number of professional and non-professional users, the Exchange believes that more data recipients may choose to offer NYSE BBO and NYSE Trades, thereby expanding the distribution of this market data for the benefit of investors. The Exchange also believes that offering an enterprise fee expands the range of options for offering NYSE BBO and NYSE Trades and allows data recipients greater choice in selecting the most appropriate level of data and fees for the professional and non-professional users they are servicing.

The Exchange notes that NYSE BBO and NYSE Trades are entirely optional. The Exchange is not required to make NYSE BBO and NYSE Trades available or to offer any specific pricing alternatives to any customers, nor is any firm required to purchase NYSE BBO and NYSE Trades. Firms that do purchase NYSE BBO and NYSE Trades do so for the primary goals of using them to increase revenues, reduce expenses, and in some instances compete directly with the Exchange (including for order flow); those firms are able to determine for themselves whether NYSE BBO and NYSE Trades or any other similar products are attractively priced or not.[10]

Firms that do not wish to purchase NYSE BBO and NYSE Trades have a variety of alternative market data products from which to choose,[11] or if NYSE BBO and NYSE Trades do not provide sufficient value to firms as offered based on the uses those firms have or planned to make of it, such firms may simply choose to conduct their business operations in ways that do not use NYSE BBO and NYSE Trades or use them at different levels or in different configurations. The Exchange notes that broker-dealers are not required to purchase proprietary market data to comply with their best execution obligations.[12]

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010), upheld reliance by the Securities and Exchange Commission (''Commission'') upon the existence of competitive market mechanisms to set reasonable and equitably allocated fees for proprietary market data:

> In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.'

Id. at 535 (quoting H.R. Rep. No. 94–229 at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 323). The court agreed with the Commission's conclusion that ''Congress intended that 'competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.' ''[13]

As explained below in the Exchange's Statement on Burden on Competition, the Exchange believes that there is substantial evidence of competition in the marketplace for proprietary market data and that the Commission can rely upon such evidence in concluding that the fees established in this filing are the product of competition and therefore satisfy the relevant statutory standards. In addition, the existence of alternatives to these data products, such as consolidated data and proprietary data from other sources, as described below, further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can select such alternatives.

As the *NetCoalition* decision noted, the Commission is not required to undertake a cost-of-service or ratemaking approach. The Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for proprietary market data would be so complicated that it could not be done practically or offer any significant benefits.[14]

In addition, the Exchange believes that the proposed fees are reasonable when compared to fees for comparable products offered by at least one other exchange. For example, Bats BZX Exchange (''BYX'') charges an enterprise fee of $15,000 per month for each of BZX Top and BZX Last Sale, which includes best bid and offer and last sale data, respectively.[15] While the Exchange is proposing enterprise fees that would be higher than the fees currently charged by BZX, the Exchange believes the proposed fees, which would be lower than current fees, are appropriate and would be beneficial to firms with a large number of users.

For these reasons, the Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory.

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. An exchange's ability to price its proprietary market data feed products is constrained by actual competition for the sale of proprietary market data products, the joint product nature of exchange platforms, and the existence of alternatives to the Exchange's proprietary data.

The Existence of Actual Competition

The market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary for the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with one another for listings and order flow and sales of market data itself, providing ample opportunities for entrepreneurs who wish to compete in any or all of those areas, including producing and distributing their own market data.

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[10] *See, e.g.,* Proposing Release on Regulation of NMS Stock Alternative Trading Systems, Securities Exchange Act Release No. 76474 (Nov. 18, 2015) (File No. S7–23–15). *See also,* ''Brokers Warned Not to Steer Clients' Stock Trades Into Slow Lane,'' Bloomberg Business, December 14, 2015 (Sigma X dark pool to use direct exchange feeds as the primary source of price data).

[11] *See* NASDAQ Rule 7047 (Nasdaq Basic) and BATS [sic] Rule 11.22 (BATS TOP and Last Sale).

[12] *See* FINRA Regulatory Notice 15–46, ''Best Execution,'' November 2015.

[13] *NetCoalition,* 615 F.3d at 535.

[14] The Exchange believes that cost-based pricing would be impractical because it would create enormous administrative burdens for all parties and the Commission to cost-regulate a large number of participants and standardize and analyze extraordinary amounts of information, accounts, and reports. In addition, and as described below, it is impossible to regulate market data prices in isolation from prices charged by markets for other services that are joint products. Cost-based rate regulation would also lead to litigation and may distort incentives, including those to minimize costs and to innovate, leading to further waste. Under cost-based pricing, the Commission would be burdened with determining a fair rate of return, and the industry could experience frequent rate increases based on escalating expense levels. Even in industries historically subject to utility regulation, cost-based ratemaking has been discredited. As such, the Exchange believes that cost-based ratemaking would be inappropriate for proprietary market data and inconsistent with Congress's direction that the Commission use its authority to foster the development of the national market system, and that market forces will continue to provide appropriate pricing discipline. *See* Appendix C to NYSE's comments to the Commission's 2000 Concept Release on the Regulation of Market Information Fees and Revenues, which can be found on the Commission's Web site at *http://www.sec.gov/rules/concept/s72899/buck1.htm.*

[15] *See* Market Data Fees at *https://batstrading.com/support/fee_schedule/bzx/.*

Proprietary data products are produced and distributed by each individual exchange, as well as other entities, in a vigorously competitive market. Indeed, the U.S. Department of Justice (''DOJ'') (the primary antitrust regulator) has expressly acknowledged the aggressive actual competition among exchanges, including for the sale of proprietary market data. In 2011, the DOJ stated that exchanges ''compete head to head to offer real-time equity data products. These data products include the best bid and offer of every exchange and information on each equity trade, including the last sale.'' [16]

Moreover, competitive markets for listings, order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products and therefore constrain markets from overpricing proprietary market data. Broker-dealers send their order flow and transaction reports to multiple venues, rather than providing them all to a single venue, which in turn reinforces this competitive constraint. As a 2010 Commission Concept Release noted, the ''current market structure can be described as dispersed and complex'' with ''trading volume . . . dispersed among many highly automated trading centers that compete for order flow in the same stocks'' and ''trading centers offer[ing] a wide range of services that are designed to attract different types of market participants with varying trading needs.'' [17] More recently, SEC Chair Mary Jo White has noted that competition for order flow in exchange-listed equities is ''intense'' and divided among many trading venues, including exchanges, more than 40 alternative trading systems, and more than 250 broker-dealers.[18]

If an exchange succeeds in competing for quotations, order flow, and trade executions, then it earns trading revenues and increases the value of its proprietary market data products because they will contain greater quote and trade information. Conversely, if an exchange is less successful in attracting quotes, order flow, and trade executions, then its market data products may be less desirable to customers in light of the diminished content and data products offered by competing venues may become more attractive. Thus, competition for quotations, order flow, and trade executions puts significant pressure on an exchange to maintain both execution and data fees at reasonable levels.

In addition, in the case of products that are also redistributed through market data vendors, such as Bloomberg and Thompson Reuters, the vendors themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models. For example, vendors that assess a surcharge on data they sell are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers. Vendors will not elect to make available NYSE BBO or NYSE Trades unless their customers request it, and customers will not elect to pay the proposed fees unless NYSE BBO and NYSE Trades can provide value by sufficiently increasing revenues or reducing costs in the customer's business in a manner that will offset the fees. All of these factors operate as constraints on pricing proprietary data products.

Joint Product Nature of Exchange Platform

Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, proprietary market data and trade executions are a paradigmatic example of joint products with joint costs. The decision of whether and on which platform to post an order will depend on the attributes of the platforms where the order can be posted, including the execution fees, data availability and quality, and price and distribution of data products. Without a platform to post quotations, receive orders, and execute trades, exchange data products would not exist.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's platform for posting quotes, accepting orders, and executing transactions and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs.

Moreover, an exchange's broker-dealer customers generally view the costs of transaction executions and market data as a unified cost of doing business with the exchange. A broker-dealer will only choose to direct orders to an exchange if the revenue from the transaction exceeds its cost, including the cost of any market data that the broker-dealer chooses to buy in support of its order routing and trading decisions. If the costs of the transaction are not offset by its value, then the broker-dealer may choose instead not to purchase the product and trade away from that exchange.

Other market participants have noted that proprietary market data and trade executions are joint products of a joint platform and have common costs.[19] The Exchange agrees with and adopts those discussions and the arguments therein. The Exchange also notes that the economics literature confirms that there is no way to allocate common costs between joint products that would shed any light on competitive or efficient pricing.[20]

[16] Press Release, U.S. Department of Justice, Assistant Attorney General Christine Varney Holds Conference Call Regarding NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandoning Their Bid for NYSE Euronext (May 16, 2011), *available* at *http://www.justice.gov/iso/opa/atr/speeches/2011/at-speech-110516.html; see also* Complaint in *U.S.* v. *Deutsche Borse AG and NYSE Euronext,* Case No. 11–cv–2280 (D.C. Dist.) ¶ 24 (''NYSE and Direct Edge compete head-to-head . . . in the provision of real-time proprietary equity data products.'').

[17] Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (Jan. 14, 2010), 75 FR 3594 (Jan. 21, 2010) (File No. S7–02–10). This Concept Release included data from the third quarter of 2009 showing that no market center traded more than 20% of the volume of listed stocks, further evidencing the dispersal of and competition for trading activity. *Id.* at 3598. Data available on ArcaVision show that from June 30, 2013 to June 30, 2014, no exchange traded more than 12% of the volume of listed stocks by either trade or dollar volume, further evidencing the continued dispersal of and fierce competition for trading activity. *See.*

[18] Mary Jo White, Enhancing Our Equity Market Structure, Sandler O'Neill & Partners, L.P. Global Exchange and Brokerage Conference (June 5, 2014) (available on the Commission Web site), citing Tuttle, Laura, 2014, ''OTC Trading: Description of Non-ATS OTC Trading in National Market System Stocks,'' at 7–8.

[19] *See* Securities Exchange Act Release No. 72153 (May 12, 2014), 79 FR 28575, 28578 n.15 [sic] (May 16, 2014) (SR–NASDAQ–2014–045) (''[A]ll of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.''). *See also* Securities Exchange Act Release No. 62907 (Sept. 14, 2010), 75 FR 57314, 57317 (Sept. 20, 2010) (SR–NASDAQ–2010–110), and Securities Exchange Act Release No. 62908 (Sept. 14, 2010), 75 FR 57321, 57324 (Sept. 20, 2010) (SR–NASDAQ–2010–111).

[20] *See generally* Mark Hirschey, Fundamentals of Managerial Economics, at 600 (2009) (''It is important to note, however, that although it is possible to determine the separate marginal costs of goods produced in variable proportions, it is impossible to determine their individual average costs. This is because common costs are expenses necessary for manufacture of a joint product. Common costs of production—raw material and equipment costs, management expenses, and other overhead—cannot be allocated to each individual by-product on any economically sound basis. . . . Any allocation of common costs is wrong and arbitrary.''). This is not new economic theory. *See,*

Continued

Analyzing the cost of market data product production and distribution in isolation from the cost of all of the inputs supporting the creation of market data and market data products will inevitably underestimate the cost of the data and data products because it is impossible to obtain the data inputs to create market data products without a fast, technologically robust, and well-regulated execution system, and system and regulatory costs affect the price of both obtaining the market data itself and creating and distributing market data products. It would be equally misleading, however, to attribute all of an exchange's costs to the market data portion of an exchange's joint products. Rather, all of an exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

As noted above, the level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including 13 equities self-regulatory organization (''SRO'') markets, as well as various forms of alternative trading systems (''ATSs''), including dark pools and electronic communication networks (''ECNs''), and internalizing broker-dealers. SRO markets compete to attract order flow and produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting Facilities compete to attract transaction reports from the non-SRO venues.

Competition among trading platforms can be expected to constrain the aggregate return that each platform earns from the sale of its joint products, but different trading platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market data products (or provide market data products free of charge), and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market data products, and setting relatively low prices for accessing posted liquidity. For example, BATS Global Markets (''Bats'') and Direct Edge, which previously operated as ATSs and obtained exchange status in 2008 and 2010, respectively, provided certain market data at no charge on their Web sites in order to attract more order flow, and used revenue rebates from resulting additional executions to maintain low execution charges for their users.[21] In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering.

Existence of Alternatives

The large number of SROs, ATSs, and internalizing broker-dealers that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, ATS, and broker-dealer is currently permitted to produce and sell proprietary data products, and many currently do, including but not limited to the Exchange, NYSE Arca, Inc., NYSE MKT LLC, NASDAQ, Bats [sic], and Direct Edge.

The fact that proprietary data from ATSs, internalizing broker-dealers, and vendors can bypass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products. By way of example, Bats [sic] and NYSE Arca both published proprietary data on the Internet before registering as exchanges. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the amount of data available via proprietary products is greater in size than the actual number of orders and transaction reports that exist in the marketplace. Indeed, in the case of NYSE BBO and NYSE Trades, the data provided through these products appears both in (i) real-time core data products offered by the Securities Information Processors (SIPs) for a fee, and (ii) free SIP data products with a 15-minute time delay, and finds a close substitute in similar products of competing venues.[22] Because market data users can find suitable substitutes for most proprietary market data products, a market that overprices its market data products stands a high risk that users may substitute another source of market data information for its own.

Those competitive pressures imposed by available alternatives are evident in the Exchange's proposed pricing.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid and inexpensive. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TrackECN, BATS Trading and Direct Edge. A proliferation of dark pools and other ATSs operate profitably with fragmentary share of consolidated market volume.

In determining the proposed changes to the fees for the NYSE BBO and NYSE Trades, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all users. The existence of numerous alternatives to the Exchange's products, including proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if the attendant fees are not justified by the returns that any particular vendor or data recipient would achieve through the purchase.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[23] of the Act and

e.g., F.W. Taussig, ''A Contribution to the Theory of Railway Rates,'' *Quarterly Journal of Economics* V(4) 438, 465 (July 1891) (''Yet, surely, the division is purely arbitrary. These items of cost, in fact, are jointly incurred for both sorts of traffic; and I cannot share the hope entertained by the statistician of the Commission, Professor Henry C. Adams, that we shall ever reach a mode of apportionment that will lead to trustworthy results.'').

[21] This is simply a securities market-specific example of the well-established principle that in certain circumstances more sales at lower margins can be more profitable than fewer sales at higher margins; this example is additional evidence that market data is an inherent part of a market's joint platform.

[22] *See supra* note 15.

[23] 15 U.S.C. 78s(b)(3)(A).

subparagraph (f)(2) of Rule 19b–4 [24] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [25] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2016–74 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–NYSE–2016–74. This file number should be included on the subject line if e-mail 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–NYSE–2016–74 and should be submitted on or before December 12, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

Brent J. Fields,

Secretary.

[FR Doc. 2016–27893 Filed 11–18–16; 8:45 am]

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[24] 17 CFR 240.19b–4(f)(2).

[25] 15 U.S.C. 78s(b)(2)(B).

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79317; File No. SR–NASDAQ–2016–121]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change Related to the Payment of a Credit by Execution Access, LLC Based on Volume Thresholds Met on the NASDAQ Options Market

November 15, 2016.

I. Introduction

On August 29, 2016, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change related to the payment of a credit by Execution Access, LLC (''EA'') that would be based on volume thresholds met on the NASDAQ Options Market LLC (''NOM''). The proposed rule change was published for comment in the **Federal Register** on September 8, 2016.[3] On October 19, 2016, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] To date, the Commission has received no comment letters on the proposal. This order institutes proceedings under Section 19(b)(2)(B) of the Act [6] to determine whether to approve or disapprove the proposed rule change.

II. Summary of the Proposed Rule Change

Under the proposal, EA [7] would offer a credit to its clients who are also NOM Participants (''dual access clients''),[8] provided they qualify for one of the two highest Market Access and Routing Subsidy (''MARS'') Payment tiers available on NOM. According to the Exchange, NOM Participants that have System Eligibility [9] and have executed the requisite number of Eligible

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 78749 (September 1, 2016), 81 FR 62212 (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 79118, 81 FR 73186 (October 24, 2016). The Commission designated December 7, 2016 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[6] 15 U.S.C. 78s(b)(2)(B).

[7] According to the Exchange, EA is a broker-dealer that operates a fully electronic central limit order book known as eSpeed, and it facilitates the matching of client orders in U.S. Treasury securities. *See* Notice, *supra* note 3, at 62212 n.3.

[8] As proposed, the dual access client may be an affiliate entity of the NOM Participant. *See id.* at 62212. Affiliates would include other legal entities under common control. *See id.* at 62212 n.4.

[9] At the time the Exchange initially submitted this proposal, to qualify for MARS, a Participant's routing system (''System'') was required to: (1) Enable the electronic routing of orders to all of the U.S. options exchanges, including NOM; (2) provide current consolidated market data from the U.S. options exchanges; and (3) be capable of interfacing with NOM's API to access current NOM match engine functionality. Further, the Participant's System needed to cause NOM to be one of the top three default destination exchanges for individually executed marketable orders if NOM is at the national best bid or offer (''NBBO''), regardless of size or time, but allow any user to manually override NOM as a default destination on an order-by-order basis. Any NOM Participant was permitted to avail itself of this arrangement, provided that its order routing functionality incorporates the features described above and satisfies NOM that it appears to be robust and reliable. The Participant remained solely responsible for implementing and operating its System. *See id.* at 62213 n.6. The Commission notes that the Exchange recently modified MARS, including the System Eligibility requirements. *See* NOM Rules at Chapter XV, Section 2(6). *See also* Securities Exchange Act Release No. 79251 (November 7, 2016), 81 FR 79536 (November 14, 2016) (SR–NASDAQ–2016–149) (''MARS Amendment'') (modifying the MARS System Eligibility requirements to provide that ''the Participant's System would also need to cause NOM to be the one of the top three default destination exchanges for (a) individually executed marketable orders if NOM is at the [NBBO], regardless of size or time *or (b) orders that establish a new NBBO on NOM's Order Book,* but allow any user to manually override NOM as a default destination on an order-by-order basis'') (emphasis added).

Contracts[10] in a month are paid MARS rebates based on average daily volume (''ADV'') in the month.[11] If a NOM Participant meets these requirements, the Exchange pays a MARS Payment on all executed Eligible Contracts that add liquidity and that are routed to NOM through the NOM Participant's System.[12]

Under the proposal, if a dual access client qualifies for NOM's MARS Payment Tier 2 in a given month, EA would credit the dual access client (or the dual access client's affiliate, if applicable) $22,000 on its EA bill for the corresponding month.[13] If a dual access client qualifies for NOM's MARS Payment Tier 3 in a given month, EA would credit the dual access client (or the dual access client's affiliate, if applicable) $40,000 on its EA bill for the corresponding month.[14] This credit would be paid by EA, would not be transferable, and would offset transaction fees on EA.[15] According to the Exchange, the purpose of this proposal is to lower prices to transact U.S. Treasury securities on EA in response to competitive forces in the Treasury markets, and to increase trading on NOM.[16]

III. Proceedings To Determine Whether To Approve or Disapprove SR–NASDAQ–2016–121 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[17] to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[18] the Commission is providing notice of the grounds for disapproval under consideration. As discussed above, under the proposal, EA would provide credits to dual access clients who meet certain volume thresholds on NOM. The Act requires that exchange rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; that exchange rules not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and that exchange rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Commission intends to assess whether the Exchange's proposal is consistent with these and other requirements of the Act.

The Commission believes it is appropriate to institute disapproval proceedings at this time in view of the legal and policy issues raised by the proposal. The sections of the Act applicable to the proposed rule change include:

- Section 6(b)(4) of the Act,[19] which requires that the rules of a national securities exchange ''provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.''
- Section 6(b)(5) of the Act,[20] which requires that the rules of a national securities exchange be designed to, among other things, ''remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest'' and not be ''designed to permit unfair discrimination between customers, issuers, brokers, or dealers.''
- Section 6(b)(8) of the Act,[21] which requires that the rules of a national securities exchange ''not impose any burden on competition not necessary or appropriate'' in furtherance of the purposes of the Act.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[22] Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by December 12, 2016. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by December 27, 2016.

The Commission invites the written views of interested persons concerning whether the proposal is consistent with Sections 6(b)(4), 6(b)(5), 6(b)(8), or any other provision of the Act, or the rules and regulations thereunder. The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following:

1. Do commenters agree with the Exchange's belief that the proposal: (a) Provides for the equitable allocation of reasonable dues, fees, and other charges among its members and issuer and other persons using its facilities; (b) is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and (c) will not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act? Why or why not?

2. What are commenters' views on the impact that the proposal would have on the current market structure? Please explain.

3. What are commenters' views on the likely effect of the proposal on competition? Specifically, what are commenters' views on the likely effect on the fees, volume, and quality of trading on NOM, EA, and the platforms that compete with NOM or EA for volume? In providing an answer, please consider any effect on the structure and process of competition, including number of competitors and/or any exit

[10] MARS Eligible Contracts include electronic Firm, Non-NOM Market Maker, Broker-Dealer, or Joint Back Office orders that add liquidity, excluding Mini Options. *See* NOM Rules at Chapter XV, Section 2(6); *see also* Notice, *supra* note 3, at 62213 n.7.

[11] At the time the Exchange initially submitted this proposal, the Exchange had three tiers of MARS Payments: $0.07 for ADV of 2,500 Eligible Contracts; $0.09 for ADV of 5,000 Eligible Contracts (''Payment Tier 2''); and $0.11 for ADV of 10,000 Eligible Contracts (''Payment Tier 3''). *See* Notice, *supra* note 3, at 62213. The Commission notes that, as a result of recent modifications to MARS, the Exchange now has four tiers of MARS Payments, as well as different MARS Payments for penny pilot options and non-penny pilot options. *See* NOM Rules at Chapter XV, Section 2(6); *see also* MARS Amendment, *supra* note 9.

[12] *See* NOM Rules at Chapter XV, Section 2(6); *see also* Notice, *supra* note 3, at 62213.

[13] *See* Notice, *supra* note 3, at 62213.

[14] *See id.*

[15] *See id.* at 62213 n.8.

[16] *See id.* at 62212–13.

[17] 15 U.S.C. 78s(b)(2)(B).

[18] *Id.*

[19] 15 U.S.C. 78f(b)(4).

[20] 15 U.S.C. 78f(b)(5).

[21] 15 U.S.C. 78f(b)(8).

[22] Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

from the market that might arise from the proposal.

4. What are commenters' views on how the proposal would affect NOM Participants and EA clients? Would the ''dual access'' requirement affect the number NOM Participants or EA clients?

5. What are commenters' views on the impact of the proposal on NOM Participants who would meet the required MARS thresholds but are not dual access clients and thus would not be able to benefit from the credit on EA?

6. What are commenters' views on the impact of the proposal on EA clients who are not NOM Participants and thus would not be eligible for the credits?

7. What are commenters' views on how EA would likely recoup the cost of the proposed credit?

8. What are commenters' views on whether the proposal would affect competitors to NOM and EA or clients of such competitors? Specifically, what are commenters' views on the impact of the proposal on exchanges that do not have affiliated broker-dealers/Alternative Trading Systems that transact securities not listed on a national securities exchange—*e.g.,* U.S. Treasury securities? Would the proposal lead to a decline in number of clients, or client volume for competitors?

9. What are commenters' views on how the proposal would impact the incentives for existing exchanges or new entities to create multiple trading venues or broker-dealers/Alternative Trading Systems under one group?

10. What are commenters' views on the impact the proposal would have, if any, on the trading of options orders across multiple options exchanges? Please explain. What are commenters' views on the impact the proposal would have, if any, on the best execution of investor orders, including the implicit costs of executing their orders (such as spreads and price impact)? Please explain.

Commenters are requested to provide empirical data and other factual support for their views.

Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2016–121 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2016–121. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet 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–NASDAQ–2016–121 and should be submitted on or before December 12, 2016. Rebuttal comments should be submitted by December 27, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Brent J. Fields,

Secretary.

[FR Doc. 2016–27897 Filed 11–18–16; 8:45 am]

BILLING CODE 8011–01–P

[23] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79316; File No. SR–NYSE–2016–45]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Change, as Modified by Amendment Nos. 1 and 2, Amending the Co-Location Services Offered by the Exchange To Add Certain Access and Connectivity Fees

November 15, 2016.

I. Introduction

On July 29, 2016, the New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change (1) to provide additional information regarding access to various trading and execution services; connectivity to market data feeds and testing and certification feeds; connectivity to Third Party Systems; and connectivity to DTCC provided to Users using data center local area networks; and (2) to establish fees relating to a User's access to various trading and execution services; connectivity to market data feeds and testing and certification feeds; connectivity to DTCC; and other services. The proposed rule change was published for comment in the **Federal Register** on August 17, 2016.[3] The Exchange filed Amendment No. 1 to the proposed rule change on August 16, 2016.[4] Amendment No. 1 was published for comment in the **Federal Register** on September 26, 2016.[5] The Commission received one comment in response to the proposed rule change, as modified

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 34–78556 (August 11, 2016), 81 FR 54877 (''Original Notice'').

[4] Amendment No. 1 (i) Amended the third party data feed MSCI from 20 Gigabite (''Gb'') to 25 Gb and amended the price from $2,000 to $1,200; (ii) clarified the costs associated with providing a greater amount of bandwidth for Premium NYSE Data Products for a particular market as compared to the bandwidth requirements for the Included Data Products for that same market; (iii) provided further details on Premium NYSE Data Products, including their composition, product release dates, and further detail on the reasonableness of their applicable fees; (iv) added an explanation for the varying fee differences for the same Gb usage for third party data feeds, DTCC, and Virtual Control Circuit.

[5] *See* Securities Exchange Act Release No. 34–78887 (September 20, 2016), 81 FR 66095. (''Notice'')

by Amendment No. 1 and the Exchange responded.[6] On October 4, 2016, the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to November 15, 2016.[7]

On November 2, 2016, the Exchange filed Amendment No. 2 to the proposed rule change.[8] The Commission is publishing this order to solicit comments on Amendment No. 2 from interested persons and to institute proceedings pursuant to Exchange Act Section 19(b)(2)(B) to determine whether to approve or disapprove the proposed rule change, as modified by Amendment Nos. 1 and 2.[9] Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to the proposed rule change, nor does it mean that the Commission will ultimately disapprove the proposed rule change. Rather, as discussed below, the Commission seeks additional input on the proposed rule change, as modified by Amendment Nos. 1 and 2, and on the issues presented by the proposal.

II. Description of the Proposed Rule Change, as Modified by Amendment Nos. 1 and 2

The proposed rule change seeks to amend the co-location services offered by the Exchange to (1) provide additional information regarding access to trading and execution services and connectivity to data provided to Users with local area networks available in the data center; and (2) establish fees relating to a User's [10] access to trading and execution services; connectivity to data feeds and to testing and certification feeds; connectivity to clearing; and other services.[11]

Background and Access to Exchange Systems

As discussed more fully in the Notice, a User can purchase access to the Liquidity Center Network (''LCN'') and/or internet protocol (''IP'') network in the data center through the purchase of a 1, 10, or 40 Gb LCN circuit, a 10 Gb LX Circuit, bundled network access, Partial Cabinet Solution bundle, or 1, 10 or 40 Gb IP network access.[12] The purchase of any of the LCN or IP network circuit options gives a User access [13] to the Exchange's trading and execution systems, connectivity to the Exchange's certification and testing feeds,[14] and the ability to connect to any NYSE Data Product.[15] More specifically, access to the Exchange's trading and execution system provides a User with access to the Exchange's ''customer gateways that provide for order entry, order receipt (*i.e.* confirmation that an order has been received), receipt of drop copies and trade reporting (*i.e.* whether a trade is executed or cancelled), as well as for sending information to shared data services for clearing and settlement.'' [16] The Exchange seeks to add clarifying language in its proposed rule to reflect the services included with purchase of Exchange system access.[17]

Connectivity to Included Data Products

As discussed more fully below, the Exchange offers connectivity to three types of data products: Included Data Products, Premium NYSE Data Products, and Third Party Data Feeds.[18] As discussed more fully in the Notice, the Included Data Products include Consolidated Tape Association (''CTA'') disseminated data feeds and NMS data feeds.[19] The CTA disseminates consolidated real-time trade and quote information in NYSE listed securities (Network A) and NYSE MKT, NYSE Arca and other regional exchanges' listed securities (Network B) pursuant to a national market system plan.[20] The NMS data feeds include Consolidated Tape System and Consolidated Quote System data streams, as well as Options Price Reporting Authority feeds.[21] To obtain connectivity to the Included Data Products, a User must enter into a contract with the data provider and pay any applicable fees.[22] Once the Exchange receives an authorization from the data feed provider, the Exchange will provide connectivity to the Included Data Product(s) through a User's LCN or IP network port.[23] The Exchange does not charge any additional fees for this connectivity ''because such access and connectivity is directly related to the purpose of co-location.'' [24] The Exchange proposes to add language to the Price List to specify that there are no additional fees for connectivity to Included Data Products.[25]

Connectivity to Premium NYSE Data Products

As part of its data product offerings, the Exchange now proposes to provide connectivity to Premium NYSE Data Products from the Exchange and its Affiliate SROs to Users over either the LCN and/or IP network ''because such access and connectivity is directly related to the purpose of co-location.'' [26] The proposed rule change seeks to amend the Price List to specify the connectivity fees for Premium NYSE Data Products.[27]

As discussed more fully in the Notice, the Premium NYSE Data Products are ''equity market data products that are

[6] *See* letter to Brent J. Fields, Secretary, Commission, from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC (IEX), dated September 9, 2016 (''IEX Letter'').

On September 23, 2016, the NYSE submitted a response (''Response Letter'').

[7] *See* Securities Exchange Act Release No. 34–78966 (September 28, 2016), 81 FR 68475.

[8] Amendment No. 2 is discussed further *infra.* Amendment No. 2 is available on the Commission's Web site at *https://www.sec.gov/comments/sr-nyse-2016-45/nyse201645-4.pdf.*

[9] 15 U.S.C. 78s(b)(2)(B).

[10] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR–NYSE–2015–40). As specified in the Price List, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates NYSE MKT LLC (''NYSE MKT'') and NYSE Arca, Inc. (''NYSE Arca'' and, together with NYSE MKT, the ''Affiliate SROs''). *See* Securities Exchange Act Release No. 70206 (August 15, 2013), 78 FR 51765 (August 21, 2013) (SR–NYSE–2013–59).

[11] *See* Notice, *supra* note 5, 81 FR at 66096.

[12] *See id.* at 66097.

[13] The purchase of access is subject to receiving authorization from the NYSE, NYSE MKT or NYSE Arca for the Included Data Products, as applicable. *See id.* at 66097 n.12.

[14] Certification feeds are used to certify that a User conforms to any relevant technical requirements for receipt of data or access to Exchange systems. Testing feeds, which do not carry live production data, provide Users with an environment to conduct tests with the non-live data, including testing for upcoming Exchange releases and product enhancements or the User's own software development. *See id.* at 66097. These feeds are only available over the IP network, however a User without an IP network connection may obtain an IP network circuit for purposes of testing and certification for free for three months. *See id.* at 66097 n.14.

[15] *See id.* at 66097.

[16] *See* Notice, *supra* note 5, 81 FR at 66097. The Exchange represents that connectivity to the Exchange systems can be obtained without the purchase of access to the LCN or IP network. *See id.*

[17] *See id.*

[18] *See id.* Neither the NYSE Data Products or Third Party Data Feeds provide access or order entry to the Exchange's execution system. *See id.* Connectivity to the NYSE Data Products is available in three forms: A resilient feed, ''Feed A'', or ''Feed B.'' A resilient feed includes two copies of the same feed for redundancy purposes and Feed A and Feed B are identical feeds. A User that wants redundancy would connect to both Feed A and Feed B or two resilient feeds, using two different ports. *See id.; see also id.* at 66097 n. 15.

[19] *See id.* at 66097.

[20] *See id.*

[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] *See id.; see also* Amendment No. 2, *supra* note 8.

[25] *See id.* at 66098.

[26] *See id.; see also* Amendment No. 2, *supra* note 8.

[27] *See* Notice, *supra* note 5, 81 FR at 66098.

variants of the equity Included Data Products. Each Premium NYSE Data Product integrates, or includes data elements from, several Included Data Products.'' [28] These Integrated Feeds include ''depth of book order data (with add, modify and delete orders), trades (with corrections and cancel/errors), opening and closing imbalance data, security status updates (*e.g.,* trade corrections and trading halts) and stock summary messages. The stock summary messages display a market's opening price, high price, low price, closing price, and cumulative volume for a security. Only the Integrated Feeds offer all these components in sequence in one feed.'' [29] Additionally, the NYSE BQT data feed includes, among other things, certain data elements from six of the equity Included Data Products of the Exchange and Affiliated SROs in one data feed: NYSE Trades, NYSE BBO, NYSE Arca Trades, NYSE Arca BBO, NYSE MKT Trades, and NYSE MKT BBO.[30]

As is the case with Included Data Products, a User of Premium NYSE Data Products must enter into a contract with the data provider for each feed and the provider would then authorize the Exchange to provide connectivity of the particular feed to that User's LCN or IP Network port.[31] The Exchange proposes to charge a User a monthly recurring fee per each Premium NYSE Data Product feed for the connectivity provided by the Exchange.[32]

Connectivity to Third Party Data Feeds

The Exchange's proposal further seeks to offer Third Party Data Feeds to Users and to charge a connectivity fee per feed as reflected on its Price List.[33] In the data center, the Exchange receives Third Party Data Feeds from multiple national securities exchanges and other content service providers which it then provides to requesting Users for a fee.[34] With the exceptions of Global OTC and NYSE Global Index, Users connect to Third Party Data Feeds over the IP network.[35] In charging for this service, the Exchange notes that its practice is consistent with the monthly fee Nasdaq charges its co-location customers for connectivity to third party data.[36]

In order to connect to a Third Party Data Feed, a User must enter into a contract with the relevant third party market or content service provider, under which the third party market or content service provider charges the User for the data feed.[37] The Exchange receives these Third Party Data Feeds over its fiber optic network and, after the data provider and User enter into a contract and the Exchange receives authorization from the data provider, the Exchange re-transmits the data to the User over a User's port.[38] Users only receive, and are only charged for, the feed(s) which they have entered into contracts for.[39] Additionally, the Exchange notes that Third Party Data Feeds do not provide access or order entry to its execution system or access to the execution system of the third party generating the feed.[40] The Exchange proposes to charge a monthly recurring fee for connectivity to each Third Party Data Feed, however for SuperFeed and MSCI it proposes to charge different fees which vary based on the bandwidth requirements for the connection.[41] A User is free to receive all or some of the feeds included in the Price List.[42] Moreover, the Exchange notes that Third Party Data Feed providers may charge redistribution fees, such as Nasdaq's Extranet Access Fees and OTC Markets Group's Access Fees,[43] which the Exchange will pass through to the User in addition to charging the applicable connectivity fee.[44] Finally, the Exchange permits third party markets or content providers that are also Users to connect to their own Third Party Data Feeds without a charge.[45] The Exchange represents that it does not charge Users that are third party markets or content providers for connectivity to their own feeds because such parties generally receive their own feeds for purposes of diagnostics and testing.[46]

Connectivity to Other Services

As part of its data center offerings, the Exchange also seeks to provide access and connectivity to Third Party Systems/content service providers, the DTCC [47] (collectively ''Service Providers''), third party certification and testing feeds,[48] and Virtual Control Circuits [49] (''VCCs'').[50] The proposed rule change seeks to amend the Price List to add new fees for connectivity to these Service Providers and third party certification and testing feeds and to specify that connectivity is dependent on a User meeting the necessary technical requirements, paying the applicable fees, and the Exchange receiving authorization to establish a connection for a User.[51] Similarly, the proposed rule change seeks to amend the Price List to add a new fee for connectivity for VCCs which will similarly require permission from the other User before the Exchange will establish the connection.[52] Accordingly,

[28] *See id.* Examples include: (1) The NYSE Integrated Feed that includes, among other items, data from three of the equity Included Data Products: NYSE OpenBook, NYSE Trades, and NYSE Order Imbalances; and (2) the NYSE BQT data feed that includes, among other items, specific data elements from six of the equity Included Data Products: NYSE Trades, NYSE BBO, NYSE Arca Trades, NYSE Arca BBO, NYSE MKT Trades, and NYSE MKT BBO. *See id.* Additionally, with respect to the NYSE Amex and NYSE Arca options data, neither NYSE Amex nor NYSE Arca offer Premium NYSE Data Products because there are ''no options data products that integrate, or include data elements from, other option data products in the same manner that the NYSE, NYSE MKT and NYSE Arca Integrated Feeds integrate, or include data elements from, equity Included Data Products.'' *See id.*

[29] *See* Amendment No. 2, *supra* note 8.

[30] *See id.* None of the Included Data Products provide Users with data from the Exchange and Affiliate SROs in one feed. *See id.* Also, according to the Exchange, the Premium Data Products contain more data overall in comparison to the Included Data Products and potentially can be subject to greater technical specifications in order to receive the feed(s). *See* Notice, *supra* note 5, 81 FR at 66098. ''For example, a User connecting to the NYSE Arca Integrated Feed, NYSE Integrated Feed or NYSE MKT Integrated Feed would need at least a 1 Gb IP network connection in order to connect to either Feed A or Feed B. To connect to a resilient feed, the User would require an LCN or IP network connection of at least 10 Gb.'' *See id.* at 66097 n. 15.

[31] *See* Notice, *supra* note 5, 81 FR at 66098.

[32] *See id.*

[33] *See id.* at 66099.

[34] *See id.*

[35] *See id.*

[36] *See id.* The Exchange notes that Nasdaq charges monthly fees of $1,500 and $4,000 for connectivity to BATS Y and BATS, respectively, and of $2,500 for connectivity to EDGA or EDGX. *See id.*

[37] *See id.*

[38] *See id.*

[39] *See id.*

[40] *See id.* There is one exception to this for the ICE feeds which include both market data and trading and clearing services. In order to receive the ICE feeds, a User must receive authorization from ICE to receive both market data and trading and clearing services. *See id.*

[41] *See id.*

[42] *See id.*

[43] *See id.* at 66100.

[44] *See id.*

[45] *See id.*

[46] *See id.*

[47] ''Such connectivity to DTCC is distinct from the access to shared data services for clearing and settlement services that a User receives when it purchases access to the LCN or IP network. The shared data services allow Users and other entities with access to the Trading Systems to post files for settlement and clearing services to access.'' *See id.* at 66100 n. 36.

[48] Certification feeds certify that a User conforms to any of the relevant content service providers' requirements for accessing Third Party Systems or receiving Third Party Data, whereas testing feeds provide Users an environment in which to conduct system tests with non-live data. *See id.* at 66100.

[49] A VCC (previously called a ''peer to peer'' connection) is a two-way connection through which two participants can establish a connection between two points over dedicated bandwidth using the IP network to be used for any purpose. *See id.* at 66101.

[50] *See id.* at 66099–66101.

[51] *See id.* at 66099–66100.

[52] *See id.* at 66100–66101.

the Exchange proposes to amend its Price List to add recurring monthly connectivity fees for Service Providers and VCCs based upon the bandwidth requirements per system and/or VCC connection between two Users.[53] For third party certification and testing feeds, the Exchange proposes to revise its Price List to include a monthly recurring $100 fee per feed.[54]

For each service, a User must execute a contract with the respective Service Provider and/or third party certification and testing feed provider(s) pursuant to which a User pays each the associated fee(s) for their services.[55] Once the Exchange receives authorization from the Service Provider and/or third party certification and testing feed provider(s), the Exchange will enable a User to connect to the Service Provider and/or third party certification and testing feed(s) over the IP Network.[56] Similarly, with respect to VCCs, the Exchange will not establish a VCC connection over its IP Network until the other User confirms the VCC request.[57] Finally, the Exchange notes, that its execution system does not provide access to Service Provider systems, nor do the Service Provider systems provide access to the Exchange's execution system.[58]

As noted above, the Commission received one comment letter.[59] This commenter (1) requested clarification about the history of the fees and ''the increasing costs of maintaining the data center and providing co-location compared to any related fee revenue'' and (2) expressed a concern about whether ''there are any true alternatives that are practically available to various types of participants who are seeking to compete with those who are paying exchanges for co-location and data services.'' [60] Specifically, the commenter noted that the NYSE states that the connectivity fees are used to defray the costs associated with providing co-location to Users, but, the commenter questions whether the fees to cover the increasing costs of providing co-location are applied in an equitable manner.[61] Moreover, with respect to alternatives, the commenter noted that broker-dealers face best execution obligations that are ''critically impacted by sub-millisecond differences in access to exchange systems and market data.'' [62] As a result, market participants face the quandary of whether to trade from outside the data center if other members are trading from inside.[63] Additionally, some broker-dealers trading for clients ''may be practically required to buy and consume proprietary market data feeds directly from exchanges in order to provide competitive products for those clients.'' [64] The commenter believes that this environment ''imposes a form of trading tax on all members by offering different methods of access to different members.'' [65] The commenter questions whether true alternatives are available for participants seeking to compete with firms paying for exchange co-location and data services and whether the Exchange's ability to set fees is truly constrained by market forces for a ''comparable product''.[66]

As discussed above, the Exchange submitted a response to the commenter.[67] The Exchange in its Response Letter stated that historical information about the development of these product offerings is ''not required by the Act and is not relevant to [] the substance of the Proposal–which is, by definition, forward looking. . . .'' [68] Additionally, the Response Letter noted that costs are not the only consideration in setting its prices, but rather the prices ''include the competitive landscape; whether Users would be required to utilize a given service; the alternatives available to Users; and, significantly, the benefits Users obtain from the services.'' [69] With respect to the commenter's concern about members needing additional information to assess the fixed costs of exchange membership, the Exchange responded that these are not fixed costs of ''Exchange members'' but instead costs to any User who voluntarily chooses to purchase such services based upon ''[t]he form and latency of access and connectivity that bests suits a User's needs . . .'' [70] Users do not require the Exchange's access or connectivity to trade on the Exchange and can instead use alternative access and connectivity options for trading if they choose.[71]

In response to the commenter's argument regarding different methods of access to trading, the Exchange stated that ''it is a vendor of fair and non-discriminatory access, and like any vendor with multiple product offerings, different purchasers may make different choices regarding which products they wish to purchase.'' [72] The Exchange further stated in response to the commenter's concern of a lack of true alternatives for a ''comparable product'', that the filing lists several alternative options for Users and a User can evaluate the ''relative benefits of those alternatives and choose whichever it deems most beneficial to it. . . .'' [73]

Amendment No. 2

In Amendment No. 2, the Exchange offers additional justification for the proposed rule change.[74] In Amendment No. 2, the Exchange addressed (1) the benefits offered by the Premium NYSE Data Products that are not present in the Included Data Products (2) how Premium NYSE Data Products are related to the purpose of co-location, (3) the similarity of charging for connectivity to Third Party Systems and DTCC and charging for connectivity to Premium NYSE Data Products and (4) the costs incurred by the Exchange in providing connectivity to Premium NYSE Data Products to Users in the data center.[75] In the Amendment, the Exchange provided further detail on the benefits provided to Users through the Premium NYSE Data Products including ''depth of book order data (with add, modify and delete orders), trades (with corrections and cancel/errors), opening and closing imbalance data, security status updates (*e.g.,* trade corrections and trading halts) and stock summary messages.'' [76] The Exchange also clarified which costs are associated with providing Users with access and connectivity to the various services discussed in the filing, including the Premium NYSE Data Products.

[53] *See id.* at 66099–66101.

[54] *See id.* at 66100.

[55] *See id.* at 66099–66100.

[56] *See id.* For Third Party Systems, once the Exchange receives the authorization from the respective third party it establishes a unicast connection between the User and the relevant third party over the IP network. *See id.* at 66099. For the DTCC, ''[t]he Exchange receives the DTCC feed over its fiber optic network and, after DTCC and the User enter into the services contract and the Exchange receives authorization from DTCC, the Exchange provides connectivity to DTCC to the User over the User's IP network port.'' *See id.* at 66100.

[57] *See* Notice, *supra* note 5, 81 FR at 66101.

[58] *See id.* at 66099–66100.

[59] *See* IEX Letter, *supra* note 6.

[60] *See id.* at 1–2.

[61] *See id.* at 1–2.

[62] *See id.* at 2.

[63] *See id.*

[64] *See id.*

[65] *See id.*

[66] *See id.*

[67] *See* Response Letter, *supra* note 6.

[68] *See id.* at 2.

[69] *See id.*

[70] *See id.* at 4.

[71] *See id.*

[72] *See id.* at 5. The Exchange makes a further argument about the Exchange being a regulated co-location space whereas other unregulated co-location options are available. *See id.*

[73] *See id.* at 6. The Exchange noted that it is not addressing the commenter's statements about broker-dealers needing to purchase market data from the Exchange as that is outside the scope of this proposal. *See id.* at 5 n.13.

[74] *See* Amendment No. 2, *supra* note 8.

[75] *See id.*

[76] *See id.; see also supra* note 29 and accompanying text.

III. Proceedings To Determine Whether To Disapprove SR–NYSE–2016–45 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [77] to determine whether the proposed rule change, as modified by Amendment Nos. 1 and 2, should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as modified by Amendment Nos. 1 and 2. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change, as modified by Amendment Nos. 1 and 2.

Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the following grounds for disapproval that are under consideration:

• Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange ''provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,'' [78]

• Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be ''designed to perfect the operation of a free and open market and a national market system'' and ''protect investors and the public interest,'' and not be ''designed to permit unfair discrimination between customers, issuers, brokers, or dealers,'' [79] and

• Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].'' [80]

As discussed above, the Exchange's proposal would, among other things, establish fees relating to a User's access to trading and execution services, connectivity to data feeds and to testing and certification feeds, connectivity to clearing, and other services. The Exchange believes that the proposed fees are consistent with Sections 6(b)(4), (5), and (8) of the Act because the fees charged for co-location services are constrained by the active competition for the order flow and other business from such market participants.[81] The Exchange stated that charging excessive fees would make it stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms.[82] Additionally, the Exchange believes that because there are alternatives for a User both in and outside of the data center if it believes the fees are too excessive, the fees are consistent with the Act.[83] Specifically, the Exchange noted that a User could terminate its co-location arrangement with the exchange ''and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location.'' [84] Additionally, ''[a]s alternatives to using the Access and Connectivity provided by the Exchange, a User may access or connect to such services and products through another User or through a connection to an Exchange access center outside the data center, third party access center, or third party vendor. The User may make such connection through a third party telecommunication provider, third party wireless network, the SFTI network, or a combination thereof.'' [85] However, the Exchange also stated that the expectation of co-location was that normally Users would expect reduced latencies in sending orders to the Exchange and in receiving market data from the Exchange by being co-located.[86] Therefore, as the Exchange states in Amendment No. 2, both Included Data Products and Premium NYSE Data Products are ''directly related to the purpose of co-location.'' [87] The commenter suggests [88] that Users do not in fact have alternatives to paying the connectivity fee to obtain NYSE Premium Data Products. If these products are integral to co-located Users for trading on the Exchange, the Commission questions whether obtaining the information contained in these products from another source is, in fact, a viable alternative given the importance of receiving such information in a timely manner. The Commission is concerned that the Exchange has not supported its argument that there are viable alternatives for Users inside the data center in lieu of obtaining such information from the Exchange. The Commission seeks comment on whether Users do have viable alternatives to paying the Exchange a connectivity fee for the NYSE Premium Data Products.

Additionally, the Exchange states that both Included Data Products and Premium NYSE Data Products are ''directly related to the purpose of co-location.'' The Commission is concerned that the Exchange has not made clear why including the cost of connectivity to the Included Data Products in the purchase of a LCN or IP network connection and charging an additional fee to obtain the Premium NYSE Data Products is an equitable allocation of reasonable dues, fees, and other charges among Users in the data center; does not unfairly discriminate between customers, issuers, brokers, or dealers; and does not impose a burden on competition which is not necessary or appropriate in furtherance of the purposes of the Act. The Commission is concerned that the Exchange has not identified a distinction between the provision of connectivity to Included Data Products and the provision of connectivity to Premium NYSE Data Products, as opposed to a distinction between the utility of the Included Data Products and Premium NYSE Data Products to Users, which the Exchange has demonstrated, even though these are all NYSE proprietary data products. Therefore, the Commission is concerned that the Exchange has not identified a reasonable basis for charging Users a separate connectivity fee for the Premium NYSE Data Products while including connectivity in the purchase price for a LCN/IP network connection. The Exchange stated in its filing that both are ''directly related to the purpose of co-location'' but it has not clearly justified why this permits including the connectivity fee for Included Data Products as part of the LCN or IP Network connection, even for those Users that do not use the Included Data Products, but not including the connectivity fee for the Premium NYSE Data Products as well.

Similarly, the Exchange justifies the costs associated with providing these feeds by stating ''[i]n order to offer connectivity to the Premium NYSE Data Products, the Exchange must provide, maintain and operate the data center facility hardware and technology infrastructure. The Exchange must handle the installation, administration, monitoring, support and maintenance of the connectivity, including by ensuring that the network infrastructure has the

[77] 15 U.S.C. 78s(b)(2)(B).

[78] 15 U.S.C. 78f(b)(4).

[79] 15 U.S.C. 78f(b)(5).

[80] 15 U.S.C. 78f(b)(8).

[81] *See* Notice, *supra* note 5, 81 FR at 66102.

[82] *See id.*

[83] *See id.*

[84] *See id.*

[85] *See id.*

[86] *See id.*

[87] *See* Amendment No. 2, *supra* note 8.

[88] *See* IEX Letter, *supra* note 6.

necessary bandwidth for the Premium NYSE Data Products and responding to any production issues.'' [89] The Commission does not believe the Exchange has clearly explained why the same rationale would not apply to the Included Data Products. The Exchange has sought to justify this on the basis that the Premium NYSE Data Products are similar to any other service offered by the Exchange such as connectivity to Third Party Systems and DTCC.[90] The Commission however is concerned that these Premium NYSE Data Products are similar to the Included Data Products and therefore should not include different fee structures as they are the same offering by the Exchange within the contemplated purpose of co-location. The Commission seeks comment on whether charging fees for Included Data Products and Premium NYSE Data Products in a different manner is consistent with Section 6(b)(4) of the Act.

Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data and arguments with respect to the concerns identified above, as well as any other concerns they may have with the proposed rule change, as modified by Amendment Nos. 1 and 2. In particular, the Commission invites the written views of interested persons concerning whether the proposal, as modified by Amendment Nos. 1 and 2, is consistent with Sections 6(b)(4), (5), or (8) [91] or any other provision of the Act, or the rules and regulations thereunder. Although there does not appear to be any issue relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,[92] any request for an opportunity to make an oral presentation.[93]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal, as modified by Amendment Nos. 1 and 2, should be approved or disapproved by December 12, 2016. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by December 27, 2016. In light of the concerns raised by the proposed rule change, as discussed above, the Commission invites additional comment on the proposed rule change, as modified by Amendment Nos. 1 and 2, as the Commission continues its analysis of the proposed rule change's consistency with Sections 6(b)(4), (5) and (8),[94] or any other provision of the Act, or the rules and regulations thereunder. The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposed rule change, as modified by Amendment Nos. 1 and 2, in addition to any other comments they may wish to submit about the proposed rule change.

Comments may be submitted by any of the following methods:

Electronic Comments:

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File No. SR–NYSE–2016–45 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 No. SR–NYSE–2016–45. 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 such 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 No. SR–NYSE–2016–45, and shoul'd be submitted by December 12, 2016. Rebuttal comments should be submitted by December 27, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[95]

Brent J. Fields,

Secretary.

[FR Doc. 2016–27896 Filed 11–18–16; 8:45 am]

BILLING CODE 8011–01–P

[89] *See* Amendment No. 2, *supra* note 8.

[90] *See id.*

[91] 15 U.S.C. 78f(b)(4), (b)(5) and (b)(8).

[92] 17 CFR 240.19b–4.

[93] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[94] 15 U.S.C. 78f(b)(4), (b)(5), and (b)(8).

[95] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79314; File No. SR–NYSEMKT–2016–101]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Change Amending the Fees for NYSE MKT BBO and NYSE MKT Trades To Lower the Enterprise Fee

November 15, 2016.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 1, 2016, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the fees for NYSE MKT BBO and NYSE MKT Trades to lower the Enterprise Fee. The proposed change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the fees for NYSE MKT BBO and NYSE MKT Trades market data products,[4] as set forth on the NYSE MKT Equities Proprietary Market Data Fee Schedule (''Fee Schedule''). Specifically, the Exchange proposes to lower the Enterprise Fee. The Exchange proposes to make the fee change effective November 1, 2016.

The Exchange currently charges an enterprise fee of $15,000 per month for an unlimited number of professional and non-professional users for each of NYSE MKT BBO and NYSE MKT Trades.[5] A single Enterprise Fee applies for clients receiving both NYSE MKT BBO and NYSE MKT Trades.[6] The Exchange proposes to lower the enterprise fee to $3,000 per month.

As an example, under the current fee structure for per user fees, if a firm had 10,000 professional users who each received NYSE MKT Trades at $1 per month and NYSE MKT BBO at $1 per month, without the Enterprise Fee, the firm would be subject to $20,000 per month in professional user fees. Under the current pricing structure, the charge would be capped at $15,000 and effective November 1, 2016 it would be capped at $3,000.

Under the proposed enterprise fee, the firm would pay a flat fee of $3,000 for an unlimited number of professional and non-professional users for both products. As is the case currently, a data recipient that pays the enterprise fee would not have to report the number of such users on a monthly basis.[7] However, every six months, a data recipient must provide the Exchange with a count of the total number of natural person users of each product, including both professional and non-professional users.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[8] in general, and Sections 6(b)(4) and 6(b)(5) of the Act,[9] in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of the data and is not designed to permit unfair discrimination among customers, issuers, and brokers.

The proposed fee change is also equitable and not unfairly discriminatory because it would apply to all data recipients that choose to subscribe to NYSE MKT BBO and NYSE MKT Trades.

The proposed enterprise fees for NYSE MKT BBO and NYSE MKT Trades are reasonable because they could result in a fee reduction for data recipients with a large number of professional and nonprofessional users, as described in the example above. If a data recipient has a smaller number of professional users of NYSE MKT BBO and/or NYSE MKT Trades, then it may continue to use the per user fee structure. By reducing prices for data recipient with a large number of professional and non-professional users, the Exchange believes that more data recipients may choose to offer NYSE MKT BBO and NYSE MKT Trades, thereby expanding the distribution of this market data for the benefit of investors. The Exchange also believes that offering an enterprise fee expands the range of options for offering NYSE MKT BBO and NYSE MKT Trades and allows data recipients greater choice in selecting the most appropriate level of data and fees for the professional and non-professional users they are servicing.

The Exchange notes that NYSE MKT BBO and NYSE MKT Trades are entirely optional. The Exchange is not required to make NYSE MKT BBO and NYSE MKT Trades available or to offer any specific pricing alternatives to any customers, nor is any firm required to purchase NYSE MKT BBO and NYSE MKT Trades. Firms that do purchase NYSE MKT BBO and NYSE MKT Trades do so for the primary goals of using them to increase revenues, reduce expenses, and in some instances compete directly with the Exchange (including for order flow); those firms are able to determine for themselves whether NYSE MKT BBO and NYSE MKT Trades or any other similar products are attractively priced or not.[10]

Firms that do not wish to purchase NYSE MKT BBO and NYSE MKT Trades have a variety of alternative market data products from which to choose,[11] or if NYSE MKT BBO and NYSE MKT Trades do not provide sufficient value to firms as offered based on the uses those firms have or planned to make of it, such firms may simply choose to conduct their business operations in ways that do not use NYSE MKT BBO and NYSE MKT Trades or use them at different levels or in different configurations. The Exchange notes that broker-dealers are not required to purchase proprietary market data to comply with their best execution obligations.[12]

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010), upheld reliance by the Securities and Exchange Commission (''Commission'') upon the existence of competitive market mechanisms to set reasonable and equitably allocated fees for proprietary market data:

> In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.'

Id. at 535 (quoting H.R. Rep. No. 94–229 at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 323). The court agreed with the Commission's conclusion that ''Congress intended that 'competitive forces should dictate the services and

[4] *See* Securities Exchange Act Release Nos. 61936 (April 16, 2010), 74 [sic] FR 21088 (April 22, 2010) (SR–NYSEAmex–2010–35) (notice—NYSE MKT BBO and NYSE MKT Trades) and 62187 (May 27, 2010), 75 FR 31500 (June 3, 2010) (SR–NYSEAmex–2010–35) (approval order—NYSE MKT BBO and NYSE MKT Trades).

[5] *See* Securities Exchange Act Release No. 76906 (January 14, 2016), 81 FR 3500 (January 21, 2016) (SR–NYSEMKT–2016–04).

[6] *See* Securities Exchange Act Release No. 70212 (August 15, 2013), 78 FR 51775 (August 21, 2013) (SR–NYSEMKT–2013–69).

[7] Professional users currently are subject to a per display device count. *See* Securities [sic] Act Release No. 73986 (January 5, 2015), 80 FR 1444 (January 9, 2015) (SR–NYSEMKT–2014–113).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4), (5).

[10] *See, e.g.,* Proposing Release on Regulation of NMS Stock Alternative Trading Systems, Securities Exchange Act Release No. 76474 (Nov. 18, 2015) (File No. S7–23–15). *See also,* ''Brokers Warned Not to Steer Clients' Stock Trades Into Slow Lane,'' Bloomberg Business, December 14, 2015 (Sigma X dark pool to use direct exchange feeds as the primary source of price data).

[11] *See* NASDAQ Rule 7047 (Nasdaq Basic) and BATS [sic] Rule 11.22 (BATS TOP and Last Sale).

[12] *See* FINRA Regulatory Notice 15–46, ''Best Execution,'' November 2015.

practices that constitute the U.S. national market system for trading equity securities.' '' [13]

As explained below in the Exchange's Statement on Burden on Competition, the Exchange believes that there is substantial evidence of competition in the marketplace for proprietary market data and that the Commission can rely upon such evidence in concluding that the fees established in this filing are the product of competition and therefore satisfy the relevant statutory standards. In addition, the existence of alternatives to these data products, such as consolidated data and proprietary data from other sources, as described below, further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can select such alternatives.

As the *NetCoalition* decision noted, the Commission is not required to undertake a cost-of-service or ratemaking approach. The Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for proprietary market data would be so complicated that it could not be done practically or offer any significant benefits.[14]

In addition, the Exchange believes that the proposed fees are reasonable when compared to fees for comparable products offered by at least one other exchange. For example, Bats BYX Exchange (''BYX'') charges an enterprise fee of $10,000 per month for each of BYX Top and BYX Last Sale, which includes best bid and offer and last sale data, respectively.[15] The Exchange is proposing enterprise fees that are less than the fees currently charged by BYX.

For these reasons, the Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory.

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. An exchange's ability to price its proprietary market data feed products is constrained by actual competition for the sale of proprietary market data products, the joint product nature of exchange platforms, and the existence of alternatives to the Exchange's proprietary data.

The Existence of Actual Competition

The market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary for the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with one another for listings and order flow and sales of market data itself, providing ample opportunities for entrepreneurs who wish to compete in any or all of those areas, including producing and distributing their own market data. Proprietary data products are produced and distributed by each individual exchange, as well as other entities, in a vigorously competitive market. Indeed, the U.S. Department of Justice (''DOJ'') (the primary antitrust regulator) has expressly acknowledged the aggressive actual competition among exchanges, including for the sale of proprietary market data. In 2011, the DOJ stated that exchanges ''compete head to head to offer real-time equity data products. These data products include the best bid and offer of every exchange and information on each equity trade, including the last sale.'' [16]

Moreover, competitive markets for listings, order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products and therefore constrain markets from overpricing proprietary market data. Broker-dealers send their order flow and transaction reports to multiple venues, rather than providing them all to a single venue, which in turn reinforces this competitive constraint. As a 2010 Commission Concept Release noted, the ''current market structure can be described as dispersed and complex'' with ''trading volume . . . dispersed among many highly automated trading centers that compete for order flow in the same stocks'' and ''trading centers offer[ing] a wide range of services that are designed to attract different types of market participants with varying trading needs.'' [17] More recently, SEC Chair Mary Jo White has noted that competition for order flow in exchange-listed equities is ''intense'' and divided among many trading venues, including exchanges, more than 40 alternative trading systems, and more than 250 broker-dealers.[18]

If an exchange succeeds in competing for quotations, order flow, and trade executions, then it earns trading revenues and increases the value of its proprietary market data products because they will contain greater quote and trade information. Conversely, if an exchange is less successful in attracting quotes, order flow, and trade executions, then its market data products may be less desirable to customers in light of the diminished content and data products offered by competing venues may become more attractive. Thus, competition for quotations, order flow, and trade executions puts significant pressure on an exchange to maintain both execution and data fees at reasonable levels.

In addition, in the case of products that are also redistributed through market data vendors, such as Bloomberg and Thompson Reuters, the vendors

[13] *NetCoalition,* 615 F.3d at 535.

[14] The Exchange believes that cost-based pricing would be impractical because it would create enormous administrative burdens for all parties and the Commission to cost-regulate a large number of participants and standardize and analyze extraordinary amounts of information, accounts, and reports. In addition, and as described below, it is impossible to regulate market data prices in isolation from prices charged by markets for other services that are joint products. Cost-based rate regulation would also lead to litigation and may distort incentives, including those to minimize costs and to innovate, leading to further waste. Under cost-based pricing, the Commission would be burdened with determining a fair rate of return, and the industry could experience frequent rate increases based on escalating expense levels. Even in industries historically subject to utility regulation, cost-based ratemaking has been discredited. As such, the Exchange believes that cost-based ratemaking would be inappropriate for proprietary market data and inconsistent with Congress's direction that the Commission use its authority to foster the development of the national market system, and that market forces will continue to provide appropriate pricing discipline. *See* Appendix C to NYSE's comments to the Commission's 2000 Concept Release on the Regulation of Market Information Fees and Revenues, which can be found on the Commission's Web site at *http://www.sec.gov/rules/concept/s72899/buck1.htm.*

[15] *See* Market Data Fees at *https://www.batstrading.com/support/fee_schedule/byx/.*

[16] Press Release, U.S. Department of Justice, Assistant Attorney General Christine Varney Holds Conference Call Regarding NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandoning Their Bid for NYSE Euronext (May 16, 2011), *available at http://www.justice.gov/iso/opa/atr/speeches/2011/at-speech-110516.html; see also* Complaint in U.S. v. Deutsche Borse AG and NYSE Euronext, Case No. 11–cv–2280 (D.C. Dist.) ¶ 24 (''NYSE and Direct Edge compete head-to-head . . . in the provision of real-time proprietary equity data products.'').

[17] Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (Jan. 14, 2010), 75 FR 3594 (Jan. 21, 2010) (File No. S7–02–10). This Concept Release included data from the third quarter of 2009 showing that no market center traded more than 20% of the volume of listed stocks, further evidencing the dispersal of and competition for trading activity. *Id.* at 3598. Data available on ArcaVision show that from June 30, 2013 to June 30, 2014, no exchange traded more than 12% of the volume of listed stocks by either trade or dollar volume, further evidencing the continued dispersal of and fierce competition for trading activity. *See https://www.arcavision.com/Arcavision/arcalogin.jsp.*

[18] Mary Jo White, Enhancing Our Equity Market Structure, Sandler O'Neill & Partners, L.P. Global Exchange and Brokerage Conference (June 5, 2014) (available on the Commission Web site), citing Tuttle, Laura, 2014, ''OTC Trading: Description of Non-ATS OTC Trading in National Market System Stocks,'' at 7–8.

themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models. For example, vendors that assess a surcharge on data they sell are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers. Vendors will not elect to make available NYSE MKT BBO or NYSE MKT Trades unless their customers request it, and customers will not elect to pay the proposed fees unless NYSE MKT BBO and NYSE MKT Trades can provide value by sufficiently increasing revenues or reducing costs in the customer's business in a manner that will offset the fees. All of these factors operate as constraints on pricing proprietary data products.

Joint Product Nature of Exchange Platform

Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, proprietary market data and trade executions are a paradigmatic example of joint products with joint costs. The decision of whether and on which platform to post an order will depend on the attributes of the platforms where the order can be posted, including the execution fees, data availability and quality, and price and distribution of data products. Without a platform to post quotations, receive orders, and execute trades, exchange data products would not exist.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's platform for posting quotes, accepting orders, and executing transactions and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs.

Moreover, an exchange's broker-dealer customers generally view the costs of transaction executions and market data as a unified cost of doing business with the exchange. A broker-dealer will only choose to direct orders to an exchange if the revenue from the transaction exceeds its cost, including the cost of any market data that the broker-dealer chooses to buy in support of its order routing and trading decisions. If the costs of the transaction are not offset by its value, then the broker-dealer may choose instead not to purchase the product and trade away from that exchange.

Other market participants have noted that proprietary market data and trade executions are joint products of a joint platform and have common costs.[19] The Exchange agrees with and adopts those discussions and the arguments therein. The Exchange also notes that the economics literature confirms that there is no way to allocate common costs between joint products that would shed any light on competitive or efficient pricing.[20]

Analyzing the cost of market data product production and distribution in isolation from the cost of all of the inputs supporting the creation of market data and market data products will inevitably underestimate the cost of the data and data products because it is impossible to obtain the data inputs to create market data products without a fast, technologically robust, and well-regulated execution system, and system and regulatory costs affect the price of both obtaining the market data itself and creating and distributing market data products. It would be equally misleading, however, to attribute all of an exchange's costs to the market data portion of an exchange's joint products. Rather, all of an exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

As noted above, the level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including 13 equities self-regulatory organization (''SRO'') markets, as well as various forms of alternative trading systems (''ATSs''), including dark pools and electronic communication networks (''ECNs''), and internalizing broker-dealers. SRO markets compete to attract order flow and produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting Facilities compete to attract transaction reports from the non-SRO venues.

Competition among trading platforms can be expected to constrain the aggregate return that each platform earns from the sale of its joint products, but different trading platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market data products (or provide market data products free of charge), and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market data products, and setting relatively low prices for accessing posted liquidity. For example, Bats Global Markets (''Bats'') and Direct Edge, which previously operated as ATSs and obtained exchange status in 2008 and 2010, respectively, provided certain market data at no charge on their Web sites in order to attract more order flow, and used revenue rebates from resulting additional executions to maintain low execution charges for their users.[21] In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering.

Existence of Alternatives

The large number of SROs, ATSs, and internalizing broker-dealers that

[19] *See* Securities Exchange Act Release No. 72153 (May 12, 2014), 79 FR 28575, 28578 n.15 [sic] (May 16, 2014) (SR–NASDAQ–2014–045) (''[A]ll of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.''). *See also* Securities Exchange Act Release No. 62907 (Sept. 14, 2010), 75 FR 57314, 57317 (Sept. 20, 2010) (SR–NASDAQ–2010–110), and Securities Exchange Act Release No. 62908 (Sept. 14, 2010), 75 FR 57321, 57324 (Sept. 20, 2010) (SR–NASDAQ–2010–111).

[20] *See generally* Mark Hirschey, Fundamentals of Managerial Economics, at 600 (2009) (''It is important to note, however, that although it is possible to determine the separate marginal costs of goods produced in variable proportions, it is impossible to determine their individual average costs. This is because common costs are expenses necessary for manufacture of a joint product. Common costs of production—raw material and equipment costs, management expenses, and other overhead—cannot be allocated to each individual by-product on any economically sound basis. . . . Any allocation of common costs is wrong and arbitrary.''). This is not new economic theory. *See, e.g.,* F.W. Taussig, ''A Contribution to the Theory of Railway Rates,'' *Quarterly Journal of Economics* V(4) 438, 465 (July 1891) (''Yet, surely, the division is purely arbitrary. These items of cost, in fact, are jointly incurred for both sorts of traffic; and I cannot share the hope entertained by the statistician of the Commission, Professor Henry C. Adams, that we shall ever reach a mode of apportionment that will lead to trustworthy results.'').

[21] This is simply a securities market-specific example of the well-established principle that in certain circumstances more sales at lower margins can be more profitable than fewer sales at higher margins; this example is additional evidence that market data is an inherent part of a market's joint platform.

currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, ATS, and broker-dealer is currently permitted to produce and sell proprietary data products, and many currently do, including but not limited to the Exchange, New York Stock Exchange LLC, NYSE Arca, Inc. (''NYSE Arca''), NASDAQ, Bats [sic], and Direct Edge.

The fact that proprietary data from ATSs, internalizing broker-dealers, and vendors can bypass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products. By way of example, Bats [sic] and NYSE Arca both published proprietary data on the Internet before registering as exchanges. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the amount of data available via proprietary products is greater in size than the actual number of orders and transaction reports that exist in the marketplace. Indeed, in the case of NYSE MKT BBO and NYSE MKT Trades, the data provided through these products appears both in (i) real-time core data products offered by the Securities Information Processors (SIPs) for a fee, and (ii) free SIP data products with a 15-minute time delay, and finds a close substitute in similar products of competing venues.[22] Because market data users can find suitable substitutes for most proprietary market data products, a market that overprices its market data products stands a high risk that users may substitute another source of market data information for its own.

Those competitive pressures imposed by available alternatives are evident in the Exchange's proposed pricing.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid and inexpensive. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TrackECN, BATS Trading and Direct Edge. A proliferation of dark pools and other ATSs operate profitably with fragmentary share of consolidated market volume.

In determining the proposed changes to the fees for the NYSE MKT BBO and NYSE MKT Trades, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all users. The existence of numerous alternatives to the Exchange's products, including proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if the attendant fees are not justified by the returns that any particular vendor or data recipient would achieve through the purchase.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[23] of the Act and subparagraph (f)(2) of Rule 19b–4[24] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[25] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2016–101 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–NYSEMKT–2016–101. 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–NYSEMKT–2016–101 and should be submitted on or before December 12, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

Brent J. Fields,

Secretary.

[FR Doc. 2016–27894 Filed 11–18–16; 8:45 am]

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[22] *See supra* note 15.

[23] 15 U.S.C. 78s(b)(3)(A).

[24] 17 CFR 240.19b–4(f)(2).

[25] 15 U.S.C. 78s(b)(2)(B).

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79315; File No. SR–C2–2016–021]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change Relating to Opening of Series for Trading on the Exchange

November 15, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 4, 2016, C2 Options Exchange, Incorporated (''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

C2 proposes to amend its rules related to the opening of series for trading on the Exchange. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

C2 proposes to amend its rules related to the opening of series for trading on the Exchange. Rule 6.11 describes the process the automated trading system used by the Exchange for the trading of options contracts (the ''System'') uses to open series on the Exchange each trading day. The Exchange may also use this same process for closing series or opening series after a trading halt. The Exchange proposes to make various changes to this rule to reorganize and simplify the rule as well as make other changes to the opening procedures in order to reflect current System functionality.

Opening (and Sometimes Closing) Procedures

The Exchange proposes to amend Rule 6.11 by reorganizing the provisions of the rule to describe the opening (and sometimes closing) procedures in a more sequential manner, clarifying the timing of each stage of the process and enhancing or modifying the description of certain provisions within the rule. The System generally processes the opening of each series as follows:

(1) *Pre-Opening Period:* During the pre-opening period, the System will accept orders and quotes and disseminate messages that contain information based on resting orders and quotes in the book, which may include the expected opening price (''EOP''), expected opening size (''EOS''), any reason why a series may not open and imbalance information, including the size and side of an imbalance (''expected opening information'' or ''EOIs'').

(2) *Initiation of the Opening Rotation:* At this time, the System initiates the opening rotation procedure and distributes a rotation notice to market participants.

(3) *Opening Rotation Period:* During the opening rotation period, the System matches and executes orders and quotes against each other in order to establish an opening Exchange best bid and offer (''BBO'') and trade price for each series while continuing to disseminate expected opening information.

(4) *Opening of Trading:* At this time, the System opens series for trading, subject to the satisfaction of certain conditions.

The proposed rule change more clearly organizes the provisions of Rule 6.11 in this order and makes the additional following changes.

Pre-Opening Period

Rule 6.11(a) currently provides for a period of time before the opening of trading in the underlying security or, in the case of index options, prior to 8:30 a.m.[3] (as determined by the Exchange on a class-by-class basis), the System will accept orders and quotes (the System will not accept certain orders during the pre-opening period, as discussed below). The times specified in the current rule are not the times at which series open for trading, but rather the times at which the System initiates opening rotations, which is described later in the rule (see description of proposed paragraph (b)(1) below). The Exchange proposes to amend Rule 6.11(a) to provide the pre-opening period begins no later than 15 minutes prior to the expected initiation of an opening rotation (the Exchange determines the specific time at which the pre-opening period will begin).[4] The Exchange believes it is repetitive to include a description of the time at which series open in this paragraph. The proposed rule change adds the pre-opening period will begin no earlier than 2:00 a.m. to provide additional information regarding when the Exchange may begin the pre-opening period. Additionally, the System begins the pre-opening period at the same time for each class within each type of option (equity, index and exchange-traded products (''ETP'')), so the proposed rule change deletes the provision of the rule that says the Exchange will determine the time on a class-by-class basis. The Exchange believes indicating a minimum and maximum time for the pre-opening period provides Trading Permit Holders with more specific information regarding the timeframe of the pre-opening period.

The proposed rule change amends Rule 6.11(a)(1) by deleting the provision that indicates the Exchange will designate eligible order size, order type and order origin code as order terms for which the Exchange may designate eligibility for submission during the pre-opening period on a class-by-class basis. The Exchange currently does not, and does not intend to, restrict the size or origin code of orders that may be submitted during the pre-opening period, so this provision is no longer necessary. Additionally, the System currently accepts all quotes and all order types during the pre-opening period except for immediate-or-cancel, fill-or-fill [sic], intermarket sweep orders, and Market-Maker trade prevention orders, as acceptance of those order types during the pre-opening period would be inconsistent with their terms.[5] The proposed rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] All times are central time.

[4] Currently, the pre-opening period begins at approximately 6:30 a.m.

[5] *See* Rule 6.10 for definitions of these order types. For example, an immediate-or-cancel order is

Continued

change lists these few exceptions in the rule. As discussed below, not all of these orders may participate in the opening rotation.

The proposed rule change proposes to amend Rule 6.11(a)(2) in several ways. First, the proposed rule change amends the description of when the System begins disseminating expected opening information. Currently, the rule states, at specified intervals of time determined by the Exchange, the System will disseminate information about resting orders in the book that remain from the prior business day and orders and quotes submitted before the opening, which may include the EOP and EOS. The Exchange proposes to revise this provision to state beginning at a time (determined by the Exchange) no earlier than three hours prior to the expected initiation of an opening rotation for a series, the System disseminates EOIs to all market participants that have elected to receive them at regular intervals of time (the length of which is determined by the Exchange) or less frequently if there are no updates to the opening information since the previously disseminated EOI. This revised rule text clarifies the time at which the System will begin disseminating expected opening information, which may be different (and generally later) than the beginning of the pre-opening period, as the Exchange believes recipients generally want to receive EOIs closer to the opening of trading.[6] Additionally, this proposed rule change indicates EOIs are generally sent out regularly, but if there have been no changes (for example, the EOS and EOP have not changed because there are no new orders or quotes), then the System does not disseminate a duplicate message to users at the next regular interval time.

Second, the proposed rule change also amends Rule 6.11(a)(2) to more specifically describe the information regarding the expected opening of a series that the System disseminates. Currently, subparagraph (a)(2) provides the System will disseminate information about resting orders in the book that remain from the prior business day and any orders and quotes submitted before the opening, including the expected opening price and size. The Exchange proposes to simplify this provision by stating that the expected opening information will be based on resting orders in the book (which includes orders remaining from the prior trading day and orders entered during the pre-opening period) and quotes submitted prior to the opening of trading. Additionally, in addition to the EOP and EOS, these messages may include additional information based on the circumstances, such as a description of the reason why a series may not or did not open (*e.g.,* no quote or opening trade) and imbalance information, including the size and side of the imbalance (see discussion below regarding opening conditions), which reasons are described in current Rule 6.11(e) and proposed Rule 6.11(d). The Exchange proposes to add a definition of EOIs, which may include not only the EOP and EOS but also these other types of information. The Exchange proposes to incorporate this definition in other parts of the rule (as further discussed below).

Third, the proposed rule change amends the provision about what the EOP is and when it is calculated. Currently, Rule 6.11(a)(2) states the EOP is the price at which the greatest number of orders and quotes in the book are expected to trade and an EOP may only be calculated if (a) there are market orders in the book, or the book is crossed or locked and (b) at least one quote is present. The proposed rule change revises this language to state the EOP is the price at which any opening trade is expected to execute. The EOS is the size of any expected opening trade. As further discussed below, the definition of opening price is included in proposed paragraph (c), so the proposed rule change deletes that definition from paragraph (a)(2) and only includes the definition in proposed paragraph (c), as the Exchange believes it is less confusing to include the opening price definition in the rules only one time. Additionally, the proposed rule change deletes the language the EOP may only be calculated if there are market orders in the book or the book is crossed. Because the EOP is a price of an expected opening trade, it is only possible to have a trade if there are market orders or a locked or crossed market, so the Exchange believes this language is unnecessary. Further, the proposed rule change states the System will only disseminate EOP and EOS messages if the width between the highest quote bid and lowest quote offer on the Exchange or disseminated by other exchanges is no wider than the OEPW range (as defined below).[7] As discussed below, the Exchange's opening quote width must be no wider than OEPW range for a series to open, and this revised language is consistent with that opening condition.

Opening Rotation Initiation and Notice

Rule 6.11(b) currently provides, unless unusual circumstances exist, at a randomly selected time within a number of seconds after the opening trade and/or the opening quote is disseminated in the market for the underlying security[8] (or after 8:30 a.m. for index options), the System initiates the opening rotation procedure and sends a notice (''Rotation Notice'') to Participants. It further provides the Rotation Notice will be sent following the opening trade or opening quote or which occurs first (as determined by the Exchange on a class-by-class basis). The Exchange proposes to amend Rule 6.11(b) to provide in proposed subparagraph (1) the System initiates the opening rotation procedure on a class-by-class basis:

- With respect to equity and ETP options, after the opening trade or the opening quote is disseminated in the market for the underlying security, or at 8:30 for classes determined by the Exchange (including over-the-counter equity classes); or
- with respect to index options, at 8:30 a.m., or at the later of 8:30 a.m. and the time the Exchange receives a disseminated index value for classes determined by the Exchange.

intended to execute immediately once represented on the Exchange or be cancelled. As there is no trading during the pre-opening period, an immediate-or-cancel order submitted during the pre-opening period would never execute and always be cancelled; thus, the Exchange determined to not permit this order type during the pre-opening period. Rule 6.10(c)(7) defines opening rotation orders, and the proposed rule change amends this definition to include limit orders (as well as to make another nonsubstantive change). The Exchange does not believe it is necessary to restrict limit orders from being entered to participate in the opening rotation, as they will execute during the opening rotation pursuant to the opening procedures in the same manner as market orders.

[6] Currently, the System begins disseminating EOIs at approximately 7:30 a.m. The System disseminates EOIs at 30-second intervals during the pre-open period and 1-second intervals during the opening rotation period (see discussion below for additional information regarding the dissemination of EOIs during the opening rotation). *See* Regulatory Circular RG15–039.

[7] Because this proposed language implies there must be a quote, the proposed rule change also deletes the language that the EOP may only be calculated if at least one quote is present, as it would be duplicative.

[8] The ''market for the underlying security'' is currently the primary listing market, the primary volume market (defined as the market with the most liquidity in that underlying security for the previous two calendar months) or the first market to open the underlying security. The Exchange does not designate the primary volume market as the market for the underlying security for any class, and thus the proposed rule change deletes that option. The proposed rule change also changes the term ''market'' to ''exchange,'' as the primary listing market or first market to open is a national securities exchange. The proposed rule change clarifies the Exchange determines on a class-by-class basis which market is the market for the underlying security.

The proposed rule change also deletes the phrase regarding the initiation of the opening rotation procedure at a randomly selected time within a number of seconds after the triggering event.

The Exchange believes this proposed change more accurately describes the timing at which the System initiates the opening rotation procedure for each type of option, which generally occurs immediately after the triggering event rather than a randomly selected number of seconds after the event. The proposed rule change provides, while the dissemination of the opening trade or quote in the market for the underlying security is generally the trigger to initiate the opening rotation for an equity or ETP class, the Exchange may determine to open certain equity and ETP classes at 8:30 a.m. instead if it does not have access to underlying information for those classes. The Exchange does not receive underlying information regarding the opening of certain equities.[9] The proposed rule change provides the Exchange with the necessary flexibility to ensure it can open trading in options overlying these equities in such circumstances. Similarly, the proposed rule change provides the Exchange with flexibility to open certain index options at the later of 8:30 a.m. and the time the Exchange receives a disseminated index value, in addition to at 8:30 a.m., to address circumstances in which this may be a more useful opening trigger.

In addition, the Exchange proposes to amend current Rule 6.11(b)(1), which is proposed Rule 6.11(b)(2), to state the System notifies market participants of the opening rotation initiation upon initiating the opening rotation procedure (defined as the ''Rotation Notice'') rather than following the opening trade or quote. The initiation of the opening rotation for a series triggers the dissemination of the notice, so the Exchange believes this proposed change more accurately and simply describes when market participants will receive the rotation notice.

Opening Rotation Period

Current Rule 6.11(c) provides after the rotation notice is sent, the System will enter into a rotation period, during which the opening price will be established for each series. During the rotation period,[10] the System will continue to calculate and provide the EOP and EOS given the current resting orders and quotes. The System will process the series of a class in a random order, and the series will begin opening after a period following the rotation notice, which period will not exceed 60 seconds and will be established on a class-by-class basis.

The proposed rule change reorganizes paragraph (c) to describe when the opening rotation period begins (which is after the System initiates the opening rotation procedure and sends the rotation notice) (proposed introduction to paragraph (c)), what happens during the period (proposed subparagraph (c)(1)), the handling of EOIs during the period (proposed subparagraph (c)(2)), and when the period ends (proposed subparagraph (c)(3)). The Exchange believes this will more clearly describe for investors the opening rotation process.

The proposed rule change adds detail regarding what occurs during the opening rotation period. Specifically, while the rules currently state the System establishes the opening trade price for a series during the opening rotation period, the proposed rule change adds proposed subparagraph (c)(1), which states the System does this (as well as establish the opening BBO) by matching and executing resting orders and quotes against each other. The proposed rule change moves the definition of opening trade price to proposed subparagraph (c)(1)(A) from current subparagraph (g)(1) (which references the ''single clearing price'' at which orders and quotes are matched at the open) so the rules include discussions of the opening trade price in a single location within the rules. The proposed rule change amends the definition of the opening trade price of a series to be the ''market-clearing'' price, which is the single price at which the largest number of contracts in the book can execute, leaving bids and offers that cannot trade with each other. The Exchange believes it is more appropriate to clear the largest size from the book at the open, even if that size is comprised of a smaller number of orders and quotes (as stated in proposed Rule 6.11(a)(2)). The EOS is the size of any expected opening trade. This is consistent with the change to the definition of EOP, as discussed above. The proposed rule change adds if there are multiple prices at which the same number of contracts would clear, the System uses the price at or nearest to the midpoint of the range consisting of the higher of the opening NBB and widest bid point of the OEPW range, and the lower of the opening NBO and widest offer point of the OEPW range.

The proposed rule change also adds proposed paragraph (c)(1)(B), which states all orders (except complex orders) and quotes in a series in the book prior to the opening rotation period participate in the opening rotation for a series. Contingency orders that participate in the opening rotation may execute during the opening rotation period only if their contingencies are triggered. The proposed rule change also notes complex orders do not participate in the opening rotation. While the System accepts those orders prior to the open, the Exchange believes it would complicate the opening rotation if they participated in the opening rotation and attempted to execute against the leg markets. Because proposed subparagraph (c)(1)(B) describes the matching process that occurs during the opening rotation period, the proposed rule change moves the rule provision regarding the priority order of orders and quotes during this matching process from current subparagraph (g)(1) to proposed subparagraph (c)(1)(C).[11]

The proposed rule change also revises the language regarding the messages disseminated during the opening rotation period to provide the System will continue to disseminate EOIs (not just the EOP and EOS). This proposed revision is consistent with the proposed language described above regarding dissemination of EOIs during the pre-opening period (and incorporates the proposed definition of EOIs). The proposed rule change provides the Exchange with the authority to determine a shorter interval length for the dissemination of EOIs during the opening rotation period than during the pre-opening period, as the Exchange believes market participants may want to receive these messages more frequently closer to the opening. This flexibility is intended to ensure the Exchange may disseminate these messages to market participants as frequently as it deems necessary to ensure a fair and orderly opening.

Proposed subparagraph (c)(3) updates the description of the length of the opening rotation period and how the System processes series to open

[9] For example, with respect to pink sheet stocks, the Exchange does not receive underlying information from the over-the-counter market (''OTC'') and believes it is in the interest of a fair and orderly market to initiate the opening rotation at 8:30 for those stocks rather than take additional time to confirm the OTC market for those stocks opened.

[10] Under the proposed rule change, rotation period is no longer a defined term. The proposed rule change, therefore, makes references to the term rotation period throughout Rule 6.11 lower-cased.

[11] The System prioritizes orders in the following order: (1) Market orders, (2) limit orders and quotes whose prices are better than the opening price, and (3) resting orders and quotes at the opening price. The proposed rule change also notes contingency orders are prioritized as set forth in Rule 6.12(c).

following the opening rotation period. Current subparagraph (c)(2) states the System will process the series of a class in a random order and the series will begin opening after a period following the Rotation Notice, which period may not exceed sixty seconds and will be established on a class-by-class basis by the Exchange. Proposed subparagraph (c)(3) states after a period of time determined by the Exchange for all classes, the System opens series of a class in a random order, staggered over regular intervals of time (the Exchange determines the length and number of these intervals for all classes).[12] Subject to satisfaction of opening conditions described below (in proposed paragraph (d)), the opening rotation period (including these intervals) may not exceed 60 seconds. The Exchange believes this change more clearly and accurately describes how the System opens series for trading, which it does randomly as set forth in the current rule but in a staggered manner over regular intervals. These intervals are intended to manage the number of series that will open during a short time period to ensure a fair and orderly opening.

Opening Quote and Trade Price

The proposed rule change deletes the language in current paragraph (d) stating as the opening price is determined by series, the System will disseminate through OPRA the opening quote and the opening trade price, if any. The System disseminates all quote and trade price information to OPRA once a series opens pursuant to the OPRA plan, including opening quote and trade price information, so the Exchange believes it is unnecessary to include this provision specifically in the opening rule.

Opening Conditions

Current Rule 6.11(e) provides the System will not open a series if one of the following conditions is met:

(1) There is no quote present in the series;

(2) the opening price is not within an acceptable range (as determined by the Exchange) compared to the lowest quote offer and the highest quote bid;

(3) the opening trade would be at a price that is not the national best bid or offer; or

(4) the opening trade would leave a market order imbalance (*i.e.,* there are more market orders to buy or to sell for the particular series than can be satisfied by the limit order, quotes and market orders on the opposite side); however, in series that will open at a minimum price increment, the System will open even if a sell market order imbalance exists.

Current paragraph (f) describes what happens when each of these conditions is present:

(1) If the condition in paragraph (e)(1) is present (*i.e.,* there is no quote), the System will check to see if there is an NBBO quote on another market that falls within the acceptable opening range. If such an NBBO quote is present, the series will open and expose the marketable order(s) at the NBBO price. If such an NBBO quote is not present, the System will not open the series and will send a notification to Participants indicating the reason.

(2) If the condition in paragraph (e)(2) is present (*i.e.,* the opening price is not within an acceptable range), the System will match orders and quotes to the extent possible at a single clearing price within the acceptable range, then expose the remaining marketable order(s) at the widest price point within the acceptable opening range or the NBBO price, whichever is better.

(3) If the condition in paragraph (e)(3) is present (*i.e.,* the opening trade would not be at the NBBO), the System will match orders and quotes to the extent possible at a single clearing price within the acceptable opening range or the NBBO price, whichever is better, then expose the remaining marketable order(s) at the NBBO price.

(4) If the condition in paragraph (e)(4) is present (*i.e.,* the opening trade would leave market order imbalance), the System will match orders and quotes to the extent possible at a single clearing price, then expose the remaining marketable order(s) at the widest price point within the acceptable opening range or the NBBO price, whichever is better.

The proposed rule change amends the opening conditions to provide in proposed paragraph (d) as follows: [13]

(1) If there are no quotes on the Exchange or disseminated from at least one away exchange present in the series, the System does not open the series. There are no exceptions to this opening condition. The Exchange generally requires an opening quote to ensure there will be liquidity in a series when it opens;

(2) if the width between the best quote bid and best quote offer, which may consist of Market-Makers quotes or bids and offers disseminated from an away exchange (for purposes of proposed paragraph (d), the ''opening quote''), is wider than an acceptable opening price range (as determined by the Exchange on a class-by-class and premium basis) (the ''Opening Exchange Prescribed Width range'' or ''OEPW range'') [14] and there are orders or quotes marketable against each other or that lock or cross the OEPW range, the System does not open the series. However, if the opening quote width is no wider than the intraday acceptable price range for the series (''IEPW range'') [15] and there are no orders or quotes marketable against each other or that lock or cross the OEPW range, the System opens the series. If the opening quote width is wider than the IEPW range, the System does not open the series. If the opening quote for a series consists solely of bids and offers disseminated from an away exchange(s), the System opens the series by matching orders and quotes to the extent they can trade and reports the opening trade, if any, at the opening trade price. The System then exposes any remaining marketable buy (sell) orders at the widest offer (bid) point of the OEPW range or NBO (NBB), whichever is lower (higher). The proposed rule change only makes nonsubstantive, simplifying changes to the exception to this opening condition. Because the proposed definition of opening quote width includes bids and offers from away exchanges, opening quote width incorporates those bids and offers. If there are no Market-Maker quotes on C2 but other exchanges have disseminated bids and offers in a series, those away quotes constitute the NBBO for the series. Thus, the proposed rule change clarifies the System will open a series if the opening quote width, which is comprised of the best quotes on C2 and other exchanges (essentially, the

[12] Currently, the Exchange has set the period of time that must pass before the System begins processing series to open at one second, and the Exchange has set the number of intervals to one and the length of the intervals to one second. As a result, the opening rotation period currently lasts one to two seconds (the proposed rule change clarifies that the various time periods and intervals combine to form the opening rotation period). *See* Regulatory Circular RG11–008. In other words, after one second, the System randomly selects a group of series to open; and after the one-second interval, the System opens the remaining group of series.

[13] The proposed rule change combines the exceptions in current paragraph (f) with the applicable opening conditions in current paragraph (e) into single proposed paragraph (d) for ease of review.

[14] Current OEPW settings are set forth in Regulatory Circular RG14–020. The acceptable price range is determined by taking the midpoint of the highest quote bid and lowest quote offer plus/minus half of the designated OEPW. The rules currently permit C2 to set the OEPW on a class-by-class basis. The proposed rule change also clarifies the Exchange may set the OEPW on a premium basis; as options with higher premiums may have wider spreads, the Exchange believes it is appropriate to have OEPW settings to reflect that. This is consistent with the Exchange's authority to set the IEPW pursuant to Rule 6.17(a).

[15] *See* Rule 6.17(a).

NBBO) is no wider than the OEPW range. The OEPW range is a price protection measure intended to prevent orders from executing at extreme prices on the open. If that market is no wider than the OEPW range, the Exchange believes it is appropriate to open a series under these circumstances and provide marketable orders on the Exchange with the opportunity to execute at the NBBO. If the opening quote width is no wider than the OEPW range, then the Exchange believes the risk of execution at an extreme risk is not present. With respect to the exception to this opening condition, if the best market (whether the Exchange or national market) would satisfy the price check parameter the Exchange uses for intraday trading, and there are no orders that can execute on the open, then there is no risk that an order will execute at an extreme price on the open. Because the risk that the OEPW range is intended to address is not present in this situation, the Exchange believes it is appropriate to open a series given these conditions. Other proposed changes make the language (*e.g.,* language regarding matching orders and quotes and reporting the opening trade, and regarding the opening price being that which clears the largest number of contracts) in this paragraph consistent with language used in the other opening conditions and exceptions in proposed paragraph (d).[16]

(3) if the opening trade price would be outside the OEPW range or the NBBO, the System opens the series by matching orders and quotes to the extent they can trade and reports the opening trade, if any, at an opening trade price not outside either the OEPW range or NBBO. The System then exposes any remaining marketable buy (sell) orders at the widest offer (bid) point of the OEPW range or NBO (NBB), whichever is lower (higher). The Exchange believes using the term OEPW range with respect to the acceptable range for opening price in the rules is a more accurate description of the appropriate range for opening prices (as this is the term used in circulars and among Participants). The OEPW range is used as a price protection measure. Additionally, the proposed rule change clarifies that a series will open if the opening trade price is at the widest part of the OEPW range (it will expose orders if it is outside the OEPW range). The proposed rule change makes nonsubstantive, simplifying changes to this opening condition and clarifies that the opening trade price must be something not outside the OEPW range or the NBBO (including the ends of the applicable range). Other proposed changes make the language in this paragraph consistent with language used in the other conditions in proposed paragraphs (d);

(4) if the opening trade would leave a market order imbalance, which means there are more market orders to buy or to sell for the particular series than can be satisfied by the orders and quotes on the opposite side, the System opens the series by matching orders and quotes to the extent they can trade and reports the opening trade, if any, at the opening trade price. The System then exposes any remaining marketable buy (sell) orders at the widest offer (bid) point of the OEPW range or NBO (NBB), whichever is lower (higher). The proposed rule change deletes language stating a series will open at a minimum price increment even if there is a sell market order imbalance. Because the System will open by matching orders and quotes, then exposing remaining orders, when there is a market order imbalance for any series, including those that will open at a minimum price increment as the rule currently states, there is no reason to highlight this situation in the rule. The proposed rule change also makes nonsubstantive, simplifying changes to this provision. Other proposed changes make the language in this paragraph consistent with language used in the other conditions in proposed paragraph (d); or

(5) if the opening quote bid (offer) or the NBB (NBO) crosses the opening quote offer (bid) or the NBO (NBB) by more than an amount determined by the Exchange on a class-by-class and premium basis, the System does not open the series.[17] The System currently does not open a series if this condition exists to prevent executions at extreme prices, and the Exchange proposes to codify this condition in the rules so that market participants are aware of all circumstances under which a series may not open. There are no exceptions to this opening condition. If the opening quote bid (offer) or NBO (NBO) crosses the opening quote offer (bid) or NBO (NBB) by no more than the specified amount, the System will open the series by matching orders and quotes to the extent they can trade and report the opening trade, if any, at the opening trade price. The System then exposes any remaining marketable buy (sell) orders at the widest offer (bid) point of the OEPW range or NBO (NBB), whichever is lower (higher). If the best away market bid and offer are inverted by no more than the specified amount, there is a marketable order on each side of the series, and the System opens the series, the System will expose the order on the side with the larger size and route for execution the order on the side with the smaller size to an away exchange that is at the NBBO. Only one order in a series may be exposed in a HAL auction, so this provision is consistent with this limitation and is intended to address the situation in which there may be a marketable order on each side of the market so that both orders have a possibility for execution. This exception is consistent with the other exceptions in proposed paragraph (d) as well as with current System functionality.

Generally, the purpose of these opening conditions and exceptions is to ensure that series open in a fair and orderly manner and at prices consistent with the current market conditions for the series and not at extreme prices, while taking into consideration the markets of other exchanges that may be better than the Exchange's at the open. The exceptions provide the opportunity for orders to execute through a HAL auction or at an away exchange when that is the case.

The proposed rule change moves provisions related to the exposure of orders at the open from current subparagraph (g)(2) and Interpretation and Policy .04 to proposed paragraph (d) to eliminate duplicative language and to include all provisions regarding the opening exposure process are including in the same place within the rules.[18] The proposed rule change deletes the provision regarding the matching period of the HAL openings. The Exchange no longer uses matching period and just uses the exposure period, which may not exceed 1.5 seconds. There is no allocation period for the HAL exposure process described in Rule 6.18, and the Exchange does not believe it is necessary to include one for HAL on the openings. As provided in current Interpretation and Policy .04

[16] Regulatory Circular RG14–020 sets forth the current OEPW range. This is the term with which Participants are familiar for the acceptable opening, and the Exchange believes it will be beneficial for investors if the rules refer to the same term.

[17] Currently, this amount is $0.25 for options with prices less than $3.00 and $0.50 for options with prices of $3.00 or more. *See* Regulatory Circular RG10–005.

[18] Proposed paragraph (d) states the acceptable tick distance the Exchange may set to prevent execution of orders following exposure on the opening priced ''too far away'' from the exposure price will be determined on a class-by-class and premium basis rather than series-by-series and premium basis, as current paragraph (g)(2) and Interpretation and Policy .04 state. The Exchange sets this amount by class rather than by series and proposes to reflect that in the rules.

and proposed paragraph (d), the exposure process will be conducted via HAL pursuant to Rule 6.18 for an exposure period designated by the Exchange for a class (which period of time will not exceed 1.5 seconds), so the Exchange believes the process for HAL on the openings should be consistent with the standard HAL process.[19]

The Exchange also proposes to add to paragraph (d) if the System does not open a series pursuant paragraphs (d), notwithstanding proposed paragraph (c) (which states the opening rotation period may not last more than 60 seconds), the opening rotation period continues (including the dissemination of EOIs, which is consistent with language the Exchange proposes to delete regarding the notifications sent to market participants if one of the opening conditions is present) until the condition causing the delay is satisfied or the Exchange otherwise determines it is necessary to open a series in accordance with proposed paragraph (e). This is currently how the System operates, and the Exchange believes it will benefit investors to explicitly state this in the rules, particularly because, under these circumstances, the opening rotation period will last longer than the standard length of time determined by the Exchange. The Exchange believes it is important for Participants to continue to receive EOIs, particularly those describing why a series is not open, so they have close to real-time information regarding the potential opening of a series.[20]

Other Changes

The proposed rule change amends Rule 6.11 as follows:

- Current Rule 6.11 provides in various places the Help Desk may deviate from the opening procedures, including paragraphs (b)(2) and (h). The Exchange believes it is simpler to have one single rule provision within Rule 6.11 that applies to the entire rule stating the Help Desk may determine whether to modify the opening procedures when they deem necessary. The Exchange proposes to delete these references and combine them into current paragraph (h) and proposed paragraph (e). The proposed rule change lists examples of actions the Help Desk has flexibility to take when necessary in the interests of commencing or maintaining a fair and orderly market (some of which are listed throughout current Rule 6.11), in the event of unusual market conditions or in the public interest, including delaying or compelling the opening of any series in any options class and modifying timers or settings described in Rule 6.11. The proposed rule change adds the Exchange will make and maintain records to document all determinations to deviate from the standard manner of the opening procedure, and periodically review these determinations for consistency with the interests of a fair and orderly market.
- The proposed rule change also amends current Rule 6.11(i) and proposed Rule 6.11(f) to indicate the procedure described in Rule 6.11 may be used to reopen a series, in addition to a class, after a trading halt. This proposed changes addresses a potential situation in which only certain series are subjected to halt. As series open on an individual basis, the Exchange does not believe this to be a significant change. The proposed rule change also adds detail regarding notice of use of this opening procedure following a trading halt and clarifies the procedure would be the same, however, based on then-existing facts and circumstances, there may be no pre-opening period or a shorter pre-opening period than the regular pre-opening period. Specifically, proposed paragraph (f) states the Exchange will announce the reopening of a class or series after a trading halt as soon as practicable via electronic message to Participants that request to receive such messages.[21] C2 believes it is in investors' best interests to reopen a class or series as soon as possible after a trading halt, which may make advance notice in certain situations impractical. The proposed rule change provides the Exchange with the ability to re-open as quickly as possible following a halt.
- The Exchange proposes to amend Interpretation and Policy .01, which states the Exchange may determine on a class-by-class basis which electronic algorithm from Rule 6.12 applies to the class during rotations. The proposed rule change makes the electronic algorithm that applies to a class intraday the algorithm that applies to a class during rotations, but still leaves the Exchange with the same flexibility to apply a different algorithm to a class during rotations if it deems necessary or appropriate. This proposed change merely makes the intraday algorithm the default opening algorithm for a class. The Exchange believes it is important to maintain this flexibility so that it can facilitate a robust opening with sufficient liquidity in all classes.
- The Exchange proposes to amend Interpretation and Policy .02, which states all pronouncements regarding determinations by the Exchange pursuant to Rule 6.11 and the Interpretations and Policies thereunder will be announced to Participants via Regulatory Circular. In addition to nonsubstantive changes to make the language more plain English, the proposed rule change adds determinations will be made via Regulatory Circular with appropriate advanced notice to ensure Trading Permit Holders are aware of these determinations and have sufficient time to make any necessary changes in response to the determinations. The proposed rule change also adds notice of determinations may be made as otherwise provided, as other parts of Rule 6.11 state certain notifications will be made in a different manner (for example, via electronic message).

The proposed rule change makes numerous nonsubstantive and clerical changes throughout Rule 6.11 (including its Interpretations and Policies), including adding or amending headings and defined terms, updating cross-references, adding introductory and clarifying language, using consistent language and punctuation, replacing terms such as ''option series'' with series (all series listed for trading on the Exchange are for options, making it unnecessary to include ''option''), and using more plain English.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[22] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [23] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and

[19] The proposed rule change deletes from current paragraph (g)(2) and Interpretation and Policy .04 the provision stating the size of a response may not exceed the size of the exposed order. This language is included in Rule 6.18(b) and applies to all exposures via HAL. Because proposed Rule 6.11(d) provides exposures under that paragraph will occur pursuant to Rule 6.18, it is not necessary (and duplicative) to include this language in Rule 6.11.

[20] Current Rule 6.11(j) and proposed Rule 6.11(g) provides the opening procedures described in the rule may also be used after the close of a trading session for series that open pursuant to Rule 6.11. The proposed rule change makes nonsubstantive changes to proposed paragraph (g) to more clearly and simply state the potential applicability of the opening procedures to a closing rotation for series that open pursuant to Rule 6.11 and to include additional detail regarding the notification to Participants regarding the decision to conduct a closing rotation.

[21] The proposed rule change also notes the Exchange may reopen a class after a trading halt as otherwise set forth in the Rules, including Rules 6.32.

[22] 15 U.S.C. 78f(b).

[23] 15 U.S.C. 78f(b)(5).

practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [24] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the proposed rule change enhances the description of the opening procedures in the rules to reflect how the System opens series, which perfects the mechanism of a free and open market and ultimately protects investors. The Exchange believes the proposed rule changes to reorganize and enhance the description of the opening (and sometimes) closing procedures will benefit investors, because the rule as amended more accurately and clearly describes how the System opens series on the Exchange. Thus, investors will have a better understanding of how their quotes and orders will be handled during opening rotations if they elect to submit quotes and orders during the pre-opening period or if they have orders resting on the book from the prior trading day. Similarly, the Exchange believes the deletion of duplicative provisions from Rule 6.11 will benefit investors by eliminating potential confusion about the applicability of those provisions. The nonsubstantive and clerical changes will create more consistency and clarity throughout and otherwise simplify the rule. Further, the Exchange believes the additional information regarding notification of the use of the opening procedure following a trading halt will clarify for Participants when and how they will know from the Exchange such use is occurring.

The revised opening conditions are intended to promote just and equitable principles of trade, as they ensure that series open in a fair and orderly market with sufficient liquidity in the series and opportunities for execution at prices that are consistent with then-current market conditions rather than potentially extreme prices. These proposed changes ensure that market participants are aware of all circumstances under which the System may not open a series.

[24] *Id.*

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The opening procedures as revised by the proposed rule change will still apply to all market participants in the same manner as they do today. The proposed rule change more accurately describes the opening procedures that are currently in place on the Exchange, which procedures are designed to open series on the Exchange in a fair and orderly manner. These changes have no impact on competition. The purposes of the opening conditions are to ensure there is sufficient liquidity in a series when it opens and the series opens at prices consistent with the current market conditions (at the Exchange and other exchanges) rather than extreme prices that could result in unfavorable executions to market participants. The nonsubstantive changes and clerical changes have no impact on competition, as they are intended to eliminate confusion within and simplify the rules.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–C2–2016–021 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–C2–2016–021. 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–C2–2016–021, and should be submitted on or before December 12, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Brent J. Fields,

Secretary.

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[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79312; File No. SR–BatsBZX–2016–75]

Self-Regulatory Organizations; Bats BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Period for the Supplemental Competitive Liquidity Provider Program

November 15, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 7, 2016, Bats BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to extend the pilot period for the Exchange's Supplemental Competitive Liquidity Provider Program (the ''Program''), which is currently set to expire on November 4, 2016 to expire on July 31, 2017.

The text of the proposed rule change is available at the Exchange's Web site at *www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

On August 30, 2011, the Exchange received approval of rules applicable to the qualification, listing and delisting of securities of issuers on the Exchange.[3] More recently, the Exchange received approval to operate a pilot program that is designed to incentivize certain Market Makers[4] registered with the Exchange as ETP CLPs, as defined in Interpretation and Policy .03 to Rule 11.8, to enhance liquidity on the Exchange in certain ETPs[5] listed on the Exchange and thereby qualify to receive part of a daily rebate as part of the Program under Interpretation and Policy .03 to Rule 11.8.[6]

The Program was approved by the Commission on a pilot basis running one-year from the date of implementation.[7] The Commission approved the Program on July 28, 2014.[8] The Exchange implemented the Program on July 28, 2014 and the pilot period for the Program was originally scheduled to end on July 28, 2015 until it was extended to end on October 28, 2015,[9] later extended to January 28, 2016,[10] again extended to April 28, 2016,[11] then again to July 28, 2016,[12] again to October 28, 2016,[13] and most recently to November 4, 2016.[14]

Proposal To Extend the Operation of the Program

The Exchange established the Program in order to enhance liquidity on the Exchange in certain ETPs listed on the Exchange (and thereby enhance the Exchange's ability to compete as a listing venue) by providing a mechanism by which ETP CLPs compete for part of a daily quoting incentive on the basis of providing the most aggressive quotes with the greatest amount of size. Such competition has the ability to reduce spreads, facilitate the price discovery process, and reduce costs for investors trading in such securities, thereby promoting capital formation and helping the Exchange to compete as a listing venue. The Exchange is proposing to extend the current pilot period for the Program from November 4, 2016 to July 31, 2017 in order to allow the Exchange to gather additional data related to the Program as the Program continues to operate.

Prior to the end of the pilot period ending July 31, 2017, the Exchange will post a report relating to the Program (the ''Assessment Report'') on its Web site three months before the end of the pilot period or at the time it files to terminate the pilot, whichever comes first. The proposed Assessment Report would list the program objectives that are the focus of the pilot and, for each, provide (a) a statistical analysis that includes evidence that is sufficient to inform a reader about whether the program has met those objectives during the pilot period, along with (b) a narrative explanation of whether and how the evidence indicates the pilot has met the objective, including both strengths and weaknesses of the evidence in this regard. The Assessment Report also would include a discussion of (a) the procedures used in selecting any samples that are used in constructing tables or statistics for inclusion in the Assessment Report, (b) the definitions of any variables and statistics reported in the tables, including test statistics, (c) the statistical significance levels of any test statistics and (d) other statistical or qualitative information that may enhance the usefulness of the Assessment Report as a basis for evaluating the performance of the program. The Assessment Report would present statistics on product performance relative to the performance of comparable or other suitable benchmark products (including test statistics that permit the reader to evaluate the statistical significance of any differences reported or discussed in the report), along with information on the procedures that were used to identify those comparable or benchmark products, the characteristics of each comparable or benchmark products, the characteristics of each product that is

[3] *See* Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR–BATS–2011–018).

[4] As defined in BZX Rules, the term ''Market Maker'' means a Member that acts a as a market maker pursuant to Chapter XI of BZX Rules.

[5] ETP is defined in Interpretation and Policy .03(b)(4) to Rule 11.8.

[6] *See* Securities Exchange Act Release No. 72692 (July 28, 2014), 79 FR 44908 (August 1, 2014) (SR–BATS–2014–022) (''CLP Approval Order'').

[7] *See id* at 44909.

[8] *Id.*

[9] *See* Securities Exchange Act Release No. 75518 (July 24, 2015), 80 FR 45566 (July 30, 2015 (SR–BATS–2015–55).

[10] *See* Securities Exchange Act Release No. 76293 (October 28, 2015), 80 FR 67808 (November 3, 2015) (SR–BATS–2015–96).

[11] *See* Securities Exchange Act Release No. 77033 (February 2, 2016), 81 FR 6558 (February 8, 2016) (SR–BATS–2016–12).

[12] *See* Securities Exchange Act Release No. 77721 (April 27, 2016), 81 FR 26591 (May 3, 2016) (SR-BatsBZX–2016–11).

[13] *See* Securities Exchange Act Release No. 78454 (August 2, 2016), 81 FR 52494 (August 8, 2016) (SR-BatsBZX–2016–46).

[14] *See* Securities Exchange Act Release No. 79222 (November 2, 2016) (SR-BatsBZX–2016–71).

the focus of the pilot, the procedures used in selecting the time horizon of the sample and the sensitivity of reported statistics to changes in the time horizon of the sample.

As such, the Exchange believes that it is appropriate to extend the current operation of the Program in order to allow the Exchange to gather additional data related to the Program as the Program continues to operate and the Exchange prepares the Assessment Report. Through this filing, the Exchange seeks to extend the current pilot period of the Program until July 31, 2017.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[15] In particular, the Exchange believes the proposed change furthers the objectives of Section 6(b)(5) of the Act,[16] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that extending the pilot period for the Program is consistent with these principles because the Program is reasonably designed to enhance quote competition, improve liquidity in securities listed on the Exchange, support the quality of price discovery, promote market transparency, and increase competition for listings and trade executions, while reducing spreads and transaction costs in such securities. Maintaining and increasing liquidity in Exchange-listed securities will help raise investors' confidence in the fairness of the market and their transactions. Further, the Exchange believes that extending the pilot period will allow the Exchange to gather additional data related to the Program as the Program continues to operate in order to better assess the effect of the Program on the public price discovery process and market structure generally as part of its preparation of the Assessment Report.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change extends an established pilot period until July 31, 2017, thus allowing the Program to enhance competition in both the listings market and in competition for market makers. The Program will continue to promote competition in the listings market by providing issuers with a vehicle for paying the Exchange additional fees in exchange for incentivizing tighter spreads and deeper liquidity in listed securities and allow the Exchange to continue to compete with similar programs at Nasdaq Stock Market LLC[17] and NYSE Arca Equities, Inc.[18]

The Exchange also believes that extending the pilot period will allow the Program to continue to enhance competition among market participants by creating incentives for market makers to compete to make better quality markets. By continuing to require that market makers both meet the quoting requirements and also compete for the daily financial incentives, the quality of quotes on the Exchange will continue to improve. This, in turn, will attract more liquidity to the Exchange and further improve the quality of trading in exchange-listed securities participating in the Program, which will also act to bolster the Exchange's listing business.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (A) Significantly affect the protection of investors or the public interest; (B) impose any significant burden on competition; and (C) by its terms, 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[19] and paragraph (f)(6) of Rule 19b–4 thereunder.[20] The Exchange has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[17] *See* Securities Exchange Act Release No. 69195 (March 20, 2013), 78 FR 18393 (March 26, 2013) (SR–NASDAQ–2012–137).

[18] *See* Securities Exchange Act Release No. 69335 (April 5, 2013), 78 FR 35340 (June 12, 2013) (SR–NYSEARCA–2013–34).

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative before 30 days from the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[21] 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 Exchange asserts that waiver of the operative delay will allow the Exchange to extend the Program prior to its expiration on November 4, 2016, which will ensure that the Program continues to operate uninterrupted while the Exchange and the Commission continue to analyze data regarding the Program.[22] The Exchange represents that extending the pilot period will allow the Exchange to gather additional data related to the Program to better assess the effect of the Program on the public price discovery process and market structure, generally, as part of its preparation of the Assessment Report. According to the Exchange, prior to the end of the pilot period ending July 31, 2017, the Exchange will post the Assessment Report on its Web site three months before the end of the pilot period or at the time it files to terminate the pilot, whichever comes first. Based on these representations, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative upon filing with the Commission.[23]

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4.

[21] 17 CFR 240.19b–4(f)(6)(iii).

[22] The Commission notes that, on November 4, 2016, the Exchange filed a similar rule filing (SR–BatsBZX–2016–74) proposing to extend the Program to July 31, 2017. The Exchange withdrew that filing on November 7, 2016, and filed this proposed rule filing on the same day.

[23] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on

Continued

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: (1) Necessary or appropriate in the public interest; (2) for the protection of investors; or (3) 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 proposal is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–BatsBZX–2016–75 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–BatsBZX–2016–75. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet 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 such filing will also 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 No. SR–BatsBZX–2016–75 and should be submitted on or before December 12, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Brent J. Fields,

Secretary.

[FR Doc. 2016–27892 Filed 11–18–16; 8:45 am]

BILLING CODE 8011–01–P

efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79311; File No. SR–BOX–2016–45]

Self-Regulatory Organizations; BOX Options Exchange LLC; Order Approving a Proposed Rule Change To Amend the Treatment of Quotes To Provide That All Quotes on BOX Are Liquidity Adding Only

November 15, 2016.

I. Introduction

On September 13, 2016, BOX Options Exchange LLC (''BOX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the treatment of quotes to provide that all quotes on BOX are liquidity adding only. The proposed rule change was published for comment in the **Federal Register** on October 3, 2016.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to amend the treatment of incoming quotes to BOX so that they are only accepted if they are liquidity adding.[4] Under the Exchange's proposed rule change, if an incoming quote or quote update is marketable because it would execute against a resting order or quote on the BOX Book,[5] it will be rejected. The Exchange will not reject incoming quotes during the opening of the market.[6] As is the case today, rejected quotes will not be considered when determining a Market Maker's quoting obligations.[7]

The Exchange also proposes to amend the treatment of incoming quotes after they interact with the Price Improvement Period (''PIP'').[8] Currently, when an incoming quote is on the same side as a PIP Order, it may cause the PIP auction to end early, if, at the time of submission, the price of the incoming quote would cause an execution to occur prior to the end of the PIP.[9] Under the proposal, the incoming quote will continue to cause the PIP auction to end early if the conditions of Rule 7150(i) exist. However, after the PIP auction is concluded, if the incoming quote is executable against resting orders or quotes on the BOX Book, it will be rejected. Additionally, currently, when an incoming quote on the opposite side of the PIP Order is received such that it would cause an execution to occur prior to the end of the PIP auction, the incoming quote will be immediately

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 78946 (Septemeber 27, 2016), 81 FR 68069 (October 3, 2016) (''Notice'').

[4] *See* Notice, *supra* note 3 (proposing a new IM–8050–3 to Exchange Rule 8050).

[5] The term ''Central Order Book'' or ''BOX Book'' means the electronic book of orders on each single option series maintained by the BOX Trading Host. *See* Exchange Rule 100(a)(10).

[6] Transactions occurring on the opening are deemed to neither add nor remove liquidity and therefore are exempt from the liquidity fees and credits on the Exchange. *See* Section II.C. of the BOX Fee Schedule.

[7] On a daily basis, a Market Maker must, during regular market hours, make markets and enter into any resulting transactions consistent with the applicable quoting requirements, such that on a daily basis a Market Maker must post valid quotes at least sixty percent (60%) of the time that the classes are open for trading. These obligations apply to all of the Market Maker's appointed classes collectively, rather than on a class-by-class basis. *See* Exchange Rule 8050(e); *see also* Exchange Rule 8040.

[8] Options Participants, both Order Flow Providers and Market Makers, executing agency orders may designate Market Orders and marketable limit Customer Orders for price improvement and submission to the PIP. Customer Orders designated for the PIP (''PIP Orders'') shall be submitted to BOX with a matching contra order equal to the full size of the PIP Order. *See* Exchange Rule 7150.

[9] Specifically, the submission to BOX of a Market Order on the same side as a PIP Order will prematurely terminate the PIP when, at the time of the submission of the Market Order, the best Improvement Order is equal to or better than the NBBO on the same side of the market as the best Improvement Order. The submission to BOX of an executable Limit Order or generation of an executable Legging Order on the same side as a PIP Order will prematurely terminate the PIP if at the time of submission: (1) The Buy (Sell) Limit Order or Legging Order price is equal to or higher (lower) than the National Best Offer (Bid) and either: (i) The BOX Best Offer (Bid) is equal to the National Best Offer (Bid); or (ii) the BOX Best Offer (Bid) is higher (lower) than the National Best Offer (Bid) and the price of the best Improvement Order is equal to or lower (higher) than the National Best Offer (Bid); or (2) the Buy (Sell) Limit Order or Legging Order price is lower (higher) than the National Best Offer (Bid) and its limit price equals or crosses the price of the best Improvement Order. *See* Exchange Rule 7150(i).

executed.[10] Under the proposal, any remaining balance of the incoming quote that did not execute against the PIP Order, and that would execute against a resting order or quote on the BOX Book, will be rejected.

The Exchange represents that it will provide BOX Participants with notice, via Information Circular, about the implementation date of the proposed rule change.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, with Section 6(b) of the Act.[11] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[12] which requires, among other things, that a national securities exchange have rules designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission believes that the proposed rule change is designed to help Market Makers more efficiently submit quotes to provide liquidity on BOX, which could benefit investors. The Commission notes that Market Makers still will be able to take liquidity on BOX by submitting orders in or out of their appointed classes.[13] In addition, according to the Exchange, the proposed rule change will not alter a Market Maker's obligations pursuant BOX Rules 8040 and 8050, including the obligation to provide continuous two-sided quotes on a daily basis.[14] Further, the Commission notes that other options exchanges offer liquidity adding only order types.[15]

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[16] that the proposed rule change (SR–BOX–2016–45) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Brent J. Fields,

Secretary.

[FR Doc. 2016–27891 Filed 11–18–16; 8:45 am]

BILLING CODE 8011–01–P

[10] Specifically, a Market Order on the opposite side of a PIP Order will immediately execute against the PIP Order when, at the time of the submission of the Market Order, the best Improvement Order does not cross the NBBO on the same side of the market as the PIP Order. The submission to BOX of an executable Limit Order or generation of an executable Legging Order on the opposite side of a PIP Order will immediately execute against a PIP Order when the Sell (Buy) Limit Order price is equal to or crosses the National Best Bid (Offer), and: (1) The BOX Best Bid (Offer) is equal to the National Best Bid (Offer); or (2) the BOX Best Bid (Offer) is lower (higher) than the National Best Bid (Offer) and neither the best Improvement Order nor BOX Best Offer (Bid) is equal to or crosses the National Best Bid (Offer). *See* Exchange Rule 7150(j).

[11] 15 U.S.C. 78f(b). In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78f(b)(5).

[13] *Id.*

[14] *Id.* at 68070–71.

[15] *See id.* (citing International Securities Exchange, LLC (''ISE'') Rule 715(n) and NYSE Arca Options, Inc. (''NYSE Arca'') Rule 6.62(t)).

[16] 15 U.S.C. 78s(b)(2).

[17] 17 CFR 200.30–3(a)(12).

SELECTIVE SERVICE SYSTEM

Forms Submitted to the Office of Management and Budget for Extension of Clearance

AGENCY: Selective Service System.

ACTION: Notice.

The following forms have been submitted to the Office of Management and Budget (OMB) for extension of clearance in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35):

SSS Form—402

Title: Uncompensated Registrar Appointment Form.

Purpose: Is used to verify the official status of applicants for the position of Uncompensated Registrars and to establish authority for those appointed to perform as Selective Service System Registrars.

Respondents: United States citizens over the age of 18.

Frequency: One time.

Burden: The reporting burden is three minutes or less per respondent.

Copies of the above identified form can be obtained upon written request to the Selective Service System, Reports Clearance Officer, 1515 Wilson Boulevard, Arlington, Virginia 22209–2425.

Written comments and recommendations for the proposed extension of clearance of the form should be sent within 60 days of the publication of this notice to the Selective Service System, Reports Clearance Officer, 1515 Wilson Boulevard, Arlington, Virginia 22209–2425.

A copy of the comments should be sent to the Office of Information and Regulatory Affairs, Attention: Desk Officer, Selective Service System, Office of Management and Budget, New Executive Office Building, Room 3235, Washington, DC 20503.

Dated: November 9, 2016.

Lawrence Romo,

Director.

[FR Doc. 2016–27921 Filed 11–18–16; 8:45 am]

BILLING CODE 8015–01–P

SELECTIVE SERVICE SYSTEM

Forms Submitted to the Office of Management and Budget for Extension of Clearance

AGENCY: Selective Service System.

ACTION: Notice.

The following forms have been submitted to the Office of Management and Budget (OMB) for extension of clearance in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35):

SSS Form—404

Title: Potential Board Member Information.

Purpose: Is used to identify individuals willing to serve as members of local, appeal or review boards in the Selective Service System.

Respondents: Potential Board Members.

Burden: A burden of 15 minutes or less on the individual respondent.

Copies of the above identified form can be obtained upon written request to the Selective Service System, Reports Clearance Officer, 1515 Wilson Boulevard, Arlington, Virginia 22209–2425.

Written comments and recommendations for the proposed extension of clearance of the form should be sent within 60 days of the publication of this notice to the Selective Service System, Reports Clearance Officer, 1515 Wilson Boulevard, Arlington, Virginia 22209–2425.

A copy of the comments should be sent to the Office of Information and Regulatory Affairs, Attention: Desk Officer, Selective Service System, Office of Management and Budget, New Executive Office Building, Room 3235, Washington, DC 20503.

Dated: November 9, 2016.

Lawrence Romo,

Director.

[FR Doc. 2016–27920 Filed 11–18–16; 8:45 am]

BILLING CODE 8015–01–P

SMALL BUSINESS ADMINISTRATION

Interagency Task Force on Veterans Small Business Development

AGENCY: U.S. Small Business Administration.

ACTION: Notice of open Federal Interagency Task Force meeting.

SUMMARY: The U.S. Small Business Administration (SBA) is issuing this notice to announce the location, date, time and agenda for the next meeting of the Interagency Task Force on Veterans Small Business Development. The meeting will be open to the public.

DATES AND TIME: Wednesday, December 7, 2016, from 1:00 p.m. to 4:00 p.m.

ADDRESSES: U.S. Small Business Administration, 409 3rd Street SW., Washington, DC 20416.

Where: Eisenhower Conference Room, Side B, located on the Concourse level.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), SBA announces the meeting of the Interagency Task Force on Veterans Small Business Development (Task Force). The Task Force is established pursuant to Executive Order 13540 to coordinate the efforts of Federal agencies to improve capital, business development opportunities, and pre-established federal contracting goals for small business concerns owned and controlled by veterans and service-disabled veterans. Moreover, the Task Force shall coordinate administrative and regulatory activities and develop proposals relating to ''six focus areas'': (1) Improving capital access and capacity of small business concerns owned and controlled by veterans and service-disabled veterans through loans, surety bonding, and franchising; (2) ensuring achievement of the pre-established Federal contracting goals for small business concerns owned and controlled by veterans and service-disabled veterans through expanded mentor-protégé assistance and matching such small business concerns with contracting opportunities; (3) increasing the integrity of certifications of status as a small business concern owned and controlled by a veteran or service-disabled veteran; (4) reducing paperwork and administrative burdens on veterans in accessing business development and entrepreneurship opportunities; (5) increasing and improving training and counseling services provided to small business concerns owned and controlled by veterans; and (6) making other improvements relating to the support for veterans business development by the Federal Government.

Additional Information: This meeting is open to the public. Advance notice of attendance is requested. Anyone wishing to attend and/or make comments to the Task Force must contact SBA's Office of Veterans Business Development no later than December 6, 2016 at *veteransbusiness@sba.gov.* Comments for the record should be applicable to the ''six focus areas'' of the Task Force and will be limited to five minutes in the interest of time and to accommodate as many participants as possible. Written comments should also be sent to the above email no later than December 6, 2016. Special accommodations requests should also be directed to SBA's Office of Veterans Business Development at (202) 205–6773 or to *veteransbusiness@sba.gov.* For more information on veteran owned small business programs, please visit *www.sba.gov/vets.*

Dated: November 9, 2016.

Miguel J. L'Heureux,

SBA Committee Management Officer.

[FR Doc. 2016–27884 Filed 11–18–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF STATE

[Public Notice: 9795]

U.S. National Commission for UNESCO; Notice of Meeting

The 2016 Annual Meeting of the U.S. National Commission for the United Nations Educational, Scientific, and Cultural Organization (UNESCO) will take place on Monday, December 12, 2016, at the U.S. Department of State in Washington, DC (2201 C Street NW.). The Commission will hold a series of informational plenary, subject-specific committee, and thematic breakout sessions and discuss final recommendations, which will be open to the public 9:30 a.m. to 11:45 a.m. and from 12:30 p.m. to approximately 4:30 p.m.

Members of the public who wish to attend any of these meetings or who need reasonable accommodation should contact the U.S. National Commission for UNESCO at the email address below no later than Thursday, December 8, 2016for further information about admission, as seating is limited. Those who wish to make oral comments during the public comment section held during the afternoon session should request to be scheduled by Thursday, December 8, 2016. Each individual will be limited to five minutes, with the total oral comment period not exceeding thirty minutes.

Access to the building is strictly controlled. For pre-clearance purposes, those planning to attend will need to provide full name, address, date of birth, citizenship, driver's license or passport number, and email address. This information will greatly facilitate entry into the building.

Written comments should be submitted by Tuesday, December 6, 2016 to allow time for distribution to the Commission members prior to the meeting. The National Commission may be contacted via email at *DCUNESCO@state.gov,* or via phone at (202) 663–2685. The Web site can be accessed at: *http://www.state.gov/p/io/unesco/.*

Personal information regarding attendees is requested pursuant to Public Law 99–399 (Omnibus Diplomatic Security and Antiterrorism Act of 1986), as amended; Public Law 107–56 (USA PATRIOT Act); and Executive Order 13356. The purpose of the collection is to validate the identity of individuals who enter Department facilities. The data will be entered into the Visitor Access Control System (VACS–D) database. Please see the Security Records System of Records Notice (State-36) at *https://foia.state.gov/_docs/SORN/State-36.pdf* for additional information.

Dated: November 7, 2016.

Allison Wright,

Executive Director, U.S. National Commission for UNESCO, Department of State.

[FR Doc. 2016–27958 Filed 11–18–16; 8:45 am]

BILLING CODE 4710–05–P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 670 (Sub-No. 2)]

Notice of Rail Energy Transportation Advisory Committee Vacancy

AGENCY: Surface Transportation Board.

ACTION: Notice of vacancy on federal advisory committee and solicitation of nominations.

SUMMARY: The Surface Transportation Board (Board) hereby gives notice of one vacancy on its Rail Energy Transportation Advisory Committee (RETAC) for a representative of private railcar owners, lessors, or

manufacturers. The Board is soliciting suggestions from the public for a candidate to fill this vacancy.

DATES: Suggestions for a candidate for membership on RETAC are due December 21, 2016.

ADDRESSES: Suggestions may be submitted either via the Board's e-filing format or in paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's Web site, at *http://www.stb.gov.* Any person submitting a filing in paper format should send the original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 670 (Sub-No. 2), 395 E Street SW., Washington, DC 20423–0001.

FOR FURTHER INFORMATION CONTACT: Jason Wolfe at 202–245–0239. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: The Board exercises broad authority over transportation by rail carriers, including rates and services (49 U.S.C. 10701–10747, 11101–11124), construction, acquisition, operation, and abandonment of railroad lines (49 U.S.C. 10901–10907), and consolidation, merger, or common control arrangements between railroads (49 U.S.C. 10902, 11323–11327).

In 2007, the Board established RETAC as a federal advisory committee consisting of a balanced cross-section of energy and rail industry stakeholders to provide independent, candid policy advice to the Board and to foster open, effective communication among the affected interests on issues such as rail performance, capacity constraints, infrastructure planning and development, and effective coordination among suppliers, railroads, and users of energy resources. RETAC operates under the Federal Advisory Committee Act (5 U.S.C. App. 2, 1–16).

RETAC's membership is balanced and representative of interested and affected parties, consisting of not less than: Five representatives from the Class I railroads; three representatives from Class II and III railroads; three representatives from coal producers; five representatives from electric utilities (including at least one rural electric cooperative and one state- or municipally-owned utility); four representatives from biofuel refiners, processors, or distributors, or biofuel feedstock growers or providers; one representative of the petroleum shipping industry; and, two representatives from private car owners, car lessors, or car manufacturers. RETAC may also include up to two members with relevant experience but not necessarily affiliated with one of the aforementioned industries or sectors. (At present, the at-large seats are occupied by representatives of railway labor and the downstream petroleum production industry.) Members are selected by the Chairman of the Board with the concurrence of a majority of the Board. The Chairman may invite representatives from the U.S. Departments of Agriculture, Energy, and Transportation and the Federal Energy Regulatory Commission to serve on RETAC in advisory capacities as *ex officio* (non-voting) members. The three members of the Board serve as *ex officio* members of the Committee.

RETAC meets at least twice per year. Meetings are generally held at the Board's headquarters in Washington, DC, but may be held in other locations. Members of RETAC serve without compensation and without reimbursement of travel expenses unless reimbursement of such expenses is authorized in advance by the Board's Managing Director. Further information about RETAC is available on the RETAC page of the Board's Web site at *http://www.stb.gov/stb/rail/retac.html.*

The Board is soliciting nominations from the public for a candidate to fill one vacancy on RETAC for a representative of private railcar owners, lessors, or manufacturers, for a three-year term ending September 30, 2019. According to revised guidance issued by the Office of Management and Budget, it is permissible for federally registered lobbyists to serve on advisory committees, such as RETAC, as long as they do so in a representative capacity, rather than an individual capacity. *See Revised Guidance on Appointment of Lobbyists to Fed. Advisory Comms., Bds., & Comm'ns,* 79 FR 47,482 (Aug. 13, 2014). Members of RETAC are appointed to serve in a representative capacity.

Nominations for a candidate to fill this vacancy should be submitted in letter form and should include: (1) The name of the candidate; (2) the interest the candidate will represent; (3) a summary of the candidate's experience and qualifications for the position; (4) a representation that the candidate is willing to serve as a member of RETAC; and, (5) a statement that the candidate agrees to serve in a representative capacity. Suggestions for a candidate for membership on RETAC should be filed with the Board by December 21, 2016. Please note that submissions will be available to the public at the Board's offices and posted on the Board's Web site under Docket No. EP 670 (Sub-No. 2).

Authority: 49 U.S.C. 1321; 49 U.S.C. 11101; 49 U.S.C. 11121.

Decided: November 16, 2016.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Brendetta S. Jones,

Clearance Clerk.

[FR Doc. 2016–27963 Filed 11–18–16; 8:45 am]

BILLING CODE 4915–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket Number USTR–2016–0023]

Generalized System of Preferences (GSP): Initiation of a Review of Argentina for Possible Designation as a Beneficiary Developing Country

AGENCY: Office of the United States Trade Representative.

SUMMARY: This notice announces the initiation of a review to consider designation of Argentina as a beneficiary developing country under the GSP program, and the schedule for public comments and a public hearing relating to whether Argentina meets the criteria for designation.

DATES: December 23, 2016 at midnight EST: Deadline for submission of comments, pre-hearing briefs, and requests to appear at the January 10, 2017, public hearing.

January 10, 2017: The GSP Subcommittee of the Trade Policy Staff Committee (TPSC) will convene a public hearing on the GSP eligibility review of Argentina in Rooms 1 and 2, 1724 F Street NW., Washington DC 20508, beginning at 9:00 a.m.

January 24, 2017 at midnight EST: Deadline for submission of post-hearing briefs.

FOR FURTHER INFORMATION CONTACT: Naomi Freeman, GSP Program, Office of the United States Trade Representative, 1724 F Street NW., Room 514, Washington DC 20508. The telephone number is (202) 395–2974, the fax number is (202) 395–9674, and the email address is *GSP@ustr.eop.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The GSP program is authorized by Title V of the Trade Act of 1974 (19 U.S.C. 2461, *et seq.*), as amended (Trade Act), and is implemented in accordance with Executive Order 11888 of November 24, 1975, as modified by subsequent Executive Orders and Presidential Proclamations. It provides for duty free treatment of designated articles imported from any country that the President designates as a GSP ''beneficiary developing country.'' In designating countries as GSP beneficiary developing countries, the President must consider the criteria in sections 502(b)(2) and 502(c) of the Trade Act, as amended (19 U.S.C. 2462(b)(2) and (c)), including definitions found in section 507 of the Trade Act (19 U.S.C. 2467). The relevant GSP provisions are available on the USTR Web site at: *https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp/gsp-program-inf.*

On May 28, 2012, Argentina was suspended from the GSP program as a result of a presidential determination that the country was not meeting the statutory GSP eligibility requirements. The United States cited Argentina's failure to enforce arbitral awards in its decision to suspend Argentina from the GSP program. On October 28, 2016, the Government of Argentina requested designation as a beneficiary of the GSP program.

II. Notice of Public Hearing

The GSP Subcommittee of the TPSC will hold a hearing on January 10, 2017, beginning at 9:00 a.m., to receive information regarding the eligibility of Argentina for GSP trade benefits. The hearing will be held at in Rooms 1 and 2, 1724 F Street NW., Washington DC 20508 and will be open to the public and to the press. A transcript of the hearing will be made available on *http://www.regulations.gov* within approximately two weeks after the date of the hearing.

All interested parties wishing to make an oral presentation at the hearing must submit, following the ''Requirements for Submissions'' set out below, the name, address, telephone number, and email address, if available, of the witness(es) representing their organization by midnight, December 23, 2016. Requests to present oral testimony must be accompanied by a written brief or summary statement, in English, and also must be received by midnight, December 23, 2016. Oral testimony before the GSP Subcommittee will be limited to five-minute presentations that summarize or supplement information contained in briefs or statements submitted for the record. Post-hearing briefs or statements will be accepted if they conform with the requirements set out below and are submitted, in English, by midnight, January 24, 2017. Parties not wishing to appear at the public hearing may submit pre-hearing and post-hearing briefs or comments by these deadlines.

The GSP Subcommittee strongly encourages submission of all post-hearing briefs or statements by the January 24, 2017 deadline in order to receive timely consideration in the GSP Subcommittee's review of GSP eligibility of Argentina. However, if there are new developments or information that parties wish to share with the GSP Subcommittee after this date, the regulations.gov docket will remain open until a final decision is made. Comments, letters, or other submissions related to Argentina's eligibility review must be posted to the docket in order to be considered by the GSP Subcommittee.

III. Requirements for Submissions

All submissions in response to this notice must conform to the GSP regulations set forth at 15 CFR part 2007, except as modified below. These regulations are available on the USTR Web site at *https://ustr.gov/sites/default/files/USTR-Regulations-Pertaining-Eligibility-GSP-Program-15-CFR-Part-2007_0.pdf.*

All submissions must be in English and must be submitted electronically via *http://www.regulations.gov,* using docket number USTR–2016–0023. Hand-delivered submissions will not be accepted.

To make a submission via *www.regulations.gov,* enter Docket Number USTR–2016–0023 on the home page and click ''Search.'' The site will provide a search-results page listing all documents associated with this docket. Find the reference to this notice and click on the button labeled ''Comment Now.'' For further information on using the *www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on ''How to Use Regulations.gov'' on the bottom of the home page.

The *www.regulations.gov* Web site allows users to provide comments by filling in a ''Type Comment'' field, or by attaching a document using an ''Upload File'' field. The GSP Subcommittee prefers that submissions be provided as an attached document. If a document is attached, please type ''GSP Review of Argentina'' in the ''Type Comment'' field. USTR prefers submissions in Microsoft Word (.doc) or Adobe Acrobat (.pdf) format. If the submission is in another file format, please indicate the name of the software application in the ''Type Comment'' field. File names should reflect the name of the person or entity submitting the comments. Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter in the comments themselves. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the comment itself, rather than submitting them as separate files. Submissions should not exceed 30 single-spaced, standard letter-size pages in 12-point type, including attachments.

For any comments submitted electronically that contains business confidential information, the file name of the business confidential version should begin with the characters ''BC''. Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page and the submission should clearly indicate, via brackets, highlighting, or other means, the specific information that is business confidential. A filer requesting business confidential treatment must certify that the information is business confidential and would not customarily be released to the public by the submitter. Additionally, the submitter should type ''Business Confidential GSP Review of Argentina'' in the ''Type Comment'' field.

Filers of submissions containing business confidential information also must submit a public version of their comments. The file name of the public version should begin with the character ''P''. The ''BC'' and ''P'' should be followed by the name of the person or entity submitting the comments. Filers submitting comments containing no business confidential information should name their file using the name of the person or entity submitting the comments. The non-business confidential version will be placed in the docket at *www.regulations.gov* and be available for public inspection.

Each submitter will receive a submission tracking number upon completion of the submissions procedure at *http://www.regulations.gov.* The tracking number will be the submitter's confirmation that the submission was received into *http://www.regulations.gov.* The GSP Subcommittee is not able to provide technical assistance for the Web site. Documents not submitted in accordance with these instructions may not be considered in this review. As noted, the GSP Subcommittee strongly urges submissions be made through *www.regulations.gov.* Any alternative arrangements must be made in advance of the relevant deadline by contacting Naomi Freeman at (202) 395–2974.

Submissions will be placed in the docket and open to public inspection, except information granted business confidential status under 15 CFR

2003.6. Comments may be viewed on the *www.regulations.gov* Web site by entering Docket Number USTR–2016–0023 in the ''Search'' field on the home page.

Erland Herfindahl,

Deputy Assistant U.S. Trade Representative for the Generalized System of Preferences, Office of the U.S. Trade Representative.

[FR Doc. 2016–27917 Filed 11–18–16; 8:45 am]

BILLING CODE 3290–F7–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2016-105]

Petition for Exemption; Summary of Petition Received; The Boeing Company

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Title 14, Code of Federal Regulations (14 CFR). The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of the FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number involved and must be received on or before December 12, 2016.

ADDRESSES: You may send comments identified by docket number FAA–2016–9097 using any of the following methods:

- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments digitally.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lynette Mitterer, ANM–113, Federal Aviation Administration, 1601 Lind Avenue SW., Renton, WA 98057–3356, email *Lynette.Mitterer@faa.gov,* phone (425) 227–1047.

This notice is published pursuant to 14 CFR 11.85.

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

Lirio Liu,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2016–9097.

Petitioner: Boeing.

Section of 14 CFR Affected: § 25.813(a).

Description of Relief Sought: The petitioner is seeking relief to install high-wall suites in the premium cabins of Boeing 777–300ER.

[FR Doc. 2016–27964 Filed 11–18–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2016–112]

Petition for Exemption; Summary of Petition Received; The Boeing Company

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Title 14, Code of Federal Regulations (14 CFR). The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of the FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number involved and must be received on or before December 12, 2016.

ADDRESSES: You may send comments identified by docket number FAA–2016–9322 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments digitally.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lynette Mitterer, ANM–113, Federal Aviation Administration, 1601 Lind Avenue SW., Renton, WA 98057–3356, email *Lynette.Mitterer@faa.gov,* phone (425) 227–1047.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on November 10, 2016.

Lirio Liu,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2016–9322.

Petitioner: The Boeing Company.

Section of 14 CFR Affected: § 25.841(a)(2), Amendment 25–87.

Description of Relief Sought: To allow relief from the requirements pertaining to cabin decompression following an uncontained engine failure on a Boeing Model 777–9.

[FR Doc. 2016–27965 Filed 11–18–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding FHWA's finding that a Buy America waiver is appropriate for the use of non-domestic iron and steel components in brake assembly with 5″ mill duty shoe, machinery rod ends with 2″ bore, static load capacity 378955 lb. for rehabilitation of Cow Bayou Swing Bridge in the State of Texas.

DATES: The effective date of the waiver is November 22, 2016.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via email at *Gerald.Yakowenko@dot.gov.* For legal questions, please contact Mr. William Winne, FHWA Office of the Chief Counsel, (202) 366–1397, or via email at *William.Winne@dot.gov.* Office hours for FHWA are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Publishing Office's database at: *https://www.gpo.gov/fdsys/.*

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding FHWA's finding that a Buy America waiver is appropriate for use of non-domestic iron and steel components in brake assembly with 5″ mill duty shoe, machinery rod ends with 2″ bore, static load capacity 378955 lb. for rehabilitation of Cow Bayou Swing Bridge in the State of Texas.

In accordance with the Consolidated Appropriations Act of 2016 (Pub. L. 114–113) and the Continuing Appropriations Act of 2017 (Pub. L. 114–223), FHWA published a notice of intent to issue a waiver on its Web site: *http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=135* on September 21st. The FHWA received no comments in response to the publication. Based on all the information available to the agency, FHWA concludes that there are no domestic manufacturers of brake assembly with 5″ mill duty shoe, machinery rod ends with 2″ bore, static load capacity 378955 lb. for rehabilitation of Cow Bayou Swing Bridge in the State of Texas.

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572), FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to FHWA's Web site via the link provided to the waiver page noted above.

(Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410)

Issued on: November 14, 2016.

Gregory G. Nadeau,

Administrator, Federal Highway Administration.

[FR Doc. 2016–27929 Filed 11–18–16; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding FHWA's finding that a Buy America waiver is appropriate for the use of non-domestic iron and steel components in four rolling elements of bearing units with 17.3'' inner diameter and radial load capacity of 816,000 lb. each for I–5 trunnion shaft replacement project in the State of Oregon.

DATES: The effective date of the waiver is November 22, 2016.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via email at *gerald.yakowenko@dot.gov.* For legal questions, please contact Mr. William Winne, FHWA Office of the Chief Counsel, 202–366–1397, or via email at *William.Winne@dot.gov.* Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Publishing Office's database at: *https://www.gpo.gov/fdsys/.*

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding FHWA's finding that a Buy America waiver is appropriate for use of non-domestic iron and steel components in four rolling element bearing units with 17.3″ inner diameter and radial load capacity of 816,000 lb. each for I–5 trunnion shaft replacement project in the State of Oregon.

In accordance with the Consolidated Appropriations Act of 2016 (Pub. L. 114–113) and the Continuing Appropriations Act of 2017 (Pub. L. 114–223), FHWA published a notice of intent to issue a waiver on its Web site: *http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=132* on August 8, 2016. The FHWA received a few comments in response to the publication. Six commenters opposed the waiver for various reasons; granting the waiver will result in supporting jobs overseas, outsourcing domestic jobs, and loss of manufacturing jobs. None of the commenters provided information on domestic availability of the four rolling element bearing units with 17.3″ inner diameter and radial load capacity of 816,000 lb. Based on all the information available to the agency, FHWA concludes that there are no domestic manufacturers of four rolling element bearing units with 17.3″ inner diameter and radial load capacity of 816,000 lb for I–5 trunnion shaft replacement project.

The Oregon State DOT, contractors, and subcontractors involved in the procurement of bearing units, are reminded of the need to comply with the Cargo Preference Act in 46 CFR part 38, if applicable.

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572), FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to FHWA's Web site via the link provided to the waiver page noted above.

Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410.

Issued on: November 14, 2016.

Gregory G. Nadeau,

Administrator, Federal Highway Administration.

[FR Doc. 2016–27928 Filed 11–18–16; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2008–0010]

Petition for Waiver of Compliance

In accordance with part 211 of Title 49 of the Code of Federal Regulations (CFR), this provides the public notice that by a document dated October 20, 2016, Sonoma Marin Area Rail Transit District (SMART) requests a rescission of its existing waiver in Docket Number FRA–2008–0010.

In a April 3, 2009 decision letter, the Federal Railroad Administration (FRA) approved SMART's application for discontinuance and removal of the interlocking signal system on three drawbridges located on the former Northwestern Pacific Railroad. Among these three was the Haystack Landing Drawbridge over the Petaluma River at milepost (MP) 37.2. SMART is now requesting that the conditions of this relief be changed in order to facilitate the establishment of commuter rail operations on the entire mainline of the former Northwestern Pacific Railroad (NWP). This line is owned by SMART, has has been rebuilt to Class IV track standards, has been equipped with an Automatic Train Control (ATC) system meeting the requirements of 49 CFR part 236, and the deteriorated former swing span has been demolished and replaced with a newly rebuilt single-leaf bascule bridge meeting modern standards. The ATC system is interlocked with the new Haystack Landing Drawbridge and its approaches, including a complete surface alignment and locking detection system, which is compliant with 49 CFR 236.312. This system is interlocked with the new Control Point at Hopper South, formerly known as Petaluma South, which will enforce speeds of 50 mph for passenger trains and 40 mph for freight trains over the bridge when it is properly lined and locked. SMART notes that the conditions of the waiver in Docket Number FRA–2008–0010 shall remain in effect on the other two drawbridges. Those locations are the Brazos Drawbridge at MP 64.7; and the Black Point Drawbridge at MP 28.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the Department of Transportation's Docket Operations Facility, 1200 New Jersey Ave., SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- Web site: *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- Fax: 202–493–2251.
- Mail: Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- Hand Delivery: 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by December 21, 2016 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of *regulations.gov.*

Robert C. Lauby,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2016–27952 Filed 11–18–16; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2016–0101]

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System

In accordance with Part 235 of Title 49 Code of Federal Regulations and 49 U.S.C. 20502(a), this document provides the public notice that by a document dated October 18, 2016, Red River Valley & Western Railroad Company (RRVW) petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of a signal system. FRA assigned the petition Docket Number FRA–2016–0101.

Applicant: Red River Valley & Western Railroad Company, Ms. Cynthia Olson, Manager-Operations/Administration, 501 Minnesota Avenue, Breckenridge, MN 56520.

RRVW seeks approval to retire and remove two stop signs located on its

Second Subdivision at Milepost (MP) 38.0 and MP 41.0 at Davenport, ND. When FRA conditionally approved abandonment of the automatic interlocking plant located at the Davenport junction (see Docket Number FRA–1999–5621) in November 1999, one of the conditions of approval required the installation of stop signs at all four quadrants of the RRVW's crossing at grade between the Second and Fourth Subdivisions. Four stop signs were installed at the four junction switches, located at MP 17.0 and MP 19.0, on the Fourth Subdivision and MPs 38.0 and 41.0 on the Second Subdivision.

The reason given for the proposed discontinuance is that RRVW experienced a change in traffic patterns in the last decade and a significant change this past year. The Second Subdivision mainline track has experienced a decline in traffic due to shuttle train traffic rerouting through a new turnout installed at Davenport that now handles a majority of these trains over the Fourth Subdivision instead of the Second Subdivision. Yard limits would remain in effect on both the Second and Fourth Subdivisions. Maximum authorized track speed for these restricted limits is 20 mph, being able to stop short within half the range of vision of the stop sign and other requirements listed by the General Code of Operating Rules 6.13 and 6.27. Maximum speed through the interlocking is 12 mph.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by January 5, 2017 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of regulations.gov.

Robert C. Lauby,

Associate Administrator for Railroad Safety Chief Safety Officer.

[FR Doc. 2016–27954 Filed 11–18–16; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2016–0087]

Petition for Waiver of Compliance

In accordance with part 211 of Title 49 of Code of Federal Regulations (CFR), this provides the public notice that by a document dated August 16, 2016, the Appanoose County Community Railroad (APNC) has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR 223.11. FRA assigned the petition Docket Number FRA–2016–0087.

APNC has petitioned FRA to grant a waiver of compliance from 49 CFR part 223, Safety Glazing Standards—Locomotives, Passenger Cars and Cabooses, for two locomotives, respectively numbered APNC 973 and APNC 116. APNC is a shortline railroad that operates over approximately 34.5 miles of track, and the majority of its operations are through rural or lightly populated areas. Locomotive number APNC 973 is a GP–7 type locomotive and was built in 1953. Locomotive number APNC 116 is a GP–7M type locomotive and was built in 1953. APNC's petition states that existing glazing on both locomotives is in good condition. The petition further states that APNC has no history of glazing related accidents or injuries and is, therefore, requesting a waiver of the safety glazing requirements.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by January 5, 2017 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of regulations.gov.

Robert C. Lauby,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2016–27953 Filed 11–18–16; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

National Advisory Committee on Travel and Tourism Infrastructure; Notice of Public Meeting

AGENCY: Department of Transportation.

ACTION: Notice of public meeting.

SUMMARY: This notice announces the first meeting of the National Advisory Committee on Travel and Tourism Infrastructure (NACTTI). At the meeting, members will be sworn-in and begin a discussion of the work they will undertake during their appointment term. The agenda and any additional information for the meeting will be posted, at least one week in advance of the meeting, on the Department of Transportation Web site at *https://www.transportation.gov/NACTTI.*

DATES: The meeting will be held on December 8, 2016, from 1:00 p.m. to 5:00 p.m., and December 9, 2016, from 9 a.m. to 5 p.m., EDT.

ADDRESSES: The meeting will be held at Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591. Individuals wishing for audio participation and any person requiring accessibility accommodations should contact the Official listed in the for further information contact section.

FOR FURTHER INFORMATION CONTACT: Anthony Robinson, Special Advisor, U.S. Department of Transportation, Office of the Secretary, at *NACTTI@dot.gov* or (202) 366–9977. Also visit the NACTTI Internet Web site at *http://www.transportation.gov/NACTTI.*

SUPPLEMENTARY INFORMATION:

I. Background

NACTTI was created in accordance with Section 1431 of the *Fixing America's Surface Transportation* (FAST) *Act* (Pub. L. 114–94: Dec. 4, 2015; Stat 1312) to provide information, advice, and recommendations to the Secretary of Transportation on matters related to the role of intermodal transportation in facilitating mobility related to travel and tourism activities.

II. Public Participation

The meeting will be open to the public on a first-come, first served basis, as space is limited. Members of the public who wish to attend in-person are asked to register, including name and affiliation, to *NACTTI@dot.gov* by December 1, 2016. Individuals requesting accessibility accommodations, such as sign language, interpretation, or other ancillary aids, may do so via email at: *NACTTI@dot.gov* by December 1, 2016.

There will be 30 minutes allotted for oral comments from members of the public joining the meeting. To accommodate as many speakers as possible, the time for public comments may be limited to 5 minutes per person. Individuals wishing to reserve speaking time during the meeting must submit a request at the time of registration, as well as the name, address, and organizational affiliation of the proposed speaker. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, the Office of the Secretary may conduct a lottery to determine the speakers. Speakers are requested to submit a written copy of their prepared remarks by 5:00 p.m. EDT on December 1, 2016, for inclusion in the meeting records and for circulation to NACTTI members.

Persons who wish to submit written comments for consideration by NACTTI must send them via email to *NACTTI@dot.gov* any time before or after the meeting. To be considered during the meeting, comments must be received no later than 5:00 p.m. EDT on December 1, 2016, to ensure transmission to NACTTI prior to the meeting. Comments received after that date and time will be distributed to the members but may not be reviewed prior to the meeting.

Copies of the meeting minutes will be available within 90 days of the meeting on the NACTTI Internet Web site at *http://www.transportation.gov/NACTTI.*

Jenny T. Rosenberg,

Acting Assistant Secretary for Aviation and International Affairs.

[FR Doc. 2016–27925 Filed 11–18–16; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Fiscal Service

Notice of Rate To Be Used for Federal Debt Collection, and Discount and Rebate Evaluation

AGENCY: Bureau of the Fiscal Service, Treasury.

ACTION: Notice.

SUMMARY: The Secretary of the Treasury is responsible for computing and publishing the percentage rate that is used in assessing interest charges for outstanding debts owed to the Government (The Debt Collection Act of 1982, as amended (codified at 31 U.S.C. 3717)). This rate is also used by agencies as a comparison point in evaluating the cost-effectiveness of a cash discount. In addition, this rate is used in determining when agencies should pay purchase card invoices when the card issuer offers a rebate (5 CFR 1315.8). Notice is hereby given that the applicable rate for calendar year 2017 is 1.00 percent.

DATES: January 1, 2017 through December 31, 2017.

FOR FURTHER INFORMATION CONTACT: E-Commerce Division, Bureau of the Fiscal Service, Department of the Treasury, 401 14th Street SW., Washington, DC 20227 (Telephone: 202–874–9428).

SUPPLEMENTARY INFORMATION: The rate reflects the current value of funds to the Treasury for use in connection with Federal Cash Management systems and is based on investment rates set for purposes of Public Law 95–147, 91 Stat. 1227 (October 28, 1977). Computed each year by averaging Treasury Tax and Loan (TT&L) investment rates for the 12-month period ending every September 30, rounded to the nearest whole percentage, for applicability effective each January 1. Quarterly revisions are made if the annual average, on a moving basis, changes by 2 percentage points. The rate for calendar year 2017 reflects the average investment rates for the 12-month period that ended September 30, 2016.

Authority: 31 U.S.C. 3717.

Dated: October 21, 2016.

Ronda L. Kent,

Assistant Commissioner, Payment Management and Chief Disbursing Officer.

[FR Doc. 2016–27947 Filed 11–18–16; 8:45 am]

BILLING CODE 4810–AS–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning tax on certain foreign procurement.

DATES: Written comments should be received on or before January 20, 2017 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Allan Hopkins, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington DC 20224, or through the internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Tax on Certain Foreign Procurement.

OMB Number: 1545–2263.

Regulation Project Number: TD 9782.

Abstract: TD 9782 contains regulations (REG 103281–11) under section 5000C of the Internal Revenue Code relating to the 2 percent tax on payments made by the U.S. government to foreign persons pursuant to certain contracts. The regulations affect U.S. government acquiring agencies and foreign persons providing certain goods or services to the U.S. government pursuant to a contract. This document also contains regulations under section 6114, with respect to foreign persons claiming an exemption from the tax under an income tax treaty. A Form W–14 must be provided to the acquiring agency (U.S. government department, agency, independent establishment, or corporation) to: Establish that they are a foreign contracting party; and If applicable, claim an exemption from withholding based on an international agreement (such as a tax treaty); or claim an exemption from withholding, in whole or in part, based on an international procurement agreement or because goods are produced, or services are performed in the United States.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of currently approved collection.

Affected Public: Federal government.

Estimated Number of Respondents: 2,000.

Estimated Time per Respondent: 5 hours, 55 minutes.

Estimated Time per Respondent: 11,840 hours.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 10, 2016.

Allan Hopkins,

Tax analyst.

[FR Doc. 2016–27906 Filed 11–18–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8453–R

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8453–R, Declaration and Signature for Electronic Filing of Forms 8947 and 8963.

DATES: Written comments should be received on or before January 20, 2017 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Martha R. Brinson, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Martha.R.Brinson@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Declaration and Signature for Electronic Filing of Forms 8947 and 8963.

OMB Number: 1545–2253.

Form Number: Form 8453–R.

Abstract: The purpose of the form is to authenticate the electronic filing of Form 8947, Report of Branded Prescription Drug Information and Form 8963, Report of Health Insurance Provider Information.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations and Not-for-profit organizations.

Estimated Number of Respondents: 2,550.

Estimated Time per Respondent: 1 hour 37 minutes.

Estimated Total Annual Burden Hours: 4,131.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 8, 2016.

Tuawana Pinkston,

IRS Reports Clearance Officer.

[FR Doc. 2016–27905 Filed 11–18–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Multiemployer Pension Plan Application To Reduce Benefits

AGENCY: Department of the Treasury.

ACTION: Notice of availability; Request for comments.

SUMMARY: On September 28, 2016, the Department published a notice of availability and request for comments regarding an application to Treasury to reduce benefits under the New York State Teamsters Conference Pension and Retirement Fund in accordance with the Multiemployer Pension Reform Act of 2014 (MPRA). The purpose of this notice is to reopen the comment period to provide more time for interested parties to provide comments.

DATES: Comments must be received on or before December 21, 2016.

ADDRESSES: You may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov,* in accordance with the instructions on that site. Electronic submissions through *www.regulations.gov* are encouraged.

Comments may also be mailed to the Department of the Treasury, MPRA Office, 1500 Pennsylvania Avenue NW., Room 1224, Washington, DC 20220. Attn: Eric Berger. Comments sent via facsimile and email will not be accepted.

Additional Instructions. All comments received, including attachments and other supporting materials, will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or any other information in your comment or supporting materials that you do not want publicly disclosed. Treasury will make comments available for public inspection and copying on *www.regulations.gov* or upon request. Comments posted on the Internet can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: For information regarding the application from the New York State Teamsters Conference Pension and Retirement Fund, please contact Treasury at (202) 622–1534 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The Multiemployer Pension Reform Act of 2014 (MPRA) amended the Internal Revenue Code to permit a multiemployer plan that is projected to have insufficient funds to reduce pension benefits payable to participants and beneficiaries if certain conditions are satisfied. In order to reduce benefits, the plan sponsor is required to submit an application to the Secretary of the Treasury, which Treasury, in consultation with the Pension Benefit Guaranty Corporation (PBGC) and the Department of Labor, is required to approve or deny.

On August 31, 2016, the Board of Trustees of the New York State Teamsters Conference Pension and Retirement Fund (NYS Teamsters Pension Fund) submitted an application for approval to reduce benefits under the plan. As required by MPRA, that application has been published on Treasury's Web site at *https://auth.treasury.gov/services/Pages/Plan-Applications.aspx.* On September 28, 2016, Treasury published a notice in the **Federal Register** (81 FR 66751–2), in consultation with PBGC and the Department of Labor, to solicit public comments on all aspects of the NYS Teamsters Pension Fund application. The notice provided that comments must be received by November 14, 2016. On November 1, 2016, the Retiree Representative (appointed by the NYS Teamsters Pension Fund in connection with its application to reduce benefits) requested a thirty-day extension of the comment period.

This notice announces the reopening of the comment period in order to give additional time for interested parties to provide comments. Comments are requested from interested parties, including contributing employers, employee organizations, and participants and beneficiaries of the NYS Teamsters Pension Fund. Consideration will be given to any comments that are received by Treasury on or before December 21, 2016. Treasury is publishing this notice in the **Federal Register**, in consultation with the PBGC and the Department of Labor, to solicit public comments on all aspects of the NYS Teamsters Pension Fund application.

Comments are requested from interested parties, including participants and beneficiaries, employee organizations, and contributing employers of the NYS Teamsters Pension Fund. Consideration will be given to any comments that are timely received by Treasury.

Dated: November 15, 2016.

David R. Pearl,

Executive Secretary, Department of the Treasury.

[FR Doc. 2016–27938 Filed 11–18–16; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF VETERANS AFFAIRS

Annual Determination of Staffing Shortages

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Section 7412 of title 38, United States Code (U.S.C.) requires the Department of Veterans Affairs (VA) Inspector General (IG) to determine and report on the top five occupations of VA personnel covered under 38 U.S.C. 7401, for which there are the largest staffing shortages. The top five occupations are calculated over the five-year period preceding the determination, and the Secretary of Veterans Affairs is required to publish these findings in the **Federal Register**. Based on its review, the IG identified

the following six occupations as having the largest staffing shortages in the identified time period: Medical Officer, Nurse, Psychologist, Physician Assistant, Physical Therapist and Medical Technologist. Six occupations are identified because the Psychologist and Physician Assistant positions tied for the third position, and the Physical Therapist and Medical Technologist positions tied for the fifth position. Additional information and analysis can be found at: *www.va.gov/OIG.*

FOR FURTHER INFORMATION CONTACT: Karen Rasmussen, Management Review Service (10AR), Veterans Health Administration, 810 Vermont Avenue NW., Washington, DC 20420 Telephone: (202) 461–6643. (This is not a toll-free number.)

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on November 2, 2016 for publication.

Dated: November 16, 2016.

Michael Shores,

Acting Director, Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2016–27976 Filed 11–18–16; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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Part II

Department of Labor

Employee Benefits Security Administration

Proposed Exemptions From Certain Prohibited Transaction Restrictions; Notice

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Proposed Exemptions From Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions 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 proposed exemptions: D–11856, Deutsche Investment Management Americas Inc. and Certain Current and Future Asset Management Affiliates of Deutsche Bank AG; D–11859, Citigroup, Inc.; D–11861, JPMorgan Chase & Co.; D–11862, Barclays Capital Inc.; D–11906, JPMorgan Chase & Co.; D–11907, UBS Assets Management, UBS Realty Investors, UBS Hedge Fund Solutions LLC, UBS O'Connor LLC, and Certain Future Affiliates in UBS's Asset Management and Wealth Management Americas Divisions; D–11908, Deutsche Investment Management Americas Inc. and Certain Current and Future Asset Management Affiliates of Deutsche Bank; D–11909, Citigroup, Inc.; and, D–11910, Barclays Capital Inc.

DATES: All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice.

ADDRESSES: Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing. All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, U.S. Department of Labor, 200 Constitution Avenue NW., Suite 400, Washington, DC 20210. Attention: Application No. ____, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via email or FAX. Any such comments or requests should be sent either by email to: *moffitt.betty@dol.gov*, or by FAX to (202) 693–8474 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1515, 200 Constitution Avenue NW., Washington, DC 20210.

Warning: All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

SUPPLEMENTARY INFORMATION:

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[1] 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 requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Deutsche Investment Management Americas Inc. (DIMA) and Certain Current and Future Asset Management Affiliates of Deutsche Bank AG (Collectively, the Applicant or the DB QPAMs), Located in New York, New York

[Exemption Application No. D–11856]

Proposed Temporary Exemption

The Department is considering granting a temporary exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act), and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[2]

Section I: Covered Transactions

If the proposed temporary exemption is granted, certain entities with specified relationships to Deutsche Bank AG (hereinafter, the DB 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,[3] notwithstanding (1) the ''Korean Conviction'' against Deutsche Securities Korea Co., a South Korean affiliate of Deutsche Bank AG (hereinafter, DSK, as further defined in Section II(f)), entered on January 23, 2016; and (2) the ''US Conviction'' against DB Group Services UK Limited, an affiliate of Deutsche Bank based in the United Kingdom (hereinafter, DB Group Services, as further defined in Section II(e)), scheduled to be entered on the April 3, 2017 (collectively, the Convictions, as further defined in Section II(a)),[4] for a period of up to 12 months beginning on the U.S. Conviction Date (as further defined in Section II(d)), provided that the following conditions are satisfied:

[1] 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).

[2] For purposes of this proposed temporary exemption, references to section 406 of Title I of the Act, unless otherwise specified, should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[3] 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).

[4] 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 criminal activity therein described.

(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 and DB Group Services that is the subject of the Convictions (for purposes of this paragraph (a), ''participate in'' includes the knowing or tacit approval of the misconduct underlying the Convictions);

(b) 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 Convictions;

(c) The DB QPAMs will not employ or knowingly engage any of the individuals that participated in the criminal conduct that is the subject of the Convictions (for purposes of this paragraph (c), ''participated in'' includes the knowing or tacit approval of the misconduct underlying the Convictions);

(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 or the Code and managed by such DB QPAM to enter into any transaction with DSK or DB Group Services, or engage DSK or DB Group Services 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 DB QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Convictions;

(f) A DB QPAM did not exercise authority over 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) in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Convictions; or cause the QPAM, affiliates, or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Convictions;

(g) DSK and DB Group Services will not provide discretionary asset management services to ERISA-covered plans or IRAs, nor will otherwise act as a fiduciary with respect to ERISA-covered plan and IRA assets;

(h)(1) Each DB QPAM must immediately develop, implement, maintain, and follow written policies and procedures (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 corporate management and business activities, including the corporate management and business activities of DB Group Services and DSK;

(ii) The DB 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 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 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 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 the discovery of such 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 DB QPAM, the independent auditor responsible for reviewing compliance with the Policies, and an appropriate fiduciary of any affected ERISA-covered plan or IRA where such fiduciary 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. A DB 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) Each DB QPAM must immediately develop and implement a program of training (the Training), conducted at least annually, for all relevant DB 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)(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 the DB QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. The audit period under this proposed temporary exemption begins on October 24, 2016, and continues through the entire effective period of this temporary exemption (the Audit Period). The Audit Period will cover the contiguous periods of time during which PTE 2016–12, the Extension of PTE 2015–15 (81 FR 75153, October 28, 2016) (the Extension) and this proposed temporary exemption are effective. The audit terms contained in this paragraph (i) supersede the terms of paragraph (f) of the Extension. However, in determining compliance with the conditions for the Extension and this proposed temporary exemption, including the Policies and Training requirements, for purposes of conducting the audit, the auditor will rely on the conditions for exemptive relief as then applicable to the respective portions of the Audit Period. The audit 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 the Policies in accordance with the conditions of this temporary exemption, and has developed and implemented the Training, as required herein;

(4) The auditor's engagement must 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 each 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) For each audit, on or before the end of the relevant period described in Section I(i)(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 the DB QPAM's Policies and Training; the DB QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective DB QPAM's noncompliance with the written Policies and Training described in Section I(h) above. Any determination 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 action taken by such DB QPAM to address such recommendations must be included in an addendum to the Audit Report (which addendum is completed prior to the certification described in Section I(i)(7) below). Any determination by the auditor that the respective DB QPAM has implemented, maintained, and followed sufficient Policies and Training must 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 implemented, maintained, and followed the Policies and Training required by this temporary exemption; and

(6) The auditor must notify the respective DB QPAM of any instance 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, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this temporary exemption; addressed, corrected, or remedied any inadequacy 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 proposed temporary exemption, and with the applicable provisions of ERISA and the Code;

(8) The Risk Committee of Deutsche Bank's Board of Directors is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking legal compliance officer of Deutsche Bank must review the Audit Report for each DB QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report;

(9) Each DB QPAM provides its certified Audit Report, by regular mail to: the Department's Office of Exemption Determinations (OED), 200 Constitution Avenue NW., Suite 400, Washington, DC 20210, or by private carrier to: 122 C Street NW., Suite 400, Washington, DC 20001–2109, no later than 45 days following its completion. The Audit Report will be part of the public record regarding this temporary exemption. Furthermore, each DB QPAM must make 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 must submit to OED: (A) Any engagement agreement(s) entered into pursuant to the engagement of the auditor under this exemption; and (B) any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this proposed temporary exemption, no later than six (6) months after the effective date of this temporary exemption (and one month after the execution of any agreement thereafter);

(11) The auditor must 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 instance of noncompliance by the relevant DB QPAM; and an explanation of any corrective or remedial action 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 exemption, and capable of making the determinations required of this exemption;

(j) Effective as of the effective date of this temporary exemption, with respect to any arrangement, agreement, or contract between a DB QPAM and an 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; 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 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 (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 DB 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 Deutsche Bank and its affiliates; 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 DB 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 Convictions;

Within four (4) months of the effective date of this temporary exemption, each DB QPAM will provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which the DB QPAM provides asset management or other discretionary fiduciary services;

(k) The DB 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 Convictions;

(l) Deutsche Bank disgorged all of its profits generated by the spot/futures-linked market manipulation activities of DSK personnel that led to the Conviction against DSK entered on January 25, 2016, in Seoul Central District Court;

(m) Each DB 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 DB QPAM relies upon the relief in the temporary exemption;

(n) During the effective period of this temporary exemption, Deutsche Bank: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) that Deutsche Bank or any of its affiliates enter 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

(o) A DB QPAM will not fail to meet the terms of this temporary exemption, solely because a different DB QPAM fails to satisfy a condition for relief under this temporary exemption described in Sections I(c), (d), (h), (i), (j), (k), and (m).

Section II: Definitions

(a) The term ''Convictions'' means (1) the judgment of conviction against DB Group Services, in Case 3:15–cr–00062–RNC to be entered in the United States District Court for the District of Connecticut to a single count of wire fraud, in violation of 18 U.S.C. 1343, and (2) 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. For all purposes under this exemption, ''conduct'' of any person or entity that is the ''subject of [a] Conviction'' encompasses any conduct of Deutsche Bank and/or their personnel, that is described in the Plea Agreement (including the Factual Statement thereto), Court judgments (including the judgment of the Seoul Central District Court), criminal complaint documents from the Financial Services Commission in Korea, and other official regulatory or judicial factual findings that are a part of this record;

(b) The term ''DB QPAM'' means a ''qualified professional asset manager'' (as defined in section VI(a)[5] of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which DSK or DK Group Services is a current or future ''affiliate'' (as defined in section VI(d) of PTE 84–14). For purposes of this temporary exemption, 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;

(c) The term ''Deutsche Bank'' means Deutsche Bank AG but, unless indicated otherwise, does not include its subsidiaries or affiliates;

(d) The term ''U.S. Conviction Date'' means the date that a judgment of conviction against DB Group Services, in Case 3:15–cr–00062–RNC, is entered in the United States District Court for the District of Connecticut;

(e) The term ''DB Group Services'' means DB Group Services UK Limited, an ''affiliate'' of Deutsche Bank (as defined in Section VI(c) of PTE 84–14) based in the United Kingdom;

(f) The term ''DSK'' means Deutsche Securities Korea Co., a South Korean ''affiliate'' of Deutsche Bank (as defined in Section VI(c) of PTE 84–14);

(g) The term ''Plea Agreement'' means the Plea Agreement (including the Factual Statement thereto), dated April 23, 2015, between the Antitrust Division and Fraud Section of the Criminal Division of the U.S. Department of Justice (the DOJ) and DB Group Services resolving the actions brought by the DOJ in Case 3:15–cr–00062–RNC against DB Group Services for wire fraud in violation of Title 18, United States Code, Section 1343 related to the manipulation of the London Interbank Offered Rate (LIBOR); and

(h) 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;

Effective Date: This proposed temporary exemption will be effective for the period beginning on the U.S. Conviction Date, and ending on the earlier the date that is twelve months following the U.S. Conviction Date; or the effective date of a final agency action made by the Department in connection with Exemption Application No. D–11908, an application for long-term exemptive relief for the covered transactions described herein.

Department's Comment: The Department is publishing this proposed

[5] 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.

temporary exemption in order to protect ERISA-covered plans and IRAs from certain costs and/or investment losses for up to one year, that may arise to the extent entities with a corporate relationship to Deutsche Bank lose their ability to rely on PTE 84–14 as of the U.S. Conviction Date, as described below. Elsewhere today in the **Federal Register**, the Department is also proposing a five-year proposed exemption, Exemption Application No. D–11908, that would provide the same relief that is described herein, but for a longer effective period. The five-year proposed exemption is subject to enhanced conditions and a longer comment period. Comments received in response to this proposed temporary exemption will be considered in connection with the Department's determination whether or not to grant such five-year exemption.

The proposed exemption would provide relief from certain of the restrictions set forth in sections 406 and 407 of ERISA. If granted, no relief from a violation of any other law would be provided by this exemption.

Furthermore, the Department cautions that the relief in this proposed temporary exemption would terminate immediately if, among other things, an entity within the Deutsche Bank 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 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 proposed 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 proposed exemption.

Summary of Facts and Representations [6]

Background

1. Deutsche Bank AG (together with its current and future affiliates, Deutsche Bank) is a German banking corporation and a commercial bank. Deutsche Bank, with and through its affiliates, subsidiaries and branches, provides a wide range of banking, fiduciary, recordkeeping, custodial, brokerage and investment services to, among others, corporations, institutions, governments, employee benefit plans, government retirement plans and private investors. Deutsche Bank had €68.4 billion in total shareholders' equity and €1,709 billion in total assets as of December 31, 2014.[7]

2. Deutsche Investment Management Americas Inc. (DIMA) is an investment adviser registered with the SEC under the Investment Advisers Act of 1940, as amended. DIMA and other wholly-owned subsidiaries of Deutsche Bank provide discretionary asset-management services to employee benefit plans and IRAs. Such entities include: (A) DIMA; (B) Deutsche Bank Securities Inc., which is a dual-registrant with the SEC under the Advisers Act as an investment adviser and broker-dealer; (C) RREEF America L.L.C., a Delaware limited liability company and investment adviser registered with the SEC under the Advisers Act; (D) Deutsche Bank Trust Company Americas, a corporation organized under the laws of the State of New York and supervised by the New York State Department of Financial Services, a member of the Federal Reserve and an FDIC-insured bank; (E) Deutsche Bank National Trust Company, a national banking association, organized under the laws of the United States and supervised by the Office of the Comptroller of the Currency, and a member of the Federal Reserve; (F) Deutsche Bank Trust Company, NA, a national banking association, organized under the laws of the United States and supervised by the OCC; (G) Deutsche Alternative Asset Management (Global) Limited, a London-based investment adviser registered with the SEC under the Advisers Act; (H) Deutsche Investments Australia Limited, a Sydney, Australia-based investment adviser registered with the SEC under the Advisers Act; (I) DeAWM Trust Company (DTC), a limited purpose trust company organized under the laws of New Hampshire and subject to supervision of the New Hampshire Banking Department; and the four following entities which currently do not rely on PTE 84–14 for the management of any ERISA-covered plan or IRA assets, but may in the future: (J) Deutsche Asset Management (Hong Kong) Ltd.; (K) Deutsche Asset Management International GmbH; (L) DB Investment Managers, Inc.; and (M) Deutsche Bank AG, New York Branch.

3. *Korean Conviction.* On January 25, 2016, Deutsche Securities Korea, Co. (DSK), an indirectly held, wholly-owned subsidiary of Deutsche Bank, was convicted in Seoul Central District Court (the Korean Court) of violations of certain provisions of Articles 176, 443, and 448 of the Korean Financial Investment Services and Capital Markets Act (FSCMA) (the Korean Conviction) for spot/futures linked market manipulation in connection with the unwind of an arbitrage position which in turn caused a decline on the Korean market. Charges under Article 448 of the FSCMA stemmed from vicarious liability assigned to DSK for the actions of its employee, who was convicted of violations of certain provisions of Articles 176 and 443 of the FCMA. Upon conviction, the Korean Court sentenced DSK to pay a criminal fine of 1.5 billion South Korean Won (KRW). Furthermore, the Korean Court ordered that Deutsche Bank forfeit KRW 43,695,371,124, while KRW 1,183,362,400 was ordered forfeited by DSK.

4. *US Conviction.* On April 23, 2015, the Antitrust Division and Fraud Section of the Criminal Division of the U.S. Department of Justice (collectively, the DOJ) filed a one-count criminal information (the Criminal Information) in Case 3:15–cr–00062–RNC in the District Court for the District of Connecticut (the District Court) against DB Group Services UK Limited (DB Group Services). The Criminal Information charged DB Group Services with wire fraud in violation of Title 18, United States Code, Section 1343 related to the manipulation of the London Interbank Offered Rate (LIBOR) for the purpose of creating favorable trading positions for Deutsche Bank traders. DB Group Services agreed to resolve the actions brought by the DOJ through a plea agreement, dated April 23, 2015 (the Plea Agreement), which is expected to result in the District Court issuing a judgment of conviction (the US Conviction and together with the Korean Conviction, the Convictions). Under the terms of the Plea Agreement, DB Group Services plead guilty to the charges set out in the Criminal Information and forfeited $150,000,000 to the United States. Furthermore, Deutsche Bank AG and the DOJ entered into a deferred prosecution agreement, dated April 23, 2015 (the DPA). Pursuant to the terms of the DPA, Deutsche Bank agreed to pay a penalty of $625,000,000.

PTE 84–14

5. The Department notes that the rules set forth in section 406 of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and section 4975(c) of the Internal Revenue Code of 1986, as

[6] The Summary of Facts and Representations is based on Deutsche Bank and DIMA's representations, unless indicated otherwise.

[7] Deutsche Bank represents that its audited financial statements are expressed in Euros and are not converted to dollars.

amended (the Code) proscribe certain ''prohibited transactions'' between plans and related parties with respect to those plans, known as ''parties in interest.''[8] Under section 3(14) of ERISA, parties in interest with respect to a plan include, among others, the plan fiduciary, a sponsoring employer of the plan, a union whose members are covered by the plan, service providers with respect to the plan, and certain of their affiliates. The prohibited transaction provisions under section 406(a) of ERISA prohibit, in relevant part, sales, leases, loans or the provision of services between a party in interest and a plan (or an entity whose assets are deemed to constitute the assets of a plan), as well as the use of plan assets by or for the benefit of, or a transfer of plan assets to, a party in interest.[9]

6. Under the authority of ERISA section 408(a) and Code section 4975(c)(2), the Department has the authority to grant exemptions from such ''prohibited transactions'' in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).

7. Class Prohibited Transaction Exemption 84–14 (PTE 84–14)[10] exempts certain prohibited transactions between a party in interest and an ''investment fund'' (as defined in Section VI(b) of PTE 84–14)[11] in which a plan has an interest, if the investment manager satisfies the definition of ''qualified professional asset manager'' (QPAM) and satisfies additional conditions for the exemption. In this regard, PTE 84–14 was developed and granted based on the essential premise that broad relief could be afforded for all types of transactions in which a plan engages only if the commitments and the investments of plan assets and the negotiations leading thereto are the sole responsibility of an independent, discretionary, manager.[12] Deutsche Bank has corporate relationships with a wide range of entities that may act as QPAMs and utilize the exemptive relief provided in PTE 84–14.

8. However, Section I(g) of PTE 84–14 prevents an entity that may otherwise meet the definition of QPAM from utilizing the exemptive relief provided by PTE 84–14, for itself and its client plans, if that entity or an affiliate thereof or any owner, direct or indirect, of a 5 percent or more interest in the QPAM has, within 10 years immediately preceding the transaction, been either convicted or released from imprisonment, whichever is later, as a result of certain specified criminal activity described in that section. The Department notes that Section I(g) was included in PTE 84–14, in part, based on the expectation that a QPAM, and those who may be in a position to influence its policies, maintain a high standard of integrity.[13] Accordingly, as a result of the Korean Conviction and the US Conviction, QPAMs with certain corporate relationships to DSK and DB Group Services, as well as their client plans that are subject to Part 4 of Title I of ERISA (ERISA-covered plans) or section 4975 of the Code (IRAs), will no longer be able to rely on PTE 84–14 without an individual exemption issued by the Department.

The DB QPAMs

9. Deutsche Bank represents that certain current and future ''affiliates'' of DSK and DB Group Services, as that term is defined in Section VI(d) of PTE 84–14, may act as QPAMs in reliance on the relief provided in PTE 84–14 (these entities are collectively referred to as the ''DB QPAMs'' or the ''Applicant''). The DB QPAMs are currently comprised of several wholly-owned direct and indirect subsidiaries of Deutsche Bank including: (A) DIMA; (B) Deutsche Bank Securities Inc., which is a dual-registrant with the SEC under the Advisers Act as an investment adviser and broker-dealer; (C) RREEF America L.L.C., a Delaware limited liability company and investment adviser registered with the SEC under the Advisers Act; (D) Deutsche Bank Trust Company Americas, a corporation organized under the laws of the State of New York and supervised by the New York State Department of Financial Services, a member of the Federal Reserve and an FDIC-insured bank; (E) Deutsche Bank National Trust Company, a national banking association, organized under the laws of the United States and supervised by the Office of the Comptroller of the Currency, and a member of the Federal Reserve; (F) Deutsche Bank Trust Company, NA, a national banking association, organized under the laws of the United States and supervised by the OCC; (G) Deutsche Alternative Asset Management (Global) Limited, a London-based investment adviser registered with the SEC under the Advisers Act; (H) Deutsche Investments Australia Limited, a Sydney, Australia-based investment adviser registered with the SEC under the Advisers Act; (I) DeAWM Trust Company (DTC), a limited purpose trust company organized under the laws of New Hampshire and subject to supervision of the New Hampshire Banking Department; and the four following entities which currently do not rely on PTE 84–14 for the management of any ERISA-covered plan or IRA assets, but may in the future: (J) Deutsche Asset Management (Hong Kong) Ltd.; (K) Deutsche Asset Management International GmbH; (L) DB Investment Managers, Inc.; and (M) Deutsche Bank AG, New York Branch.[14]

10. DIMA notes that discretionary asset management services are provided to ERISA-covered plans, IRAs and others under the following Asset & Wealth Management (AWM) business lines, each of which may be served by one or more of the DB QPAMs: (A) Wealth Management—Private Client Services and Wealth Management—Private Bank ($178.1 million in ERISA assets, $643.9 million in IRA assets and $1.8 million in rabbi trust assets); (B) Active Management ($299 million in ERISA assets, $227.9 million in governmental plan assets, and $141.7 million in rabbi trust assets); (C) Alternative and Real Assets ($7.4 billion in ERISA-covered and governmental plan assets);[15] (D) Alternatives & Fund Solutions ($20.8 million in ERISA accounts, $29 million in IRA holdings and $14.1 million in governmental plan holdings); and (E) Passive Management

[8] For purposes of the Summary of Facts and Representations, references to specific provisions of Title I of ERISA, unless otherwise specified, refer also to the corresponding provisions of the Code.

[9] The prohibited transaction provisions also include certain fiduciary prohibited transactions under section 406(b) of ERISA. These include transactions involving fiduciary self-dealing; fiduciary conflicts of interest, and kickbacks to fiduciaries.

[10] 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).

[11] An ''investment fund'' includes single customer and pooled separate accounts maintained by an insurance company, individual trusts and common, collective or group trusts maintained by a bank, and any other account or fund to the extent that the disposition of its assets (whether or not in the custody of the QPAM) is subject to the discretionary authority of the QPAM.

[12] See 75 FR 38837, 38839 (July 6, 2010).

[13] See 47 FR 56945, 56947 (December 21, 1982).

[14] For reasons described below, exemptive relief to rely on PTE 84–14 notwithstanding the Convictions is not being proposed for DBSI and the branches of Deutsche Bank AG (including the NY Branch), and as such, these entities are excluded from the definition of ''DB QPAM'' for purposes of the operative language of this proposed temporary exemption.

[15] The Alternatives and Real Assets business line also provides discretionary asset management services, through a separately managed account, to one church plan with total assets under management of $168.6 million and, through a pooled fund subject to ERISA, to two church plans with total assets under management of $7.9 million. According to Deutsche Bank, with respect to governmental plan assets, most management agreements are contractually subject to ERISA standards.

(no current ERISA or IRA assets).[16] Finally, DTC manages the DWS Stock Index Fund, a collective investment trust with $192 million in assets as of March 31, 2015.

11. The Applicant represents that the AWM business is separate from Group Services. The DB QPAMs that serve the AWM business have their own boards of directors. The Applicant represents that the AWM business has its own legal and compliance teams. The Applicant further notes that the DB QPAMs are subject to certain policies and procedures that are designed to, among other things, ensure that asset management decisions are made without inappropriate outside influence, applicable law and governing documents are followed, personnel act with professionalism and in the best interests of clients, clients are treated fairly, confidential information is protected, conflicts of interest are avoided, errors are reported and a high degree of integrity is maintained.

Market Manipulation Activities of DSK [17]

12. Deutsche Securities Korea Co. (DSK), an indirect wholly-owned subsidiary of Deutsche Bank, is a broker-dealer organized in Korea and supervised by the Financial Supervisory Service in Korea. The Absolute Strategy Group (ASG) of Deutsche Bank's Hong Kong Branch (DB HK) conducts index arbitrage trading for proprietary accounts in Asian markets, including Korea. On January 25, 2016, DSK was convicted in Seoul Central District Court (the Korean Court), under Articles 176, 443, and 448 of South Korea's Financial Investment Services and Capital Markets Act (FSCMA) for spot/futures-linked market price manipulation. The Korean Court issued a written decision (the Korean Decision) in connection with the Korean Conviction.

13. Deutsche Bank represents that index arbitrage trading is a trading strategy through which an investor such as Deutsche Bank seeks to earn a return by identifying and exploiting a difference between the value of futures contracts in respect of a relevant equity index and the spot value of the index, as determined by the current market price of the constituent stocks. For instance, where the futures contracts are deemed to be overpriced by reference to the spot value of the index (*i.e.,* if the premium is sufficiently large), then an index arbitrageur will short sell the relevant futures contracts (either the exchange-traded contracts or the put and call option contracts which together synthetically replicate the exchange-traded futures contracts) and purchase the underlying stocks. The short and long positions offset each other in order to be hedged (although the positions may not always be perfectly risk-neutral).

14. Deutsche Bank represents that ASG pursued an index arbitrage trading strategy in various Asian markets, including Korea. In Korea, the index arbitrage position involved the Korean Composite Stock Price Index (KOSPI 200 Index), which reflects stocks commonly traded on the Korea Exchange (KRX). Deutsche Bank represents that, while ASG tried to track the KOSPI 200 Index as closely as possible, there is a limit on foreign ownership for certain shares such as telecommunication companies. Thus, once ASG's cash position reached this limitation, DSK carried the remainder and ASG's book, combined with DSK's book for Korea telecommunication companies, reflected ASG's overall KOSPI 200 index arbitrage position.

15. On November 11, 2010, the Applicant states that ASG ''unwound'' an arbitrage position on the KOSPI 200 Index through DSK.[18] The ''unwind'' included a sale of $2.1 billion worth of stocks in the KRX during the final 10 minutes of trading (*i.e.,* the closing auction period) and comprised 88% of the volume of stock traded during this period. This large volume sale contributed to a drop of the KOSPI 200 Index by 2.7%.

16. Prior to the unwinding, but after the decision to unwind was made, ASG had taken certain derivative positions, including put options on the KOSPI 200 Index. Thus, ASG earned a profit when the KOSPI 200 Index declined as a result of the unwind trades (the derivative positions and unwind trades cumulatively referred to as the Trades). DSK had also purchased put options on that day that resulted in it earning a profit as a result of the drop of the KOSPI 200 Index. The aggregate amount of profit earned from such Trades was approximately $40 million.

17. The Seoul Central District Prosecutor's Office (the Korean Prosecutors) alleged that the Trades constitute spot/futures linked market manipulation, a criminal violation under Korean securities law. In this regard, the Korean Prosecutors alleged that ASG unwound its cash position of certain securities listed on the KRX(spot) through DSK, and caused a fluctuation in the market price of securities related to exchange-traded derivatives (the put options) for the purpose of gaining unfair profit from such exchange-traded derivatives. On August 19, 2011, the Korean Prosecutors indicted DSK and four individuals on charges of stock market manipulation to gain unfair profits. Two of the individuals, Derek Ong and Bertrand Dattas, worked for ASG at DB HK. Mr. Ong was a Managing Director and head of ASG, with power and authority with respect to the KOSPI 200 Index arbitrage trading conducted by Deutsche Bank. Mr. Dattas served as a Director of ASG and was responsible for the direct operations of the KOSPI 200 Index arbitrage trading. Philip Lonergan, the third individual, was employed by Deutsche Bank Services (Jersey) Limited. At the time of the transaction, Mr. Lonergan was seconded to DB HK and served as Head of Global Market Equity, Trading and Risk. Mr. Lonergan served as Mr. Ong's regional superior and was in charge of risk management for his team. The fourth individual charged, Do-Joon Park, was employed by DSK, serving as a Managing Director of Global Equity Derivatives (GED) at DSK and was in charge of the index arbitrage trading using DSK's book that had been integrated into and managed by ASG. Mr. Park was also a de facto chief officer of equity and derivative product operations of DSK.

18. The Korean Prosecutors' case against DSK was based on Korea's criminal vicarious liability provision, under which DSK may be held vicariously liable for an act of its employee (*i.e.,* Mr. Park) if it failed to exercise due care in the appointment and supervision of its employees.[19]

19. The trial commenced in January 2012 in the Korean Court. The Korean Court convicted both DSK and Mr. Park on January 25, 2016. The Korean Court sentenced Mr. Park to five years imprisonment. Upon conviction, the

[16] With the exception of Passive Management, the statistics for each of the individual business lines listed here have been updated by Deutsche Bank and are current as of June 30, 2015, to the best of Deutsche Bank's knowledge.

[17] The Department has incorporated the facts related to the circumstances leading to the Korean Conviction as represented by Deutsche Bank in Application No. D–11696 and included in the **Federal Register** in the notice of proposed exemption for the aforementioned application at 80 FR 51314 (August 24, 2015).

[18] The Department understands the ''unwinding'' of a transaction to mean closing out a relatively complicated investment position. For example, an investor who practices arbitrage by taking one position in stocks and the opposite position in option contracts would have to unwind by the date on which the options would expire. This would entail selling the underlying stocks and covering the options.

[19] Article 448 of the FSCMA allows for charges against an employer stemming from vicarious liability for the actions of its employees.

Korean Court ordered DSK to pay a criminal fine of KRW 1.5 billion. Furthermore, the Korean Court ordered that Deutsche Bank forfeit KRW 43,695,371,124, while KRW 1,183,362,400 was ordered forfeited by DSK.[20]

LIBOR Manipulation Activities by DB Group Services

20. DB Group Services is an indirect wholly-owned subsidiary of Deutsche Bank located in the United Kingdom. On April 23, 2015, DB Group Services pled guilty in the United States District Court for the District of Connecticut to a single count of wire fraud, in violation of 18 U.S.C. 1343 (the Plea Agreement), related to the manipulation of the London Interbank Offered Rate (LIBOR) described below. In connection with the Plea Agreement with DB Group Services, the DOJ filed a Statement of Fact (the DOJ Plea Factual Statement) that details the underlying conduct that serves as the basis for the criminal charges and impending US Conviction.

21. According to the DOJ Plea Factual Statement, LIBOR is a benchmark interest rate used in financial markets around the world. Futures, options, swaps, and other derivative financial instruments traded in the over-the-counter market. The LIBOR for a given currency is derived from a calculation based upon submissions from a panel of banks for that currency (the Contributor Panel) selected by the British Bankers' Association (BBA). Each member of the Contributor Panel would submit its rates electronically. Once each Contributor Panel bank had submitted its rate, the contributed rates were ranked. The highest and lowest quartiles were excluded from the calculation, and the middle two quartiles (*i.e.,* 50% of the submissions) were averaged to formulate the LIBOR ''fix'' or ''setting'' for the given currency and maturity.

22. The DOJ Plea Factual Statement states that, from 2006 to 2011, Deutsche Bank's Global Finance and Foreign Exchange business units (GFFX) had employees in multiple entities associated with Deutsche Bank, in multiple locations around the world including London and New York. Deutsche Bank, through the GFFX unit, employed traders in both its Pool Trading groups (Pool) and its Money Market Derivatives (MMD) groups. Many of the GFFX traders based in London were employed by DB Group Services.

23. According to the DOJ Plea Factual Statement, Deutsche Bank's Pool traders engaged in, among other things, cash trading and overseeing Deutsche Bank's internal funding and liquidity. Deutsche Bank's Pool traders traded a variety of financial instruments. Deutsche Bank's Pool traders were primarily responsible for formulating and submitting Deutsche Bank's LIBOR and EURIBOR daily contributions. Deutsche Bank's MMD traders, on the other hand, were responsible for, among other things, trading a variety of financial instruments, some of which, such as interest rate swaps and forward rate agreements, were tied to LIBOR and EURIBOR. The DOJ Plea Factual Statement notes that both the Pool traders and the MMD traders worked in close proximity and reported to the same chain of command. DB Group Services employed many of Deutsche Bank's London-based Pool and MMD traders.

24. Deutsche Bank and DB Group Services's derivatives traders (the Derivatives Traders) were responsible for trading a variety of financial instruments, some of which, such as interest rate swaps and forward rate agreements, were tied to reference rates such as LIBOR and EURIBOR. According to the DOJ Plea Factual Statement, from approximately 2003 through at least 2010, the Derivatives Traders defrauded their counterparties by secretly manipulating U.S. Dollar (USD), Yen, and Pound Sterling LIBOR, as well as the EURO Interbank Offered Rate (EURIBOR, and collectively, the IBORs or IBOR). The Derivatives Traders requested that the IBOR submitters employed by Deutsche Bank and other banks send in IBORs that would benefit the Derivatives Traders' trading positions, rather than rates that complied with the definitions of the IBORs. According to the DOJ, Deutsche Bank employees engaged in this collusion through face-to-face requests, electronic communications, which included both emails and electronic chats, and telephone calls.

25. The DOJ Plea Factual Statement explains that when the Derivatives Traders' requests for favorable IBOR submissions were taken into account by the submitters, the resultant contributions affected the value and cash flows of derivatives contracts, including interest rate swap contracts. In accommodating these requests, the Derivatives Traders and submitters were engaged in a deceptive course of conduct in an effort to gain an advantage over their counterparties. As part of this effort: (1) The Deutsche Bank Pool and MMD Traders submitted materially false and misleading IBOR contributions; and (2) Derivatives Traders, after initiating and continuing their effort to manipulate IBOR contributions, entered into derivative transactions with counterparties that did not know that the Deutsche Bank personnel were often manipulating the relevant rate.

26. The DOJ Plea Factual Statement notes that from 2003 through at least 2010, DB Group Services employees regularly sought to manipulate USD LIBOR to benefit their trading positions and thereby benefit themselves and Deutsche Bank. During most of this period, traders at Deutsche Bank who traded products linked to USD LIBOR were primarily located in London and New York. DB Group Services employed almost all of the USD LIBOR traders who were located in London and involved in the misconduct. Throughout the period during which the misconduct occurred, the Deutsche Bank USD LIBOR submitters in London sat within feet of the USD LIBOR traders. This physical proximity enabled the traders and submitters to conspire to make and solicit requests for particular LIBOR submissions.

27. Pursuant to the Plea Agreement that DB Group Services entered into with the DOJ on April 23, 2015, pleading guilty to wire fraud for manipulation of LIBOR, DB Group Services also agreed: (A) To work with its parent company (Deutsche Bank) in fulfilling obligations undertaken by the Bank in connection with its own settlements; (B) to continue to fully cooperate with the DOJ and any other law enforcement or government agency designated by the DOJ in a manner consistent with applicable laws and regulations; and (C) to pay a fine of $150 million.

28. On April 23, 2015, Deutsche Bank AG entered into a deferred prosecution agreement (DPA) with the DOJ, in disposition of a 2-count criminal information charging Deutsche Bank with one count of wire fraud, in violation of Title 18, United States Code, Section 1343, and one count of price-fixing, in violation of the Sherman Act, Title 15, United States Code, Section 1. By entering into the DPA, Deutsche Bank AG agreed, among other things: (A) To continue to cooperate with the DOJ and any other law enforcement or government agency; (B) to retain an independent compliance monitor for three years, subject to extension or early termination, to be selected by the DOJ from among qualified candidates proposed by the Bank; (C) to further strengthen its internal controls as recommended by the monitor and as required by other settlements; and (D) to pay a penalty of $625 million.

[20] KRW refers to a South Korean Won.

29. On April 23, 2015, Deutsche Bank AG and Deutsche Bank AG, New York Branch (DB NY) also entered into a consent order with the New York State Department of Financial Services (NY DFS) in which Deutsche Bank AG and DB NY agreed to pay a penalty of $600 million. Furthermore, Deutsche Bank AG and DB NY engaged an independent monitor selected by the NY DFS in the exercise of the NY DFS's sole discretion, for a 2-year engagement. Finally, the NY DFS ordered that certain employees involved in the misconduct be terminated, or not be allowed to hold or assume any duties, responsibilities, or activities involving compliance, IBOR submissions, or any matter relating to U.S. or U.S. Dollar operations.

30. Furthermore, the United States Commodities Futures Trading Commission (CFTC) entered a consent order, dated April 23, 2015, requiring Deutsche Bank AG to cease and desist from certain violations of the Commodity Exchange Act, to pay a fine of $800 million, and to agree to certain undertakings.

31. The United Kingdom's Financial Conduct Authority (FCA) issued a final notice (Final Notice), dated April 23, 2015, imposing a fine of £226.8 million on Deutsche Bank AG. In its Final Notice, the FCA cited Deutsche Bank's inadequate systems and controls specific to IBOR. The FCA noted that Deutsche Bank had defective systems to support the audit and investigation of misconduct by traders; and Deutsche Bank's systems for identifying and recording traders' telephone calls and for tracing trading books to individual traders were inadequate. The FCA's Final Notice provided that Deutsche Bank took over two years to identify and produce all relevant audio recordings requested by the FCA. Furthermore, according to the Final Notice, Deutsche Bank gave the FCA misleading information about its ability to provide a report commissioned by Bundesanstalt für Finanzdienstleistungsaufsicht, Germany's Federal Financial Supervisory Authority (BaFin). In addition, the FCA notes in its Final Notice that Deutsche Bank provided it with a false attestation that stated that its systems and controls in relation to LIBOR were adequate, an attestation known to be false by the person who drafted it. The Final Notice provides that, in one instance, Deutsche Bank, in error, destroyed 482 tapes of telephone calls, despite receiving an FCA notice requiring their preservation, and provided inaccurate information to the regulator about whether other records existed.

32. Finally, BaFin set forth preliminary findings based on an audit of LIBOR related issues in a May 15, 2015, letter to Deutsche Bank. At that time, BaFin raised certain questions about the extent of certain senior managers' possible awareness of wrongdoing within Deutsche Bank.

Prior and Anticipated Convictions and Failure To Comply With Section I(g) of PTE 84–14

33. The Korean Conviction caused the DB QPAMs to violate Section I(g) of PTE 84–14. As a result, the Department granted, and later extended the effective period for, PTE 2015–15, which allows the DB QPAMs to rely on the relief provided by PTE 84–14, notwithstanding the January 25, 2016 Korean Conviction. The Department granted, and extended, PTE 2015–15 in order to protect ERISA-covered plans and IRAs from IRAs from certain costs and/or investment losses that could have occurred to the extent the DB QPAMs lost their ability to rely on PTE 84–14 as a result of the Korean Conviction. PTE 2015–15 and its extension, PTE 2016–12 (81 FR 75153, October 28, 2016) (the Extension) are subject to enhanced conditions that are protective of the rights of the participants and beneficiaries of affected ERISA-covered plans and IRAs.

34. The Applicant represents that date on which the US Conviction will be entered (the U.S. Conviction Date) is tentatively scheduled for April 3, 2017, will also cause DB QPAMs to violate Section I(g) of PTE 84–14. Therefore, Deutsche Bank requests a single, new exemption that would permit the DB QPAMs, and their ERISA-covered plan and IRA clients, to continue to utilize the relief in PTE 84–14, notwithstanding both the Korean Conviction and the US Conviction.

35. The Department is proposing a temporary exemption herein to allow the DB QPAMs to rely on PTE 84–14 notwithstanding the Korean Conviction and the US Conviction, subject to a comprehensive suite of protective conditions designed to protect the rights of the participants and beneficiaries of the ERISA-covered plans and IRAs that are managed by DB QPAMs. This proposed temporary exemption would be effective for a period of up to one year beginning on the U.S. Conviction Date; and ending on the earlier of the date that is twelve months after the U.S. Conviction Date or the effective date of a final agency action made by the Department in connection with Exemption Application No. D–11908. In this regard, elsewhere today in the **Federal Register**, the Department is proposing Exemption Application No. D–11908, a five-year proposed exemption subject to enhanced protective conditions that would provide the same exemptive relief that is described herein, but for a longer effective period.

This temporary exemption will allow the Department sufficient time to contemplate whether or not to grant the five-year exemption without risking the sudden loss of exemptive relief for the DB QPAMs upon the expiration of the relief provided by the Extension. The Extension expires upon the earlier of April 23, 2017 or the effective date of a final agency action in connection with this proposed temporary exemption (*e.g.,* the Department denies or grants this proposed temporary exemption).

36. This temporary exemption will not apply to Deutsche Bank Securities, Inc. (DBSI).[21] Section I(a) of PTE 2015–15, as well as this proposed temporary exemption, requires that ''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.'' In a letter to the Department dated July 15, 2016, Deutsche Bank raised the possibility that an individual,[22] while employed at DBSI, may have known or had reason to know of the criminal conduct of DSK that is the subject of the Korean Conviction. In a letter to the Department dated August 19, 2016, Deutsche Bank further clarified that ''there is no evidence that anyone at DBSI other than Mr. Ripley knew in advance of the trades conducted by the Absolute Strategy Group on November 11, 2010.'' Deutsche Bank states that it had previously interpreted Section I(a) of PTE 2015–15 as requiring only that ''any current director, officer or employee did not know of, have reason to know of, or participate in the conduct.'' The Department notes that Deutsche Bank did not raise any interpretive questions regarding Section I(a) of PTE 2015–15, or express any concerns regarding DBSI's possible noncompliance, during the comment period for PTE 2015–15. Nor did Deutsche Bank seek a technical

[21] The Applicant represents that DBSI has not relied on the relief provided by PTE 84–14 since the date of the Korean Conviction.

[22] The Applicant identifies the individual as Mr. John Ripley, a senior global manager in DBSI who was based in the United States and who was a functional supervisor over the employees of DSK that were prosecuted for market manipulation. Furthermore, the Applicant states that Mr. Ripley was terminated by DBSI for ''loss of confidence'' in that he could have exercised more care and been more proactive in reviewing the trades at issue.

correction or other remedy to address such concerns between the time that PTE 2015–15 was granted and the date of the Korean Conviction. The Department notes that a period of approximately nine months passed before Deutsche Bank raised an interpretive question regarding Section I(a) of PTE 2015–15. Accordingly, the Department is not proposing exemptive relief for DBSI in this temporary exemption.

This temporary exemption will also not apply with respect to Deutsche Bank AG (the parent entity) or any of its branches. The Applicant represents that neither Deutsche Bank AG nor its branches have relied on the relief provided by PTE 84–14 since the date of the Korean Conviction.

37. Finally, the Applicant represents that it currently does not have a reasonable basis to believe that any pending criminal investigation [23] of any of Deutsche Bank's affiliated corporate entities would cause a reasonable plan or IRA customer not to hire or retain the Bank's affiliated managers as a QPAM. Furthermore, this temporary exemption will not apply to any other conviction(s) of Deutsche Bank or its affiliates for crimes described in Section I(g) of PTE 84–14. The Department notes that, in such event, the Applicant and its ERISA-covered plan and IRA clients should be prepared to rely on exemptive relief other than PTE 84–14 for any prohibited transactions entered into after the date of such new conviction(s); withdraw from any arrangements that solely rely on PTE 84–14 for exemptive relief; or avoid engaging in any such prohibited transactions in the first place.

Remedial Measures To Address Criminal Conduct of DSK

38. Deutsche Bank represents that it has voluntarily disgorged its profits generated from exercising derivative positions and put options in connection with the activity associated with the Korean Conviction. DSK also suspended its proprietary trading from April 2011 to 2012, and thereafter DSK only engaged in limited proprietary trading (but not index arbitrage trading).[24] Further, in response to the actions of the Korean Prosecutors, Deutsche Bank enhanced its compliance measures and implemented additional measures in order to ensure compliance with applicable laws in Korea and Hong Kong, as well as within other jurisdictions where Deutsche Bank conducts business.

39. Deutsche Bank states that Mr. Ong and Mr. Dattas were terminated for cause by DB HK on December 6, 2011, and Mr. Lonergan was terminated on January 31, 2012. In addition, Mr. Park was suspended for six months due to Korean administrative sanctions, and remained on indefinite administrative leave, until being terminated effective January 25, 2016. John Ripley, a New York-based employee of Deutsche Bank Securities Inc. (DBSI) who was not indicted, was also terminated in October 2011.[25]

Remedial Measures To Address Criminal Conduct of DB Group Services

40. Deutsche Bank represents that it has significantly modified its compensation structure. Specifically, Deutsche Bank: Eliminated the use of ''percentage of trading profit'' contracts once held by two traders involved in the LIBOR case; extended the vesting/distribution period for deferred compensation arrangements; made compliance with its internal policies a significant determinant of bonus awards; and modified its compensation plans to facilitate forfeiture/clawback of compensation when employees are found after the fact to have engaged in wrongdoing. Deutsche Bank represents that the forfeiture/clawback provisions of its compensation plans have been altered so as to permit action against employees even when misconduct is discovered years later.

41. With respect to the LIBOR-related misconduct, Deutsche Bank represents that it has separated from or disciplined the employees responsible. With the exceptions described below, none of the employees determined to be responsible for the misconduct remains employed by Deutsche Bank. Deutsche Bank represents that, during the initial phase of its internal investigation into the LIBOR matters, it terminated the two employees most responsible for the misconduct, including the Global Head of Money Market and Derivatives Trading.

42. Deutsche Bank then terminated five benchmark submitters in its Frankfurt office, including the Head of Global Finance and Foreign Exchange in Frankfurt. Four of these employees successfully challenged their termination in a German Labor court, and one employee entered into a separation agreement with Deutsche Bank after initially indicating that he would challenge the termination decision. With respect to the four employees who challenged their termination, the Bank agreed to mediate the employee labor disputes and reached settlements with the four employees. Pursuant to the settlements, the two more senior employees remained on paid leave through the end of 2015 and then have no association with Deutsche Bank. The two more junior employees have returned to the Bank in non-risk-taking roles. They do not work for any DB QPAMs and have no involvement in the Bank's AWM business or the setting of interest rate benchmarks. Deutsche Bank represents that it also terminated four additional individuals, and another eight individuals left the bank before facing disciplinary action.

43. Deutsche Bank represents that it will take action to terminate any additional employees who are determined to have been involved in the improper benchmark manipulation conduct, as well as those who knew about it and approved it. Moreover, the Applicant states that Deutsche Bank has taken further steps, both on its own and in consultation with U.S. and foreign regulators, to discipline those whose performance fell short of DB's expectations in connection with the above-described conduct.

Statutory Findings—In the Interests of Affected Plans and IRAs

44. The Applicant represents that the proposed exemption is in the interests of affected ERISA-covered plans and IRAs. Deutsche Bank represents that the DB QPAMS provide discretionary asset management services under several business lines, including (A) Alternative and Real Assets (ARA); (B) Alternatives & Fund Solutions (AFS); (C) Active Management (AM); and (D) Wealth Management—Private Client Services and Wealth Management—Private Bank. Deutsche Bank asserts that plans will incur direct transaction costs in liquidating and reinvesting their portfolios. According to Deutsche Bank, the direct transaction costs of liquidating and reinvesting ERISA-covered plan, IRA and ERISA-like assets

[23] The Applicant references the Deutsche Bank AG Form 6–K, filed July 27, 2016, available at: *https://www.db.com/ir/en/download/6_K_Jul_2016.pdf*; and the Deutsche Bank AG Form 10–F filed March 11, 2016 and available at: *https://www.db.com/ir/en/download/Deutsche_Bank_20_F_2015.pdf.*

[24] Deutsche Bank notes that DSK was never permitted to trade on behalf of Deutsche Bank.

[25] According to the Korean prosecutors, Mr. Ripley served as a Head of Global ASG of Deutsche Bank, AG, and was a functional superior to Mr. Ong. Mr. Ripley was suspected of having advised to unwind all the KOSPI 200 index arbitrage trading for the purpose of management of the ending profits and losses of Global ASK and approved Mr. Ong's request to establish the speculative positions in the course of the unwinding. Though the Korean prosecutors named Mr. Ripley as a suspect, he was not named in the August 19, 2011, Writ of Indictment.

under the various business lines (other than core real estate) could range from 2.5 to 25 basis points, resulting in an estimated dollar cost of approximately $5–7 million. Deutsche Bank also states that an unplanned liquidation of the Alternatives and Real Assets business' direct real estate portfolios could result in portfolio discounts of 10–20% of gross asset value, in addition to transaction costs ranging from 30 to 100 basis points, for estimated total cost to plan investors of between $281 million and $723 million, depending on the liquidation period.

45. Deutsche Bank states that its managers provide discretionary asset management services, through both separately managed accounts and four pooled funds subject to ERISA, to a total of 46 ERISA-covered plan accounts, with total assets under management (AuM) of $1.1 billion. Deutsche Bank estimates that the underlying plans cover in total at least 640,000 participants. Deutsche Bank represents that its managers provide asset management services, through both separately managed accounts and pooled funds subject to ERISA, to a total of 22 governmental plan accounts, with total AuM of $7.1 billion. The underlying plans cover at least 3 million participants. With respect to church plans and rabbi trust accounts, Deutsche Bank investment managers separately manage accounts and a pooled fund subject to ERISA, to a total of 4 church plan and rabbi trust accounts, with total AuM of $318.3 million. With respect to ERISA-covered Plan, IRA, Governmental Plan and Church Plan Accounts in Non-Plan Asset Pooled Funds, Deutsche Bank represents that its asset managers manages 175 ERISA-covered plan accounts with interests totaling $4.23 billion, 178 IRAs with interests totaling $29 million, 66 governmental plan accounts with interests totaling $2.08 billion, and 14 church plan accounts with interests totaling $67.1 million.

46. Deutsche Bank contends that ERISA-covered, IRA, governmental plan and other plan investors that terminate or withdraw from their relationship with their DB QPAM manager may be harmed in several specific ways, including: The costs of searching for and evaluating a new manager; the costs of leaving a pooled fund and finding a replacement fund or investment vehicle; and the lack of a secondary market for certain investments and the costs of liquidation.[26]

47. Deutsche Bank represents that its ARA business line provides discretionary asset management services to, among others, 17 ERISA accounts and 18 governmental plan accounts. The largest account has $1.6 billion in AuM. ERISA-covered and governmental plans total $7.4 billion in AuM. Deutsche Bank estimates that the underlying plans cover at least 2.7 million participants. ARA provides these services through separately managed accounts and pooled funds subject to ERISA. ARA also provides discretionary asset management services, through a separately managed account, to one church plan with total AuM of $168.6 million and, through a pooled fund subject to ERISA, to two church plans with total AuM of $7.9 million.

Deutsche Bank argues that PTE 84–14 is the sole exemption available to ARA for investments in direct real estate for separately managed accounts.

48. Deutsche Bank represents that, as a result of terminating ARA's management, a typical plan client may incur $30,000 to $40,000 in consulting fees in searching for a new manager as well as $10,000 to $30,000 in legal fees. Furthermore, with respect to direct real estate investments, Deutsche Bank states that plan clients may face direct transaction costs of 30–100 basis points for early liquidation, or a $4.8 million to $16 million loss for its largest ARA governmental plan client; as well as a 10–20% discount for early liquidation, or a $162.5 million to $325 million loss for the largest ARA governmental plan client. With respect to non-direct real estate investments, Deutsche Bank states that plan clients may face direct transaction costs of 20–60 basis points, or $933,000 for ARA's largest ERISA client.

49. Deutsche Bank notes that ARA manages seven unregistered real estate investment trusts and other funds that currently rely on one or more exceptions to the Department's plan asset regulation. Interests in the funds are held by 131 ERISA-covered plan accounts, 63 governmental plan accounts and 14 church plan accounts. Deutsche Bank represents that the largest holding in these funds by an ERISA-covered plan account is $647.4 million. Holdings by all ERISA plan accounts in these funds total $4.21 billion. The underlying ERISA-covered plans cover at least 2 million participants. The largest holding by a governmental plan account in these funds is $286.5 million. Holdings of all governmental plan accounts in these funds total $2.07 billion. The underlying plans cover at least 6.1 million participants. The largest holding by a church plan is $16 million. Holdings of all church plans in these funds total $67.1 million.

50. Deutsche Bank represents that its AFS business line manages 28 unregistered, closed-end, private equity funds, with $2.8 billion in total assets, in which ERISA-covered, IRA and governmental plans invest. Interests in these funds are held by, among others, 44 ERISA-covered plan accounts, 178 IRAs and 3 governmental plan accounts. Holdings by all ERISA-covered plan accounts total $20.8 million. Deutsche Bank notes that the underlying plans cover at least 57,000 participants. Holdings by all IRAs total $29 million. Holdings by all governmental plans total $14.1 million. These funds invest primarily in equity interests issued by other private equity funds. The funds currently rely on the 25% benefit plan investor participation exception under the Department's plan asset regulation.

51. Deutsche Bank contends that, in the event the AFS business line cannot rely upon the exemptive relief of PTE 84–14, all plans would have to undertake the time and expense of identifying suitable transferees, accept a discounted sale price, comply with applicable transfer rules and pay the funds a transfer fee, which may run to $5,000 or more. Deutsche Bank states that, in locating a replacement fund, a typical plan could incur 6–8 months of delay, $30,000–$40,000 in consultant fees for a private manager/fund search, 25–50 hours in client time and $10,000–$30,000 in legal fees to review subscription agreements and negotiate side letters.

52. Deutsche Bank represents that its AM business line provides discretionary asset management services to separately managed plan accounts, including five ERISA-covered plan accounts and three governmental plan accounts. The largest ERISA account is $164.2 million. Total ERISA AuM is $299.2 million. The underlying ERISA-covered plans cover at least 143,000 participants. The largest governmental plan account is $164.3 million. Total governmental plan AuM is $227.9 million. The underlying plans cover at least 731,000 participants. Deutsche Bank notes that AM also provides such services to one rabbi trust with total AuM of $141.7 million.

53. Deutsche Bank represents that the AM line manages these accounts with a variety of strategies, including: (A) Equities, (B) fixed income, (C) overlay, (D) commodities, and (E) cash. These strategies involve a range of asset classes

[26] The Department notes that, if this temporary exemption is granted, compliance with the condition in Section I(j) of the exemption would require the DB QPAMs to hold their plan customers harmless for any losses attributable to, inter alia, any prohibited transactions or violations of the duty of prudence and loyalty.

and types, including: (A) U.S. and foreign fixed income (Treasuries, Agencies, corporate bonds, asset-backed securities, mortgage and commercial mortgage-backed securities, deposits); (B) U.S. and foreign mutual funds and ETFs; (C) U.S. and foreign futures, (D) currency; (E) swaps (interest rate and credit default); (F) U.S. and foreign equities; and (G) short term investment funds.

54. Deutsche Bank estimates that, in the event the AM business line cannot rely upon the exemptive relief of PTE 84–14, plan clients would typically incur $30,000 to $40,000 in consulting fees related to a new manager search, up to 5 basis points in direct transaction costs, and $15,000–$30,000 in legal costs to negotiate each new futures, cleared derivatives, swap or other trading agreements.

55. Deutsche Bank represents that its Wealth Management—Private Client Services and Wealth Management—Private Bank business lines manage $178.1 million in ERISA assets, $643.9 million in IRA assets, and $1.8 million of rabbi trust assets (Wealth Management—Private Bank). Deutsche Bank asserts that causing plan clients to change managers will lead the plans and IRAs to incur transaction costs, estimated at 2.5 basis points overall.

Statutory Findings—Protective of the Rights of Participants of Affected Plans and IRAs

56. The Applicant has proposed certain conditions it believes are protective of plans and IRAs with respect to the transactions described herein. The Department has determined to revise and supplement the proposed conditions so that it can make its required finding that the requested exemption is protective of the rights of participants and beneficiaries of affected plans and IRAs.

57. Several of the conditions underscore the Department's understanding, based on Deutsche Bank's representations, that the affected DB QPAMs were not involved in the misconduct that is the subject of the Convictions. The temporary exemption, if granted as proposed, mandates that 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 and DB Group Services that is the subject of the Convictions. For purposes of this requirement, ''participate in'' includes an individual's knowing or tacit approval of the misconduct underlying the Convictions. Furthermore, the DB QPAMs (including their officers, directors, employees, and agents other than Deutsche Bank) cannot have received direct compensation, or knowingly received indirect compensation, in connection with the criminal conduct that is the subject of the Convictions.

58. The proposed temporary exemption defines the Convictions as: (1) The judgment of conviction against DB Group Services, in Case 3:15–cr–00062–RNC to be entered in the United States District Court for the District of Connecticut to a single count of wire fraud, in violation of 18 U.S.C. 1343 (the US Conviction); and (2) 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 (the Korean Conviction). The Department notes that the ''conduct'' of any person or entity that is the ''subject of [a] Conviction'' encompasses any conduct of Deutsche Bank and/or their personnel, that is described in the Plea Agreement (including the Factual Statement), Court judgments (including the judgment of the Seoul Central District Court), criminal complaint documents from the Financial Services Commission in Korea, and other official regulatory or judicial factual findings that are a part of this record.

59. The Department expects that DB QPAMs will rigorously ensure that the individuals associated with the misconduct will not be employed or knowingly engaged by such QPAMs. In this regard, the proposed temporary exemption mandates that the DB QPAMs will not employ or knowingly engage any of the individuals that knowingly participated in the spot/futures-linked market manipulation or LIBOR manipulation activities that led to the Convictions, respectively. For purposes of this condition, ''participated in'' includes an individual's knowing or tacit approval of the behavior that is the subject of the Convictions. Further, 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 or the Code and managed by such DB QPAM to enter into any transaction with DSK or DB Group Services, nor otherwise engage DSK or DB Group Services to provide additional services to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or services may otherwise be within the scope of relief provided by an administrative or statutory exemption.

60. The DB QPAMs must 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 Convictions. Further, any failure of the DB QPAMs to satisfy Section I(g) of PTE 84–14 must result solely from the US Conviction and the Korean Conviction.

61. No relief will be provided by this temporary exemption to the extent that a DB QPAM exercised its authority over 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) in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Convictions; or cause the QPAM, affiliates, or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Convictions.

Further, no temporary relief will be provided to the extent DSK or DB Group Services provides any discretionary asset management services to ERISA-covered plans or IRAs or otherwise act as a fiduciary with respect to ERISA-covered plan or IRA assets.

62. *Policies.* The Department believes that robust policies and training are warranted where, as here, extensive criminal misconduct has occurred within a corporate organization that includes one or more QPAMs managing plan investments in reliance on PTE 84–14. Therefore, this proposed temporary exemption requires each DB QPAM to immediately develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that: The asset management decisions of the DB QPAM are conducted independently of the corporate management and business activities of Deutsche Bank, including DB Group Services and DSK; 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; 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; 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 QPAM's knowledge at that time; 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; and the DB QPAM complies with the terms of this proposed temporary exemption. Any violation of, or failure to comply with, the Policies must be corrected promptly upon discovery, and any such violation or compliance failure not promptly corrected must be 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.[27] A DB 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 reports such instance of noncompliance as explained above.

63. *Training.* The Department has also imposed a condition that requires each DB QPAM to immediately develop and implement a program of training (the Training) for all relevant DB 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) and ethical conduct, the consequences for not complying with the conditions of this proposed temporary exemption (including the loss of the exemptive relief provided herein), and prompt reporting of wrongdoing.

64. *Independent Transparent Audit.* The Department views a rigorous, transparent audit that is conducted by an independent party as essential to ensuring that the conditions for exemptive relief described herein are followed by the DB QPAMs. Therefore, Section I(i) of this proposed temporary exemption requires that 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 the DB QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies.

This proposed temporary exemption requires that the audit described herein must ''look back'' to cover the period of time beginning on the effective date of the Extension, October 24, 2016, and ending on the earlier the date that is twelve months following the U.S. Conviction Date; or the effective date of a final agency action made by the Department in connection with Exemption Application No. D–11908 (the Audit Period). The audit must be completed no later than six (6) months after the Audit Period. In order to harmonize the audit required herein with the audit required by the Extension, the audit requirement described in paragraph (i) of this temporary exemption expressly supersedes paragraph (f) of the Extension. However, in determining the DB QPAMs' compliance with the provisions of the Extension and the temporary exemption for purposes of conducting the audit, the auditor will rely on the conditions for exemptive relief as then applicable to the respective portions of the Audit Period.

The audit condition requires that, 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.

The auditor's engagement must specifically require the auditor to determine whether each DB QPAM has complied with the Policies and Training conditions described herein, and must further require the auditor to test each DB QPAM's operational compliance with the Policies and Training. 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 the DB QPAM's Policies and Training; the DB QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective DB QPAM's noncompliance with the written Policies and Training.

Any determination 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 action taken by such DB QPAM to address such recommendations must be included in an addendum to the Audit Report. Any determination by the auditor that the respective DB QPAM has implemented, maintained, and followed sufficient Policies and Training must 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 implemented, maintained, and followed the Policies and Training required by this temporary exemption. Furthermore, the auditor must notify the respective DB QPAM of any instance 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.

This proposed temporary exemption requires that certain senior personnel of Deutsche Bank review the Audit Report, make certifications, and take various corrective actions. In this regard, the General Counsel, or one of the three most senior executive officers of the DB QPAM to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this exemption; addressed, corrected, or remedied any inadequacy 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 proposed temporary exemption and with the applicable provisions of ERISA and the Code. The Risk Committee of Deutsche Bank's Board of Directors is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking legal compliance officer of Deutsche Bank must review the Audit Report for each DB QPAM and must certify in writing, under penalty of

[27] With respect to any ERISA-covered plan or IRA sponsored by an ''affiliate'' (as defined in Part 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.

perjury, that such officer has reviewed each Audit Report.

In order to create a more transparent record in the event that the proposed temporary relief is granted, each DB QPAM must provide its certified Audit Report to the Department no later than 45 days following its completion. The Audit Report will be part of the public record regarding this temporary exemption. Furthermore, each DB QPAM must make 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. Additionally, each DB QPAM and the auditor must submit to the Department any engagement agreement(s) entered into pursuant to the engagement of the auditor under this temporary exemption; and any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this proposed temporary exemption, no later than six (6) months after the effective date of this temporary exemption (and one month after the execution of any agreement thereafter). Finally, if the temporary exemption is granted, the auditor must provide the Department, 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 instance of noncompliance by the relevant DB QPAM; and an explanation of any corrective or remedial action taken by the applicable DB QPAM.

In order to enhance oversight of the compliance with the temporary exemption, Deutsche Bank must notify the Department at least 30 days prior to any substitution of an auditor, and Deutsche Bank must demonstrate to the Department's satisfaction that any new auditor is independent of Deutsche Bank, experienced in the matters that are the subject of the temporary exemption, and capable of making the determinations required of this temporary exemption.

65. *Contractual Obligations.* This proposed temporary exemption requires DB QPAMs to enter into certain contractual obligations in connection with the provision of services to their clients. It is the Department's view that the condition in Section I(j) is essential to the Department's ability to make its findings that the proposed temporary exemption is protective of the rights of the participants and beneficiaries of ERISA-covered plan and IRA clients. In this regard, effective as of the effective date of this temporary exemption, with respect to any arrangement, agreement, or contract between a DB QPAM and an ERISA-covered plan or IRA for which a DB QPAM provides asset management or other discretionary fiduciary services, each DB QPAM agrees: 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); 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; and to indemnify and hold harmless the ERISA-covered plan and IRA for any damages resulting from a DB QPAM's violation of applicable laws, a DB QPAM's breach of contract, or any claim brought in connection with the failure of such DB 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 Convictions. Furthermore, DB QPAMs must agree not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the DB QPAM for violating ERISA or the Code or engaging in prohibited transactions; 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; not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the DB 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; 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; and not to include exculpatory provisions disclaiming or otherwise limiting liability of the DB 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 Deutsche Bank.

66. Within four (4) months of the effective date of this proposed temporary exemption, each DB QPAM will provide a notice of its obligations under Section I(j) to each ERISA-covered plan and IRA client for which the DB QPAM provides asset management or other discretionary fiduciary services.

67. Each DB QPAM must maintain records necessary to demonstrate that the conditions of this proposed temporary exemption have been met, for six (6) years following the date of any transaction for which such DB QPAM relies upon the relief in the proposed temporary exemption.

68. Certain of the conditions of the temporary exemption are specifically directed at Deutsche Bank. In this regard, Deutsche Bank must have disgorged all of its profits generated by the spot/futures-linked market manipulation activities of DSK personnel that led to the Conviction against DSK entered on January 25, 2016, in Seoul Central District Court.

69. The proposed temporary exemption mandates that, during the effective period of this temporary exemption, Deutsche Bank: Must (1) immediately disclose to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) that Deutsche Bank 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 provide 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. In this regard, any conduct that would have constituted a violation of Section I(g) of PTE 84–14 or given rise to the prohibition described under section 411 of ERISA if such conduct had resulted in a conviction, but instead was the subject of a DPA or NPA

between Deutsche Bank or any affiliate of Deutsche Bank and the U.S. Department of Justice, must be disclosed to the Department.

Statutory Findings—Administratively Feasible

70. Deutsche Bank represents that the proposed temporary exemption is administratively feasible because it does not require any monitoring by the Department but relies on an independent auditor to determine that the exemption conditions are being complied with. Furthermore, the requested temporary exemption does not require the Department's oversight because, as a condition of this proposed temporary exemption, neither DB Group Services nor DSK will provide any fiduciary or QPAM services to ERISA covered plans and IRAs.

71. Given the revised and new conditions described above, the Department has tentatively determined that the temporary relief sought by the Applicant satisfies the statutory requirements for an exemption under section 408(a) of ERISA.

Notice to Interested Persons

All written comments and/or requests for a hearing must be received by the Department within five days of the date of publication of this proposed temporary exemption in the **Federal Register**. All comments will be made available to the public. To the extent the Department publishes a proposed exemption that contains more permanent relief for the transactions described herein, the notice of proposed exemption will set forth a notice and comment period that extends at least 45 days.

All comments will be made available to the public.

Warning: If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Scott Ness of the Department, telephone (202) 693–8561. (This is not a toll-free number.)

Citigroup, Inc. (Citigroup or the Applicant), Located in New York, New York

[Application No. D–11859]

Proposed Temporary Exemption

The Department is considering granting a temporary exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[28]

Section I: Covered Transactions

If the proposed temporary exemption is granted, the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs, as defined in Sections II(a) and II(b), respectively, will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Class Exemption 84–14 (PTE 84–14 or the QPAM Exemption),[29] notwithstanding the judgment of conviction against Citicorp (the Conviction, as defined in Section II(c)),[30] for engaging in a conspiracy to: (1) Fix the price of, or (2) eliminate competition in the purchase or sale of the euro/U.S. dollar currency pair exchanged in the Foreign Exchange (FX) Spot Market. This temporary exemption will be effective for a period of up to twelve (12) months beginning on the Conviction Date (as defined in Section II(d)), provided the following conditions are satisfied:

(a) Other than a single individual who worked for a non-fiduciary business within Citigroup's Markets and Securities Services business, and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs (including their officers, directors, agents other than Citicorp, and employees of such Citigroup QPAMs) did not know of, have reason to know of, or participate in the criminal conduct of Citicorp 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) Other than a single individual who worked for a non-fiduciary business within Citigroup's Markets and Securities Services business, and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs (including their officers, directors, agents other than Citicorp, and employees of such Citigroup Affiliated 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 Citigroup Affiliated 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 Citigroup Affiliated 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 Citigroup Affiliated QPAM, to enter into any transaction with Citicorp or the Markets and Securities Services business of Citigroup, or to engage Citicorp or the Markets and Securities Services business of Citigroup, 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 a Citigroup Affiliated QPAM or a Citigroup Related QPAM to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction;

(f) A Citigroup Affiliated QPAM or a Citigroup Related QPAM did not exercise authority over 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) in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Conviction; or cause the Citigroup Affiliated QPAM or the Citigroup Related QPAM or its affiliates or related parties to directly or indirectly profit from the criminal

[28] For purposes of this proposed temporary exemption, references to section 406 of Title I of the Act, unless otherwise specified, should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[29] 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).

[30] 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 violation of the Sherman Antitrust Act, Title 15 United States Code, Section 1.

conduct that is the subject of the Conviction;

(g) Citicorp and the Markets and Securities Services business of Citigroup will not provide discretionary asset management services to ERISA-covered plans or IRAs, nor will otherwise act as a fiduciary with respect to ERISA-covered plan and IRA assets;

(h)(1) Within four (4) months of the Conviction, each Citigroup Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that:

(i) The asset management decisions of the Citigroup Affiliated QPAM are conducted independently of the corporate management and business activities of Citigroup, including the corporate management and business activities of the Markets and Securities Services business of Citigroup;

(ii) The Citigroup Affiliated 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 Citigroup Affiliated 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 Citigroup Affiliated QPAM to regulators, including but not limited to, the Department, 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 Citigroup Affiliated 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 plans and IRA clients;

(vi) The Citigroup Affiliated QPAM complies with the terms of this temporary exemption; and

(vii) Any violation of, or failure to comply with an item in subparagraphs (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 Citigroup Affiliated QPAM, and an appropriate fiduciary of any affected ERISA-covered plan or IRA, where such fiduciary is independent of Citigroup; 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 Citigroup or beneficially owned by an employee of Citigroup or its affiliates, such fiduciary does not need to be independent of Citigroup. A Citigroup Affiliated 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 (4) months of the date of the Conviction, each Citigroup Affiliated QPAM must develop and implement a program of training (the Training), conducted at least annually, for all relevant Citigroup Affiliated 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)(1) Effective as of the effective date of this temporary exemption, with respect to any arrangement, agreement, or contract between a Citigroup Affiliated QPAM and an ERISA-covered plan or IRA for which a Citigroup Affiliated QPAM provides asset management or other discretionary fiduciary services, each Citigroup Affiliated QPAM agrees:

(i) 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, as applicable, with respect to each such ERISA-covered plan and IRA;

(ii) Not to require (or otherwise cause) the ERISA covered plan or IRA to waive, limit, or qualify the liability of the Citigroup Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(iii) 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 Citigroup Affiliated QPAM for violating ERISA or the Code, 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, which is independent of Citigroup, and its affiliates;

(iv) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the Citigroup Affiliated 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 the actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors;

(v) Not to impose any fee, penalty, or charge 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 each such fee is applied consistently and in like manner to all such investors;

(vi) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the Citigroup Affiliated 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 which is independent of Citigroup, and its affiliates; and

(vii) 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 Citigroup Affiliated 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;

(2) Within four (4) months of the date of the Conviction, each Citigroup Affiliated QPAM will provide a notice of its obligations under this Section I(i) to each ERISA-covered plan and IRA for which a Citigroup Affiliated QPAM provides asset management or other discretionary fiduciary services;

(j) The Citigroup Affiliated QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction;

(k) Each Citigroup Affiliated 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 Citigroup Affiliated QPAM relies upon the relief in the temporary exemption;

(l) During the effective period of this temporary exemption, Citigroup: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) 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 agreement; and

(m) A Citigroup Affiliated QPAM or a Citigroup Related QPAM will not fail to meet the terms of this temporary exemption solely because a different Citigroup Affiliated QPAM or Citigroup Related 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 ''Citigroup Affiliated QPAM'' means a ''qualified professional asset manager'' (as defined in section VI(a)[31] of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which Citigroup is a current or future ''affiliate'' (as defined in section VI(d)(1) of PTE 84–14). The term ''Citigroup Affiliated QPAM'' excludes the parent entity, Citicorp and Citigroup's Markets and Securities Services business.

(b) The term ''Citigroup Related QPAM'' means any current or future ''qualified professional asset manager'' (as defined in section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14, and with respect to which Citigroup owns a direct or indirect five percent or more interest, but with respect to which Citigroup is not an ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14).

(c) 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;

(d) The term ''Citigroup'' means Citigroup, Inc., the parent entity, and does not include any subsidiaries or other affiliates;

(e) The term ''Conviction'' means the judgment of conviction against Citigroup for violation of the Sherman Antitrust Act, 15 U.S.C. 1, which is scheduled to be entered in the District Court for the District of Connecticut (the District Court)(Case Number 3:15–cr–78–SRU), in connection with Citigroup, through one of its euro/U.S. dollar (EUR/USD) traders, entering into and engaging in a combination and conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, the EUR/USD currency pair exchanged in the FX spot market by agreeing to eliminate competition in the purchase and sale of the EUR/USD currency pair in the United States and elsewhere. For all purposes under this temporary exemption, ''conduct'' of any person or entity that is the ''subject of [a] Conviction'' encompasses any conduct of Citigroup and/or their personnel, that is described in the Plea Agreement, (including the Factual Statement), and other official regulatory or judicial factual findings that are a part of this record; and

(f) The term ''Conviction Date'' means the date that a judgment of Conviction against Citicorp is entered by the District Court in connection with the Conviction.

Effective Date: This proposed temporary exemption will be effective for the period beginning on the Conviction Date until the earlier of: (1) The date that is twelve (12) months following the Conviction Date; or (2) the effective date of final agency action made by the Department in connection with an application for long-term exemptive relief for the covered transactions described herein.

Department's Comment: The Department is publishing this proposed 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 Citigroup lose their ability to rely on PTE 84–14 as of the Conviction Date, as described below. Elsewhere today in the **Federal Register**, the Department is also proposing a five-year proposed exemption that would provide the same relief that is described herein, but for a longer effective period. The five-year proposed exemption is subject to enhanced conditions and a longer comment period. Comments received in response to this proposed temporary exemption will be considered in connection with the Department's determination whether or not to grant such five-year exemption.

The proposed exemption would provide relief from certain of the restrictions set forth in sections 406 and 407 of ERISA. No relief from a violation of any other law would be provided by this exemption, including any criminal conviction described herein.

Furthermore, the Department cautions that the relief in this proposed exemption would terminate immediately if, among other things, an entity within the Citigroup 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 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 proposed 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 proposed exemption.

Summary of Facts and Representations[32]

Background

1. Citigroup is a global diversified financial services holding company incorporated in Delaware and headquartered in New York, New York. Citigroup and its affiliates provide consumers, corporations, governments and institutions with a broad range of financial products and services, including consumer banking and credit, corporate and investment banking, securities brokerage, trade and securities

[31] 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 has acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM.

[32] The Summary of Facts and Representations is based on the Applicant's representations, unless indicated otherwise.

services and wealth management. Citigroup has approximately 241,000 employees and operations in over 160 countries and jurisdictions. As of December 31, 2014, Citigroup had approximately $1.8 trillion of assets under management and held $889 billion in deposits.

2. Citigroup currently operates, for management reporting purposes, via two primary business segments which include: (a) Citigroup's Global Consumer Banking businesses (GCB); and (b) Citigroup's Institutional Clients Group (ICG).

GCB includes a global, full-service consumer franchise delivering a wide array of retail banking, commercial banking, Citi-branded credit cards and investment services through a network of local branches, offices and electronic delivery systems. GCB had 3,280 branches in 35 countries around the world. For the year ended December 31, 2014, GCB had $399 billion of average assets and $331 billion of average deposits.

ICG provides a broad range of banking and financial products and services to corporate, institutional, public sector and high-net-worth clients in approximately 100 countries. ICG transacts with clients in both cash instruments and derivatives, including fixed income, foreign currency, equity and commodity products. ICG is divided into several business lines including: (a) Citi Corporate and Investment Banking; (b) Treasury and Trade Solutions; (c) Markets and Securities Services; and (d) Citi Private Bank (CPB).

3. The Applicant represents that Citigroup has several affiliates that provide investment management services.[33] Citigroup provides investment advisory services to clients world-wide through a number of different programs offered by various businesses that are tailored to meet the needs of its diverse clientele. Within the United States, Citigroup offers its investment advisory programs primarily through the following: (a) CPB and Citigroup's Global Consumers Group (GCG), acting through Citigroup Global Markets Inc. (CGMI); and (b) Citibank, N.A. (Citibank) and Citi Private Advisory, LLC (CPA) (collectively, the Advisory Businesses). The Applicant represents that CPA and CGMI are each investment advisers, registered under the Advisers Act. The Applicant also represents that CPB, CGMI, Citibank, and CPA are QPAMs.

Within the United States, Citigroup's Advisory Businesses are conducted within CPB and GCG. Together, CPB and GCG provide services to over 44,000 customer advisory accounts with assets under management totaling over $33 billion. Of these, there are over 20,000 accounts for ERISA pension plans and individual retirement accounts (IRAs) (collectively, Retirement Accounts), with assets under management of approximately $3.8 billion.

Although each of the advisory programs offered by the Advisory Businesses is unique, most utilize independent third-party managers on a discretionary or nondiscretionary basis, as determined by the client. Other programs such as Citi Investment Management (CIM), which operates through both the CGMI and CPB business units, primarily provide advice concerning the selection of individual securities for CPB clients.

CPB, GCG, CBNA, CGMI and their affiliates provide administrative, management and/or technical services designed to implement and monitor client's investment guidelines, and in certain nondiscretionary programs, offer recommendations on investing and re-investing portfolio assets for the client's consideration. CPB provides private banking services, and offers its clients access to a broad array of products and services available through bank and non-bank affiliates of Citigroup. GCG services include U.S. and international retail banking, U.S. consumer lending, international consumer finance, and commercial finance. Citibank is a wholly-owned subsidiary of Citigroup and a national banking association which provides fiduciary advisory services.

4. CGMI is a wholly-owned subsidiary of Citigroup whose principal activities include retail and institutional private client services which include: (a) Advice with respect to financial markets; (b) the execution of securities and commodities transactions as a broker or dealer; (c) securities underwriting; (d) investment banking; (e) investment management (including fiduciary and administrative services); and (f) trading and holding securities and commodities for its own account. CGMI holds a number of registrations, including registration as an investment adviser, a securities broker-dealer, and a futures commission merchant.

CPA is also a wholly-owned subsidiary of Citigroup and provides advisory services to private investment funds that are organized to invest primarily in other private investment funds advised by third-party managers.

The Applicant represents that trading decisions and investment strategy of current Citigroup Affiliated QPAMs for their clients is not shared with Citigroup employees outside of the Advisory Business, nor do employees of the Advisory Business consult with other Citigroup affiliates prior to making investment decisions on behalf of clients.

5. On May 20, 2015, the Applicant filed an application for exemptive relief from the prohibitions of sections 406(a) and 406(b) of ERISA, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) of the Code, in connection with a conviction that would make the relief in PTE 84–14 unavailable to any current or future Citigroup-related investment managers.

The U.S. Department of Justice (Department of Justice) has conducted an investigation of certain conduct and practices of Citigroup in the FX spot market. To resolve the Department of Justice's investigation, Citicorp, a Delaware corporation that is a financial services holding company and the direct parent company of Citibank, entered into a plea agreement with the Department of Justice (the Plea Agreement), to be approved by the U.S. District Court for the District of Connecticut (the District Court), pursuant to which Citicorp has pleaded guilty to one count of an antitrust violation of the Sherman Antitrust Act, 15 U.S.C. 1 (15 U.S.C. 1). The Plea Agreement acknowledges that Citigroup has provided ''substantial assistance'' to the Department of Justice in carrying out its investigation.

As set forth in the Plea Agreement, from at least December 2007 and continuing to at least January 2013 (the Relevant Period), Citicorp, through one London-based euro/U.S. dollar (EUR/USD) trader employed by Citibank, entered into and engaged in a conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, the EUR/USD currency pair exchanged in the FX spot market by agreeing to eliminate competition in the purchase and sale of the EUR/USD currency pair in the United States and elsewhere. The criminal conduct that is the subject of the Conviction included near daily

[33] Section VI(d) of PTE 84–14 defines an ''affiliate'' of a person, for purposes of Section I(g), as: (1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person, (2) any director of, relative of, or partner in, any such person, (3) any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner, and (4) any employee or officer of the person who—(A) is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent or more of the yearly wages of such person), or (B) has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets.

conversations, some of which were in code, in an exclusive electronic chat room used by certain EUR/USD traders, including the EUR/USD trader employed by Citibank. The criminal conduct that is the subject of the Conviction forms the basis for the Department of Justice's antitrust charge that Citicorp violated 15 U.S.C. 1.

Under the terms of the Plea Agreement, the Department of Justice and Citicorp have agreed that the District Court should impose a sentence requiring Citicorp to pay a criminal fine of $925 million. The Plea Agreement also provides for a three-year term of probation, with conditions to include, among other things, Citigroup's continued implementation of a compliance program designed to prevent and detect the criminal conduct that is the subject of the Conviction throughout its operations, as well as Citigroup's further strengthening of its compliance and internal controls as required by other regulatory or enforcement agencies that have addressed the criminal conduct that is the subject of the Conviction, including: (a) The U.S. Commodity Futures Trading Commission (the CFTC), pursuant to its settlement with Citibank on November 11, 2014, requiring remedial measures to strengthen the control framework governing Citigroup's FX trading business; (b) the Office of the Comptroller of the Currency, pursuant to its settlement with Citibank on November 11, 2014, requiring remedial measures to improve the control framework governing Citigroup's wholesale trading and benchmark activities; (c) the U.K. Financial Conduct Authority (FCA), pursuant to its settlement with Citibank on November 11, 2014; and (d) the U.S. Board of Governors of the Federal Reserve System (FRB), pursuant to its settlement with Citigroup entered into concurrently with the Plea Agreement with Department of Justice, requiring remedial measures to improve Citigroup's controls for FX trading and activities involving commodities and interest rate products.

6. The Applicant states that in January 2016, Nigeria's Federal Director of Public Prosecutions filed charges against a Nigerian subsidiary of Citibank and fifteen individuals (some of whom are current or former employees of that subsidiary) relating to specific credit facilities provided to a certain customer in 2000 to finance the import of goods. The Applicant represents that these charges are the latest of a series of charges that were filed and then withdrawn between 2007 and 2011. The Applicant also represents that to its best knowledge, it does not have a reasonable basis to believe that the discretionary asset management activities of any Citigroup QPAMs are subject to these charges. Further, the Applicant represents that it does not have a reasonable basis to believe that there are any pending criminal investigations involving Citigroup or any of its affiliates that would cause a reasonable plan or IRA customer not to hire or retain the institution as a QPAM.

7. Notwithstanding the aforementioned charges, once the Conviction is entered, the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs, as well as their client plans that are subject to Part 4 of Title I of ERISA (ERISA-covered plans) or section 4975 of the Code (IRAs), will no longer be able to rely on PTE 84–14, pursuant to the anti-criminal rule set forth in section I(g) of the class exemption, absent an individual exemption. The Applicant is seeking an individual exemption that would permit the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs, and their ERISA-covered plan and IRA clients to continue to utilize the relief in PTE 84–14, notwithstanding the anticipated Conviction, provided that such QPAMs satisfy the additional conditions imposed by the Department in the proposed temporary exemption herein.

8. The Applicant represents that the criminal conduct that is the subject of the Conviction was neither widespread nor pervasive. The Applicant states that such criminal conduct consisted of isolated acts perpetrated by a single EUR/USD trader employed in Citigroup's Markets and Securities Services business in the United Kingdom who was removed from the activities of the Citigroup Affiliated QPAMs, both geographically and organizationally. The Applicant represents that this London-based EUR/USD trader was not an officer or director of Citigroup, and did not have any involvement in, or influence over, Citigroup or any of the Citigroup Affiliated QPAMs. The Applicant states that this London-based EUR/USD trader had minimal management responsibilities, which related exclusively to Citigroup's G10 Spot FX trading business, outside of the United States. As represented by the Applicant, once senior management became aware of the criminal conduct that is the subject of the Conviction, Citibank took action to terminate the employee.

9. The Applicant represents that no current or former employee of Citigroup or of any Citigroup Affiliated QPAM who previously has been or who subsequently may be identified by Citigroup, or any U.S. or non-U.S. regulatory or enforcement agencies, as having been responsible for the criminal conduct that is the subject of the Conviction will have any involvement in providing asset management services to plans and IRAs or will be an officer, director, or employee of the Applicant or of any Citigroup Affiliated QPAM.

Citigroup's Business Separation/ Compliance/Training

10. The Applicant represents that Citigroup's Advisory Businesses are operated independently from Citigroup's Markets and Securities Services, the segment of Citigroup in which foreign exchange trading is conducted.[34] Although the Advisory Business falls under the umbrellas of ICG and GCG, it operates separately in all material respects from the sales and trading businesses that comprise that business segment. The Advisory Business maintains separate: (a) Management and reporting lines; (b) compliance programs; (c) compensation arrangements; (d) profit and loss reporting (with different comptrollers), (e) human resources and training programs, and (f) legal coverage. The Applicant represents that the Advisory Businesses maintain a separate, dedicated compliance function, and have protocols to preserve the separation between employees in the Advisory Business and those in Markets and Securities Services.

11. The Applicant represents that Citigroup's independent control functions, including Compliance, Finance, Legal and Risk, set standards according to which Citigroup and its businesses are expected to manage and oversee risks, including compliance with applicable laws, regulatory requirements, policies and standards of ethical conduct. Among other things, the independent control functions provide advice and training to Citigroup's businesses and establish tools, methodologies, processes and oversight of controls used by the businesses to foster a culture of compliance and control and to satisfy those standards.

12. The Applicant represents that compliance at Citigroup is an

[34] The Applicant represents that each of Citigroup's primary business units operates a large number of separate and independent businesses. These lines of business generally have: (a) A group of employees working solely on matters specific to its line of business, (b) separate management and reporting lines; (c) tailored compliance regimens; (d) separate compensation arrangements; (e) separate profit and loss reporting; (vi) separate human resources personnel and training, (f) dedicated risk and compliance officers and (g) dedicated legal coverage.

independent control function within Franchise Risk and Strategy that is designed to protect Citigroup not only by managing adherence to applicable laws, regulations and other standards of conduct, but also by promoting business behavior and activity that is consistent with global standards for responsible finance. The Applicant states that Citigroup has implemented company-wide initiatives designed to further embed ethics in Citigroup's culture. This includes training for more than 40,000 senior employees that fosters ethical decision-making and underscores the importance of escalating issues, a video series featuring senior leaders discussing ethical decisions, regular communications on ethics and culture, and the development of enhanced tools to support ethical decision-making.

Statutory Findings—In the Interest of Affected Plans and IRAs

13. The Applicant represents that, if the exemption is denied, the Citigroup Affiliated QPAMs may be unable to effectively manage assets subject to ERISA or the prohibited transaction provisions of the Code where PTE 84–14 is needed to avoid engaging in a prohibited transaction. The Applicant further represents that plans and participants would be harmed because they would be unnecessarily deprived of the current and future opportunity to utilize the Applicant's experience in and expertise with respect to the financial markets and investing. The Applicant anticipates that, if the exemption is denied, some of Citigroup's 20,000 existing Retirement Account clients may feel forced to terminate their advisory relationship with Citigroup, incurring expenses related to: (a) Consultant fees and other due diligence expenses for identifying new managers; (b) transaction costs associated with a change in investment manager, including the sale and purchase of portfolio investments to accommodate the investment policies and strategy of the new manager, and the cost of entering into new custodial arrangements; and (c) lost investment opportunities in connection with the change.[35]

Statutory Findings—Protective of the Rights of Participants of Affected Plans and IRAs

14. The Applicant has proposed certain conditions it believes are protective of participants and beneficiaries of ERISA-covered plans and IRAs with respect to the transactions described herein. The Department has determined to revise and supplement the proposed conditions so that it can make its required finding that the requested exemption is protective of the rights of participants and beneficiaries of affected plans and IRAs. In this regard, the Department has tentatively determined that the following conditions adequately protect the rights of participants and beneficiaries of affected plans and IRAs with respect to the transactions that would be covered by this temporary exemption.

Relief under this proposed exemption is only available to the extent: (a) Other than with respect to a single individual who worked for a non-fiduciary business within Citigroup's Markets and Securities Services business and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, Citigroup Affiliated QPAMs, including their officers, directors, agents other than Citicorp, and employees of such Citigroup Affiliated QPAMs, did not know of, have reason to know of, or participate in the criminal conduct of Citicorp that is the subject of the Conviction (For purposes of the foregoing condition, the term ''participate in'' includes the knowing or tacit approval of the misconduct underlying the Conviction.); (b) any failure of those QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction; and (c) other than a single individual who worked for a non-fiduciary business within Citigroup's Markets and Securities Services business, and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs (including their officers, directors, agents other than Citicorp, and employees of such Citigroup QPAMs) did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct that is the subject of the Conviction.

15. The Department expects the Citigroup Affiliated QPAMs to rigorously ensure that the individual associated with the criminal conduct of Citicorp will not be employed or knowingly engaged by such QPAMs. In this regard, the temporary exemption, if granted as proposed, mandates that the Citigroup Affiliated 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 condition, the term ''participated in'' includes the knowing or tacit approval of the misconduct underlying the Conviction.

16. Further, the Citigroup Affiliated 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 Citigroup Affiliated QPAM to enter into any transaction with Citicorp or the Markets and Securities business of Citigroup, or to engage Citigroup or the Markets and Securities business of Citigroup 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.

17. The Citigroup Affiliated QPAMs and the Citigroup Related QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction. Further, any failure of the Citigroup Affiliated QPAMs or the Citigroup Related QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction.

No relief will be provided by the temporary exemption to the extent that a Citigroup Affiliated QPAM or a Citigroup Related QPAM exercised authority over the assets of an ERISA-covered plan or IRA in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Conviction; or cause the Citigroup Affiliated QPAM or the Citigroup Related QPAM, or its affiliates or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Conviction. Further, no relief will be provided to the extent Citicorp or the Markets and Securities business of Citigroup provides any discretionary asset management services to ERISA-covered plans or IRAs, or otherwise acts as a fiduciary with respect to ERISA-covered plan or IRA assets.

18. The Department believes that robust policies and training are warranted where, as here, the criminal misconduct has occurred within a corporate organization that is affiliated with one or more QPAMs managing

[35] The Department notes that, if this temporary exemption is granted, compliance with the condition in Section I(j) of the exemption would require the Citigroup Affiliated QPAMs to hold their plan customers harmless for any losses attributable to, *inter alia,* any prohibited transactions or violations of the duty of prudence and loyalty.

plan assets in reliance on PTE 84–14. Therefore, this proposed temporary exemption requires that within four (4) months of the date of the Conviction, each Citigroup Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that: The asset management decisions of the Citigroup Affiliated QPAM are conducted independently of the corporate management and business activities of Citigroup, including the Markets and Securities business of Citigroup; the Citigroup Affiliated 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 violation of these duties and provisions with respect to ERISA-covered plans and IRAs; the Citigroup Affiliated QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to ERISA-covered plans and IRAs; any filings or statements made by the Citigroup Affiliated QPAM to regulators, including, but not limited to, the Department, 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; the Citigroup Affiliated 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; and the Citigroup Affiliated QPAM complies with the terms of this temporary exemption. Any violation of, or failure to comply with these items 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 Citigroup Affiliated QPAM, and an appropriate fiduciary of any affected ERISA-covered plan or IRA, which fiduciary is independent of Citigroup.

19. The Department has also imposed a condition that requires each Citigroup Affiliated QPAM within four (4) months of the date of the Conviction, to develop and implement a program of training (the Training), conducted at least annually, for all relevant Citigroup Affiliated 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.

20. This temporary exemption requires the Citigroup Affiliated QPAMs to enter into certain contractual obligations in connection with the provision of services to their clients. It is the Department's view that the condition for exemptive relief requiring these contractual obligations is essential to the Department's ability to make its findings that the proposed temporary exemption is protective of the rights of the participants and beneficiaries of ERISA-covered and IRA plan clients of Citigroup Affiliated QPAMs under section 408(a) of ERISA. In this regard, Section I(i) of the proposed temporary exemption provides that, as of the effective date of this temporary exemption, with respect to any arrangement, agreement, or contract between a Citigroup Affiliated QPAM and an ERISA-covered plan or IRA for which a Citigroup Affiliated QPAM provides asset management or other discretionary fiduciary services, each Citigroup Affiliated QPAM must agree: (a) 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 (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, as applicable, with respect to each such ERISA-covered plan and IRA; (b) 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 Citigroup Affiliated 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; (c) not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the Citigroup Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions; (d) 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 Citigroup Affiliated QPAM for violating ERISA or the Code, or engaging in prohibited transactions, except for a violation or a prohibited transaction caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of Citigroup, and its affiliates; (e) not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the Citigroup Affiliated 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; and (f) not to impose any fee, penalty, or charge 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 each such fee is applied consistently and in like manner to all such investors. Furthermore, any contract, agreement or arrangement between a Citigroup Affiliated QPAM and its ERISA-covered plan or IRA client must not contain exculpatory provisions disclaiming or otherwise limiting liability of the Citigroup Affiliated 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 which is independent of Citigroup, and its affiliates.

21. Within four (4) months of the date of the Conviction, each Citigroup Affiliated QPAM will provide a notice of its obligations under Section I(i) to each ERISA-covered plan and IRA for which the Citigroup Affiliated QPAM provides asset management or other discretionary fiduciary services. In addition, each Citigroup Affiliated QPAM must 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 Citigroup Affiliated QPAM relies upon the relief in the temporary exemption.

22. Furthermore, the proposed temporary exemption mandates that, during the effective period of this temporary exemption, Citigroup must immediately disclose to the Department any Deferred Prosecution Agreement (a DPA) or a Non-Prosecution Agreement (an NPA) that Citigroup or an affiliate enters into with the 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. In addition, Citigroup or an affiliate must immediately provide the Department any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement.

23. The proposed exemption would provide relief from certain of the restrictions set forth in Section 406 and 407 of ERISA. Such a granted exemption would not provide relief from any other violation of law. Pursuant to the terms of this proposed exemption, any criminal conviction not expressly described herein, but otherwise described in Section I(g) of PTE 84–14 and attributable to the Applicant for purposes of PTE 84–14, would result in the Applicant's loss of this exemption.

Statutory Findings—Administratively Feasible

24. The Applicant represents that the proposed temporary exemption is administratively feasible because it does not require any monitoring by the Department. In addition, the limited effective duration of the temporary exemption provides the Department with the opportunity to determine whether long-term exemptive relief is warranted, without causing sudden and potentially costly harm to ERISA-covered plans and IRAs.

Summary

25. Given the revised and new conditions described above, the Department has tentatively determined that the relief sought by the Applicant satisfies the statutory requirements for a temporary exemption under section 408(a) of ERISA.

Notice to Interested Persons

Written comments and requests for a public hearing on the proposed temporary exemption should be submitted to the Department within five (5) days from the date of publication of this **Federal Register** notice. Given the short comment period, the Department will consider comments received after such date, in connection with its consideration of more permanent relief.

Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph Brennan of the Department at (202) 693–8456. (This is not a toll-free number.)

JPMorgan Chase & Co. (JPMC or the Applicant), Located in New York, New York

[Application No. D–11861]

Proposed Temporary Exemption

The Department is considering granting a temporary exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[36]

Section I: Covered Transactions

If the proposed temporary exemption is granted, the JPMC Affiliated QPAMs and the JPMC Related QPAMs, as defined in Sections II(a) and II(b), respectively, will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Class Exemption 84–14 (PTE 84–14 or the QPAM Exemption),[37] notwithstanding the judgment of conviction against JPMC (the Conviction), as defined in Section II(c)),[38] for engaging in a conspiracy to: (1) Fix the price of, or (2) eliminate competition in the purchase or sale of the euro/U.S. dollar currency pair exchanged in the Foreign Exchange (FX) Spot Market. This temporary exemption will be effective for a period of up to twelve (12) months beginning on the Conviction Date (as defined in Section II(d)), provided the following conditions are satisfied:

(a) Other than a single individual who worked for a non-fiduciary business within JPMorgan Chase Bank and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the JPMC Affiliated QPAMs and the JPMC Related QPAMs (including their officers, directors, agents other than JPMC, and employees of such JPMC QPAMs) did not know of, have reason to know of, or participate in the criminal conduct of JPMC 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) Other than a single individual who worked for a non-fiduciary business within JPMorgan Chase Bank and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the JPMC Affiliated QPAMs and the JPMC Related QPAMs (including their officers, directors, agents other than JPMC, and employees of such JPMC 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 JPMC Affiliated 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 JPMC Affiliated 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 JPMC Affiliated QPAM to enter into any transaction with JPMC or the Investment Banking Division of JPMorgan Chase Bank, or engage JPMC or the Investment Banking Division of JPMorgan Chase Bank 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 a JPMC Affiliated QPAM or a JPMC Related QPAM to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction;

[36] For purposes of this proposed temporary exemption, references to section 406 of Title I of the Act, unless otherwise specified, should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[37] 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).

[38] 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 violation of the Sherman Antitrust Act, Title 15 United States Code, Section 1.

(f) A JPMC Affiliated QPAM or a JPMC Related QPAM did not exercise authority over plan assets in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Conviction; or cause the JPMC QPAM or its affiliates or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Conviction;

(g) JPMC and the Investment Banking Division of JPMorgan Chase Bank will not provide discretionary asset management services to ERISA-covered plans or IRAs, and will not otherwise act as a fiduciary with respect to ERISA-covered plan and IRA assets;

(h)(1) Within four (4) months of the Conviction, each JPMC Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that:

(i) The asset management decisions of the JPMC Affiliated QPAM are conducted independently of the corporate management and business activities of JPMC, including the Investment Banking Division of JPMorgan Chase Bank;

(ii) The JPMC Affiliated 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 JPMC Affiliated 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 JPMC Affiliated QPAM to regulators, including but not limited to, the Department, 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 JPMC Affiliated 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 plans and IRA clients;

(vi) The JPMC Affiliated QPAM complies with the terms of this temporary exemption; and

(vii) Any violation of, or failure to comply with an item in subparagraphs (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 JPMC Affiliated QPAM, and an appropriate fiduciary of any affected ERISA-covered plan or IRA, where such fiduciary is independent of JPMC; 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 JPMC or beneficially owned by an employee of JPMC or its affiliates, such fiduciary does not need to be independent of JPMC. A JPMC Affiliated 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 (4) months of the date of the Conviction, each JPMC Affiliated QPAM must develop and implement a program of training (the Training), conducted at least annually, for all relevant JPMC Affiliated 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)(1) Effective as of the effective date of this temporary exemption, with respect to any arrangement, agreement, or contract between a JPMC Affiliated QPAM and an ERISA-covered plan or IRA for which a JPMC Affiliated QPAM provides asset management or other discretionary fiduciary services, each JPMC Affiliated QPAM agrees:

(i) 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, as applicable, with respect to each such ERISA-covered plan and IRA;

(ii) Not to require (or otherwise cause) the ERISA covered plan or IRA to waive, limit, or qualify the liability of the JPMC Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(iii) 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 JPMC Affiliated QPAM for violating ERISA or the Code, 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, which is independent of JPMC and its affiliates;

(iv) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the JPMC Affiliated 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 the actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors;

(v) Not to impose any fee, penalty, or charge 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 each such fee is applied consistently and in like manner to all such investors;

(vi) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the JPMC Affiliated 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 which is independent of JPMC, and its affiliates; and

(vii) 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 JPMC Affiliated 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;

(2) Within four (4) months of the date of the Conviction, each JPMC Affiliated QPAM will provide a notice of its obligations under this Section I(i) to each ERISA-covered plan and IRA for which a JPMC Affiliated QPAM provides asset management or other discretionary fiduciary services;

(j) The JPMC Affiliated QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction;

(k) Each JPMC Affiliated 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 JPMC Affiliated QPAM relies upon the relief in the temporary exemption;

(l) During the effective period of this temporary exemption, JPMC: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) 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 agreement; and

(m) A JPMC Affiliated QPAM or a JPMC Related QPAM will not fail to meet the terms of this temporary exemption solely because a different JPMC Affiliated QPAM or JPMC Related QPAM fails to satisfy a condition for relief under this temporary exemption, as described in Sections I(c), (d), (h), (i), (j) and (k).

Section II: Definitions

(a) The term ''JPMC Affiliated QPAM'' means a ''qualified professional asset manager'' (as defined in Section VI(a) [39] of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which JPMC is a current or future ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14). The term ''JPMC Affiliated QPAM'' excludes the parent entity, JPMC, the division directly implicated by the criminal conduct that is the subject of the Conviction.

(b) The term ''JPMC Related QPAM'' means any current or future ''qualified professional asset manager'' (as defined in section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14, and with respect to which JPMC owns a direct or indirect five percent or more interest, but with respect to which JPMC is not an ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14).

(c) 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;

(d) The term ''JPMC'' means JPMorgan Chase and Co., the parent entity, but does not include any subsidiaries or other affiliates;

(e) The term ''Conviction'' means the judgment of conviction against JPMC for violation of the Sherman Antitrust Act, 15 U.S.C. 1, which is scheduled to be entered in the District Court for the District of Connecticut (the District Court) (Case Number 3:15–cr–79–SRU), in connection with JPMC, through one of its euro/U.S. dollar (EUR/USD) traders, entering into and engaging in a combination and conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, the EUR/USD currency pair exchanged in the FX spot market by agreeing to eliminate competition in the purchase and sale of the EUR/USD currency pair in the United States and elsewhere. For all purposes under this temporary exemption, ''conduct'' of any person or entity that is the ''subject of [a] Conviction'' encompasses any conduct of JPMC and/or their personnel, that is described in the Plea Agreement, (including the Factual Statement), and other official regulatory or judicial factual findings that are a part of this record; and

(f) The term ''Conviction Date'' means the date that a judgment of Conviction against JPMC is entered by the District Court in connection with the Conviction.

Effective Date: This proposed temporary exemption will be effective for the period beginning on the Conviction Date until the earlier of: (1) The date that is twelve (12) months following the Conviction Date; or (2) the effective date of final agency action made by the Department in connection with an application for long-term exemptive relief for the covered transactions described herein.

Department's Comment: The Department is publishing this proposed 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 JPMC lose their ability to rely on PTE 84–14 as of the Conviction Date, as described below. Elsewhere today in the **Federal Register**, the Department is also proposing a five-year proposed exemption that would provide the same relief that is described herein, but for a longer effective period. The five-year proposed exemption is subject to enhanced conditions and a longer comment period. Comments received in response to this proposed temporary exemption will be considered in connection with the Department's determination whether or not to grant such five-year exemption.

The proposed exemption would provide relief from certain of the restrictions set forth in sections 406 and 407 of ERISA. No relief from a violation of any other law would be provided by this exemption including any criminal conviction described herein.

Furthermore, the Department cautions that the relief in this proposed exemption would terminate immediately if, among other things, an entity within the JPMC 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 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 proposed 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 proposed exemption.

Summary of Facts and Representations [40]

Background

1. JPMC is a financial holding company and global financial services firm, incorporated in Delaware and headquartered in New York, New York, with approximately 240,000 employees and operations in over 60 countries. According to the Applicant, JPMC provides a variety of services, including investment banking, financial services for consumers and small business, commercial banking, financial transaction processing, and asset management.

[39] 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 has acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM.

[40] The Summary of Facts and Representations is based on the Applicant's representations, unless indicated otherwise.

The Applicant represents that JPMC's principal bank subsidiaries are: (a) JPMorgan Chase Bank, a national banking association wholly owned by JPMC, with U.S. branches in 23 states; and (b) Chase Bank USA, National Association, a national banking association that is JPMC's credit card-issuing bank. The Applicant also represents that two of JPMC's principal non-bank subsidiaries are its investment bank subsidiary, J.P. Morgan Securities LLC, and its primary investment management subsidiary, J.P. Morgan Investment Management Inc. (JPMIM). The bank and nonbank subsidiaries of JPMC operate internationally through overseas branches and subsidiaries, representative offices and subsidiary foreign banks.

The Applicant explains that entities within the JPMC's asset management line of business (Asset Management) serve institutional and retail clients worldwide through the Global Investment Management (GIM) and Global Wealth Management (GWM) businesses. The Applicant represents that JPMC's Asset Management line of business had total client assets of about $2.4 trillion and discretionary assets under management of approximately $1.7 trillion at the end of 2014.[41]

2. The Applicant represents that JPMC has several affiliates that provide investment management services.[42] JPMorgan Chase Bank and most of the U.S. registered advisers manage the assets of ERISA-covered plans and/or IRAs on a discretionary basis. They routinely rely on the QPAM Exemption to provide relief for party in interest transactions. According to the Applicant, the primary domestic bank and U.S. registered adviser affiliates in which JPMC owns a significant interest, directly or indirectly, include the following: JPMorgan Chase Bank, N.A.; JPMorgan Investment Management Inc.; J.P. Morgan Securities LLC; JF International Management Inc.; J.P. Morgan Alternative Asset Management, Inc.; Highbridge Capital Management, LLC; and Security Capital Research & Management Incorporated. These are the entities that currently would be covered by the exemption, if it is granted.

3. In addition to the QPAMs identified above, the Applicant has other affiliated managers that meet the definition of a QPAM that do not currently manage ERISA or IRA assets on a discretionary basis, but may in the future, including: J.P. Morgan Partners, LLC; Sixty Wall Street Management Company LLC; J.P. Morgan Private Investments Inc.; J.P. Morgan Asset Management (UK) Limited; JPMorgan Funds Limited; and Bear Stearns Asset Management, Inc. The Applicant requests that affiliates that manage ERISA or IRA assets be covered by the exemption. The Applicant also acquires and creates new affiliates frequently, and to the extent that these new affiliates meet the definition of a QPAM and manage ERISA-covered plans or IRAs, the Applicant requests that these entities be covered by the exemption. The Applicant represents that JPMC owns, directly or indirectly, a 5% or greater interest in certain investment managers (and may in the future own similar interests in other managers), but such managers are not affiliated in the sense that JPMC has actual control over their operations and activities. JPMC does not have the authority to exercise a controlling influence over these investment managers and is not involved with the managers' clients, strategies, or ERISA assets under management, if any.[43] The Applicant requests that these entities also be covered by the proposed temporary exemption.

4. On May 20, 2015, the Applicant filed an application for exemptive relief from the prohibitions of sections 406(a) and 406(b) of ERISA, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) of the Code, in connection with a conviction that would make the relief in PTE 84–14 unavailable to any current or future JPMC-related investment managers.

On May 20, 2015, the U.S. Department of Justice (Department of Justice) filed a criminal information in the U.S. District Court for the District of Connecticut (the District Court) against JPMC, charging JPMC with a one-count violation of the Sherman Antitrust Act, 15 U.S.C. 1 (the Information). The Information charges that, from at least as early as July 2010 until at least January 2013, JPMC, through one of its euro/U.S. dollar (EUR/USD) traders, entered into and engaged in a combination and conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, the EUR/USD currency pair exchanged in the FX spot market by agreeing to eliminate competition in the purchase and sale of the EUR/USD currency pair in the United States and elsewhere. The criminal conduct that is the subject of the Conviction involved near daily conversations, some of which were in code, in an exclusive electronic chat room used by certain EUR/USD traders, including the EUR/USD trader described herein.

5. JPMC sought to resolve the charges through a Plea Agreement presented to the District Court on May 20, 2015. Under the Plea Agreement, JPMC agreed to enter a plea of guilty to the charge set out in the Information (the Plea). In addition, JPMC has made an admission of guilt to the District Court. The Applicant expects that the District Court will enter a judgment against JPMC that will require remedies that are materially the same as those set forth in the Plea Agreement.

Pursuant to the Plea Agreement, the District Court will order a term of probation and JPMC will be subject to certain conditions. First, JPMC must not commit another crime in violation of the federal laws of the United States or engage in the Conduct set forth in Paragraphs 4(g)–(i) of the Plea Agreement during the term of probation, and shall make disclosures relating to certain other sales-related practices. Second, JPMC must notify the probation officer upon learning of the commencement of any federal criminal investigation in which JPMC is a target, or of any federal criminal prosecution against it. Third, JPMC must implement and must continue to implement a compliance program designed to prevent and detect the criminal conduct that is the subject of the Conviction.

[41] In addition to its Asset Management line of business, the Applicant represents that JPMC operates three other core lines of business. They are: Consumer and Community Banking Services; Corporate and Investment Banking Services; and Commercial Banking Services.

[42] Section VI(d) of PTE 84–14 defines an ''affiliate'' of a person, for purposes of Section I(g), as: (1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person, (2) any director of, relative of, or partner in, any such person, (3) any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner, and (4) any employee or officer of the person who—(A) is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent or more of the yearly wages of such person), or (B) has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets.

[43] Section VI(d) of PTE 84–14 defines an ''affiliate'' of a person, for purposes of Section I(g), as: (1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person, (2) any director of, relative of, or partner in, any such person, (3) any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner, and (4) any employee or officer of the person who—(A) is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent or more of the yearly wages of such person), or (B) has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets.

Section VI(e) of PTE 84–14 defines the term ''control'' as the power to exercise a controlling influence over the management or policies of a person other than an individual.

Fourth, JPMC must further strengthen its compliance and internal controls as required by the CFTC, the Financial Conduct Authority (FCA), and any other regulatory or enforcement agencies that have addressed the criminal conduct that is the subject of the Conviction, as set forth in the factual basis section of the Plea Agreement, and report to the probation officer and the United States, upon request, regarding its remediation and implementation of any compliance program and internal controls, policies, and procedures that relate to the conduct described in the factual basis section of the Plea Agreement.

6. Pursuant to the Plea Agreement, JPMC must promptly bring to the Department of Justice Antitrust Division's attention: (a) All credible information regarding criminal violations of U.S. antitrust laws by the defendant or any of its employees as to which the JPMC's Board of Directors, management (that is, all supervisors within the bank), or legal and compliance personnel are aware; (b) all federal criminal or regulatory investigations in which the defendant is a subject or a target, and all administrative or regulatory proceedings or civil actions brought by any federal governmental authority in the United States against the defendant or its employees, to the extent that such investigations, proceedings or actions allege violations of U.S. antitrust laws.

7. Pursuant to the Plea Agreement, JPMC must promptly bring to the Department of Justice Criminal Division, Fraud Section's attention: (a) All credible information regarding criminal violations of U.S. law concerning fraud, including securities or commodities fraud by the defendant or any of its employees as to which the JPMC's Board of Directors, management (that is, all supervisors within the bank), or legal and compliance personnel are aware; and (b) all criminal or regulatory investigations in which JPMC is or may be a subject or a target, and all administrative proceedings or civil actions brought by any governmental authority in the United States against JPMC or its employees, to the extent such investigations, proceedings or actions allege violations of U.S. law concerning fraud, including securities or commodities fraud.

Pursuant to Paragraph 9(c) of the Plea Agreement, the Department of Justice agreed ''that it [would] support a motion or request by [JPMC] that sentencing in this matter be adjourned until the Department of Labor has issued a ruling on the defendant's request for an exemption . . . .'' According to the Applicant, sentencing has not yet occurred in the District Court, nor has sentencing been scheduled.

8. Along with the Department of Justice, the Board of Governors of the Federal Reserve Board (FRB), the Office of the Comptroller of the Currency (OCC), the Commodity Futures Trading Commission (CFTC), and the Financial Conduct Authority (FCA) have conducted or have been conducting investigations into the practices of JPMC and its direct and indirect subsidiaries relating to FX trading.

The FRB issued a cease and desist order on May 20, 2015, against JPMC concerning unsafe and unsound banking practices relating to JPMC's FX business and requiring JPMC to cease and desist, assessing against JPMC a civil money penalty of $342,000,000, and requiring JPMC to agree to take certain affirmative actions (FRB Order).

The OCC issued a cease and desist order on November 11, 2014, against JPMorgan Chase Bank concerning deficiencies and unsafe or unsound practices relating to JPMorgan Chase Bank's wholesale FX business and requiring JPMorgan Chase Bank to cease and desist, ordering JPMorgan Chase Bank to pay a civil money penalty of $350,000,000, and requiring JPMorgan Chase Bank to agree to take certain affirmative actions (OCC Order).

The CFTC issued a cease and desist order on November 11, 2014, against JPMorgan Chase Bank relating to certain FX trading activities and requiring JPMorgan Chase Bank to cease and desist from violating certain provisions of the Commodity Exchange Act, ordering JPMorgan Chase Bank to pay a civil monetary penalty of $310,000,000, and requiring JPMorgan Chase Bank to agree to certain conditions and undertakings (CFTC Order).

The FCA issued a warning notice on November 11, 2014, against JPMorgan Chase Bank for failing to control business practices in its G10 spot FX trading operations and caused JPMorgan Chase Bank to pay a financial penalty of £222,166,000 (FCA Order).

9. In addition to the investigations described above, relating to FX trading, the Applicant is or has been the subject of other investigations, by: (a) The Hong Kong Monetary Authority, which concluded its investigation of the Applicant on December 14, 2014, and found no evidence of collusion among the banks investigated, rigging of FX benchmarks published in Hong Kong, or market manipulation, and imposed no financial penalties on the Applicant; (b) the South Africa Reserve Bank, which released the report of its inquiry of the Applicant on October 19, 2015, and found no evidence of widespread malpractice or serious misconduct by the Applicant in the South Africa FX market, and noted that most authorized dealers have acceptable arrangements and structures in place as well as whistle-blowing policies and client complaint processes; (c) the Australian Securities & Investments Commission, (d) the Japanese Financial Services Agency, (e) the Korea Fair Trade Commission, and (f) the Swiss Competition Commission. According to the Applicant, it is cooperating with the inquiries by these organizations.

In addition, the French criminal authorities have been investigating a series of transactions involving senior managers of Wendel Investissement (Wendel) during the period 2004–2007. In 2007, the Paris branch of JPMorgan Chase Bank provided financing for the transactions to Wendel managers. The Applicant explains that JPMC is responding to and cooperating with the investigation, and to date, no decision or indictment has been made by the French court.

In addition, the Applicant represents that the Criminal Division of the Department of Justice is investigating the Applicant's compliance with the Foreign Corrupt Practices Act and other laws with respect the Applicant's hiring practices related to candidates referred by clients, potential clients, and government officials, and its engagement of consultants in the Asia Pacific region. The Applicant states that it is responding to and cooperating with this investigation.

The Applicant also represents that to its best knowledge, it does not have a reasonable basis to believe that the discretionary asset management activities of any affiliated QPAM are subject to the aforementioned investigations. Further, the Applicant represents that JPMC currently does not have a reasonable basis to believe that there are any pending criminal investigations involving JPMC or any of its affiliated companies that would cause a reasonable plan or IRA customer not to hire or retain the institution as a QPAM.

10. Once the Conviction is entered, the JPMC Affiliated QPAMs and the JPMC Related QPAMs, as well as their client plans that are subject to Part 4 of Title I of ERISA (ERISA-covered plans) or section 4975 of the Code (IRAs), will no longer be able to rely on PTE 84–14, pursuant to the anti-criminal rule set forth in section I(g) of the class exemption, absent an individual exemption. The Applicant is seeking an individual exemption that would permit the JPMC Affiliated QPAMs and the JPMC Related QPAMs, and their ERISA-

covered plan and IRA clients to continue to utilize the relief in PTE 84–14, notwithstanding the anticipated Conviction, provided that such QPAMs satisfy the additional conditions imposed by the Department in the proposed temporary exemption herein.

11. According to the Applicant, the criminal conduct giving rise to the Plea did not involve any of the JPMC Affiliated QPAMs acting in the capacity of investment manager or trustee. JPMC represents that its participation in the antitrust conspiracy described in the Plea Agreement is limited to a single EUR/USD trader in London. The Applicant represents that the criminal conduct that is the subject of the Conviction was not widespread, nor was it pervasive; rather it was isolated to a single trader. No current or former personnel from JPMC or its affiliates have been sued individually in this matter for the criminal conduct that is the subject of the Conviction, and the individual referenced in the Complaint as responsible for such criminal conduct is no longer employed by JPMC or its affiliates.[44]

The Applicant submits that the criminal conduct that is the subject of the Conviction did not involve any of JPMC's asset management staff. The Applicant represents that: (a) Other than a single individual who worked for a non-fiduciary business within JPMorgan Chase Bank and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the JPMC Affiliated QPAMs, and the JPMC Related QPAMs (including officers, directors, agents other than JPMC, and employees of such QPAMs who had responsibility for, or exercised authority in connection with, the management of plan assets) did not know of, did not have reason to know of, and did not participate in the criminal conduct that is the subject of the Conviction; and (b) no current or former employee of JPMC or of any JPMC Affiliated QPAM who previously has been or who subsequently may be identified by JPMC, or any U.S. or non-U.S. regulatory or enforcement agencies, as having been responsible for the such criminal conduct has or will have any involvement in providing asset management services to plans and IRAs or will be an officer, director, or employee of the Applicant or of any JPMC Affiliated QPAM.[45]

12. According to the Applicant, the transactions covered by the temporary exemption include the full range of everyday investment transactions that a plan might enter into, including the purchase and sale of debt and equity securities, both foreign and domestic, both registered and sold under Rule 144A or otherwise (*e.g.,* traditional private placement), pass-through securities, asset-backed securities, the purchase and sale of commodities, futures, forwards, options, swaps, stable value wrap contracts, real estate, real estate financing and leasing, foreign repurchase agreements, foreign exchange, and other investments, and the hedging of risk through a variety of investment instruments and strategies. The Applicant states that these transactions are customary for the industry and investment managers routinely rely on the QPAM Exemption to enter into them.

13. The Applicant represents that the investment management businesses that are operated out of the JPMC Affiliated QPAMs are separated from the non-investment management businesses of the Applicant. Each of these investment management businesses, including the investment management business of JPMorgan Chase Bank (as well as the agency securities lending business of JPMorgan Chase Bank), have systems, management, dedicated risk and compliance officers and legal coverage that are separate from the foreign exchange trading activities that were the subject of the Plea Agreement.

The Applicant represents that the investment management businesses of the JPMC Affiliated QPAMs are subject to policies and procedures and JPMC Affiliated QPAM personnel engage in training designed to ensure that such businesses understand and manage their fiduciary duties in accordance with applicable law. Thus, the Applicant maintains that the management of plan assets is conducted separately from: (a) The non-investment management business activities of the Applicant, including the investment banking, treasury services and other investor services businesses of the Corporate & Investment Bank business of the Applicant (CIB); and/or (b) the criminal conduct that is the subject of the Plea Agreement. Generally, the policies and procedures create information barriers, which prevent employees of the JPMC Affiliated QPAMs from gaining access to inside information that an affiliate may have acquired or developed in connection with investment banking, treasury services or other investor services business activities. These policies and procedures apply to employees, officers, and directors of the JPMC Affiliated QPAMs. The Applicant maintains an employee hotline for employees to express any concerns of wrongdoing anonymously.

The Applicant represents that, to the best of its knowledge: (a) No JPMC employees are involved in the trading decisions or investment strategies of the JPMC Affiliated or Related QPAMs; (b) the JPMC Affiliated and Related QPAMs do not consult with JPMC employees prior to making investment decisions on behalf of plans; (c) JPMC does not control the asset management decisions of the JPMC Affiliated or Related QPAMs; (d) the JPMC Affiliated and Related QPAMs do not need JPMC's consent to make investment decisions, correct errors, or adopt policies or training for staff; and (e) there is no interaction between JPMC employees and the JPMC Affiliated or Related QPAMs in connection with the investment management activities of the JPMC Affiliated QPAMs.

Statutory Findings—In the Interest of Affected Plans and IRAs

14. The Applicant represents that, if the proposed temporary exemption is denied, the JPMC Affiliated QPAMs may be unable to manage efficiently the strategies for which they have contracted with thousands of plans and IRAs. Transactions currently dependent on the QPAM Exemption could be in default and be terminated at a significant cost to the plans. In particular, the Applicant represents that the JPMC Affiliated QPAMs have entered, and could in the future enter, into contracts on behalf of, or as investment adviser of, ERISA-covered plans, collective trusts and other funds subject to ERISA for certain outstanding transactions, including but not limited to: The purchase and sale of debt and equity securities, both foreign and domestic, both registered and sold under Rule 144A or otherwise (*e.g.,* traditional private placement); pass-through securities; asset-backed securities; and the purchase and sale of commodities, futures, options, stable value wrap contracts, real estate, foreign repurchase agreements, foreign exchange, and other investments.

The JPMC Affiliated QPAMs also have entered into, and could in the future enter into, contracts for other transactions such as swaps, forwards, and real estate financing and leasing on

[44] The Applicant has confirmed with JPMC's Human Resources Department that the individual referenced in the Complaint is no longer employed with any entity within JPMC or its affiliates.

[45] The Applicant states that counsel for JPMC confirmed that the individual responsible for the criminal conduct that is the subject of the Conviction is not currently employed by any entity that is part of JPMC. This individual's employment has been terminated and a notation has been made in his employment file to ensure he is not re-hired at any future date.

behalf of their ERISA clients. According to the Applicant, these and other strategies and investments require the JPMC Affiliated QPAMs to meet the conditions in the QPAM Exemption. The Applicant states that certain derivatives transactions and other contractual agreements automatically and immediately could be terminated without notice or action, or could become subject to termination upon notice from a counterparty, in the event the Applicant no longer qualifies for relief under the QPAM Exemption.

15. The Applicant represents that real estate transactions, for example, could be subject to significant disruption without the QPAM Exemption. Clients of the JPMC Affiliated QPAMs have over $27 billion in ERISA and public plan assets in commingled funds invested in real estate strategies, with approximately 235 holdings. Many transactions in these accounts rely on Parts I, II and III of the QPAM Exemption as a backup to the collective investment fund exemption (which may become unavailable to the extent a related group of plans has a greater than 10% interest in the collective investment fund). The Applicant estimates that there would be significant loss in value if assets had to be quickly liquidated—over a 10% bid-ask spread—in addition to substantial reinvestment costs and opportunity costs. There could also be prepayment penalties. In addition, real estate transactions are affected in funds that are not deemed to hold plan assets under applicable law. While funds may have other available exemptions for certain transactions, that fact could change in the future.

16. The JPMC Affiliated QPAMs also rely on the QPAM Exemption when buying and selling fixed income products. Stable value strategies, for example, rely on the QPAM Exemption to enter into wrappers and insurance contracts that permit the assets to be valued at book value. Many counterparties specifically require a representation that the QPAM Exemption applies, and those contracts could be in default if the requested exemption were not granted. Depending on the market value of the assets in these funds at the time of termination, such termination could result in losses to the stable value funds. The Applicant states that, while the market value currently exceeds book value, that can change at any time, and could result in market value adjustments to withdrawing plans and withdrawal delays under their contracts.

17. The Applicant submits that nearly 400 accounts managed by the JPMC Affiliated QPAMs (including commingled funds and separately managed accounts) invest in fixed income products, with a total portfolio of approximately $49.3 billion in market value of ERISA and public plan assets in commingled funds. Fixed income strategies in which those accounts are invested include investment-grade short, intermediate, and long duration bonds, as well as securitized products, and high yield and emerging market investments. If the QPAM Exemption were lost, the Applicant estimates that its clients could incur average weighted liquidation costs of approximately 65 basis points of the total market value in fixed income products, assuming normal market conditions where the holdings can be liquidated at a normal bid-offer spread without significant widening. While short and intermediate term bonds could be liquidated for between 15–50 basis points, long duration bonds may be more difficult to liquidate and costs may range from 75–100 basis points. Costs of liquidating high-yield and emerging market investments could range from 75–150 basis points. Such costs do not include reinvestment costs for transitioning to a new manager.

18. The Applicant states that, futures, options, and cleared and bilateral swaps, which certain strategies rely on to hedge risk and obtain certain exposures on an economic basis, rely on the QPAM Exemption. The Applicant further states that the QPAM Exemption is particularly important for securities and other instruments that may be traded on a principal basis, such as mortgage-backed securities, corporate debt, municipal debt, other U.S. fixed income securities, Rule 144A securities, non-US fixed income securities, non-US equity securities, U.S. and non-US over-the-counter instruments such as forwards and options, structured products and FX.

19. The Applicant represents that plans that decide to continue to employ the JPMC Affiliated QPAMs could be prohibited from engaging in certain transactions that would be beneficial to such plans, such as hedging transactions using over-the-counter options or derivatives. Counterparties to such transactions are far more comfortable with the QPAM Exemption than any other exemption, and a failure of the QPAM Exemption to be available could trigger a default or early termination by the plan or pooled trust. Even if other exemptions are available to such counterparties, the Applicant predicts that the cost of the transaction might increase to reflect any lack of comfort in transacting business using a less familiar exemption. The Applicant represents that plans may also face collateral consequences, such as missed investment opportunities, administrative delay, and the cost of investing in cash pending reinvestments.

20. The Applicant represents that, to the extent that plans and IRAs believe they need to withdraw from their arrangements, they could incur significant transaction costs, including costs associated with the liquidation of investments, finding new asset managers, and the reinvestment of plan assets.[46] The Applicant believes that the transaction costs to plans of changing managers are significant, especially for many of the strategies employed by the JPMC Affiliated QPAMs. The Applicant also represents that, depending on the strategy, the cost of liquidating assets in connection with transitioning clients to another manager could be significant.[47] The process for transitioning to a new manager typically is lengthy, and likely would involve numerous steps—each of which could last several months—including retaining a consultant, engaging in the request for proposals, negotiating contracts, and ultimately transitioning assets. In addition, securities transactions would incur transaction-related expenses.

Statutory Findings—Protective of the Rights of Participants of Affected Plans and IRAs

21. The Applicant has proposed certain conditions it believes are protective of participants and beneficiaries of ERISA-covered plans and IRAs with respect to the transactions described herein. The Department has determined that it is necessary to modify and supplement the conditions before it can tentatively determine that the requested exemption meets the statutory requirements of section 408(a) of ERISA. In this regard, the Department has tentatively determined that the following

[46] The Department notes that, if this temporary exemption is granted, compliance with the condition in Section I(i) of the exemption would require the JPMC Affiliated QPAMs to hold their plan customers harmless for any losses attributable to, inter alia, any prohibited transactions or violations of the duty of prudence and loyalty.

[47] According to the Applicant: Some investments are more liquid than others (*e.g.,* Treasury bonds generally are more liquid than foreign sovereign bonds and equities generally are more liquid than swaps); some of the strategies followed by the Applicant tend to be less liquid than certain other strategies and, thus, the cost of a transition would be significantly higher than, for example, liquidating a large cap equity portfolio; and particularly hard hit would be the real estate separate account strategies, which are illiquid and highly dependent on the QPAM Exemption.

conditions adequately protect the rights of participants and beneficiaries of affected plans and IRAs with respect to the transactions that would be covered by this temporary exemption.

The exemption, if granted as proposed, is only available to the extent: (a) Other than with respect to a single individual who worked for a non-fiduciary business within JPMorgan Chase Bank and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the JPMC Affiliated QPAMs, including their officers, directors, agents other than JPMC, and employees of such JPMC Affiliated QPAMs, did not know of, have reason to know of, or participate in the criminal conduct of JPMC that is the subject of the Conviction (Again, for purposes of the foregoing condition, the term ''participate in'' includes the knowing or tacit approval of the misconduct underlying the Conviction.); (b) any failure of those QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction; and (c) other than a single individual who worked for a non-fiduciary business within JPMorgan Chase Bank and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the JPMC Affiliated QPAMs and the JPMC Related QPAMs (including their officers, directors, agents other than JPMC, and employees of such JPMC QPAMs) did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct that is the subject of the Conviction.

22. The Department expects the JPMC Affiliated QPAMs to rigorously ensure that the individual associated with the criminal conduct of JPMC will not be employed or knowingly engaged by such QPAMs. In this regard, the temporary exemption, if granted as proposed, mandates that the JPMC Affiliated 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 condition, the term ''participated in'' includes the knowing or tacit approval of the misconduct underlying the Conviction.

23. Further, the JPMC Affiliated 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 JPMC Affiliated QPAM to enter into any transaction with JPMC or the Investment Banking Division of JPMorgan Chase Bank, or to engage JPMC or the Investment Banking Division of JPMorgan Chase Bank 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.

24. The JPMC Affiliated QPAMs and the JPMC Related QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction. Further, any failure of the JPMC Affiliated QPAMs or the JPMC Related QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction.

No relief will be provided by the temporary exemption to the extent that a JPMC Affiliated QPAM or a JPMC Related QPAM exercised authority over plan assets in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Conviction; or cause the JPMC QPAM or its affiliates or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Conviction.

Further, no relief will be provided to the extent JPMC or the Investment Banking Division of JPMorgan Chase Bank provides any discretionary asset management services to ERISA-covered plans or IRAs, or otherwise acts as a fiduciary with respect to ERISA-covered plan or IRA assets.

25. The Department believes that robust policies and training are warranted where, as here, the criminal misconduct has occurred within a corporate organization that is affiliated with one or more QPAMs managing plan assets in reliance on PTE 84–14. Therefore, this proposed temporary exemption requires that within four (4) months of the date of the Conviction, each JPMC Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that: The asset management decisions of the JPMC Affiliated QPAM are conducted independently of the corporate management and business activities of JPMC, including the Investment Banking Division of JPMorgan Chase Bank; the JPMC Affiliated 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 violation of these duties and provisions with respect to ERISA-covered plans and IRAs; the JPMC Affiliated QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to ERISA-covered plans and IRAs; any filings or statements made by the JPMC Affiliated QPAM to regulators, including, but not limited to, the Department, 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; the JPMC Affiliated 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; and the JPMC Affiliated QPAM complies with the terms of this temporary exemption. Any violation of, or failure to comply with these items 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 JPMC Affiliated QPAM, and an appropriate fiduciary of any affected ERISA-covered plan or IRA, which fiduciary is independent of JPMC.

26. The Department has also imposed a condition that requires each JPMC Affiliated QPAM, within four (4) months of the date of the Conviction, to develop and implement a program of training (the Training), conducted at least annually, for all relevant JPMC Affiliated 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.

27. This temporary exemption requires the JPMC Affiliated QPAMs to enter into certain contractual obligations in connection with the provision of services to their clients. It is the Department's view that the condition for exemptive relief requiring these contractual obligations is essential to the Department's ability to make its findings that the proposed temporary

exemption is protective of the rights of the participants and beneficiaries of ERISA-covered and IRA plan clients of JPMC Affiliated QPAMs under section 408(a) of ERISA.

In this regard, effective as of the effective date of this temporary exemption, with respect to any arrangement, agreement, or contract between a JPMC Affiliated QPAM and an ERISA-covered plan or IRA for which a JPMC Affiliated QPAM provides asset management or other discretionary fiduciary services, each JPMC Affiliated QPAM agrees: (a) 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, as applicable, with respect to each such ERISA-covered plan and IRA; (b) not to require (or otherwise cause) the ERISA covered plan or IRA to waive, limit, or qualify the liability of the JPMC Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions; (c) 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 JPMC Affiliated QPAM for violating ERISA or the Code, 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, which is independent of JPMC, and its affiliates; (d) not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the JPMC Affiliated 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 the actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors; (e) not to impose any fee, penalty, or charge 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 each such fee is applied consistently and in like manner to all such investors; (f) not to include exculpatory provisions disclaiming or otherwise limiting liability of the JPMC Affiliated 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 which is independent of JPMC, and its affiliates; and (g) 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 JPMC Affiliated 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.

28. Within four (4) months of the date of the Conviction, each JPMC Affiliated QPAM will provide a notice of its obligations under this Section I(i) to each ERISA-covered plan and IRA for which a JPMC Affiliated QPAM provides asset management or other discretionary fiduciary services. In addition, each JPMC Affiliated QPAM must 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 JPMC Affiliated QPAM relies upon the relief in the temporary exemption.

29. Furthermore, the proposed temporary exemption mandates that, during the effective period of this temporary exemption, JPMC must immediately disclose to the Department any Deferred Prosecution Agreement (a DPA) or a Non-Prosecution Agreement (an NPA) that JPMC or an affiliate enters into with the 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. In addition, JPMC or an affiliate must immediately provide the Department any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement.

30. The proposed exemption would provide relief from certain of the restrictions set forth in Section 406 and 407 of ERISA. Such a granted exemption would not provide relief from any other violation of law. Pursuant to the terms of this proposed exemption, any criminal conviction not expressly described herein, but otherwise described in Section I(g) of PTE 84–14 and attributable to the Applicant for purposes of PTE 84–14, would result in the Applicant's loss of this exemption.

Statutory Findings—Administratively Feasible

31. The Applicant represents that the proposed temporary exemption is administratively feasible because it does not require any monitoring by the Department. In addition, the limited effective duration of the temporary exemption provides the Department with the opportunity to determine whether long-term exemptive relief is warranted, without causing sudden and potentially costly harm to ERISA-covered plans and IRAs.

32. Given the revised and new conditions described above, the Department has tentatively determined that the relief sought by the Applicant satisfies the statutory requirements for a temporary exemption under section 408(a) of ERISA.

Notice to Interested Persons

Written comments and requests for a public hearing on the proposed temporary exemption should be submitted to the Department within seven (7) days from the date of publication of this **Federal Register** notice. Given the short comment period, the Department will consider comments received after such date, in connection with its consideration of more permanent relief.

Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph Brennan of the Department at (202) 693–8456. (This is not a toll-free number.)

Barclays Capital Inc. (BCI or the Applicant), Located in New York, New York

[Application No. D–11862]

Proposed Temporary Exemption

The Department is considering granting a temporary exemption under the authority of section 408(a) of Employee Retirement Income Security Act of 1974, as amended, (ERISA or the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[48]

Section I: Covered Transactions

If the proposed temporary exemption is granted, the Barclays Affiliated QPAMs and the Barclays Related QPAMs, as defined in Sections II(a) and II(b), respectively, will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Exemption 84–14 (PTE 84–14 or the QPAM Exemption),[49] notwithstanding a judgment of conviction against Barclays PLC (BPLC) (the Conviction), as defined in Section II(c)),[50] for engaging in a conspiracy to: (1) Fix the price of, or (2) eliminate competition in the purchase or sale of the euro/U.S. dollar currency pair exchanged in the Foreign Exchange (FX) Spot Market. This temporary exemption will be effective for a period of up to twelve (12) months beginning on the Conviction Date (as defined in Section II(e)), provided the following conditions are satisfied:

(a) Other than certain individuals who: Worked for a non-fiduciary business within BCI; had no responsibility for, and exercised no authority in connection with, the management of plan assets; and are no longer employed by BCI, the Barclays Affiliated QPAMs (including their officers, directors, agents other than BPLC, and employees of such QPAMs who had responsibility for, or exercised authority in connection with the management of plan assets) did not know of, have reason to know of, or participate in the criminal conduct 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 Barclays Affiliated QPAMs and the Barclays Related QPAMs (including their officers, directors, agents other than BPLC, and employees of such 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 Barclays Affiliated 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 Barclays Affiliated 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 Barclays Affiliated QPAM, to enter into any transaction with BPLC or BCI, or to engage BPLC or BCI, 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 a Barclays Affiliated QPAM or a Barclays Related QPAM to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction;

(f) A Barclays Affiliated QPAM or a Barclays Related QPAM did exercise authority over 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) in a manner that it knew or should have known would: further the criminal conduct that is the subject of the Conviction; or cause the Barclays Affiliate QPAM or the Barclays Related QPAM, or its affiliates or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Conviction;

(g) BPLC and BCI will not provide discretionary asset management services to ERISA-covered plans or IRAs, nor will otherwise act as a fiduciary with respect to ERISA-covered plan and IRA assets;

(h)(1) Prior to a Barclays Affiliated QPAM's engagement by any ERISA-covered plan or IRA for discretionary asset management services, the Barclays Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that:

(i) The asset management decisions of the Barclays Affiliated QPAM are conducted independently of the corporate management and business activities of BPLC and BCI;

(ii) The Barclays Affiliated 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 Barclays Affiliated 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 Barclays Affiliated 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 Barclays Affiliated 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 Barclays Affiliated QPAM complies with the terms of this temporary exemption; and

(vii) Any violation of, or failure to comply with, an item in subparagraphs (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 Barclays Affiliated QPAM, and an appropriate fiduciary of any affected ERISA-covered plan or IRA where such fiduciary is independent of BPLC; 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 BPLC or beneficially owned by an employee of BPLC or its affiliates, such fiduciary does not need to be independent of BPLC. A Barclays Affiliated 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) Prior to a Barclays Affiliated QPAM's engagement by any ERISA covered plan or IRA for discretionary asset management services, the Barclays

[48] For purposes of this proposed temporary exemption, references to section 406 of Title I of the Act, unless otherwise specified, refer as well to the corresponding provisions of section 4975 of the Code.

[49] 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).

[50] 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 violation of the Sherman Antitrust Act, Title 15 United States Code, Section 1.

Affiliated QPAM must develop and implement a program of training (the Training), conducted at least annually, for all relevant Barclays Affiliated 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 Barclays Affiliated QPAM and an ERISA-covered plan or IRA for which such Barclays Affiliated QPAM provides asset management or other discretionary fiduciary services, each Barclays Affiliated 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 Barclays Affiliated 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 Barclays Affiliated 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 BPLC, and its affiliates;

(4) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the Barclays Affiliated 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 Barclays Affiliated 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 BPLC, and its affiliates; 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 Barclays Affiliated 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 four (4) months of the date of the Conviction, each Barclays Affiliated QPAM will provide a notice of its obligations under this Section I(i) to each ERISA-covered plan and IRA for which a Barclays Affiliated QPAM provides asset management or other discretionary fiduciary services;

(j) The Barclays Affiliated 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 Barclays Affiliated 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 Barclays Affiliated QPAM relies upon the relief in the temporary exemption;

(l) During the effective period of this temporary exemption, BPLC: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) that BPLC 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) A Barclays Affiliated QPAM or a Barclays Related QPAM will not fail to meet the terms of this temporary exemption solely because a different Barclays Affiliated QPAM or Barclays Related 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 ''Barclays Affiliated QPAM'' means a ''qualified professional asset manager'' (as defined in Section VI(a)[51] of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which BPLC is a current or future ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14). The term ''Barclays Affiliated QPAM'' excludes BPLC and BCI.

(b) The term ''Barclays Related QPAM'' means any current or future ''qualified professional asset manager'' (as defined in Section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14, and with respect to which BPLC owns a direct or indirect five percent or more interest, but with respect to which BPLC is not an ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14).

(c) 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;

(d) The term ''BPLC'' means Barclays PLC, the parent entity, and does not include any subsidiaries or other affiliates;

(e) The term ''Conviction'' means the judgment of conviction against BPLC for violation of the Sherman Antitrust Act, 15 U.S.C. 1, which is scheduled to be entered in the District Court for the District of Connecticut (the District Court), Case Number 3:15–cr–00077–SRU–1, in connection with BPLC,

[51] 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.

through certain of its euro/U.S. dollar (EUR/USD) traders, entering into and engaging in a combination and conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, the EUR/USD currency pair exchanged in the FX spot market by agreeing to eliminate competition in the purchase and sale of the EUR/USD currency pair in the United States and elsewhere. For all purposes under this temporary exemption, ''conduct'' of any person or entity that is the ''subject of [a] Conviction'' encompasses any conduct of BPLC and/or their personnel, that is described in the Plea Agreement, (including the Factual Statement), and other official regulatory or judicial factual findings that are a part of this record; and

(f) The term ''Conviction Date'' means the date that a judgment of Conviction against BPLC is entered by the District Court in connection with the Conviction.

Effective Date: This proposed temporary exemption will be 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.

Department's Comment: The Department is publishing this proposed 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 BPLC lose their ability to rely on PTE 84–14 as of the Conviction Date, as described below. Elsewhere today in the **Federal Register**, the Department is also proposing a five-year proposed exemption that would provide the same relief that is described herein, but for a longer effective period. The five-year proposed exemption is subject to enhanced conditions and a longer comment period. Comments received in response to this proposed temporary exemption will be considered in connection with the Department's determination whether or not to grant such five-year exemption.

The proposed exemption would provide relief from certain of the restrictions set forth in sections 406 and 407 of ERISA. No relief from a violation of any other law would be provided by this exemption.

Furthermore, the Department cautions that the relief in this proposed exemption would terminate immediately if, among other things, an entity within the BPLC 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 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 proposed 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 proposed exemption.

Summary of Facts and Representations[52]

Background

1. BCI is a broker-dealer registered under the Securities Exchange Act of 1934, as amended, and was, until December 28, 2015, an investment adviser registered under the Investment Advisers Act of 1940, as amended. As a registered broker-dealer, BCI is regulated by the U.S. Securities and Exchange Commission and Financial Industry Regulatory Authority.

BCI is incorporated in the State of Connecticut and headquartered in New York, with 18 U.S. branch offices. BCI is wholly-owned by Barclays Group US Inc., a wholly-owned subsidiary of Barclays Bank PLC, which, in turn, is a wholly-owned subsidiary of BPLC, a non-operating holding company.

Barclays Bank PLC wholly owns, indirectly, one bank subsidiary in the United States—Barclays Bank Delaware, a Delaware chartered commercial bank supervised and regulated by the Federal Deposit Insurance Corporation, the Delaware Office of the State Bank Commissioner and the Consumer Financial Protection Bureau. Barclays Bank Delaware does not manage ERISA plan or IRA assets currently, but may do so in the future.

BPLC's asset management business, Barclays Wealth and Investment Management (BWIM), offers wealth management products and services for many types of clients, including individual and institutional clients. BWIM operates through over 20 offices worldwide. Prior to December 4, 2015, BWIM functioned in the United States through BCI.

On December 4, 2015, BCI consummated a sale of its U.S. operations of BWIM, including Barclays Wealth Trustees, to Stifel Financial Corp. As a result of the transaction, as of that date, neither BCI nor any of its affiliates continued to manage ERISA-covered plan or IRA assets.

2. On May 20, 2015, the Department of Justice filed a one-count criminal information (the Information) in the United States District Court for the District of Connecticut charging BPLC, an affiliate of BCI, with participating in a combination and a conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, Euro/USD currency pairs exchanged in the foreign currency exchange spot market by agreeing to eliminate competition in the purchase and sale of such currency pairs in the United States and elsewhere, in violation of the Sherman Antitrust Act, 15 U.S.C. 1. For example, BPLC engaged in communications with other financial services firms in an electronic chat room limited to specific EUR/USD traders, each of whom was employed, at certain times, by one of the financial services firms engaged in the FX Spot Market.

BPLC also participated in a conspiracy to decrease competition in the purchase and sale of the EUR/USD currency pair. BPLC and other financial services firms coordinated the trading of the EUR/USD currency pair in connection with certain benchmark currency ''fixes'' which occurred at specific times each trading day. In addition, BPLC and other financial services firms refrained from certain trading behavior, by withholding bids and offers, when another firm held an open risk position, so that the price of the currency traded would not move in a direction adverse to the firm with the open risk position.

Also, on May 20, 2015, pursuant to a plea agreement (the Plea Agreement), BPLC entered a plea of guilty for the violation of Sherman Antitrust Act, 15 U.S.C. 1. Under the Plea Agreement, BPLC pled guilty to the charge set out in the Information. The judgment of Conviction has not yet been entered.

BPLC paid a criminal fine of $710 million to the Department of Justice, of which $650 million is attributable to the charge set out in the Information. The remaining $60 million is attributable to conduct covered by the non-prosecution agreement that BPLC entered into on June 26, 2012, with the Criminal Division, Fraud Section of the Department of Justice related to BPLC's submissions of benchmark interest rates, including the London InterBank Offered Rate (known as LIBOR). In addition, Barclays Bank PLC, a wholly-owned subsidiary of BPLC, entered into a settlement agreement with the U.K.

[52] The Summary of Facts and Representations is based on the Applicant's representations, unless indicated otherwise.

Financial Conduct Authority to pay a monetary penalty of £284.432 million ($440.9 million).

As part of the settlement, Barclays Bank PLC consented to the entry of an Order Instituting Proceedings Pursuant to Sections 6(c)(4)(A) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions by the Commodity Futures Trading Commission (CFTC) imposing a civil money penalty of $400 million (the CFTC Order). In addition, Barclays Bank PLC and its New York branch consented to the entry of an Order to Cease and Desist and Order of Assessment of a Civil Money Penalty Issued Upon Consent Pursuant to the Federal Deposit Insurance Act, as Amended, by the Board of Governors of the Federal Reserve System (the Federal Reserve) imposing a civil money penalty of $342 million (the Board Order). Barclays Bank PLC and its New York branch also consented to the entry of a Consent Order under New York Bank Law 44 and 44–a by the New York Department of Financial Services (DFS) imposing a civil money penalty of $485 million [53] (the DFS Order and, together with the Plea Agreement, the CFTC Order and the Board Order, the FX Settlements).

3. In addition to the settlements described above, relating to FX trading, in July 2015, the Israeli tax authorities commenced a criminal investigation relating to the Value Added Tax returns of Barclays Bank PLC in Israel. The Applicant represents that the investigation is ongoing, and the outcome is anticipated to be a non-material financial penalty.

In addition, the Applicant represents that Barclays Italy is the subject of three separate criminal proceedings before the Tribunal of Rome, which stem from individual allegations of usury, fraud and forgery in connection with a mortgage, and embezzlement. With respect to this investigation, Applicant also anticipates the outcome will be a non-material financial penalty.

The Applicant represents that to the best of its knowledge, it does not have a reasonable basis to believe that the discretionary activities of any affiliated QPAM are the subject of the investigation or the criminal proceedings discussed above. The Applicant also represents that it does not have a reasonable basis to believe that any pending criminal investigation involving the Applicant or its affiliates would cause a reasonable plan or IRA customer not to hire or retain a QPAM affiliated with the Applicant.[54]

Failure To Comply With Section I(g) of PTE 84–14 and Proposed Relief

4. PTE 84–14 is a class exemption that permits certain transactions between a party in interest with respect to an employee benefit plan and an investment fund in which the plan has an interest and which is managed by a ''qualified professional asset manager'' (QPAM), if the conditions of the exemption are satisfied. These conditions include Section I(g), which precludes a person who may otherwise meet the definition of a QPAM from relying on the relief provided by PTE 84–14 if that person or its ''affiliate'' [55] has, within 10 years immediately preceding the transaction, been either convicted or released from imprisonment, whichever is later, as a result of certain specified criminal activity described therein.[56] The Department notes that a QPAM, and those who may be in a position to influence its policies, are expected to maintain a high standard of integrity.

5. The Applicant represents that BPLC is currently affiliated (within the meaning of Part VI(d) of PTE 84–14) with only two entities that could meet the definition of ''QPAM'' in Part VI(a) of PTE 84–14, namely Barclays Bank Delaware and Barclays Bank PLC, New York Branch, both of which are subject to its control (within the meaning of Part VI(d)(1) of PTE 84–14). The Applicant states that BPLC or a subsidiary may, in the future, invest in non-controlled, minimally related QPAMs that could constitute Barclays Related QPAMs, as defined in the proposed exemption.[57] The Applicant states that it may acquire a new affiliate at any time, and creates new affiliates frequently, in either case that could constitute Barclays Affiliated QPAMs or Barclays Related QPAMs, as defined in the proposed exemption. To the extent that these new affiliates manage ERISA-covered plans or IRAs, these future affiliates would also be covered by the exemption.

However, the exemption described herein does not extend to the convicted entity, BPLC, or BCI. Regarding BCI, according to the Applicant, the New York Department of Financial Services referred to 14 people who DFS believed should be sanctioned in some way. According to Barclays' human resources records, seven of those individuals were line managers with some supervisory authority at some point during the relevant time period. Five of those individuals were employed by both Barclays Bank PLC and BCI. Nine of the fourteen worked, at one time or another, in New York. The Department views BCI's level of involvement in the misconduct that gave rise to the Conviction as unacceptable, and is not proposing relief herein for that entity to act as a QPAM.

Remedial Actions To Address the Criminal Conduct of BPLC—Pursuant to the Plea Agreement

6. The Applicant states that the Department of Justice and BPLC negotiated a settlement reflected in the Plea Agreement, in which BPLC agreed to lawfully undertake the following pursuant to the Plea Agreement:

(a) Payment by BPLC of a total monetary penalty in the amount of $710 million;

(b) During the probation term of three years, BPLC will not commit another crime under U.S. federal law or engage

[53] On November 17, 2015, Barclays Bank PLC announced that it had reached a subsequent settlement with DFS in respect of its investigation into Barclays Bank PLC's electronic trading of FX and FX electronic trading system, that it had agreed to pay a civil money penalty of $150 million and that Barclays Bank PLC would take certain remedial steps, including submission of a proposed remediation plan concerning the underlying conduct to the independent consultant who was initially installed pursuant to a Memorandum of Understanding entered between Barclays Bank PLC and DFS, and whose engagement terminated February 19, 2016.

[54] According to the Applicant, for further information related to both criminal and civil matters involving BPLC, BPLC's most recent litigation-related disclosure can be found in note 19 (''Legal, competition and regulatory matters'') to the ''Results of Barclays PLC Group as of, and for the six months ended, 30 June 2016,'' filed as exhibit 99.1 to a Form 6–K (Report of Foreign Private Issuer Pursuant to Rule 13a-16 or 15d-16 of the Securities Exchange Act of 1934), filed by BPLC with the U.S. Securities and Exchange Commission on July 29, 2016. The Applicant also notes that this disclosure does not specifically describe certain confidential investigations resulting from BPLC's reporting of certain conduct that may be criminal to enforcement authorities but as to which BPLC would not expect to be the subject of an indictment.

[55] Section VI(d) of PTE 84–14 defines the term ''affiliate'' for purposes of Section I(g) as ''(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person, (2) Any director of, relative of, or partner in, any such person, (3) Any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner, and (4) Any employee or officer of the person who—(A) Is a highly compensated employee (as defined in Section 4975(e)(2)(H) of the Code) or officer (earning 10 percent or more of the yearly wages of such person), or (B) Has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets.''

[56] For purposes of Section I(g) of PTE 84–14, a person shall be deemed to have been ''convicted'' from the date of the judgment of the trial court, regardless of whether that judgment stands on appeal.

[57] For example, the Applicant states that BPLC may provide seed investments for new managers in exchange for minority interests. However, the Applicant points out that these managers, which had nothing to do with the conduct underlying the Conviction, would be unable to rely on PTE 84–14 for the benefit of their plan clients absent such relief.

in the conduct that gave rise to the Plea Agreement;

(c) BPLC will notify the probation officer upon learning of the commencement of any federal criminal investigation in which BPLC is a target, or federal criminal prosecution against it;

(d) During the probation term, BPLC will prominently post and maintain on its Web site and, within 30 days after BPLC pleads guilty, make best efforts to send spot FX customers and counterparties (other than customers and counterparties who BPLC can establish solely engaged in buying or selling foreign currency through its consumer bank units and not its spot FX sales or trading staff) a retrospective disclosure notice regarding certain historical conduct involving FX Spot Market transactions with customers via telephone, email and/or electronic chat;

(e) BPLC will implement a compliance program designed to prevent and detect the conduct underlying the Plea Agreement throughout its operations including those of its affiliates and subsidiaries and provide an annual progress report to the Department of Justice and the probation officer;

(f) BPLC will further strengthen its compliance and internal controls as required by the CFTC and the U.K. Financial Conduct Authority and any other regulatory or enforcement agencies that have addressed the conduct underlying the Plea Agreement, which shall include, but not be limited to, a thorough review of the activities and decision-making by employees of BPLC's legal and compliance functions with respect to the historical conduct underlying the Plea Agreement, and promptly report to the Department of Justice and the probation officer all of its remediation efforts required by these agencies, as well as remediation and implementation of any compliance program and internal controls, policies and procedures related to the criminal conduct underlying the Plea Agreement;

(g) BPLC will report to the Department of Justice all credible information regarding criminal violations of U.S. antitrust laws and of U.S. law concerning fraud, including securities or commodities fraud, by BPLC or any of its employees, as to which BPLC's Board of Directors, management (that is, all supervisors within the bank), or legal and compliance personnel are aware;

(h) BPLC will bring to the Antitrust Division's attention all federal criminal investigations in which BPLC is identified as a subject or a target, and all administrative or regulatory proceedings or civil actions brought by any federal or state governmental authority in the United States against BPLC or its employees, to the extent that such investigations, proceedings or actions allege facts that could form the basis of a criminal violation of U.S. antitrust laws, and also bring to the Criminal Division, Fraud Section's attention all federal criminal or regulatory investigations in which BPLC is identified as a subject or a target, and all administrative or regulatory proceedings or civil actions brought by any federal governmental authority in the United States against BPLC or its employees, to the extent that such investigations, proceedings or actions allege violation of U.S. law concerning fraud, including securities or commodities fraud;

(i) BPLC and all of the entities in which BPLC had, indirectly or directly, a greater than 50% ownership interest as of the date of the Plea Agreement, including Barclays Bank PLC and Barclays Capital Services Ltd. (*i.e.,* the Related Entities), will cooperate fully and truthfully with the Department of Justice in its investigation and prosecution of the conduct underlying the Plea Agreement, or any other currency pair in the FX Spot Market, or any foreign exchange forward, foreign exchange option or other foreign exchange derivative, or other financial product, to the extent such other financial product has been disclosed to the Department of Justice (excluding a certain sealed investigation). This will include producing non-privileged non-protected materials, wherever located; using its best efforts to secure continuing cooperation of the current or former directors, officers and employees of BPLC and its Related Entities; and identifying witnesses who, to BPLC's knowledge, may have material information regarding the matters under investigation;

(j) During the probation term, BPLC will cooperate fully with the Department of Justice and any other law enforcement authority or government agency designated by the Department of Justice, in a manner consistent with applicable law and regulations, with regard to a certain sealed investigation.

(k) BPLC must expeditiously seek relief from the Department by filing an application for the QPAM Exemption and will provide all information requested by the Department in a timely manner.

Remedial Actions To Address the Criminal Conduct of BPLC Subject to the Conviction—Structural Enhancements

7. The Applicant represents that BPLC and its subsidiaries and affiliates, including Barclays Bank PLC and its New York branch (collectively, the Bank) have implemented and will continue to implement policies and procedures designed to prevent the recurrence of the conduct that is the subject of the FX Settlements as required by the Plea Agreement.

Remedial Actions To Address the Criminal Conduct of BPLC Subject to the Conviction—Additional Structural Enhancements

8. The Applicant states that the Bank has made substantial investments in the independent, external review of its governance, operational model, and risk and control programs, conducted by Sir Anthony Salz, including interviews of more than 600 employees, clients, and competitors, as well as consideration of more than 9,000 responses to an internal staff survey. The Applicant represents that the Bank has taken steps to clearly articulate its policies and values and disseminate that information firm-wide through trainings.

The Applicant states that the Bank continues to develop a strong institutionalized framework of supervision and accountability running from the desk level to the top of the organization. The Applicant represents that the Bank continues to institute an enhanced global compliance and controls system, supported by substantial financial and human resources, and charged with enforcing and continually monitoring adherence to BPLC's policies.

Statutory Findings—Protective of the Rights of Participants of Affected Plans and IRAs

9. The Applicant proposed certain conditions it believes are protective of the rights of participants and beneficiaries of ERISA-covered plans and IRAs with respect to the transactions described herein. The Department has determined to revise and supplement the proposed conditions so that it can make its required finding that the requested exemption is protective of the rights of participants and beneficiaries of affected plans and IRAs. In this regard, the Department has tentatively determined that the following conditions adequately protect the rights of participants and beneficiaries of affected plans and IRAs with respect to the transactions that

would be covered by this temporary exemption.

10. Relief under this proposed exemption is only available to the extent: (a) Other than with respect to certain individuals who worked for a non-fiduciary business within BCI and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the Barclays Affiliated QPAMs, including their officers, directors, agents other than BPLC and employees of such Barclays Affiliated QPAMs, did not know of, have reason to know of, or participate in the criminal conduct of BPLC that is the subject of the Conviction (for purposes of this condition, the term ''participated in'' includes the knowing or tacit approval of the misconduct underlying the Conviction); (b) any failure of those QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction; and (c) the Barclays Affiliated QPAMs and the Barclays Related QPAMs (including their officers, directors, agents other than BPLC, and employees of such QPAMs) did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct that is the subject of the Conviction.

11. The Department expects the Barclays Affiliated QPAMs to rigorously ensure that the individuals associated with the criminal conduct of BPLC will not be employed or knowingly engaged by such QPAMs. In this regard, the temporary exemption, if granted as proposed, mandates that the Barclays Affiliated QPAMs will not employ or knowingly engage any of the individuals that participated in criminal conduct that is the subject of the Conviction. Again, for purposes of this condition, the term ''participated in'' includes the knowing or tacit approval of the misconduct underlying the Conviction.

Further, the Barclays Affiliated 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 Barclays Affiliated QPAM, to enter into any transaction with BPLC or BCI, or to engage BPLC or BCI, 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.

12. The Barclays Affiliated QPAMs and Barclays Related QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction. Further, any failure of the Barclays Affiliated QPAMs or the Barclays Related QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction.

13. No relief will be provided by the temporary exemption to the extent that a Barclays Affiliated QPAM or a Barclays Related QPAM exercised authority over the assets of an ERISA-covered plan or IRA in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Conviction; or cause the Barclays Affiliated QPAM or the Barclays Related QPAM, affiliates, or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Conviction. Further, no relief will be provided to the extent BPLC or BCI provides any discretionary asset management services to ERISA-covered plans or IRAs, or otherwise acts as a fiduciary with respect to ERISA-covered plan and IRA assets.

13. The Department believes that robust policies and training are warranted where, as here, the criminal misconduct has occurred within a corporate organization that is affiliated with one or more QPAMs managing plan or IRA assets in reliance on PTE 84–14. Therefore, this proposed temporary exemption requires that prior to a Barclays Affiliated QPAM's engagement by any ERISA-covered plan or IRA for discretionary asset management services, each Barclays Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that: The asset management decisions of the Barclays Affiliated QPAM are conducted independently of the corporate management and business activities of BPLC and BCI; the Barclays Affiliated 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; the Barclays Affiliated QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to ERISA-covered plans and IRAs; any filings or statements made by the Barclays Affiliated QPAM to regulators, including but not limited to, the Department, 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; the Barclays Affiliated 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; and the Barclays Affiliated QPAM complies with the terms of this temporary exemption. Any violation of, or failure to comply with, these items 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 Barclays Affiliated QPAM, and an appropriate fiduciary of any affected ERISA-covered plan or IRA, where such fiduciary is independent of BPLC.

13. The Department has also imposed a condition that requires that prior to a Barclays Affiliated QPAM's engagement by any ERISA-covered plan or IRA for discretionary asset management services reliant on PTE 84–14, each Barclays Affiliated QPAM develops and implements a program of training (the Training), conducted at least annually, for all relevant Barclays Affiliated 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.

14. This temporary exemption requires the Barclays Affiliated QPAMs to enter into certain contractual obligations in connection with the provision of services to their clients. It is the Department's view that the condition for exemptive relief requiring these contractual obligations is essential to the Department's ability to make its findings that the proposed temporary exemption is protective of the rights of the participants and beneficiaries of ERISA-covered and IRA plan clients of Barclays Affiliated QPAMs under section 408(a) of ERISA. In this regard, Section I(i) of the proposed temporary exemption provides that, as of the effective date of this temporary exemption with respect to any

arrangement, agreement, or contract between a Barclays Affiliated QPAM and an ERISA-covered plan or IRA for which a Barclays Affiliated QPAM provides asset management or other discretionary fiduciary services, each Barclays Affiliated QPAM must agree: 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 (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; 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 Barclays Affiliated 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; not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the Barclays Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions; 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 Barclays Affiliated 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 BPLC, and its affiliates; not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the Barclays Affiliated 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 the actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors; and 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. Furthermore, any contract, agreement or arrangement between a Barclays Affiliated QPAM and its ERISA-covered plan or IRA client must not contain exculpatory provisions disclaiming or otherwise limiting liability of the Barclays Affiliated 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 BPLC, and its affiliates, and its affiliates.

15. Within four (4) months of the date of the Conviction, each Barclays Affiliated QPAM will: Provide a notice of its obligations under Section I(i) to each ERISA-covered plan and IRA for which the Barclays Affiliated QPAM provides asset management or other discretionary fiduciary services.

16. In addition, each Barclays Affiliated QPAM must 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 Barclays Affiliated QPAM relies upon the relief in the temporary exemption.

17. Furthermore, the proposed temporary exemption mandates that, during the effective period of this temporary exemption, BPLC must immediately disclose to the Department any Deferred Prosecution Agreement (a DPA) or a Non-Prosecution Agreement (an NPA) that BPLC or an affiliate enters into with the 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. In addition, BPLC or an affiliate must immediately provide 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 agreement.

18. The proposed exemption would provide relief from certain of the restrictions set forth in Section 406 and 407 of ERISA. Such a granted exemption would not provide relief from any other violation of law. Pursuant to the terms of this proposed exemption, any criminal conviction not expressly described herein, but otherwise described in Section I(g) of PTE 84–14 and attributable to the Applicant for purposes of PTE 84–14, would result in the Applicant's loss of this exemption.

Statutory Findings—Administratively Feasible

19. The Applicant represents that the proposed temporary exemption is administratively feasible because it does not require any monitoring by the Department. In addition, the limited effective duration of the temporary exemption provides the Department with the opportunity to determine whether long-term exemptive relief is warranted, without causing sudden and potentially costly harm to ERISA-covered plans and IRAs.

Summary

20. Given the revised and new conditions described above, the Department has tentatively determined that the relief sought by the Applicant satisfies the statutory requirements for an exemption under section 408(a) of ERISA.

Notice to Interested Persons

Written comments and requests for a public hearing on the proposed temporary exemption should be submitted to the Department within five (5) days from the date of publication of this **Federal Register** Notice. Given the short comment period, the Department will consider comments received after such date, in connection with its consideration of more permanent relief.

Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Ms. Anna Mpras Vaughan of the Department, telephone (202) 693–8565. (This is not a toll-free number.)

JPMorgan Chase & Co. (JPMC or the Applicant), Located in New York, New York

[Application No. D–11906]

Proposed Five Year Exemption

The Department is considering granting a five-year exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[58]

[58] For purposes of this proposed five-year exemption, references to section 406 of Title I of the

Section I: Covered Transactions

If the proposed five-year exemption is granted, certain asset managers with specified relationships to JPMC (the JPMC Affiliated QPAMs and the JPMC Related QPAMs, as defined further in Sections II(a) and II(b), respectively) will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Class Exemption 84–14 (PTE 84–14 or the QPAM Exemption),[59] notwithstanding the judgment of conviction against JPMC (the Conviction), as defined in Section II(c)),[60] for engaging in a conspiracy to: (1) Fix the price of, or (2) eliminate competition in the purchase or sale of the euro/U.S. dollar currency pair exchanged in the Foreign Exchange (FX) Spot Market, for a period of five years beginning on the date the exemption is granted, provided the following conditions are satisfied:

(a) Other than a single individual who worked for a non-fiduciary business within JPMorgan Chase Bank and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the JPMC Affiliated QPAMs and the JPMC Related QPAMs (including their officers, directors, agents other than JPMC, and employees of such QPAMs who had responsibility for, or exercised authority in connection with the management of plan assets) did not know of, did not have reason to know of, or participate in the criminal conduct 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) Other than a single individual who worked for a non-fiduciary business within JPMorgan Chase Bank and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the JPMC Affiliated QPAMs and the JPMC Related QPAMs (including their officers, directors, and agents other than JPMC, and employees of such JPMC 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 JPMC Affiliated 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 the purposes of this paragraph (c), ''participated in'' includes the knowing or tacit approval of the misconduct underlying Conviction;

(d) A JPMC Affiliated 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 JPMC Affiliated QPAM, to enter into any transaction with JPMC or the Investment Banking Division of JPMorgan Chase Bank, or engage JPMC or the Investment Banking Division of JPMorgan Chase Bank 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 a JPMC Affiliated QPAM or a JPMC Related QPAM to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction;

(f) A JPMC Affiliated QPAM or a JPMC Related QPAM did not exercise authority over 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) in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Conviction; or cause the JPMC QPAM or its affiliates or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Conviction;

(g) JPMC and the Investment Banking Division of JPMorgan Chase Bank will not provide discretionary asset management services to ERISA-covered plans or IRAs, and will not otherwise act as a fiduciary with respect to ERISA-covered plan or IRA assets;

(h)(1) Within four (4) months of the Conviction, each JPMC Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that:

(i) The asset management decisions of the JPMC Affiliated QPAM are conducted independently of JPMC's management and business activities, including the corporate management and business activities of the Investment Banking Division of JPMorgan Chase Bank;

(ii) The JPMC Affiliated 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 violation of these duties and provisions with respect to ERISA-covered plans and IRAs;

(iii) The JPMC Affiliated 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 JPMC Affiliated QPAM to regulators, including, but not limited to, the Department, 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 JPMC Affiliated 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 plans and IRA clients;

(vi) The JPMC Affiliated QPAM complies with the terms of this five-year exemption; and

(vii) Any violation of, or failure to comply with an item in subparagraphs (ii) through (vi), is corrected promptly upon discovery, and any such violation or compliance failure not promptly corrected is reported, upon the discovery of such 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 JPMC Affiliated QPAM, 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 JPMC; 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 JPMC or beneficially owned by an employee of JPMC or its affiliates, such fiduciary does not need to be independent of JPMC. A JPMC Affiliated 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);

Act, unless otherwise specified, should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[59] 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).

[60] 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 violation of the Sherman Antitrust Act, Title 15 United States Code, Section 1.

(2) Within four (4) months of the date of the Conviction, each JPMC Affiliated QPAM must develop and implement a program of training (the Training), conducted at least annually, for all relevant JPMC Affiliated QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. The Training must:

(i) 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 five-year exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing; and

(ii) Be conducted by an independent professional who has been prudently selected and who has appropriate technical and training and proficiency with ERISA and the Code;

(i)(1) Each JPMC Affiliated QPAM submits to an audit conducted annually 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 the JPMC Affiliated QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. Each annual audit must cover a consecutive twelve month period starting with the twelve month period that begins on the effective date of the five-year exemption, and each annual audit 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 JPMC Affiliated QPAM and, if applicable, JPMC, 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 JPMC Affiliated QPAM has developed, implemented, maintained, and followed the Policies in accordance with the conditions of this five-year exemption, and has developed and implemented the Training, as required herein;

(4) The auditor's engagement must specifically require the auditor to test each JPMC Affiliated QPAM's operational compliance with the Policies and Training. In this regard, the auditor must test a sample of each 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) For each audit, on or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to JPMC and the JPMC Affiliated 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:

(i) The adequacy of the JPMC Affiliated QPAM's Policies and Training; the JPMC Affiliated QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective JPMC Affiliated QPAM's noncompliance with the written Policies and Training described in Section I(h) above. Any determination 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 JPMC Affiliated QPAM must be promptly addressed by such JPMC Affiliated QPAM, and any action taken by such JPMC Affiliated QPAM to address such recommendations must be included in an addendum to the Audit Report (which addendum is completed prior to the certification described in Section I(i)(7) below). Any determination by the auditor that the respective JPMC Affiliated QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that the JPMC Affiliated QPAM has complied with the requirements under this subsection must be based on evidence that demonstrates the JPMC Affiliated QPAM has actually implemented, maintained, and followed the Policies and Training required by this five-year exemption. Furthermore, the auditor must not rely on the Annual Report created by the compliance officer (the Compliance Officer) as described in Section I(m) below in lieu of independent determinations and testing performed by the auditor as required by Section I(i)(3) and (4) above; and

(ii) The adequacy of the Annual Review described in Section I(m) and the resources provided to the Compliance Officer in connection with such Annual Review;

(6) The auditor must notify the respective JPMC Affiliated QPAM of any instance 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 JPMC Affiliated QPAM to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this exemption; addressed, corrected, or remedied any inadequacy 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 proposed five-year exemption, and with the applicable provisions of ERISA and the Code;

(8) The Risk Committee of JPMC's Board of Directors is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking legal compliance officer of JPMC must review the Audit Report for each JPMC Affiliated QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report;

(9) *Each JPMC Affiliated QPAM provides its certified Audit Report, by regular mail to:* The Department's Office of Exemption Determinations (OED), 200 Constitution Avenue NW., Suite 400, Washington, DC 20210, or by private carrier to: 122 C Street NW., Suite 400, Washington, DC 20001–2109, no later than 30 days following its completion. The Audit Report will be part of the public record regarding this five-year exemption. Furthermore, each JPMC Affiliated QPAM must make 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 JPMC Affiliated QPAM;

(10) *Each JPMC Affiliated QPAM and the auditor must submit to OED:* (A) Any engagement agreement(s) entered into pursuant to the engagement of the auditor under this five-year exemption; and (B) any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this five-year

exemption, no later than six (6) months after the Conviction Date (and one month after the execution of any agreement thereafter);

(11) *The auditor must 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 instance of noncompliance by the relevant JPMC Affiliated QPAM; and an explanation of any corrective or remedial action taken by the applicable JPMC Affiliated QPAM; and

(12) JPMC 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 JPMC demonstrates to the Department's satisfaction that such new auditor is independent of JPMC, experienced in the matters that are the subject of the exemption, and capable of making the determinations required of this exemption;

(j) Effective as of the effective date of this five-year exemption, with respect to any arrangement, agreement, or contract between a JPMC Affiliated QPAM and an ERISA-covered plan or IRA for which a JPMC Affiliated QPAM provides asset management or other discretionary fiduciary services, each JPMC Affiliated QPAM agrees and warrants:

(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, as applicable, with respect to each such ERISA-covered plan and IRA;

(2) To indemnify and hold harmless the ERISA-covered plan or IRA for any damages resulting from a JPMC Affiliated QPAM's violation of applicable laws, a JPMC Affiliated QPAM's breach of contract, or any claim brought in connection with the failure of such JPMC Affiliated 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;

(3) Not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the JPMC Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(4) 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 JPMC Affiliated 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 JPMC, and its affiliates;

(5) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the JPMC Affiliated 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;

(6) 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; and

(7) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the JPMC Affiliated 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 JPMC, and its affiliates;

(8) Within four (4) months of the date of the Conviction, each JPMC Affiliated QPAM must provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which an JPMC Affiliated QPAM provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a JPMC Affiliated QPAM provides asset management or other discretionary services, the JPMC Affiliated QPAM will agree in writing to its obligations under this Section I(j) in an updated investment management agreement between the JPMC Affiliated QPAM and such clients or other written contractual agreement;

(k)(1) *Notice to ERISA-covered plan and IRA clients.* Within thirty (30) days of the publication of this proposed five-year exemption in the **Federal Register**, each JPMC Affiliated QPAM will provide a notice of the proposed five-year exemption, along with a separate summary describing the facts that led to the Conviction (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that the Conviction results in a failure to meet a condition in PTE 84–14, to each sponsor of an ERISA-covered plan and each beneficial owner of an IRA for which a JPMC Affiliated QPAM provides asset management or other discretionary services, or the sponsor of an investment fund in any case where a JPMC Affiliated QPAM acts only as a sub-advisor to the investment fund in which such ERISA-covered plan and IRA invests. In the event that this proposed five-year exemption is granted, the **Federal Register** copy of the notice of final five-year exemption must be delivered to such clients within sixty (60) days of its publication in the **Federal Register**, and may be delivered electronically (including by an email that has a link to the exemption). Any prospective clients for which a JPMC Affiliated QPAM provides asset management or other discretionary services must receive the proposed and final five-year exemptions with the Summary and the Statement prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the JPMC Affiliated QPAM; and

(2) *Notice to Non-Plan Clients.* Each JPMC Affiliated QPAM will provide a **Federal Register** copy of the proposed five-year exemption, a **Federal Register** copy of the final five-year exemption; the Summary; and the Statement to each: (A) Current Non-Plan Client within four (4) months of the effective date, if any, of a final five-year exemption; and (B) Future Non-Plan Client prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the JPMC Affiliated QPAM. For purposes of this subparagraph (2), a Current Non-Plan Client means a client of a JPMC Affiliated QPAM that: Is neither an ERISA-covered plan nor an IRA; has assets managed by the JPMC Affiliated QPAM as of the effective date, if any, of a final five-year exemption; and has received a written representation (qualified or otherwise) from the JPMC Affiliated QPAM that such JPMC Affiliated QPAM qualifies as a QPAM or

qualifies for the relief provided by PTE 84–14. For purposes of this subparagraph (2), a Future Non-Plan Client means a client of a JPMC Affiliated QPAM that is neither an ERISA-covered plan nor an IRA that, has assets managed by the JPMC Affiliated QPAM as of the effective date, if any, of a final five-year exemption, and has received a written representation (qualified or otherwise) from the JPMC Affiliated QPAM that such JPMC Affiliated QPAM is a QPAM, or qualifies for the relief provided by PTE 84–14;

(l) The JPMC Affiliated QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction;

(m)(1) JPMC designates a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer must conduct an annual review (the Annual Review) to determine the adequacy and effectiveness of the implementation of the Policies and Training. With respect to the Compliance Officer, the following conditions must be met:

(i) The Compliance Officer must be a legal professional with extensive experience with, and knowledge of, the regulation of financial services and products, including under ERISA and the Code; and

(ii) The Compliance Officer must have a direct reporting line to the highest-ranking corporate officer in charge of legal compliance that is independent of JPMC's other business lines;

(2) With respect to each Annual Review, the following conditions must be met:

(i) The Annual Review includes a review of: Any compliance matter related to the Policies or Training that was identified by, or reported to, the Compliance Officer or others within the compliance and risk control function (or its equivalent) during the previous year; any material change in the business activities of the JPMC Affiliated QPAMs; and any change to ERISA, the Code, or regulations related to fiduciary duties and the prohibited transaction provisions that may be applicable to the activities of the JPMC Affiliated QPAMs;

(ii) The Compliance Officer prepares a written report for each Annual Review (each, an Annual Report) that (A) summarizes his or her material activities during the preceding year; (B) sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action; (C) details any change to the Policies or Training to guard against any similar instance of noncompliance occurring again; and (D) makes recommendations, as necessary, for additional training, procedures, monitoring, or additional and/or changed processes or systems, and management's actions on such recommendations;

(iii) In each Annual Report, the Compliance Officer must certify in writing that to his or her knowledge: (A) The report is accurate; (B) the Policies and Training are working in a manner which is reasonably designed to ensure that the Policies and Training requirements described herein are met; (C) any known instance of noncompliance during the preceding year and any related correction taken to date have been identified in the Annual Report; (D) the JPMC Affiliated QPAMs have complied with the Policies and Training in all respects, and/or corrected any instances of noncompliance in accordance with Section I(h) above; and (E) JPMC has provided the Compliance Officer with adequate resources, including, but not limited to, adequate staffing;

(iv) Each Annual Report must be provided to appropriate corporate officers of JPMC and each JPMC Affiliated QPAM to which such report relates; the head of compliance and the General Counsel (or their functional equivalent) of the relevant JPMC Affiliated QPAM; and must be made unconditionally available to the independent auditor described in Section I(i) above;

(v) Each Annual Review, including the Compliance Officer's written Annual Report, must be completed at least three (3) months in advance of the date on which each audit described in Section I(i) is scheduled to be completed;

(n) Each JPMC Affiliated QPAM will maintain records necessary to demonstrate that the conditions of this exemption have been met, for six (6) years following the date of any transaction for which such JPMC Affiliated QPAM relies upon the relief in the exemption;

(o) During the effective period of the five-year exemption JPMC: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or a Non-Prosecution Agreement (an NPA) with the U.S. Department of Justice, entered into by JPMC or any of its affiliates in connection with 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 conduct and allegations that led to the agreement. After review of the information, the Department may require JPMC, its affiliates, or related parties, as specified by the Department, to submit a new application for the continued availability of relief as a condition of continuing to rely on this exemption. If the Department denies the relief requested in the new application, or does not grant such relief within twelve months of application, the relief described herein is revoked as of the date of denial or as of the expiration of the twelve month period, whichever date is earlier;

(p) Each JPMC Affiliated QPAM, in its agreements with ERISA-covered plan and IRA clients, or in other written disclosures provided to ERISA-covered plan and IRA clients, within 60 days prior to the initial transaction upon which relief hereunder is relied, and then at least once annually, will clearly and prominently: Inform the ERISA-covered plan and IRA client that the client has the right to obtain copies of the QPAM's written Policies adopted in accordance with the exemption; and

(q) A JPMC Affiliated QPAM or a JPMC Related QPAM will not fail to meet the terms of this exemption solely because a different JPMC Affiliated QPAM or JPMC Related QPAM fails to satisfy a condition for relief described in Sections I(c), (d), (h), (i), (j), (k), (l), (n) and (p).

Section II: Definitions

(a) The term ''JPMC Affiliated QPAM'' means a ''qualified professional asset manager'' (as defined in Section VI(a) [61] of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which JPMC is a current or future ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14). The term ''JPMC Affiliated QPAM'' excludes the parent entity, JPMC, the division implicated in the criminal conduct that is the subject of the Conviction.

(b) The term ''JPMC Related QPAM'' means any current or future ''qualified professional asset manager'' (as defined in section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14, and with respect to which JPMC owns a direct or indirect five percent or more interest, but with respect to which JPMC

[61] 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 has acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM.

is not an ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14).

(c) 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.

(d) The term ''JPMC'' means JPMorgan Chase and Co., the parent entity, but does not include any subsidiaries or other affiliates;

(e) The term ''Conviction'' means the judgment of conviction against JPMC for violation of the Sherman Antitrust Act, 15 U.S.C. 1, which is scheduled to be entered in the District Court for the District of Connecticut (the District Court) (Case Number 3:15–cr–79–SRU), in connection with JPMC, through one of its euro/U.S. dollar (EUR/USD) traders, entering into and engaging in a combination and conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, the EUR/USD currency pair exchanged in the FX spot market by agreeing to eliminate competition in the purchase and sale of the EUR/USD currency pair in the United States and elsewhere. For all purposes under this exemption, ''conduct'' of any person or entity that is the ''subject of [a] Conviction'' encompasses any conduct of JPMC and/or their personnel, that is described in the Plea Agreement, (including the Factual Statement), and other official regulatory or judicial factual findings that are a part of this record; and

(f) The term ''Conviction Date'' means the date that a judgment of Conviction against JPMC is entered by the District Court in connection with the Conviction.

Effective Date: This proposed five-year exemption will be effective beginning on the date of publication of such grant in the **Federal Register** and ending on the date that is five years thereafter. Should the Applicant wish to extend the effective period of exemptive relief provided by this proposed five-year exemption, the Applicant must submit another application for an exemption. In this regard, the Department expects that, in connection with such application, the Applicant should be prepared to demonstrate compliance with the conditions for this exemption and that the JPMC Affiliated QPAMs, and those who may be in a position to influence their policies, have maintained the high standard of integrity required by PTE 84–14.

Department's Comment: Concurrently with this proposed five-year exemption, the Department is publishing a proposed one-year exemption for JPMC Affiliated QPAMs to continue to rely on PTE 84–14. That one-year exemption is intended to allow the Department sufficient time, including a longer comment period, to determine whether to grant this five-year exemption. The proposed one-year exemption is designed to protect ERISA-covered plans and IRAs from the potential costs and losses, described below, that would be incurred if such JPMC Affiliated QPAMs were to suddenly lose their ability to rely on PTE 84–14 as of the Conviction date.

The proposed five-year exemption would provide relief from certain of the restrictions set forth in sections 406 and 407 of ERISA. No relief from a violation of any other law would be provided by this exemption including any criminal conviction described herein.

The Department cautions that the relief in this proposed five-year exemption would terminate immediately if, among other things, an entity within the JPMC 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 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 proposed five-year 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 proposed exemption.

Summary of Facts and Representations [62]

Background

1. JPMC is a financial holding company and global financial services firm, incorporated in Delaware and headquartered in New York, New York, with approximately 240,000 employees and operations in over 60 countries. According to the Applicant, JPMC provides a variety of services, including investment banking, financial services for consumers and small business, commercial banking, financial transaction processing, and asset management.

The Applicant represents that JPMC's principal bank subsidiaries are: (a) JPMorgan Chase Bank, a national banking association wholly owned by JPMC, with U.S. branches in 23 states; and (b) Chase Bank USA, National Association, a national banking association that is JPMC's credit card-issuing bank. The Applicant also represents that two of JPMC's principal non-bank subsidiaries are its investment bank subsidiary, J.P. Morgan Securities LLC, and its primary investment management subsidiary, J.P. Morgan Investment Management Inc. (JPMIM). The bank and nonbank subsidiaries of JPMC operate internationally through overseas branches and subsidiaries, representative offices and subsidiary foreign banks.

The Applicant explains that entities within the JPMC's asset management line of business (Asset Management) serve institutional and retail clients worldwide through the Global Investment Management (GIM) and Global Wealth Management (GWM) businesses. The Applicant represents that JPMC's Asset Management line of business had total client assets of about $2.4 trillion and discretionary assets under management of approximately $1.7 trillion at the end of 2014.[63]

2. The Applicant represents that JPMC has several affiliates that provide investment management services.[64] JPMorgan Chase Bank and most of the U.S. registered advisers manage the assets of ERISA-covered plans and/or IRAs on a discretionary basis. They routinely rely on the QPAM Exemption to provide relief for party in interest transactions. According to the Applicant, the primary domestic bank and U.S. registered adviser affiliates in which JPMC owns a significant interest, directly or indirectly, include the following: JPMorgan Chase Bank, N.A.; JPMorgan Investment Management Inc.; J.P. Morgan Securities LLC; JF International Management Inc.; J.P. Morgan Alternative Asset Management, Inc.; Highbridge Capital Management, LLC; and Security Capital Research & Management Incorporated. These are the entities that currently would be

[62] The Summary of Facts and Representations is based on the Applicant's representations, unless indicated otherwise.

[63] In addition to its Asset Management line of business, the Applicant represents that JPMC operates three other core lines of business. They are: Consumer and Community Banking Services; Corporate and Investment Banking Services; and Commercial Banking Services.

[64] Section VI(d) of PTE 84–14 defines an ''affiliate'' of a person, for purposes of Section I(g), as: (1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person, (2) any director of, relative of, or partner in, any such person, (3) any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner, and (4) any employee or officer of the person who—(A) is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent or more of the yearly wages of such person), or (B) has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets.

covered by the exemption, if it is granted.

3. In addition to the QPAMs identified above, the Applicant has other affiliated managers that meet the definition of a QPAM that do not currently manage ERISA or IRA assets on a discretionary basis, but may in the future, including: J.P. Morgan Partners, LLC; Sixty Wall Street Management Company LLC; J.P. Morgan Private Investments Inc.; J.P. Morgan Asset Management (UK) Limited; JPMorgan Funds Limited; and Bear Stearns Asset Management, Inc. The Applicant requests that affiliates that manage ERISA or IRA assets be covered by the five-year exemption. The Applicant also acquires and creates new affiliates frequently, and to the extent that these new affiliates meet the definition of a QPAM and manage ERISA-covered plans or IRAs, the Applicant requests that these entities be covered by the five-year exemption. The Applicant represents that JPMC owns, directly or indirectly, a 5% or greater interest in certain investment managers (and may in the future own similar interests in other managers), but such managers are not affiliated in the sense that JPMC has actual control over their operations and activities. JPMC does not have the authority to exercise a controlling influence over these investment managers and is not involved with the managers' clients, strategies, or ERISA assets under management, if any.[65] The Applicant requests that these entities also be covered by the five-year exemption.

4. On May 20, 2015, the Applicant filed an application for exemptive relief from the prohibitions of sections 406(a) and 406(b) of ERISA, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) of the Code, in connection with a conviction that would make the relief in PTE 84–14 unavailable to any current or future JPMC-related investment managers.

[65] Section VI(d) of PTE 84–14 defines an ''affiliate'' of a person, for purposes of Section I(g), as: (1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person, (2) any director of, relative of, or partner in, any such person, (3) any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner, and (4) any employee or officer of the person who—(A) is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent or more of the yearly wages of such person), or (B) has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets.

Section VI(e) of PTE 84–14 defines the term ''control'' as the power to exercise a controlling influence over the management or policies of a person other than an individual.

On May 20, 2015, the U.S. Department of Justice (Department of Justice) filed a criminal information in the U.S. District Court for the District of Connecticut (the District Court) against JPMC, charging JPMC with a one-count violation of the Sherman Antitrust Act, 15 U.S.C. 1 (the Information). The Information charges that, from at least as early as July 2010 until at least January 2013, JPMC, through one of its euro/U.S. dollar (EUR/USD) traders, entered into and engaged in a combination and conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, the EUR/USD currency pair exchanged in the FX spot market by agreeing to eliminate competition in the purchase and sale of the EUR/USD currency pair in the United States and elsewhere. The criminal conduct that is the subject of the Conviction involved near daily conversations, some of which were in code, in an exclusive electronic chat room used by certain EUR/USD traders, including the EUR/USD trader described herein.

5. JPMC sought to resolve the charges through a Plea Agreement presented to the District Court on May 20, 2015. Under the Plea Agreement, JPMC agreed to enter a plea of guilty to the charge set out in the Information (the Plea). In addition, JPMC has made an admission of guilt to the District Court. The Applicant expects that the District Court will enter a judgment against JPMC that will require remedies that are materially the same as those set forth in the Plea Agreement.

Pursuant to the Plea Agreement, the District Court will order a term of probation and JPMC will be subject to certain conditions. First, JPMC must not commit another crime in violation of the federal laws of the United States or engage in the Conduct set forth in Paragraphs 4(g)–(i) of the Plea Agreement during the term of probation, and shall make disclosures relating to certain other sales-related practices. Second, JPMC must notify the probation officer upon learning of the commencement of any federal criminal investigation in which JPMC is a target, or federal criminal prosecution against it. Third, JPMC must implement and must continue to implement a compliance program designed to prevent and detect the criminal conduct that is the subject of the Conviction. Fourth, JPMC must further strengthen its compliance and internal controls as required by the CFTC, the Financial Conduct Authority (FCA), and any other regulatory or enforcement agencies that have addressed the criminal conduct that is the subject of the Conviction, as set forth in the factual basis section of the Plea Agreement, and report to the probation officer and the United States, upon request, regarding its remediation and implementation of any compliance program and internal controls, policies, and procedures that relate to the conduct described in the factual basis section of the Plea Agreement.

6. Pursuant to the Plea Agreement, JPMC must promptly bring to the Department of Justice Antitrust Division's attention: (a) All credible information regarding criminal violations of U.S. antitrust laws by the defendant or any of its employees as to which the JPMC's Board of Directors, management (that is, all supervisors within the bank), or legal and compliance personnel are aware; (b) all federal criminal or regulatory investigations in which the defendant is a subject or a target, and all administrative or regulatory proceedings or civil actions brought by any federal governmental authority in the United States against the defendant or its employees, to the extent that such investigations, proceedings or actions allege violations of U.S. antitrust laws.

7. Pursuant to the Plea Agreement, JPMC must promptly bring to the Department of Justice Criminal Division, Fraud Section's attention: (a) All credible information regarding criminal violations of U.S. law concerning fraud, including securities or commodities fraud by the defendant or any of its employees as to which the JPMC's Board of Directors, management (that is, all supervisors within the bank), or legal and compliance personnel are aware; and (b) all criminal or regulatory investigations in which JPMC is or may be a subject or a target, and all administrative proceedings or civil actions brought by any governmental authority in the United States against JPMC or its employees, to the extent such investigations, proceedings or actions allege violations of U.S. law concerning fraud, including securities or commodities fraud.

Pursuant to Paragraph 9(c) of the Plea Agreement, the Department of Justice agreed ''that it [would] support a motion or request by [JPMC] that sentencing in this matter be adjourned until the Department of Labor has issued a ruling on the defendant's request for an exemption. . . .'' According to the Applicant, sentencing has not yet occurred in the District Court, nor has sentencing been scheduled.

8. Along with the Department of Justice, the Board of Governors of the Federal Reserve Board (FRB), the Office of the Comptroller of the Currency (OCC), the Commodity Futures Trading

Commission (CFTC), and the Financial Conduct Authority (FCA) have conducted or have been conducting investigations into the practices of JPMC and its direct and indirect subsidiaries relating to FX trading.

The FRB issued a cease and desist order on May 20, 2015, against JPMC concerning unsafe and unsound banking practices relating to JPMC's FX business and requiring JPMC to cease and desist, assessing against JPMC a civil money penalty of $342,000,000, and requiring JPMC to agree to take certain affirmative actions (FRB Order).

The OCC issued a cease and desist order on November 11, 2014, against JPMorgan Chase Bank concerning deficiencies and unsafe or unsound practices relating to JPMorgan Chase Bank's wholesale FX business and requiring JPMorgan Chase Bank to cease and desist, ordering JPMorgan Chase Bank to pay a civil money penalty of $350,000,000, and requiring JPMorgan Chase Bank to agree to take certain affirmative actions (OCC Order).

The CFTC issued a cease and desist order on November 11, 2014, against JPMorgan Chase Bank relating to certain FX trading activities and requiring JPMorgan Chase Bank to cease and desist from violating certain provisions of the Commodity Exchange Act, ordering JPMorgan Chase Bank to pay a civil monetary penalty of $310,000,000, and requiring JPMorgan Chase Bank to agree to certain conditions and undertakings (CFTC Order).

The FCA issued a warning notice on November 11, 2014, against JPMorgan Chase Bank for failing to control business practices in its G10 spot FX trading operations and caused JPMorgan Chase Bank to pay a financial penalty of £222,166,000 (FCA Order).

9. In addition to the investigations described above, relating to FX trading, the Applicant is or has been the subject of other investigations, by: (a) The Hong Kong Monetary Authority, which concluded its investigation of the Applicant on December 14, 2014, and found no evidence of collusion among the banks investigated, rigging of FX benchmarks published in Hong Kong, or market manipulation, and imposed no financial penalties on the Applicant; (b) the South Africa Reserve Bank, which released the report of its inquiry of the Applicant on October 19, 2015, and found no evidence of widespread malpractice or serious misconduct by the Applicant in the South Africa FX market, and noted that most authorized dealers have acceptable arrangements and structures in place as well as whistle-blowing policies and client complaint processes; (c) the Australian Securities & Investments Commission, (d) the Japanese Financial Services Agency, (e) the Korea Fair Trade Commission, and (f) the Swiss Competition Commission. According to the Applicant, it is cooperating with the inquiries by these organizations.

In addition, the French criminal authorities have been investigating a series of transactions entered into by senior managers of Wendel Investissement (Wendel) during the period 2004–2007. In 2007, the Paris branch of JPMorgan Chase Bank provided financing for the transactions to a number of Wendel managers. The Applicant explains that JPMC is responding to and cooperating with the investigation, and to date, no decision or indictment has been made by the French court.

In addition, the Applicant represents that the Criminal Division of the Department of Justice is investigating the Applicant's compliance with the Foreign Corrupt Practices Act and other laws with respect the Applicant's hiring practices related to candidates referred by clients, potential clients, and government officials, and its engagement of consultants in the Asia Pacific region. The Applicant states that it is responding to, and cooperating with, this investigation.

The Applicant also represents that to its best knowledge, it does not have a reasonable basis to believe that the discretionary asset management activities of any affiliated QPAM are subject to the aforementioned investigations. Further, the Applicant represents that JPMC currently does not have a reasonable basis to believe that there are any pending criminal investigations involving JPMC or any of its affiliated companies that would cause a reasonable plan or IRA customer not to hire or retain the institution as a QPAM.

10. Once the Conviction is entered, the JPMC Affiliated QPAMs and the JPMC Related QPAMs, as well as their client plans that are subject to Part 4 of Title I of ERISA (ERISA-covered plans) or section 4975 of the Code (IRAs), will no longer be able to rely on PTE 84–14, pursuant to the anti-criminal rule set forth in section I(g) of the class exemption, absent an individual exemption. The Applicant is seeking an individual exemption that would permit the JPMC Affiliated QPAMs and the JPMC Related QPAMs, and their ERISA-covered plan and IRA clients to continue to utilize the relief in PTE 84–14, notwithstanding the anticipated Conviction, provided that such QPAMs satisfy the additional conditions imposed by the Department in the proposed five-year exemption herein.

11. According to the Applicant, the criminal conduct giving rise to the Plea did not involve any of the JPMC Affiliated QPAMs acting in the capacity of investment manager or trustee. JPMC's participation in the antitrust conspiracy described in the Plea Agreement is limited to a single EUR/USD trader in London. The Applicant represents that the criminal conduct that is the subject of the Conviction was not widespread, nor was it pervasive; rather it was isolated to a single trader. No current or former personnel from JPMC or its affiliates have been sued individually in this matter for the criminal conduct that is the subject of the Conviction, and the individual referenced in the Complaint as responsible for such criminal conduct is no longer employed by JPMC or its affiliates.[66]

The Applicant submits that the criminal conduct that is the subject of the Conviction did not involve any of JPMC's asset management staff. The Applicant represents that: (a) Other than a single individual who worked for a non-fiduciary business within JPMorgan Chase Bank and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the JPMC Affiliated QPAMs, and the JPMC Related QPAMs (including officers, directors, agents other than JPMC, and employees of such QPAMs who had responsibility for, or exercised authority in connection with, the management of plan assets) did not know of, did not have reason to know of, and did not participate in the criminal conduct that is the subject of the Conviction; and (b) no current or former employee of JPMC or of any JPMC Affiliated QPAM who previously has been or who subsequently may be identified by JPMC, or any U.S. or non-U.S. regulatory or enforcement agencies, as having been responsible for the such criminal conduct has or will have any involvement in providing asset management services to plans and IRAs or will be an officer, director, or employee of the Applicant or of any JPMC Affiliated QPAM.[67]

[66] The Applicant has confirmed with JPMC's Human Resources Department that the individual referenced in the Complaint is no longer employed with any entity within JPMC or its affiliates.

[67] The Applicant states that counsel for JPMC confirmed that the individual responsible for the criminal conduct that is the subject of the Conviction is not currently employed by any entity that is part of JPMC. This individual's employment has been terminated and a notation has been made

Continued

12. According to the Applicant, the transactions covered by this five-year exemption include the full range of everyday investment transactions that a plan might enter into, including the purchase and sale of debt and equity securities, both foreign and domestic, both registered and sold under Rule 144A or otherwise (*e.g.,* traditional private placement), pass-through securities, asset-backed securities, the purchase and sale of commodities, futures, forwards, options, swaps, stable value wrap contracts, real estate, real estate financing and leasing, foreign repurchase agreements, foreign exchange, and other investments, and the hedging of risk through a variety of investment instruments and strategies. The Applicant states that all of these transactions are customary for the industry and investment managers routinely rely on the QPAM Exemption to enter into them.

13. The Applicant represents that the investment management businesses that are operated out of the JPMC Affiliated QPAMs are separated from the non-investment management businesses of the Applicant. Each of these investment management businesses, including the investment management business of JPMorgan Chase Bank (as well as the agency securities lending business of JPMorgan Chase Bank), have systems, management, dedicated risk and compliance officers and legal coverage that are separate from the foreign exchange trading activities that were the subject of the Plea Agreement.

The Applicant represents that the investment management businesses of the JPMC Affiliated QPAMs are subject to policies and procedures and JPMC Affiliated QPAM personnel engage in training designed to ensure that such businesses understand and manage their fiduciary duties in accordance with applicable law. Thus, the Applicant maintains that the management of plan assets is conducted separately from: (a) The non-investment management business activities of the Applicant, including the investment banking, treasury services and other investor services businesses of the Corporate & Investment Bank business of the Applicant (CIB); and/or (b) the criminal conduct that is the subject of the Plea Agreement. Generally, the policies and procedures create information barriers, which prevent employees of the JPMC Affiliated QPAMs from gaining access to inside information that an affiliate may have acquired or developed in connection with the investment banking, treasury services or other investor services business activities. These policies and procedures apply to employees, officers, and directors of the JPMC Affiliated QPAMs. The Applicant maintains an employee hotline for employees to express any concerns of wrongdoing anonymously.

The Applicant represents that, to the best of its knowledge: (a) No JPMC employees are involved in the trading decisions or investment strategies of the JPMC Affiliated or Related QPAMs; (b) the JPMC Affiliated and Related QPAMs do not consult with JPMC employees prior to making investment decisions on behalf of plans; (c) JPMC does not control the asset management decisions of the JPMC Affiliated or Related QPAMs; (d) the JPMC Affiliated and Related QPAMs do not need JPMC's consent to make investment decisions, correct errors, or adopt policies or training for staff; and (e) there is no interaction between JPMC employees and the JPMC Affiliated or Related QPAMs in connection with the investment management activities of the JPMC Affiliated QPAMs.

Statutory Findings—In the Interest of Affected Plans and IRAs

14. The Applicant states that, if the proposed five-year exemption is denied, the JPMC Affiliated QPAMs may be unable to manage efficiently the strategies for which they have contracted with thousands of plans and IRAs. Transactions currently dependent on the QPAM Exemption could be in default and be terminated at a significant cost to the plans. In particular, the Applicant represents that the JPMC Affiliated QPAMs have entered, and could in the future enter, into contracts on behalf of, or as investment adviser of, ERISA-covered plans, collective trusts and other funds subject to ERISA for certain outstanding transactions, including but not limited to: The purchase and sale of debt and equity securities, both foreign and domestic, both registered and sold under Rule 144A or otherwise (*e.g.,* traditional private placement); pass-through securities; asset-backed securities; and the purchase and sale of commodities, futures, options, stable value wrap contracts, real estate, foreign repurchase agreements, foreign exchange, and other investments.

The JPMC Affiliated QPAMs also have entered into, and could in the future enter into, contracts for other transactions such as swaps, forwards, and real estate financing and leasing on behalf of their ERISA clients. According to the Applicant, these and other strategies and investments require the JPMC Affiliated QPAMs to meet the conditions in the QPAM Exemption. The Applicant states that certain derivatives transactions and other contractual agreements automatically and immediately could be terminated without notice or action, or could become subject to termination upon notice from a counterparty, in the event the Applicant no longer qualifies for relief under the QPAM Exemption.

15. The Applicant represents that real estate transactions, for example, could be subject to significant disruption without the QPAM Exemption. Clients of the JPMC Affiliated QPAMs have over $27 billion in ERISA and public plan assets in commingled funds invested in real estate strategies, with approximately 235 holdings. Many transactions in these accounts rely on Parts I, II and III of the QPAM Exemption as a backup to the collective investment fund exemption (which may become unavailable to the extent a related group of plans has a greater than 10% interest in the collective investment fund). The Applicant estimates that there would be significant loss in value if assets had to be quickly liquidated—over a 10% bid-ask spread—in addition to substantial reinvestment costs and opportunity costs. There could also be prepayment penalties. In addition, real estate transactions are affected in funds that are not deemed to hold plan assets under applicable law. While funds may have other available exemptions for certain transactions, that fact could change in the future.

16. The JPMC Affiliated QPAMs also rely on the QPAM Exemption when buying and selling fixed income products. Stable value strategies, for example, rely on the QPAM Exemption to enter into wrappers and insurance contracts that permit the assets to be valued at book value. Many counterparties specifically require a representation that the QPAM Exemption applies, and those contracts could be in default if the requested exemption were not granted. Depending on the market value of the assets in these funds at the time of termination, such termination could result in losses to the stable value funds. The Applicant states that, while the market value currently exceeds book value, that can change at any time, and could result in market value adjustments to withdrawing plans and withdrawal delays under their contracts.

17. The Applicant submits that nearly 400 accounts managed by the JPMC Affiliated QPAMs (including commingled funds and separately managed accounts) invest in fixed

in his employment file to ensure he is not re-hired at any future date.

income products, with a total portfolio of approximately $49.3 billion in market value of ERISA and public plan assets in commingled funds. Fixed income strategies in which those accounts are invested include investment-grade short, intermediate, and long duration bonds, as well as securitized products, and high yield and emerging market investments. If the QPAM Exemption were lost, the Applicant estimates that its clients could incur average weighted liquidation costs of approximately 65 basis points of the total market value in fixed income products, assuming normal market conditions where the holdings can be liquidated at a normal bid-offer spread without significant widening. While short and intermediate term bonds could be liquidated for between 15–50 basis points, long duration bonds may be more difficult to liquidate and costs may range from 75–100 basis points. Costs of liquidating high-yield and emerging market investments could range from 75–150 basis points. Such costs do not include reinvestment costs for transitioning to a new manager.

18. The Applicant states that, futures, options, and cleared and bilateral swaps, which certain strategies rely on to hedge risk and obtain certain exposures on an economic basis, rely on the QPAM Exemption. The Applicant further states that the QPAM Exemption is particularly important for securities and other instruments that may be traded on a principal basis, such as mortgage-backed securities, corporate debt, municipal debt, other US fixed income securities, Rule 144A securities, non-US fixed income securities, non-US equity securities, US and non-US over-the-counter instruments such as forwards and options, structured products and FX.

19. The Applicant represents that plans that decide to continue to employ the JPMC Affiliated QPAMs could be prohibited from engaging in certain transactions that would be beneficial to such plans, such as hedging transactions using over-the-counter options or derivatives. Counterparties to such transactions are far more comfortable with the QPAM Exemption than any other exemption, and a failure of the QPAM Exemption to be available could trigger a default or early termination by the plan or pooled trust. Even if other exemptions were acceptable to such counterparties, the Applicant predicts that the cost of the transaction might increase to reflect any lack of comfort in transacting business using a less familiar exemption. The Applicant represents that plans may also face collateral consequences, such as missed investment opportunities, administrative delay, and the cost of investing in cash pending reinvestments.

20. The Applicant represents that, to the extent that plans and IRAs believe they need to withdraw from their arrangements, they could incur significant transaction costs, including costs associated with the liquidation of investments, finding new asset managers, and the reinvestment of plan assets.[68] The Applicant believes that the transaction costs to plans of changing managers are significant, especially for many of the strategies employed by the JPMC Affiliated QPAMs. The Applicant also believes that, depending on the strategy, the cost of liquidating assets in connection with transitioning clients to another manager could be significant.[69] The process for transitioning to a new manager typically is lengthy, and likely would involve numerous steps—each of which could last several months—including retaining a consultant, engaging in the request for proposals, negotiating contracts, and ultimately transitioning assets. In addition, securities transactions would incur transaction-related expenses.

Statutory Findings—Protective of the Rights of Participants of Affected Plans and IRAs

21. The Applicant has proposed certain conditions it believes are protective of participants and beneficiaries of ERISA-covered plans and IRAs with respect to the transactions described herein. The Department has determined that it is necessary to modify and supplement the conditions before it can tentatively determine that the requested exemption meets the statutory requirements of section 408(a) of ERISA. In this regard, the Department has tentatively determined that the following conditions adequately protect the rights of participants and beneficiaries of affected plans and IRAs with respect to the transactions that would be covered by this proposed five-year exemption.

The five-year exemption, if granted as proposed, is only available to the extent: (a) Other than with respect to a single individual who worked for a non-fiduciary business within JPMorgan Chase Bank and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, JPMC Affiliated QPAMs, including their officers, directors, agents other than JPMC, and employees, did not know of, have reason to know of, or participate in the criminal conduct of JPMC that is the subject of the Conviction (for purposes of this requirement, ''participate in'' includes an individual's knowing or tacit approval of the misconduct underlying the Conviction); (b) any failure of those QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction; and (c) other than a single individual who worked for a non-fiduciary business within JPMorgan Chase Bank and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the JPMC Affiliated QPAMs and the JPMC Related QPAMs (including their officers, directors, agents other than JPMC, and employees of such JPMC QPAMs) did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct that is the subject of the Conviction.

22. The Department expects the JPMC Affiliated QPAMs will rigorously ensure that the individual associated with the misconduct will not be employed or knowingly engaged by such QPAMs. In this regard, the five-year exemption mandates that the JPMC Affiliated QPAMs will not employ or knowingly engage any of the individuals that participated in the FX manipulation that is the subject of the Conviction. For purposes of this condition, ''participated in'' includes an individual's knowing or tacit approval of the behavior that is the subject of the Conviction.

23. Further, the JPMC Affiliated 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 JPMC Affiliated QPAM to enter into any transaction with JPMC or the Investment Banking Division of JPMorgan Chase Bank, or to engage JPMC or the Investment Banking Division of JPMorgan Chase Bank to provide any service to such investment fund, for a direct or indirect fee borne by such

[68] The Department notes that, if this temporary exemption is granted, compliance with the condition in Section I(j) of the exemption would require the JPMC Affiliated QPAMs to hold their plan customers harmless for any losses attributable to, inter alia, any prohibited transactions or violations of the duty of prudence and loyalty.

[69] Some investments are more liquid than others (*e.g.,* Treasury bonds generally are more liquid than foreign sovereign bonds and equities generally are more liquid than swaps). Some of the strategies followed by the Applicant tend to be less liquid than certain other strategies and, thus, the cost of a transition would be significantly higher than, for example, liquidating a large cap equity portfolio. Particularly hard hit would be the real estate separate account strategies, which are illiquid and highly dependent on the QPAM Exemption.

investment fund, regardless of whether such transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption.

24. The JPMC Affiliated QPAMs and the JPMC Related QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction. Further, any failure of the JPMC Affiliated QPAMs or the JPMC Related QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction.

No relief will be provided by this five-year exemption if a JPMC Affiliated QPAM or a JPMC Related QPAM exercised authority over plan assets in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Conviction; or cause the JPMC QPAM or its affiliates or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Conviction. Also, no relief will be provided by this five-year exemption to the extent JPMC or the Investment Banking Division of JPMorgan Chase Bank: Provides any discretionary asset management services to ERISA-covered plans or IRAs; or otherwise acts as a fiduciary with respect to ERISA-covered plan or IRA assets.

25. The Department believes that robust policies and training are warranted where, as here, the criminal misconduct has occurred within a corporate organization that is affiliated with one or more QPAMs managing plan or IRA assets. Therefore, this proposed five-year exemption requires that within four (4) months of the Conviction, each JPMC Affiliated QPAM must develop, implement, maintain, and follow written policies (the Policies) requiring and reasonably designed to ensure that: The asset management decisions of the JPMC Affiliated QPAM are conducted independently of the corporate management and business activities of JPMC, including the management and business activities of the Investment Banking Division of JPMorgan Chase Bank; the JPMC Affiliated 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 violation of these duties and provisions with respect to ERISA-covered plans and IRAs; the JPMC Affiliated QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to ERISA-covered plans and IRAs; any filings or statements made by the JPMC Affiliated 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; the JPMC Affiliated 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; and the JPMC Affiliated QPAM complies with the terms of this five-year exemption. Any violation of, or failure to comply with these Policies must be 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 JPMC Affiliated QPAM, the independent auditor responsible for reviewing compliance with the Policies, and an appropriate fiduciary of any affected ERISA-covered plan or IRA, which fiduciary is independent of JPMC. A JPMC Affiliated 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 reports such instance of noncompliance as explained above.

26. The Department has also imposed a condition that requires each JPMC Affiliated QPAM, within four (4) months of the date of the Conviction, to develop and implement a program of training (the Training), conducted at least annually, for all relevant JPMC Affiliated 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 five-year exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing. Further, the Training must be conducted by an independent professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code.

27. *Independent Transparent Audit.* The Department views a rigorous and transparent audit that is conducted annually by an independent party, as essential to ensuring that the conditions for exemptive relief described herein are followed by the JPMC Affiliated QPAMs. Therefore, Section I(i) of this proposed five-year exemption requires that each JPMC Affiliated QPAM submits to an audit, conducted annually 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 the JPMC Affiliated QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. In addition, each annual audit must cover a consecutive twelve (12) month period starting with the twelve (12) month period that begins on the effective date of the five-year exemption. Each annual audit must be completed no later than six (6) months after the period to which the audit applies.

28. Among other things, the audit condition requires that, 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 JPMC Affiliated QPAM and, if applicable, JPMC, 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.

In addition, the auditor's engagement must specifically require the auditor to determine whether each JPMC Affiliated QPAM has complied with the Policies and Training conditions described herein, and must further require the auditor to test each JPMC Affiliated QPAM's operational compliance with the Policies and Training. The auditor must issue a written report (the Audit Report) to JPMC and the JPMC Affiliated 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 the JPMC Affiliated QPAM's Policies and Training; the JPMC Affiliated QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective JPMC

Affiliated QPAM's noncompliance with the written Policies and Training.

Any determination 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 JPMC Affiliated QPAM must be promptly addressed by such JPMC Affiliated QPAM, and any action taken by such JPMC Affiliated QPAM to address such recommendations must be included in an addendum to the Audit Report. Further, any determination by the auditor that the respective JPMC Affiliated QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that the JPMC Affiliated QPAM has complied with the requirements, as described above, must be based on evidence that demonstrates the JPMC Affiliated QPAM has actually implemented, maintained, and followed the Policies and Training required by this five-year exemption. Finally, the Audit Report must address the adequacy of the Annual Review required under this exemption and the resources provided to the Compliance Officer in connection with such Annual Review. Moreover, the auditor must notify the respective JPMC Affiliated QPAM of any instance 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.

29. This exemption requires that certain senior personnel of JPMC review the Audit Report and make certain certifications and take various corrective actions. In this regard, the General Counsel, or one of the three most senior executive officers of the JPMC Affiliate QPAM to which the Audit Report applies, must certify, in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this five-year exemption; addressed, corrected, or remedied an inadequacy 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 proposed five-year exemption and with the applicable provisions of ERISA and the Code. The Risk Committee of JPMC's Board of Directors is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking legal compliance officer of JPMC must review the Audit Report for each JPMC Affiliated QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report.

30. In order to create a more transparent record in the event that the proposed relief is granted, each JPMC Affiliated QPAM must provide its certified Audit Report to the Department no later than thirty (30) days following its completion. The Audit Report will be part of the public record regarding this five-year exemption.

Further, each JPMC Affiliated QPAM must make 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 JPMC Affiliated QPAM. Additionally, each JPMC Affiliated QPAM and the auditor must submit to the Department any engagement agreement(s) entered into pursuant to the engagement of the auditor under this five-year exemption. Also, they must submit to the Department any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this proposed five-year exemption no later than six (6) months after the Conviction Date (and one month after the execution of any agreement thereafter).

Finally, if the exemption is granted, the auditor must provide the Department, 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 instance of noncompliance by the relevant JPMC Affiliated QPAM; and an explanation of any corrective or remedial action taken by the applicable JPMC Affiliated QPAM.

In order to enhance oversight of the compliance with the exemption, JPMC must notify the Department at least thirty (30) days prior to any substitution of an auditor, and JPMC must demonstrate to the Department's satisfaction that any new auditor is independent of JPMC, experienced in the matters that are the subject of the exemption, and capable of making the determinations required of this five-year exemption.

31. *Contractual Obligations.* This five-year exemption requires the JPMC Affiliated QPAMs to enter into certain contractual obligations in connection with the provision of services to their clients. It is the Department's view that the condition in Section I(j) is essential to the Department's ability to make its findings that the proposed five-year exemption is protective of the rights of the participants and beneficiaries of ERISA-covered and IRA plan clients of JPMC Affiliated QPAMs under section 408(a) of ERISA.

In this regard, effective as of the effective date of this five-year exemption, with respect to any arrangement, agreement, or contract between a JPMC Affiliated QPAM and an ERISA-covered plan or IRA for which a JPMC Affiliated QPAM provides asset management or other discretionary fiduciary services, each JPMC Affiliated QPAM agrees and warrants: (a) 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, as applicable, with respect to each such ERISA-covered plan and IRA; (b) to indemnify and hold harmless the ERISA-covered plan or IRA for any damages resulting from a JPMC Affiliated QPAM's violation of applicable laws, a JPMC Affiliated QPAM's breach of contract, or any claim brought in connection with the failure of such JPMC Affiliated 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; (c) not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the JPMC Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions; (d) 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 JPMC Affiliated 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 JPMC, and its affiliates; (e) not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the JPMC Affiliated 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; (f) 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; and (g) not to include exculpatory provisions disclaiming or otherwise limiting liability of the JPMC Affiliated 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 JPMC, and its affiliates.

32. Further, within four (4) months of the date of the Conviction, each JPMC Affiliated QPAM must provide a notice of its obligations under Section I(j) to each ERISA-covered plan and IRA for which an JPMC Affiliated QPAM provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a JPMC Affiliated QPAM provides asset management or other discretionary services, the JPMC Affiliated QPAM will agree in writing to its obligations under Section I(j) in an updated investment management agreement between the JPMC Affiliated QPAM and such clients or other written contractual agreement.

33. *Notice Requirements.* The proposed exemption contains extensive notice requirements, some of which extend not only to ERISA-covered plan and IRA clients of JPMC Affiliated QPAMs, but which also go to non-Plan clients of JPMC Affiliated QPAMs. In this regard, the Department understands that many firms may promote their ''QPAM'' designation in order to earn asset management business, including from non-ERISA plans. Therefore, in order to fully inform any clients that may have retained JPMC Affiliated QPAMs as asset managers because such JPMC Affiliated QPAMs have represented themselves as able to rely on PTE 84–14, the Department has determined to condition exemptive relief upon the following notice requirements.

Within fifteen (15) days of the publication of this proposed five-year exemption in the **Federal Register**, each JPMC Affiliated QPAM will provide a notice of the proposed five-year exemption, along with a separate summary describing the facts that led to the Conviction (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that the Conviction results in the failure to meet a condition in PTE 84–14, to each sponsor of an ERISA-covered plan and each beneficial owner of an IRA for which a JPMC Affiliated QPAM provides asset management or other discretionary services, or the sponsor of an investment fund in any case where a JPMC Affiliated QPAM acts only as a sub-adviser to the investment fund in which such ERISA-covered plan and IRA invests. In the event that this proposed five-year exemption is granted, the **Federal Register** copy of the notice of final five-year exemption must be delivered to such clients within sixty (60) days of its publication in the **Federal Register**, and may be delivered electronically (including by an email that has a link to the exemption). Any prospective clients for which a JPMC Affiliated QPAM provides asset management or other discretionary services must receive the proposed and final five-year exemptions with the Summary and the Statement prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the JPMC Affiliated QPAM.

In addition, each JPMC Affiliated QPAM will provide a **Federal Register** copy of the proposed five-year exemption, a **Federal Register** copy of the final five-year exemption; the Summary; and the Statement to each: (A) Current Non-Plan Client within four (4) months of the effective date, if any, of a final five-year exemption; and (B) Future Non-Plan Client prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the JPMC Affiliated QPAM. A ''Current Non-Plan Client'' is a client of a JPMC Affiliated QPAM that: Is neither an ERISA-covered plan nor an IRA; has assets managed by the JPMC Affiliated QPAM as of the effective date, if any, of a final five-year exemption; and has received a written representation (qualified or otherwise) from the JPMC Affiliated QPAM that such JPMC Affiliated QPAM qualifies as a QPAM or qualifies for the relief provided by PTE 84–14. A ''Future Non-Plan Client'' is a client of a JPMC Affiliated QPAM that is neither an ERISA-covered plan nor an IRA that has assets managed by the JPMC Affiliated QPAM after the effective date, if any, of a final five-year exemption, and has received a written representation (qualified or otherwise) from the JPMC Affiliated QPAM that such JPMC Affiliated QPAM is a QPAM, or qualifies for the relief provided by PTE 84–14.

34. This proposed five-year exemption also requires JPMC to designate a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer will have several obligations that it must comply with, as described in Section I(m) above. These include conducting an annual review (the Annual Review) to determine the adequacy and effectiveness of the implementation of the Policies and Training; the preparation of a written report for each Annual Review (each, an Annual Report) that, among other things, summarizes his or her material activities during the preceding year; and sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action. Each Annual Report must be provided to appropriate corporate officers of JPMC and each JPMC Affiliated QPAM to which such report relates; the head of compliance and the General Counsel (or their functional equivalent) of the relevant JPMC Affiliated QPAM; and must be made unconditionally available to the independent auditor described above.

35. Each JPMC Affiliated QPAM must maintain records necessary to demonstrate that the conditions of this exemption have been met for six (6) years following the date of any transaction for which such JPMC Affiliated QPAM relies upon the relief in the proposed five-year exemption.

36. The proposed five-year exemption mandates that, during the effective period of this five-year exemption JPMC must immediately disclose to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) that JPMC or an affiliate enters into with the U.S. Department of Justice, to the extent such DPA or NPA involved conduct described in Section I(g) of PTE 84–14 or section 411 of ERISA. In addition, JPMC must immediately provide 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 agreement. The Department may,

following its review of that information, require JPMC or a party specified by the Department, to submit a new application for the continued availability of relief as a condition of continuing to rely on this exemption. In this regard, the QPAM (or other party submitting the application) will have the burden of justifying the relief sought in the application. If the Department denies the relief requested in that application, or does not grant such relief within twelve months of the application, the relief described herein would be revoked as of the date of denial or as of the expiration of the twelve month period, whichever date is earlier.

37. Finally, each JPMC Affiliated QPAM, in its agreements with ERISA-covered plan and IRA clients, or in other written disclosures provided to ERISA-covered plan and IRA clients, within sixty (60) days prior to the initial transaction upon which relief hereunder is relied, will clearly and prominently: Inform the ERISA-covered plan or IRA client that the client has the right to obtain copies of the QPAM's written Policies adopted in accordance with this five-year exemption.

Statutory Findings—Administratively Feasible

38. The Applicant represents that the proposed exemption is administratively feasible because it does not require any monitoring by the Department. Furthermore, the requested five-year exemption does not require the Department's oversight because, as a condition of this proposed five-year exemption, neither JPMC nor the Investment Banking Division of JPMorgan Chase Bank will provide any fiduciary or QPAM services to ERISA-covered plans and IRAs.

Summary

39. Given the revised and new conditions described above, the Department has tentatively determined that the relief sought by the Applicant satisfies the statutory requirements for a five-year exemption under section 408(a) of ERISA.

Notice to Interested Persons

Notice of the proposed exemption will be provided to all interested persons within 30 days of the publication of the notice of proposed five-year exemption in the **Federal Register**. The notice will be provided to all interested persons in the manner described in Section I(k)(1) of this proposed five-year exemption and will contain the documents described therein and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the pending exemption. All written comments and/or requests for a hearing must be received by the Department within sixty (60) days of the date of publication of this proposed exemption in the **Federal Register**. All comments will be made available to the public.

Warning: If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as a Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph Brennan of the Department at (202) 693–8456. (This is not a toll-free number.)

UBS Assets Management (Americas) Inc.; UBS Realty Investors LLC; UBS Hedge Fund Solutions LLC; UBS O'Connor LLC; and Certain Future Affiliates in UBS's Asset Management and Wealth Management Americas Divisions (Collectively, the Applicants or the UBS QPAMs), Located in Chicago, Illinois; Hartford, Connecticut; New York, New York; and Chicago, Illinois, Respectively

[Exemption Application No. D–11907]

Proposed Five Year Exemption

The Department is considering granting a five-year exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act), and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[70]

Section I: Covered Transactions

If the proposed five-year exemption is granted, certain asset managers with specified relationships to UBS, AG (hereinafter, the UBS 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),[71] notwithstanding the ''2013 Conviction'' against UBS Securities Japan Co., Ltd. entered on September 18, 2013 and the ''2016 Conviction'' against UBS AG scheduled to be entered on November 29, 2016 (collectively the Convictions, as further defined in Section II(a)),[72] for a period of five years beginning on the date on which a grant notice is published in the **Federal Register**, provided that the following conditions are satisfied:

(a) The UBS QPAMs (including their officers, directors, agents other than UBS, and employees of such UBS QPAMs) did not know of, have reason to know of, or participate in: (1) The FX Misconduct; or (2) the criminal conduct that is the subject of the Convictions (for the purposes of this Section I(a), ''participate in'' includes the knowing or tacit approval of the FX Misconduct or the misconduct that is the subject of the Convictions);

(b) The UBS QPAMs (including their officers, directors, agents other than UBS, and employees of such UBS QPAMs) did not receive direct compensation, or knowingly receive indirect compensation, in connection with: (1) The FX Misconduct; or (2) the criminal conduct that is the subject of the Convictions;

(c) The UBS QPAMs will not employ or knowingly engage any of the individuals that participated in: (1) The FX Misconduct or (2) the criminal conduct that is the subject of the Convictions (for the purposes of this Section I(c), ''participated in'' includes the knowing or tacit approval of the FX Misconduct or the misconduct that is the subject of the Convictions);

(d) A UBS 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 UBS QPAM, to enter into any transaction with UBS or UBS Securities Japan or engage UBS or UBS Securities Japan to provide any service to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such

[70] For purposes of this proposed five-year exemption, references to section 406 of Title I of the Act, unless otherwise specified, should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[71] 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).

[72] 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 criminal activity therein described.

transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption;

(e) Any failure of the UBS QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Convictions;

(f) A UBS QPAM did not exercise authority over 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) in a manner that it knew or should have known would: Further the FX Misconduct or the criminal conduct that is the subject of the Convictions; or cause the UBS QPAM, its affiliates or related parties to directly or indirectly profit from the FX Misconduct or the criminal conduct that is the subject of the Convictions;

(g) UBS and UBS Securities Japan will not provide discretionary asset management services to ERISA-covered plans or IRAs, nor will otherwise act as a fiduciary with respect to ERISA-covered plan or IRA assets;

(h)(1) Each UBS QPAM must immediately develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that:

(i) The asset management decisions of the UBS QPAM are conducted independently of UBS's corporate management and business activities, including the corporate management and business activities of the Investment Bank division and UBS Securities Japan;

(ii) The UBS 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 violation of these duties and provisions with respect to ERISA-covered plans and IRAs;

(iii) The UBS 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 UBS 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 UBS 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 UBS QPAM complies with the terms of this five-year exemption; and

(vii) Any violation of, or failure to comply with, an item in subparagraphs (ii) through (vi), is corrected promptly upon discovery, and any such violation or compliance failure not promptly corrected is reported, upon discovery of such 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 UBS QPAM, 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 UBS; 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 UBS or beneficially owned by an employee of UBS or its affiliates, such fiduciary does not need to be independent of UBS. A UBS 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) Each UBS QPAM must immediately develop and implement a program of training (the Training), conducted at least annually, for all relevant UBS QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. The Training must:

(i) 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 five-year exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing; and

(ii) Be conducted by an independent professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code;

(i)(1) Each UBS QPAM submits to an audit conducted annually 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 the UBS QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. Each annual audit must cover a consecutive twelve month period starting with the twelve month period that begins on the date of the Conviction Date (the Initial Audit Period). If this proposed five-year exemption is granted within one year of the effective date of the proposed temporary exemption for UBS QPAMs (Exemption Application No. D–11863),[73] then the Initial Audit Period will cover the period of time during which such temporary exemption is effective and a portion of the time during which this proposed five-year exemption is effective. In such event, the audit terms contained in this Section I(i) will supersede the terms of Section I(i) of the proposed temporary exemption. Additionally, in determining compliance with the conditions for relief in the proposed temporary exemption and this proposed five-year exemption, including the Policies and Training requirements, for purposes of conducting the audit, the auditor will rely on the conditions for exemptive relief as then applicable to the respective periods under audit. For time periods prior to the Conviction Date and covered under PTE 2013–09, the audit requirements in Section (g) of PTE 2013–09 will remain in effect. Each annual audit 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 UBS QPAM and, if applicable, UBS, 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 UBS QPAM has developed, implemented, maintained, and followed the Policies in accordance with the conditions of this five-year exemption, and has developed and implemented the Training, as required herein;

(4) The auditor's engagement must specifically require the auditor to test

[73] A proposed temporary exemption in respect of Exemption Application No. D–11863 for UBS QPAMs to rely on the exemptive relief provided by PTE 84–14, notwithstanding the Convictions, for up to twelve months from the date of the U.S. Conviction, is being published elsewhere in the **Federal Register**.

each UBS QPAM's operational compliance with the Policies and Training. In this regard, the auditor must test a sample of each 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) For each audit, on or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to UBS and the UBS 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:

(i) The adequacy of the UBS QPAM's Policies and Training; the UBS QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective UBS QPAM's noncompliance with the written Policies and Training described in Section I(h) above. Any determination 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 UBS QPAM must be promptly addressed by such UBS QPAM, and any action taken by such UBS QPAM to address such recommendations must be included in an addendum to the Audit Report (which addendum is completed prior to the certification described in Section I(i)(7) below). Any determination by the auditor that the respective UBS QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that the UBS QPAM has complied with the requirements under this subsection must be based on evidence that demonstrates the UBS QPAM has actually implemented, maintained, and followed the Policies and Training required by this five-year exemption. Furthermore, the auditor must not rely on the Annual Report created by the Compliance Officer as described in Section I(m) below in lieu of independent determinations and testing performed by the auditor as required by Section I(i)(3) and (4) above; and

(ii) The adequacy of the Annual Review described in Section I(m) and the resources provided to the Compliance officer in connection with such Annual Review;

(6) The auditor must notify the respective UBS QPAM of any instance 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 UBS QPAM to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this five-year exemption; addressed, corrected, or remedied any inadequacy 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 proposed five-year exemption and with the applicable provisions of ERISA and the Code;

(8) The Risk Committee, the Audit Committee, and the Corporate Culture and Responsibility Committee of UBS's Board of Directors are provided a copy of each Audit Report; and a senior executive officer of UBS's Compliance and Operational Risk Control function must review the Audit Report for each UBS QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report;

(9) Each UBS QPAM must provide its certified Audit Report, by regular mail to: the Department's Office of Exemption Determinations (OED), 200 Constitution Avenue NW., Suite 400, Washington DC 20210, or by private carrier to: 122 C Street NW., Suite 400, Washington, DC 20001–2109, no later than 45 days following its completion. The Audit Report will be part of the public record regarding this five-year exemption. Furthermore, each UBS QPAM must make 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 UBS QPAM;

(10) Each UBS QPAM and the auditor must submit to OED: (A) Any engagement agreement entered into pursuant to the engagement of the auditor under this five-year exemption; and (B) any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this proposed five-year exemption no later than six (6) months after the effective date of this five-year exemption (and one month after the execution of any agreement thereafter);

(11) The auditor must 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 instance of noncompliance by the relevant UBS QPAM; and an explanation of any corrective or remedial action taken by the applicable UBS QPAM; and

(12) UBS 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 UBS demonstrates to the Department's satisfaction that such new auditor is independent of UBS, experienced in the matters that are the subject of the five-year exemption and capable of making the determinations required of this five-year exemption;

(j) Effective as of the effective date of this five-year exemption, with respect to any arrangement, agreement, or contract between a UBS QPAM and an ERISA-covered plan or IRA for which such UBS QPAM provides asset management or other discretionary fiduciary services, each UBS QPAM agrees and warrants:

(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, as applicable;

(2) Not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the UBS 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 UBS 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 UBS;

(4) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the UBS 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 UBS 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 UBS and its affiliates; and

(7) To indemnify and hold harmless the ERISA-covered plan and IRA for any damages resulting from a violation of applicable laws, a UBS QPAM's breach of contract, or any claim arising out of the failure of such UBS 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 Convictions;

(8) Within four (4) months of the effective date of this proposed five-year exemption, each UBS QPAM must provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which the UBS QPAM provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a UBS QPAM provides asset management or other discretionary fiduciary services, the UBS QPAM will agree in writing to its obligations under this Section I(j) in an updated investment management agreement or advisory agreement between the UBS QPAM and such clients or other written contractual agreement;

(k)(1) *Notice to ERISA-covered plan and IRA clients.* Within fifteen (15) days of the publication of this proposed five-year exemption in the **Federal Register**, each UBS QPAM will provide a notice of the proposed five-year exemption, along with a separate summary describing the facts that led to the Convictions (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that each Conviction separately results in a failure to meet a condition in PTE 84–14, to each sponsor of an ERISA-covered plan and each beneficial owner of an IRA for which a UBS QPAM provides asset management or other discretionary fiduciary services, or the sponsor of an investment fund in any case where a UBS QPAM acts only as a sub-advisor to the investment fund in which such ERISA-covered plan and IRA invests. In the event that this proposed five-year exemption is granted, the **Federal Register** copy of the notice of final five-year exemption must be delivered to such clients within sixty (60) days of its publication in the **Federal Register**, and may be delivered electronically (including by an email that has a link to the five-year exemption). Any prospective clients for which a UBS QPAM provides asset management or other discretionary fiduciary services must receive the proposed and final five-year exemptions with the Summary and the Statement prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the UBS QPAM; and

(2) *Notice to Non-Plan Clients.* Each UBS QPAM will provide a **Federal Register** copy of the proposed five-year exemption, a **Federal Register** copy of the final five-year exemption; the Summary; and the Statement to each: (A) Current Non-Plan Client within four (4) months of the effective date, if any, of a final five-year exemption; and (B) Future Non-Plan Client prior to, or contemporaneously with, the client's receipt of a written asset management agreement, or other written contractual agreement, from the UBS QPAM. For purposes of this subparagraph (2), a Current Non-Plan Client means a client of a UBS QPAM that: Is neither an ERISA-covered plan nor an IRA; has assets managed by the UBS QPAM as of the effective date, if any, of a final five-year exemption; and has received a written representation (qualified or otherwise) from the UBS QPAM that such UBS QPAM qualifies as a QPAM or qualifies for the relief provided by PTE 84–14. For purposes of this subparagraph (2), a Future Non-Plan Client means a prospective client of a UBS QPAM that: Is neither an ERISA-covered plan nor an IRA; has assets managed by the UBS QPAM after (but not as of) the effective date, if any, of a final five-year exemption; and has received a written representation (qualified or otherwise) from the UBS QPAM that such UBS QPAM qualifies as a QPAM or qualifies for the relief provided by PTE 84–14;

(l) The UBS QPAMs must 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 Convictions;

(m)(1) UBS designates a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer must conduct an annual review (the Annual Review) to determine the adequacy and effectiveness of the implementation of the Policies and Training. With respect to the Compliance Officer, the following conditions must be met:

(i) The Compliance Officer must be a legal professional with extensive experience with, and knowledge of, the regulation of financial services and products, including under ERISA and the Code; and

(ii) The Compliance Officer has a dual-reporting line within UBS's Compliance and Operational Risk Control (C&ORC) function: (A) A divisional reporting line to the Head of Compliance and Operational Risk Control, Asset Management, and (B) a regional reporting line to the Head of Americas Compliance and Operational Risk Control. The C&ORC function will be organizationally independent of UBS's business divisions—including Asset Management and the Investment Bank—and is led by the Global Head of C&ORC, who will report directly to UBS's Chief Risk Officer;

(2) With respect to each Annual Review, the following conditions must be met:

(i) The Annual Review includes a review of: Any compliance matter related to the Policies or Training that was identified by, or reported to, the Compliance Officer or others within the Compliance and Operational Risk Control function during the previous year; any material change in the business activities of the UBS QPAMs; and any change to ERISA, the Code, or regulations related to fiduciary duties and the prohibited transaction provisions that may be applicable to the activities of the UBS QPAMs;

(ii) The Compliance Officer prepares a written report for each Annual Review (each, an Annual Report) that (A) summarizes his or her material activities during the preceding year; (B) sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action; (C) details any change to the Policies or Training to guard against any similar instance of noncompliance occurring again; and (D) makes recommendations, as necessary, for additional training, procedures, monitoring, or additional and/or changed processes or systems, and management's actions on such recommendations;

(iii) In each Annual Report, the Compliance Officer must certify in writing that to his or her knowledge: (A) The report is accurate; (B) the Policies and Training are working in a manner which is reasonably designed to ensure that the Policies and Training requirements described herein are met; (C) any known instance of noncompliance during the preceding year and any related correction taken to date have been identified in the Annual Report; (D) the UBS QPAMs have complied with the Policies and Training in all respects, and/or corrected any instances of noncompliance in accordance with Section I(h) above; and (E) UBS has provided the Compliance Officer with adequate resources, including, but not limited to, adequate staffing;

(iv) Each Annual Report must be provided to appropriate corporate officers of UBS and each UBS QPAM to which such report relates; the head of Compliance and the General Counsel (or their functional equivalent) of the relevant UBS QPAM; and must be made unconditionally available to the independent auditor described in Section I(i) above;

(v) Each Annual Review, including the Compliance Officer's written Annual Report, must be completed at least three (3) months in advance of the date on which each audit described in Section I(i) is scheduled to be completed;

(n) UBS imposes its internal procedures, controls, and protocols on UBS Securities Japan to: (1) Reduce the likelihood of any recurrence of conduct that that is the subject of the 2013 Conviction, and (2) comply in all material respects with the Business Improvement Order, dated December 16, 2011, issued by the Japanese Financial Services Authority;

(o) UBS complies in all material respects with the audit and monitoring procedures imposed on UBS by the United States Commodity Futures Trading Commission Order, dated December 19, 2012;

(p) Each UBS QPAM will maintain records necessary to demonstrate that the conditions of this five-year exemption have been met, for six (6) years following the date of any transaction for which such UBS QPAM relies upon the relief in the five-year exemption;

(q) During the effective period of this five-year exemption UBS: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) that UBS 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 agreement;

After review of the information, the Department may require UBS, its affiliates, or related parties, as specified by the Department, to submit a new application for the continued availability of relief as a condition of continuing to rely on this exemption. If the Department denies the relief requested in the new application, or does not grant such relief within twelve months of application, the relief described herein is revoked as of the date of denial or as of the expiration of the twelve month period, whichever date is earlier;

(r) Each UBS QPAM, in its agreements with ERISA-covered plan and IRA clients, or in other written disclosures provided to ERISA-covered plan and IRA clients, within 60 days prior to the initial transaction upon which relief hereunder is relied, and then at least once annually, will clearly and prominently: Inform the ERISA-covered plan or IRA client that the client has the right to obtain copies of the QPAM's written Policies adopted in accordance with this five-year exemption; and

(s) A UBS QPAM will not fail to meet the terms of this five-year exemption, solely because a different UBS QPAM fails to satisfy a condition for relief under this five-year exemption described in Sections I(c), (d), (h), (i), (j), (k), (l), (p), and (r).

Section II: Definitions

(a) The term ''Convictions'' means the 2013 Conviction and the 2016 Conviction. The term ''2013 Conviction'' means the judgment of conviction against UBS Securities Japan Co. Ltd. in Case Number 3:12–cr–00268–RNC in the U.S. District Court for the District of Connecticut for one count of wire fraud in violation of Title 18, United Sates Code, sections 1343 and 2 in connection with submission of YEN London Interbank Offered Rates and other benchmark interest rates. The term ''2016 Conviction'' means the anticipated judgment of conviction against UBS AG in Case Number 3:15–cr–00076–RNC in the U.S. District Court for the District of Connecticut for one count of wire fraud in violation of Title 18, United States Code, Sections 1343 and 2 in connection with UBS's submission of Yen London Interbank Offered Rates and other benchmark interest rates between 2001 and 2010. For all purposes under this proposed five-year exemption, ''conduct'' of any person or entity that is the ''subject of [a] Conviction'' encompasses any conduct of UBS and/or their personnel, that is described in the Plea Agreement, (including Exhibits 1 and 3 attached thereto), and other official regulatory or judicial factual findings that are a part of this record.

(b) The term ''UBS QPAM'' means UBS Asset Management (Americas) Inc., UBS Realty Investors LLC, UBS Hedge Fund Solutions LLC, UBS O'Connor LLC, and any future entity within the Asset Management or the Wealth Management Americas divisions of UBS AG that qualifies as a ''qualified professional asset manager'' (as defined in Section VI(a) [74] of PTE 84–14) and that relies on the relief provided by PTE 84–14 and with respect to which UBS AG is an ''affiliate'' (as defined in Part VI(d) of PTE 84–14). The term ''UBS QPAM'' excludes the parent entity, UBS AG and UBS Securities Japan.

(c) The term ''UBS'' means UBS AG.

(d) The term ''Conviction Date'' means the date that a judgment of conviction against UBS is entered in the 2016 Conviction.

(e) The term ''FX Misconduct'' means the conduct engaged in by UBS personnel described in Exhibit 1 of the Plea Agreement (Factual Basis for Breach) entered into between UBS AG and the Department of Justice Criminal Division, on May 20, 2015 in connection with Case Number 3:15–cr–00076–RNC filed in the U.S. District Court for the District of Connecticut.

(f) The term ''UBS Securities Japan'' means UBS Securities Japan Co. Ltd, a wholly-owned subsidiary of UBS incorporated under the laws of Japan.

(g) The term ''Plea Agreement'' means the Plea Agreement (including Exhibits 1 and 3 attached thereto) entered into between UBS AG and the Department of Justice Criminal Division, on May 20,

[74] 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.

2015 in connection with Case Number 3:15–cr–00076–RNC filed in the US District Court for the District of Connecticut.

Effective Date: This proposed five-year exemption will be effective beginning on the date of publication of such grant in the **Federal Register** and ending on the date that is five years thereafter. Should the Applicants wish to extend the effective period of exemptive relief provided by this proposed five-year exemption, the Applicants must submit another application for an exemption. In this regard, the Department expects that, in connection with such application, the Applicants should be prepared to demonstrate compliance with the conditions for this exemption and that the UBS QPAMs, and those who may be in a position to influence their policies, have maintained the high standard of integrity required by PTE 84–14.

Department's Comment: As described in further detail below, on September 13, 2013, the Department published PTE 2013–09, which is an exemption that permits certain UBS asset managers to continue to rely on PTE 84–14, notwithstanding the 2013 Conviction. The impending 2016 Conviction will constitute a violation of the conditions of PTE 2013–09 and PTE 84–14. As a result, the UBS QPAMs will not be able to rely on PTE 84–14 for exemptive relief as of the Conviction Date.

Elsewhere in the **Federal Register**, in connection with Exemption Application D–11863, the Department is publishing a proposed temporary exemption for the UBS QPAMs to continue to rely on PTE 84–14 notwithstanding the Convictions, for a period of up to twelve months. That temporary exemption is intended to allow the Department sufficient time, including a longer comment period, to determine whether or not to grant this five-year exemption. The proposed temporary exemption is designed to protect ERISA-covered plans and IRAs from the potential costs and losses, described below, that would be incurred if such UBS QPAMs were to suddenly lose their ability to rely on PTE 84–14 as of the Conviction date.

The five-year exemption proposed herein would permit certain asset managers affiliated with UBS and its affiliates to continue to rely on PTE 84–14 for a period of five years from its effective date. Upon the effective date of the proposed five-year exemption, the Temporary Exemption, if still effective, would expire.

The proposed five-year exemption would provide relief from certain of the restrictions set forth in sections 406 and 407 of ERISA. If granted, no relief or waiver of a violation of any other law would be provided by this five-year exemption.

Furthermore, the Department cautions that the relief in this proposed five-year exemption would terminate immediately if, among other things, an entity within the UBS corporate structure is convicted of a crime described in Section I(g) of PTE 84–14 (other than the Convictions) during the effective period of the five-year 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 proposed five-year 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 proposed five-year exemption.

Summary of Facts and Representations [75]

The Applicants

1. UBS AG (UBS) is a Swiss-based global financial services company organized under the laws of Switzerland. UBS has banking divisions and subsidiaries throughout the world, with its United States headquarters located in New York, New York and Stamford, Connecticut. UBS and its affiliates employ approximately 20,000 people in the United States.

2. The operational structure of UBS and its affiliates (collectively, the UBS Group) consists of a Corporate Center function and five business divisions: Wealth Management; Wealth Management Americas; Retail & Corporate; Asset Management; and the Investment Bank.

3. *LIBOR NPA.* On December 18, 2012, UBS and the United States Department of Justice (DOJ) entered into a Non-Prosecution Agreement (the LIBOR NPA) related to UBS's misconduct and involving its submission of Yen London Interbank Offer Rate (Yen LIBOR) rates and other benchmark rates between 2001 and 2010. In exchange for UBS promising, among other things, not to commit any crime in violation of U.S. laws for a period of two years from the date of the LIBOR NPA, DOJ agreed that it would not prosecute UBS for any crimes related to the submission of Yen LIBOR rates and other benchmark rates. For its part, UBS agreed to, among other things: (i) Pay a monetary penalty of $500,000,000; and (ii) take steps to further strengthen its internal controls, as required by certain other U.S. and non-U.S. regulatory agencies that had addressed the misconduct described in the LIBOR NPA. Such requirements include those imposed by the United States Commodity Futures Trading Commission's (CFTC) order dated December 19, 2012 (the CFTC Order) which requires UBS to comply with significant auditing and monitoring conditions that set standards for submissions related to interest rate benchmarks such as LIBOR, qualifications of submitters and supervisors, documentation, training, and firewalls. Under the CFTC Order, UBS must maintain monitoring systems or electronic exception reporting systems that identify possible improper or unsubstantiated submissions. The CFTC Order requires UBS to conduct internal audits of reasonable and random samples of its submissions every six months. Additionally, UBS must retain an independent, third-party auditor to conduct a yearly audit of the submission process for five years and a copy of the report must be provided to the CFTC. Furthermore, the Japanese Financial Service Authority's (JFSA) Business Improvement Order dated December 16, 2011 requires UBS Securities Japan to (i) develop a plan to ensure compliance with its legal and regulatory obligations and to establish a control framework that is designed to prevent recurrences of the fraudulent submissions for benchmark interest rates; and (ii) provide periodic written reports to the JFSA regarding UBS Securities Japan's implementation of the measures required by the order.

4. *2013 Conviction.* Although UBS, the parent entity, was not criminally charged in connection with the submission of benchmark rates when it entered into the LIBOR NPA, UBS Securities Japan Co. Ltd. (UBS Securities Japan), a wholly-owned subsidiary of UBS incorporated under the laws of Japan, pled guilty on December 19, 2012, to one count of wire fraud in violation of Title 18, United Sates Code, sections 1343 and 2. UBS Securities Japan's guilty plea arose out of its fraudulent submission of Yen LIBOR rates between 2006 and 2009,[76]

[75] The Summary of Facts and Representations is based on the Applicants' representations, unless indicated otherwise.

[76] Section 1343 generally imposes criminal liability for fraud, including fines and/or imprisonment, when a person utilizes wire, radio, or television communication in interstate or foreign commerce. Section 2 generally imposes criminal liability on a person as a principal if that person aids, counsels, commands, induces, or willfully

and its participation in a scheme to defraud counterparties to interest rate derivatives trades executed on its behalf, by secretly manipulating certain benchmark interest rates, namely Yen LIBOR and the Euroyen Tokyo InterBank Offered Rate (EuroYen TIBOR), to which the profitability of those trades was tied. On September 18, 2013 (the 2013 Conviction Date), UBS Securities Japan was sentenced by the United States District Court for the District of Connecticut (the 2013 Conviction).[77]

5. *FX Misconduct and Breach of LIBOR NPA.* At approximately the same time, the DOJ was conducting an investigation of several multi-national banks, including UBS, in connection with the reported manipulation of the foreign exchange (FX) markets. The DOJ determined, among other things, that UBS had engaged in deceptive currency trading and sales practices in conducting certain FX market transactions, as well as collusive conduct in certain FX markets. The DOJ did not file separate charges in connection with the FX-related misconduct, but instead determined that the LIBOR NPA had been breached. The DOJ terminated the LIBOR NPA and filed a one-count criminal information (the Information), Case Number 3:15–cr–00076–RNC, in the U.S. District Court for the District of Connecticut. The Information charged that, on or about June 29, 2009, in furtherance of a scheme to defraud counterparties to interest rate derivatives transactions UBS transmitted or caused the transmission of electronic communications in interstate and foreign commerce, in violation of Title 18, United States Code, Sections 1343 and 2.

6. *2016 Conviction.* UBS entered into a Plea Agreement with the DOJ dated May 20, 2015 (the Plea Agreement), pleading guilty to the charges in the Information, and agreeing to pay a $203,000,000 criminal penalty.[78] In addition, UBS agreed not to commit another federal crime during a three year probation period; to continue implement a compliance program designed to prevent and detect, or otherwise remedy, conduct that led to the LIBOR NPA; and to provide annual reports to the probation officer and the DOJ on its progress in implementing the program. UBS also agreed to continue to strengthen its compliance program and internal controls as required by: The U.S. Commodity Futures Trading Commission (CFTC); the United Kingdom's Financial Conduct Authority (UK FCA); the Swiss Financial Market Supervisory Authority (FINMA); and any other regulatory enforcement agency, in connection with resolutions involving conduct in FX markets or conduct related to benchmark rates. UBS must provide information regarding its compliance programs to the probation officer, upon request. A judgment of conviction (the 2016 Conviction) against UBS in Case Number 3:15–cr–00076–RNC is scheduled to be entered in the U.S. District Court for the District of Connecticut on or about November 29, 2016.

PTE 84–14

7. The Department notes that the rules set forth in section 406 of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and section 4975(c) of the Internal Revenue Code of 1986, as amended (the Code) proscribe certain ''prohibited transactions'' between plans and related parties with respect to those plans, known as ''parties in interest.''[79] Under section 3(14) of ERISA, parties in interest with respect to a plan include, among others, the plan fiduciary, a sponsoring employer of the plan, a union whose members are covered by the plan, service providers with respect to the plan, and certain of their affiliates. The prohibited transaction provisions under section 406(a) of ERISA prohibit, in relevant part, sales, leases, loans or the provision of services between a party in interest and a plan (or an entity whose assets are deemed to constitute the assets of a plan), as well as the use of plan assets by or for the benefit of, or a transfer of plan assets to, a party in interest.[80] Under the authority of section 408(a) of ERISA and section 4975(c)(2) of the Code, the Department has the authority to grant exemptions from such ''prohibited transactions'' in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).

8. Prohibited Transaction Exemption 84–14 (PTE 84–14)[81] exempts certain prohibited transactions between a party in interest and an ''investment fund'' (as defined in Section VI(b) of PTE 84–14)[82] in which a plan has an interest, if the investment manager satisfies the definition of ''qualified professional asset manager'' (QPAM) and satisfies additional conditions for the exemption. In this regard, PTE 84–14 was developed and granted based on the essential premise that broad relief could be afforded for all types of transactions in which a plan engages only if the commitments and the investments of plan assets and the negotiations leading thereto are the sole responsibility of an independent, discretionary, manager.[83]

9. However, Section I(g) of PTE 84–14 prevents an entity that may otherwise meet the definition of QPAM from utilizing the exemptive relief provided by PTE 84–14, for itself and its client plans, if that entity or an ''affiliate''[84] thereof or any owner, direct or indirect, of a 5 percent or more interest in the QPAM has, within 10 years immediately preceding the transaction, been either convicted or released from imprisonment, whichever is later, as a result of certain specified criminal activity described in that section. The Department notes that Section I(g) was included in PTE 84–14, in part, based on the expectation that a QPAM, and those who may be in a position to influence its policies, maintain a high standard of integrity.[85] Accordingly, as a result of the Convictions, QPAMs with certain corporate relationships to UBS and UBS Securities Japan, as well as their client plans that are subject to Part 4 of Title I of ERISA (ERISA-covered plans) or section 4975 of the Code (IRAs), will no longer be able to rely on

causes another person to engage in criminal activity.

[77] *United States of America* v. *UBS Securities Japan Limited,* Case Number 3:12–cr–00268–RNC.

[78] *United States of America* v. *UBS*, Case Number 3:15–cr–00076–RNC.

[79] For purposes of the Summary of Facts and Representations, references to specific provisions of Title I of ERISA, unless otherwise specified, refer also to the corresponding provisions of the Code.

[80] The prohibited transaction provisions also include certain fiduciary prohibited transactions under section 406(b) of ERISA. These include transactions involving fiduciary self-dealing; fiduciary conflicts of interest, and kickbacks to fiduciaries.

[81] 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).

[82] An ''investment fund'' includes single customer and pooled separate accounts maintained by an insurance company, individual trusts and common, collective or group trusts maintained by a bank, and any other account or fund to the extent that the disposition of its assets (whether or not in the custody of the QPAM) is subject to the discretionary authority of the QPAM.

[83] See 75 FR 38837, 38839 (July 6, 2010).

[84] Section VI(d) of PTE 84–14 defines the term ''affiliate'' for purposes of Section I(g) as ''(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person, (2) Any director of, relative of, or partner in, any such person, (3) Any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner, and (4) Any employee or officer of the person who—(A) Is a highly compensated employee (as defined in Section 4975(e)(2)(H) of the Code) or officer (earning 10 percent or more of the yearly wages of such person), or (B) Has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets.''

[85] See 47 FR 56945, 56947 (December 21, 1982).

PTE 84–14 without an individual exemption issued by the Department.

The UBS QPAMs

10. UBS Asset Management (Americas) Inc., UBS Realty Investors LLC, UBS Hedge Fund Solutions LLC, and UBS O'Connor LLC are affiliates of UBS, AG (UBS) [86] within UBS's Asset Management division, and may rely on PTE 84–14. Such entities, along with future entities in UBS's Assets Management and Wealth Management Americas divisions that qualify as ''qualified professional asset managers'' (as defined in Part VI(a) of PTE 84–14) and rely on the relief provided by PTE 84–14 and with respect to which UBS AG is an ''affiliate'' (as defined in Part VI(d) of PTE 84–14) are hereinafter referred to as the ''UBS QPAMs''. The Applicants represent that currently, the Asset Management division is the only division that has entities functioning as QPAMs and that UBS itself does not provide investment management services to client plans that are subject to Part 4 of Title I of ERISA (ERISA plans) or section 4975 of the Code (IRAs), or otherwise exercise discretionary control over ERISA assets.

11. The Applicants represent further that the UBS QPAMs provide investment management services to 36 ERISA plan and IRA clients through separately-managed accounts and pooled funds. These ERISA plan clients are all large plans and several have more than 500,000 participants and beneficiaries. Collectively, the UBS QPAMs currently manage approximately $22.1 billion of ERISA Plan and IRA assets (excluding ERISA Plan and IRA assets invested in pooled funds that are not plan asset funds). Several types of investment strategies are used by the UBS QPAMs to invest ERISA plan and IRA assets. These strategies include investments of approximately $3.3 billion in alternative investments/hedge funds, $835 million in equity investments, $8.6 billion in fixed income, $2.2 billion in multi-asset investments, $5.8 billion in derivative investments and $1.4 billion in real estate investments.

UBS's FX Misconduct

12. The DOJ determined that, prior to and after UBS signed the LIBOR NPA on December 18, 2012, certain employees of UBS engaged in fraudulent and deceptive currency trading and sales practices in conducting certain FX market transactions via telephone, email and/or electronic chat, to the detriment of UBS's customers.[87] These employees also engaged in collusion with other participants in certain FX markets (such conduct, as further detailed below, is hereinafter referred to as the ''FX Misconduct'').

13. According to the Factual Basis for Breach, the FX Misconduct included the addition of undisclosed markups to certain FX transactions. In that regard, sales staff misrepresented to customers on certain transactions that markups were not being added, when in fact they were.

14. The Factual Basis for Breach explains that for certain limit orders, UBS personnel would use a price level different from the one specified by the customers, without the customers' knowledge, to ''track'' certain limit orders. This practice was done to obtain an undisclosed markup on the trade for UBS if the market hit both the customer's limit price and UBS's altered tracking price. Additionally, the practice also subjected customers to the potential that their limit orders would be delayed or not filled when the market hit the customer's limit price but not UBS's altered tracking price.

15. The Factual Basis for Breach also details how certain customers obtaining quotes and placing trades over the phone would, on occasion, request an ''open-line'' so they could hear the conversation regarding price quotes between the UBS trader and salesperson. Certain of these customers had an expectation the price they heard from the trader did not include a sales markup for their transaction currency. While on certain ''open-line'' phone calls, UBS traders and salespeople used hand signals to fraudulently conceal markups from these customers.

16. The Factual Basis for Breach describes how, from about October 2011 to at least January 2013, a UBS FX trader conspired with other financial services firms acting as dealers in the FX spot market, by agreeing to restrain competition in the purchase and sale of the Euro/U.S. dollar currency pair. To achieve this, among other things, the conspirators: (i) Coordinated the trading of the Euro/U.S. dollar currency pair in connection with the European Central Bank and the World Markets/Reuters benchmark currency ''fixes;'' and (ii) refrained from certain trading behavior by withholding offers and bids when one conspirator held an open risk position. They did this so that the price of the currency traded would not move in a direction adverse to the conspirator with an open risk position.

17. The Factual Basis for Breach explains that in determining that UBS was in breach of the LIBOR NPA, the DOJ considered UBS's FX Misconduct described above in light of UBS's obligation under the LIBOR NPA to commit no further crimes. The DOJ also took into account UBS's three recent prior criminal resolutions [88] and multiple civil and regulatory resolutions. In addition, the DOJ also considered that the compliance programs and remedial efforts put in place by UBS following the LIBOR NPA failed to detect the collusive and deceptive conduct in the FX markets until an article was published pointing to potential misconduct in the FX markets.

UBS's LIBOR Misconduct

18. The Statement of Facts (SOF) in Exhibit 3 of the Plea Agreement describes the circumstances of UBS's scheme to defraud counterparties to interest rate derivatives transactions, by secretly manipulating benchmark interest rates to which the profitability of those transactions was tied. According to the SOF, LIBOR is a benchmark interest rate used in financial markets worldwide, namely on exchanges and in over-the-counter markets, to settle trades for futures, options, swaps, and other derivative financial instruments. In addition, LIBOR is often used as a reference rate for mortgages, credit cards, student loans, and other consumer lending products. LIBOR and the other benchmark interest rates play a fundamentally important role in financial markets throughout the world due their widespread use.

19. Each business day the LIBOR average benchmark interest rates are calculated and published by Thomson Reuters, acting as agent for the British Bankers' Association (BBA), for ten currencies (including the United States Dollar, the British Pound Sterling, and

[86] UBS Asset Management (Americas) Inc. and UBS Realty Investors LLC are wholly owned by UBS Americas, Inc., a wholly-owned subsidiary of UBS AG. UBS Hedge Fund Solutions LLC (formerly UBS Alternative and Quantitative Investments, LLC) and UBS O'Connor LLC are wholly owned by UBS Americas Holding LLC, a wholly owned subsidiary of UBS AG.

[87] The circumstances of UBS's violation of the terms of the LIBOR NPA are described in Exhibit 1 to the Plea Agreement, entitled ''The Factual Basis for Breach of the Non-Prosecution Agreement'' (the Factual Basis for Breach).

[88] In addition to the 2012 LIBOR NPA described above, in February 2009, UBS entered into a deferred prosecution agreement with the DOJ's Tax Division for conspiring to defraud the United States of tax revenue through secret Swiss bank accounts for United States tax payers. In connection therewith, UBS agreed to pay $780 million. In May of 2011, UBS entered into a non-prosecution agreement with the DOJ's Antitrust Division to resolve allegations of bid-rigging in the municipal bond derivatives market, and agreed to pay $160 million.

the Japanese Yen) and for various maturities (ranging from overnight to twelve months). The calculation for a given currency is based upon rate submissions from a panel of banks for that currency (the Contributor Panel). In general terms, LIBOR is the rate at which the Contributor Panel member could borrow funds. According to the BBA, the Contributor Bank Panel must submit the rate considered by the bank's cash management staff, and not the bank's personnel responsible for derivative trading, as the rate the bank could borrow unsecured inter-bank funds in the London money market, without reference to rates contributed by other Contributor Panel banks. Additionally, a Contributor Panel bank may not contribute a rate based on the pricing of any derivative financial instrument. Once each Contributor Panel bank has submitted its rate, the contributed rates are ranked and averaged, discarding the highest and lowest 25%, to formulate the LIBOR ''Fix'' for that particular currency and maturity. Since 2005, UBS has been a member of the Contributor Panels for the Dollar LIBOR, Yen LIBOR, Euro LIBOR, Swiss Franc LIBOR, and Pound Sterling LIBOR.

20. UBS has also been a member of the Contributor Panel for the Euro Interbank Offered Rate (Euribor) since 2005. The European Banking Federation (EBF) oversees the Euribor reference rate which is the rate expected to be offered by one prime bank to another for Euro interbank term deposits within the Euro zone. The Euribor Contributor Panel bank rate submissions are ranked, and the highest and lowest 15% of all the submissions are excluded from the calculation. The Euribor fix is then formulated using the average of the remaining rate submissions.

21. In addition, UBS was also a member of the Contributor Panel for the Euroyen TIBOR from at least 2005 until 2012. The Japanese Bankers Association (JBA) oversees the TIBOR reference rate. Yen deposits maintained in accounts outside of Japan are referred to as ''Euroyen'' and the prevailing lending market rates between prime banks in the Japan Offshore Market is Euroyen TIBOR. Euroyen TIBOR is calculated by averaging the rate submissions of Contributor Panel members after discarding the two highest and lowest rate submissions. The Euroyen TIBOR rates and the Contributor Panel members' rate submissions are made available worldwide.

22. The SOF also describes the wide-ranging and systematic efforts, practiced nearly on a daily basis, by several UBS employees to manipulate YEN LIBOR in order to benefit UBS's trading positions through internal manipulation within UBS, by using cash brokers to influence other Contributor Panel banks' Yen LIBOR submissions, and by colluding directly with employees at other Contributor Panel banks to influence those banks' Yen LIBOR submissions.

23. The SOF provides that, at various times from at least 2001 through June 2010, certain UBS derivatives traders manipulated submissions for various interest rate benchmarks, and colluded with employees at other banks and cash brokers to influence certain benchmark rates to benefit their trading positions. The SOF explains that the UBS derivatives traders directly and indirectly exercised improper influence over UBS's submissions for LIBOR, Euroyen TIBOR and Euribor. In this regard, those UBS derivatives traders requested, and sometimes directed, that certain UBS benchmark interest submitters submit a particular benchmark interest rate contribution or a higher, lower, or unchanged rate for LIBOR, Euroyen TIBOR, and Euribor that would be beneficial to the traders. These UBS traders' requests for favorable benchmark rates submissions were regularly accommodated by the UBS submitters.[89]

24. The SOF also details how cash brokers [90] were used by certain UBS Yen derivatives traders to distribute misinformation to other Contributor Panel banks regarding Yen LIBOR in order to manipulate Yen LIBOR submissions to the benefit of UBS. The SOF details further how the UBS traders, submitters, supervisors and certain UBS managers, continued to encourage, allow, or participate in the conduct even though they were aware that manipulation of LIBOR submissions was inappropriate and they attempted to conceal the manipulation and obstruct the LIBOR investigation.

25. UBS acknowledges that the SOF is true and correct and that the wrongful acts taken by the participating employees in furtherance of the misconduct set forth above were within the scope of their employment at UBS. Furthermore, UBS acknowledges that the participating employees intended, at least in part, to benefit UBS through the actions described above.

Prior and Anticipated Convictions and Failure To Comply With Section I(g) of PTE 84–14

26. The 2013 Conviction caused the UBS QPAMs to violate Section I(g) of PTE 84–14. On September 13, 2013, the Department granted PTE 2013–09, which allows the UBS QPAMs to rely on the relief provided in PTE 84–14, notwithstanding the 2013 Conviction of UBS Securities Japan.[91] Under PTE 2013–09, the UBS QPAMs must comply with a number of conditions, including the condition in Section I(h) which provides that, ''Notwithstanding the [2013 Conviction], UBS complies with each condition of PTE 84–14, as amended.'' [92] As a result of this requirement, if UBS or one of its affiliates is convicted of another crime (besides the 2013 Conviction) described in Section I(g) of PTE 84–14, then the relief provided by PTE 2013–09 would be unavailable.

27. The 2016 Conviction will cause the UBS QPAMs to violate Section I(g) of PTE 84–14, once a judgment of conviction is entered by the District Court. As a consequence, the UBS QPAMs will not be able to rely upon the exemptive relief provided by PTE 84–14 for a period of ten years as of the 2016 Conviction Date. Furthermore, the 2016 Conviction will also cause Section I(h) of PTE 2013–09 to be violated, as of the 2016 Conviction Date. UBS QPAMs will become ineligible for the relief provided by PTE 84–14 as a result of both the 2013 Conviction and 2016 Conviction. Therefore, the Applicants request a single, new exemption that provides relief for the UBS QPAMs to rely on PTE 84–14 notwithstanding the 2013 Conviction and the 2016 Conviction, effective as of the 2016 Conviction Date.

28. The Department is proposing a five-year exemption herein to allow the UBS QPAMs to rely on PTE 84–14 notwithstanding the Convictions, subject to a comprehensive suite of protective conditions that are designed to protect the rights of the participants and beneficiaries of the ERISA-covered plans and IRAs that are managed by UBS QPAMs.

Elsewhere in the **Federal Register**, the Department is publishing a proposed temporary exemption for UBS QPAMs to rely on PTE 84–14 notwithstanding the Convictions, for a period of up to one year. The temporary exemption will allow the Department to determine whether to grant this proposed five-year exemption, and will protect ERISA-covered plans and IRAs from potential

[89] According to the SOF, UBS personnel on occasion also engaged in the internal manipulation of UBS's interest rate submissions in connection with the Swiss Franc LIBOR, the British Pound Sterling LIBOR, the Euribor, and the U.S. Dollar LIBOR.

[90] Bids and offers for cash are tracked in the market by cash brokers. These cash brokers also act as intermediaries by assisting derivatives and money market traders in arranging transactions between financial institutions.

[91] 78 FR 56740 (September 13, 2013).

[92] Section I(h) of PTE 2013–09, at 78 FR 56741 (September 18, 2013).

losses if such UBS QPAMs suddenly lose their ability to rely on PTE 84–14 with respect to such plans and IRAs. The temporary exemption will be effective from the Conviction Date until the earlier of twelve months from such Conviction Date or until the effective date of a final agency action made by the Department in connection with this proposed five-year exemption. The proposed five-year exemption would supplant the exemptive relief set forth in a temporary exemption, effective as of the date of grant.

29. Finally, excluding the Convictions and the FX Misconduct, UBS represents that it currently does not have a reasonable basis to believe there are any pending criminal investigations involving the Applicants or any of their affiliated companies that would cause a reasonable plan or IRA customer not to hire or retain the institution as a QPAM.

Furthermore, this proposed five-year exemption will not apply to any other conviction(s) of UBS or its affiliates for crimes described in Section I(g) of PTE 84–14. The Department notes that, in such event, the Applicants and their ERISA-covered plan and IRA clients should be prepared to rely on exemptive relief other than PTE 84–14 for any prohibited transactions entered into after the date of such conviction(s), withdraw from any arrangements that solely rely on PTE 84–14 for exemptive relief; or avoid engaging in any such prohibited transactions in the first place.

Remedial Measures Taken by UBS To Address the LIBOR Conduct and FX Misconduct

30. The Applicants represent that UBS took extensive remedial actions and implemented internal control procedures before, during, and after the LIBOR investigations and FX Misconduct, in order to reform its compliance structure and strengthen its corporate culture. UBS represents that it undertook the following structural reforms and compliance enhancements:

Corporate Culture. UBS represents that it has significantly revised and strengthened its Code of Business Conduct and Ethics from approximately 2008 through 2011, and instituted a ''Principles of Behavior'' program from approximately late 2013 through the present. In 2013, UBS adopted a firm-wide definition of ''conduct risk,'' and defined the roles and responsibilities of UBS's business divisions with respect to such conduct risk. In 2013 UBS also enhanced employee supervision policies.

Annual Risk Assessments. Beginning in approximately 2008, UBS instituted annual business and operational risk assessments for each UBS sub-division and for particular risks across the firm, such as fraud risk and market risk.

Coordination of High-Risk Matters and Compliance Reorganization. During 2011 through 2013, UBS established the cross-functional Investigation Sounding Board (ISB) chaired by UBS's Global Head of Litigation and Investigations, which oversees and coordinates all investigations of high risk issues. In 2013, UBS integrated its compliance function and operational risk control functions to avoid gaps in risk coverage.

Transactional and Employee Monitoring. In 2013, UBS adopted and began to implement an automated system to monitor transactions covering all asset classes. UBS enhanced the monitoring of all email and group messaging, and implemented a system to monitor audio communications including land lines and cell phones. UBS implemented a trader surveillance system, and developed and implemented a tool to monitor and assess employee behavioral indicators. UBS also expanded cross border monitoring, and improved the processes associated with the UBS Group's whistleblowing policy.

Compensation Reformation. From approximately 2008 through 2011, UBS reformed its compensation and incentives structure, including longer deferred compensation periods, greater claw-back and forfeiture provisions. UBS enhanced processes to ensure that disciplinary sanctions and compliance related violations (such as failure to complete training) are considered when determining employee compensation and in an individual's performance review.

Corporate Reforms. In October 2012, UBS announced a transformation of the Investment Bank—where the LIBOR and FX Misconduct occurred—by reducing the size and complexity of the Investment Bank to ensure it can operate within strict risk and financial resource limitations.

Benchmark Interest Rate Submissions. From 2011 through 2013, UBS created a dedicated, independent benchmark submissions team and index group segregated from the for-profit activities of the bank. UBS also imposed appropriate communications firewalls between those functions of the bank, and implemented strict controls and procedures for determining benchmark submissions. UBS enhanced supervisory oversight of benchmark and indices submissions, and implemented appropriate monitoring systems to identify unsubstantiated submissions.

Risk Management and Control. In 2013, UBS adopted or strengthened firm-wide policies that set forth and established: Standards for market conduct; a ''zero tolerance'' approach to fraud; standard approaches for fraud risk management and issue escalation across the firm; a firm-wide approach to identifying, managing, and escalating actual and potential conflicts of interest; and key principles to ensure that UBS complies with all applicable competition laws.

Front Office Processes. UBS invested approximately $100 million to address the FX business conduct and control deficiencies identified during the FX investigation, including initiating continuous transaction monitoring and detailed time stamping of orders and implementing controls, principles and systems similar to those required by the regulated markets for its FX business. UBS states that it has: Standardized the FX fixing order process; updated chatroom standards and controls; prohibited the use of mobile phones on trading floors; implemented new requirements for client and market conduct, behavior, and communications; established enhanced supervisory procedures; and required all Investment Bank personnel to take market conduct training.

31. Furthermore, the Applicants represent that UBS took disciplinary action against forty-four individuals in connection with the LIBOR misconduct, and against sixteen individuals in connection with the FX Misconduct. The individuals involved in the disciplinary actions included traders, benchmark submitters, compliance personnel, salespeople and managers. The disciplinary actions encompassed the termination or separation of thirty employees and also included financial consequences, such as forfeiture of deferred compensation, loss of bonuses and bonus reductions.

Statutory Findings—In the Interest of Affected ERISA Plans and IRAs

32. The Applicants represent that the requested exemption is in the interest of affected plans and their participants and beneficiaries because it will enable ERISA plan and IRA clients to have the opportunity to enter into transactions that are beneficial to the plan and may otherwise be prohibited or more costly. The Applicants maintain that if the exemption request is denied, the UBS QPAMs will be unable to cause ERISA-covered plan clients to engage in many routine and standard transactions that occur across many asset classes. According to the Applicants, these

transactions encompass the following asset classes:

Real Estate. UBS QPAMs manage approximately $1.4 billion of real estate assets in a separate account as an ERISA section 3(38) investment manager for a large multiemployer pension plan with many participating employers (and therefore, numerous parties in interest). The investments constitute equity and debt investments in operating real properties, including apartments, office buildings, retail centers, and industrial buildings. The Applicants represent that they rely on PTE 84–14 for the acquisitions of properties in the separate account, as well as mortgage loans entered into in connection with the purchases of the properties; leases of space in commercial properties and residential leases in apartment properties; property management agreements and agreements with vendors providing services at the properties (*e.g.* janitorial services); and sales to potential buyers of the properties.

Alternative Investments. The UBS QPAMs manage three hedge funds of funds that hold assets deemed to constitute ''plan assets'' under ERISA, with approximately $825 million under management. The Applicants state that they rely on PTE 84–14 to enter into and manage the credit facilities totaling approximately $56 million entered into by the funds.

Derivatives. The UBS QPAMs manage approximately $8.3 billion of assets for ERISA plan separate account clients and plan assets funds whose investment guidelines permit or require investment in derivatives contracts documented through International Swaps and Derivatives Association, Inc. (ISDA) agreements or cleared swap agreements. According to the Applicants, approximately 12 ERISA plan separate account clients and 23 plan asset funds are counterparties to ISDA umbrella agreements and cleared swaps account agreements, and the UBS QPAMs currently manage approximately 350 separate trading lines on behalf of those clients and funds. According to the Applicants, PTE 84–14 is primarily relied upon for these transactions, and the counterparties to these agreements almost always require representations to such effect to be included in the agreements.

Fixed Income. The Applicants state that, as a result of regulatory proposals by the Financial Regulatory Authority (FINRA) and the Federal Reserve of New York Treasury Markers Practice Group, Master Securities Forward Transaction Agreements (MSFTAs) are beginning to be required to be in place in order to enter into several broad categories of agency mortgage-backed securities transactions. According to the Applicants, similar to ISDAs, the counterparties to MSFTAs universally require UBS QPAMs to represent that they can rely on PTE 84–14, making it impossible for the UBS QPAMs to execute such transactions on behalf of their ERISA plan and IRA clients. The UBS QPAMs manage approximately $5.3 billion of assets for ERISA separate account clients and plan asset funds whose investment guidelines permit these types of transactions, of which approximately $25 million has been invested in these types of fixed income transactions.

Equity Investments. The Applicants state that, although direct investments in equities typically do not require reliance on PTE 84–14, certain related transactions do, such as futures contracts. Moreover, according to the Applicants, even when another exemption is available for equity investments, ERISA plan and IRA clients may not want to retain an investment manager that cannot rely on PTE 84–14 for the reasons discussed above.

OCIO Services. The Applicants explain that in addition to providing investment management services, the UBS QPAMs also provide outsourced chief investment officer (OCIO) services to a number of ERISA plan clients, one of which, to the Applicants knowledge, is the largest ERISA plan to enter into an OCIO arrangement. According to the Applicants, OCIO services generally provide that UBS has the authority to manage a plan's entire investment portfolio, including selecting and negotiating contracts with other investment managers, allocating assets, developing investment policies, assisting with regulatory reporting, and advising plan fiduciaries. The Applicants represent that PTE 84–14 is the only exemption the UBS QPAMs can rely on for the large OCIO ERISA plan client because no other exemptions are available for transactions involving futures, derivatives, and other investments that are not widely-traded.

33. The Applicants represent that, if the exemption request is denied, and ERISA plan and IRA clients leave the UBS QPAMs, these clients would typically incur transition costs associated with identifying appropriate replacement investment managers and liquidating and re-investing the assets currently managed by the UBS QPAMs. The Applicants estimate that the aggregate transition costs for liquidating and re-investing of each asset class for UBS's ERISA plan and IRA clients would be approximately $280 million.[93] These cost estimates are described below:

Real Estate. The Applicants estimate transition costs of 1,152 basis points for the $1.4 billion of ERISA plan and IRA real estate assets under UBS QPAMs' management. These costs include the losses incurred from selling properties for 90 cents on the dollar, closing costs of 1.5 percent of the sale price and mortgage prepayment fees of one percent of the outstanding mortgages. This would result in a total estimated cost of $160 million for the real estate assets, all of which would be absorbed by one ERISA plan client.

Alternative Investments. UBS states that, combined with early redemption penalties,[94] the cost of liquidating the alternative investments managed by UBS QPAMs on behalf of ERISA-covered plans and IRAs would be 212 basis points of the NAV for a total cost of about $69 million (of which approximately $58 million would be to one ERISA plan client).

Fixed Income. According to the Applicants, the approximate transition costs for liquidating domestic and international fixed income investments is estimated by the Applicants to be $48 million. The Applicants explain that they estimated the costs of liquidating domestic and international bonds using Barclays Capital's ''liquidity cost score'' methodology (LCS), which reflects the percentage of a bond's price that is estimated to be incurred in transaction costs in a standard institutional transaction. The Applicants note that the LCS is primarily driven by the liquidity of the market, but is also impacted by other factors, including the time to maturity for the bond. Using LCS, the Applicants state that liquidating and re-investing fixed income products, emerging market debt securities, and fixed income funds would result in transition costs,

[93] The Applicants state that the estimates that UBS developed do not assume a ''fire sale'' of any assets; rather, they assume that assets would be liquidated quickly as reasonably possible consistent with the UBS QPAMs' fiduciary obligations to their ERISA plan clients.

[94] The Department notes that, if this exemption and the related temporary exemption were granted, compliance with the condition in Section I(j) would require the UBS QPAMs to clearly demonstrate that any ''early redemption penalties'' 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 . . . .'' In addition, under Section I(j), the UBS QPAMs would have to hold their plan customers harmless for any losses attributable to, inter alia, any prohibited transactions or violations of the duties of prudence and loyalty.

respectively, of 94, 91, and 97 basis points.[95]

Equities. The Applicants state that UBS' investment professionals conducted trading simulations to determine the impact of selling the aggregate block of each class of equity securities currently held by the UBS QPAMs on behalf of their clients. According to the Applicants, the trading simulations yielded transition cost assumptions of 32 basis points for U.S. large-cap equities; 79 basis points for U.S. small-cap equities; 19 basis points for global equities; 40 basis points for emerging market equities; and 17 basis points for equity funds. The Applicants represent that the total estimated costs for liquidating equities held by UBS QPAMs' ERISA plan and IRA clients would be approximately $2.5 million.

Derivatives. Lastly, the Applicants estimate the transition costs for derivative investments such as swaps, forwards, futures, and options would be approximately $2.3 million. The Applicants also used the LCS methodology to arrive at a transition cost assumption of 10 basis points for credit default swaps; 6 basis points for interest rate swaps; 35 basis points for total return swaps; and 4 basis points for fixed income futures. Transition costs for equities futures were assumed to be 6 basis points given the liquidity of the indices underlying those transactions. Finally, the Applicants note that, because of the liquidity associated with currency forwards and the relatively small amount of the UBS QPAMs' investments in equity and fixed income options, UBS assumed that the costs of liquidating and re-investing those assets would be negligible.

OCIO Relationship. In the absence of granted relief, the Applicants estimate that it would take this large OCIO ERISA plan client 18 to 24 months to find providers to replicate all the OCIO services provided by the UBS QPAMs. UBS represents that this estimate is consistent with the following projections for the steps this plan client would need to take to secure and fully implement replacement OCIO services: (i) 6–9 months to issue a Request for Proposals, receive and evaluate proposals, and select a new service provider(s); (ii) 3–6 months to negotiate a contract and complete other necessary transition tasks (*e.g.,* establishing custodial accounts) with the new service provider(s); and (iii) 9–12 months for the new service provider(s) to implement its own investment program, which would include evaluating the client's existing investments and performing due diligence on existing sub-managers. The Applicants note that the estimate is also consistent with the amount of time it took UBS to establish the current OCIO relationship with this client. The Applicants represent in addition to these transition costs, the ERISA plan client would pay substantially more in fees than it is currently paying if it had to obtain all these services from a variety of different providers.

Statutory Findings—Protective of the Rights of Participants of Affected Plans and IRAs

34. The Applicants have proposed certain conditions it believes are protective of ERISA-covered plans and IRAs with respect to the transactions described herein. The Department has determined to revise and supplement the proposed conditions so that it can make its required finding that the requested five-year exemption is protective of the rights of participants and beneficiaries of affected plans and IRAs.

35. Several of these conditions underscore the Department's understanding, based on the Applicant's representations, that the affected UBS QPAMs were not involved in the FX Misconduct or the misconduct that is the subject of the Convictions. For example, the five-year exemption, if granted as proposed, mandates that the UBS QPAMs (including their officers, directors, agents other than UBS, and employees of such UBS QPAMs) did not know of, have reason to know of, or participate in: (1) The FX Misconduct; or (2) the criminal conduct that is the subject of the Convictions (for purposes of this requirement, ''participate in'' includes an individual's knowing or tacit approval of the FX Misconduct and the misconduct that is the subject of the Convictions). Under this the proposed five-year exemption, the term ''Convictions'' includes the 2013 Conviction and the 2016 Conviction. The term ''2013 Conviction'' means the judgment of conviction against UBS Securities Japan Co. Ltd. in Case Number 3:12–cr–00268–RNC in the U.S. District Court for the District of Connecticut for one count of wire fraud in violation of Title 18, United Sates Code, sections 1343 and 2 in connection with submission of YEN London Interbank Offered Rates and other benchmark interest rates. The term ''2016 Conviction'' means the anticipated judgment of conviction against UBS AG in Case Number 3:15–cr–00076–RNC in the U.S. District Court for the District of Connecticut for one count of wire fraud in violation of Title 18, United States Code, Sections 1343 and 2 in connection with UBS's submission of Yen London Interbank Offered Rates and other benchmark interest rates between 2001 and 2010. Furthermore, for all purposes under the proposed five-year exemption, ''conduct'' of any person or entity that is the ''subject of [a] Conviction'' encompasses any conduct of UBS and/or their personnel, that is described in the Plea Agreement, (including Exhibits 1 and 3 attached thereto), the plea agreement entered into between UBS Securities Japan and the Department of Justice Criminal Division, on December 19, 2012, in connection with Case Number 3:12–cr–00268–RNC (and attachments thereto), and other official regulatory or judicial factual findings that are a part of this record. The proposed five-year exemption defines the FX Misconduct as the conduct engaged in by UBS personnel described in Exhibit 1 of the Plea Agreement entered into between UBS AG and the Department of Justice Criminal Division, on May 20, 2015 in connection with Case Number 3:15–cr–00076–RNC filed in the US District Court for the District of Connecticut.

36. Further, the UBS QPAMs (including their officers, directors, agents other than UBS, and employees of such UBS QPAMs) may not have received direct compensation, or knowingly have received indirect compensation, in connection with: (1) The FX Misconduct; or (2) the criminal conduct that is the subject of the Convictions.

37. The Department expects that UBS QPAMs will rigorously ensure that the individuals associated with the UBS misconduct will not be employed or knowingly engaged by such QPAMs. In this regard, the proposed five-year exemption mandates that the UBS QPAMs will not employ or knowingly engage any of the individuals that participated in: (1) The FX Misconduct or (2) the criminal conduct that is the subject of the Convictions. For purposes of this condition, ''participated in'' includes an individual's knowing or tacit approval of the FX Misconduct or the conduct that is the subject of Convictions. Further, a UBS 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 UBS QPAM, to enter into any transaction with UBS or UBS Securities Japan, nor otherwise engage UBS or UBS Securities Japan to provide

[95] The Applicants assume that the costs of liquidating and re-investing cash equivalent and currency holdings would be negligible, given the liquidity associated with those assets.

additional services to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or services may otherwise be within the scope of relief provided by an administrative or statutory exemption.

38. The UBS QPAMs must 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 Convictions. Further, any failure of the UBS QPAMs to satisfy Section I(g) of PTE 84–14 must result solely from the Convictions.

39. No relief will be provided by this five-year exemption to the extent a UBS QPAM exercised authority over 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) in a manner that it knew or should have known would: Further the FX Misconduct or the criminal conduct that is the subject of the Convictions; or cause the UBS QPAM, its affiliates or related parties to directly or indirectly profit from the FX Misconduct or the criminal conduct that is the subject of the Convictions. The conduct that is the subject of the Convictions includes that which is described in the Plea Agreement (including Exhibits 1 and 3 attached thereto) and the plea agreement entered into between UBS Securities Japan and the Department of Justice Criminal Division, on December 19, 2012, in connection with Case Number 3:12–cr–00268–RNC (and attachments thereto). The FX Misconduct engaged in by UBS personnel includes that which is described in Exhibit 1 of the Plea Agreement (Factual Basis for Breach) entered into between UBS AG and the Department of Justice Criminal Division, on May 20, 2015 in connection with Case Number 3:15–cr–00076–RNC filed in the US District Court for the District of Connecticut. Further, no five-year relief will be provided to the extent UBS, or UBS Securities Japan, provides any discretionary asset management services to ERISA-covered plans or IRAs or otherwise act as a fiduciary with respect to ERISA-covered plan or IRA assets.

40. *Policies.* The Department believes that robust policies and training are warranted where, as here, extensive criminal misconduct has occurred within a corporate organization that includes one or more QPAMs managing plan investments in reliance on PTE 84–14. Therefore, this proposed five-year exemption requires that each UBS QPAM must immediately develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that: The asset management decisions of the UBS QPAM are conducted independently of UBS's corporate management and business activities, including the corporate management and business activities of the Investment Bank division and UBS Securities Japan; the UBS 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; the UBS QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to ERISA-covered plans and IRAs; any filings or statements made by the UBS 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; the UBS 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; and the UBS QPAM complies with the terms of this proposed five-year exemption. Any violation of, or failure to comply with, the Policies must be corrected promptly upon discovery, and any such violation or compliance failure not promptly corrected must be reported, upon the discovery of such failure to promptly correct, in writing, to appropriate corporate officers, the head of Compliance and the General Counsel of the relevant UBS 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 UBS.[96] A UBS 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 reports such instance of noncompliance as explained above.

41. *Training.* The Department has also imposed a condition that requires each UBS QPAM to immediately develop and implement a program of training (the Training), conducted at least annually, for all relevant UBS 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) and ethical conduct, the consequences for not complying with the conditions of this proposed five-year exemption (including the loss of the exemptive relief provided herein), and prompt reporting of wrongdoing. Furthermore, the Training must be conducted by an independent professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code.

42. *Independent Transparent Audit.* The Department views a rigorous, transparent audit that is conducted by an independent party as essential to ensuring that the conditions for exemptive relief described herein are followed by the UBS QPAMs. Therefore, Section I(i) of this proposed five-year exemption requires that each UBS QPAM submits to an audit conducted annually 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 the UBS QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. Each annual audit must cover a consecutive twelve month period starting with the twelve month period that begins on the date of the 2016 Conviction (the Initial Audit Period). If this proposed five-year exemption is granted within one year of the effective date of the proposed temporary exemption for UBS QPAMs (Exemption Application No. D–11863), then the Initial Audit Period will cover the period of time during which such temporary exemption is effective and a portion of the time during which this proposed five-year exemption is effective. In such event, the audit terms contained in Section I(i) of this five-year exemption will supersede the terms of Section I(i) of the temporary exemption. Additionally, in determining compliance with the conditions for relief in the temporary exemption and this five-year exemption including the

[96] With respect to any ERISA-covered plan or IRA sponsored by an ''affiliate'' (as defined in Part VI(d) of PTE 84–14) of UBS or beneficially owned by an employee of UBS or its affiliates, such fiduciary does not need to be independent of UBS.

Policies and Training requirements, for purposes of conducting the audit, the auditor will rely on the conditions for exemptive relief as then applicable to the respective periods under audit. For time periods prior to the Conviction Date and covered under PTE 2013–09, the audit requirements in Section (g) of PTE 2013–09 will remain in effect such for time periods. Each annual audit must be completed no later than six (6) months after the period to which the audit applies.

43. The audit condition requires that, 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 UBS QPAM and, if applicable, UBS, 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.

44. The auditor's engagement must specifically require the auditor to determine whether each UBS QPAM has complied with the Policies and Training conditions described herein, and must further require the auditor to test each UBS QPAM's operational compliance with the Policies and Training.

45. On or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to UBS and the UBS 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 the UBS QPAM's Policies and Training; the UBS QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective UBS QPAM's noncompliance with the written Policies and Training.

Any determination 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 UBS QPAM must be promptly addressed by such UBS QPAM, and any action taken by such UBS QPAM to address such recommendations must be included in an addendum to the Audit Report. Any determination by the auditor that the respective UBS QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that the UBS QPAM has complied with the requirements under this subsection must be based on evidence that demonstrates the UBS QPAM has actually implemented, maintained, and followed the Policies and Training required by this proposed five-year exemption. Finally, the Audit Report must address the adequacy of the Annual Review required under this exemption and the resources provided to the Compliance Officer in connection with such Annual Review.

46. Furthermore, the auditor must notify the respective UBS QPAM of any instance 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.

This proposed five-year exemption requires that certain senior personnel of UBS review the Audit Report, make certain certifications, and take various corrective actions. In this regard, the General Counsel, or one of the three most senior executive officers of the UBS QPAM to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this proposed five-year exemption; addressed, corrected, or remedied any inadequacy 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 proposed five-year exemption and with the applicable provisions of ERISA and the Code.

47. The Risk Committee, the Audit Committee, and the Corporate Culture and Responsibility Committee of UBS's Board of Directors are provided a copy of each Audit Report; and a senior executive officer of UBS's Compliance and Operational Risk Control function must review the Audit Report for each UBS QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report.

In order to create a more transparent record in the event that the proposed relief is granted, each UBS QPAM must provide its certified Audit Report to the Department no later than 45 days following its completion. The Audit Report will be part of the public record regarding this proposed five-year exemption. Furthermore, each UBS QPAM must make 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 UBS QPAM.

48. Additionally, each UBS QPAM and the auditor must submit to the Department any engagement agreement entered into pursuant to the engagement of the auditor under this proposed five-year exemption; and any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this proposed five-year exemption no later than six (6) months after the effective date of this five-year exemption (and one month after the execution of any agreement thereafter). Finally, if the five-year exemption is granted, the auditor must provide the Department, 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 instance of noncompliance by the relevant UBS QPAM; and an explanation of any corrective or remedial action taken by the applicable UBS QPAM.

In order to enhance oversight of the compliance with the exemption, UBS must notify the Department at least 30 days prior to any substitution of an auditor, and UBS must demonstrate to the Department's satisfaction that any new auditor is independent of UBS, experienced in the matters that are the subject of the five-year exemption, and capable of making the determinations required of this five-year exemption.

49. *Contractual Obligations.* This five-year exemption requires UBS QPAMs to enter into certain contractual obligations in connection with the provision of services to their clients. It is the Department's view that the condition in Section I(j) is essential to the Department's ability to make its findings that the proposed five-year exemption is protective of the rights of the participants and beneficiaries of ERISA-covered plan and IRA clients. In this regard, effective as of the effective date of this five-year exemption with respect to any arrangement, agreement, or contract between a UBS QPAM and an ERISA-covered plan or IRA for which a UBS QPAM provides asset management or other discretionary fiduciary services, each UBS QPAM agrees and warrants: 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); to comply with the standards of prudence and loyalty set forth in section 404 of ERISA, as applicable; and to indemnify and hold

harmless the ERISA-covered plan or IRA for any damages resulting from a UBS QPAM's violation of applicable laws, a UBS QPAM's breach of contract, or any claim brought in connection with the failure of such UBS 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 Convictions. Furthermore, UBS QPAMs must agree not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the UBS QPAM for violating ERISA or the Code or engaging in prohibited transactions; 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 UBS 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 UBS; not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the UBS 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; 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; and not to include exculpatory provisions disclaiming or otherwise limiting liability of the UBS QPAMs 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 UBS.

50. Within four (4) months of the effective date of this proposed five-year exemption each UBS QPAM will provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which a UBS QPAM provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a UBS QPAM provides asset management or other discretionary fiduciary services, the UBS QPAM will agree in writing to its obligations under this Section I(j) in an updated investment management agreement or advisory agreement between the UBS QPAM and such clients or other written contractual agreement.

51. *Notice Requirements.* The proposed five-year exemption contains extensive notice requirements, some of which extend not only to ERISA-covered plan and IRA clients of UBS QPAMs, but which also apply to the non-Plan clients of UBS QPAMs. In this regard, the Department understands that many firms may promote their ''QPAM'' designation in order to earn asset management business, including business from non-ERISA plans. Therefore, in order to fully inform any clients that may have retained UBS QPAMs as asset managers because such UBS QPAMs have represented themselves as able to rely on PTE 84–14, the Department has determined to condition exemptive relief upon the following notice requirements.

Within fifteen (15) days of the publication of this proposed five-year exemption in the **Federal Register**, each UBS QPAM must provide a notice of the proposed five-year exemption, along with a separate summary describing the facts that led to the Convictions (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that each Conviction separately results in a failure to meet a condition in PTE 84–14, to each sponsor of an ERISA-covered plan and each beneficial owner of an IRA for which a UBS QPAM provides asset management or other discretionary fiduciary services, or the sponsor of an investment fund in any case where a UBS QPAM acts only as a sub-advisor to the investment fund in which such ERISA-covered plan and IRA invests. In the event that this proposed five-year exemption is granted, the **Federal Register** copy of the notice of final five-year exemption must be delivered to such clients within sixty (60) days of its publication in the **Federal Register**, and may be delivered electronically (including by an email that has a link to the exemption). Any prospective clients for which a UBS QPAM provides asset management or other discretionary fiduciary services must receive the proposed and final five-year exemptions with the Summary and the Statement prior to, or contemporaneously with, the client's receipt of a written asset management agreement or other contractual agreement from the UBS QPAM.

In addition, each UBS QPAM will provide a **Federal Register** copy of the proposed five-year exemption, a **Federal Register** copy of the final five-year exemption; the Summary; and the Statement to each: (A) Current Non-Plan Client within four (4) months of the effective date, if any, of a final five-year exemption; and (B) Future Non-Plan Client prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the UBS QPAM. A ''Current Non-Plan Client'' is a client of a UBS QPAM that: Is neither an ERISA-covered plan nor an IRA; has assets managed by the UBS QPAM as of the effective date, if any, of a final five-year exemption; and has received a written representation (qualified or otherwise) from the UBS QPAM that such UBS QPAM qualifies as a QPAM or qualifies for the relief provided by PTE 84–14. A ''Future Non-Plan Client'' is a prospective client of a UBS QPAM that: Is neither an ERISA-covered plan nor an IRA; has assets managed by the UBS QPAM after (but not as of) the effective date, if any, of a final five-year exemption; and has received a written representation (qualified or otherwise) from the UBS QPAM that such UBS QPAM qualifies as a QPAM, or qualifies for the relief provided by PTE 84–14.

52. This proposed five-year exemption also requires UBS to designate a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer will have several obligations that it must comply with, as described in Section I(m) above. These include conducting an annual review (the Annual Review) to determine the adequacy and effectiveness of the implementation of the Policies and Training; preparing a written report for each Annual Review (each, an Annual Report) that, among other things, summarizes his or her material activities during the preceding year; and sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action. Each Annual Report must be provided to appropriate corporate officers of UBS and each UBS QPAM to which such

report relates; the head of Compliance and the General Counsel (or their functional equivalent) of the relevant UBS QPAM; and must be made unconditionally available to the independent auditor described above.

53. Each UBS QPAM must maintain records necessary to demonstrate that the conditions of this proposed five-year exemption have been met, for six (6) years following the date of any transaction for which such UBS QPAM relies upon the relief in the five-year exemption.

54. Certain conditions of the proposed five-year exemption are directed UBS and UBS Securities Japan. These requirements were included in PTE 2013–09 as conditions to providing exemptive relief and have been included in this proposed five-year exemption. In this regard, UBS must impose internal procedures, controls, and protocols on UBS Securities Japan to: (1) Reduce the likelihood of any recurrence of conduct that that is the subject of the 2013 Conviction, and (2) comply in all material respects with the Business Improvement Order, dated December 16, 2011, issued by the Japanese Financial Services Authority. Additionally, UBS must comply in all material respects with the audit and monitoring procedures imposed on UBS by the United States Commodity Futures Trading Commission Order, dated December 19, 2012.

55. The proposed five-year exemption requires that, during the effective period of this proposed five-year exemption UBS: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) that UBS 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 agreement. After review of the information, the Department may require UBS, its affiliates, or related parties, as specified by the Department, to submit a new application for the continued availability of relief as a condition of continuing to rely on this exemption. In this regard, the UBS QPAM (or other party submitting the application) will have the burden of justifying the relief sought in the application. If the Department denies the relief requested in the new application, or does not grant such relief within twelve months of application, the relief described herein is revoked as of the date of denial or as of the expiration of the twelve-month period, whichever date is earlier.

56. Finally, each UBS QPAM, in its agreements with ERISA-covered plan and IRA clients, or in other written disclosures provided to ERISA-covered plan and IRA clients, within 60 days prior to the initial transaction upon which relief hereunder is relied, will clearly and prominently inform the ERISA-covered plan or IRA client that the client has the right to obtain copies of the QPAM's written Policies adopted in accordance with this five-year exemption.

Statutory Findings—Administratively Feasible

57. The Applicants represents that the proposed five-year exemption, is administratively feasible because it does not require any monitoring by the Department but relies on an independent auditor to determine that the exemption conditions are being complied with. Furthermore, the requested five-year exemption does not require the Department's oversight because, as a condition of this proposed five-year exemption, neither UBS nor UBS Securities Japan will provide any fiduciary or QPAM services to ERISA-covered plans and IRAs.

58. Given the revised and new conditions described above, the Department has tentatively determined that the five-year relief sought by the Applicants satisfies the statutory requirements for an exemption under section 408(a) of ERISA.

Notice to Interested Persons

Notice of the proposed exemption will be provided to all interested persons within fifteen (15) days of the publication of the notice of proposed five-year exemption in the **Federal Register**. The notice will be provided to all interested persons in the manner described in Section I(k)(1) of this proposed five-year exemption and will contain the documents described therein and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the pending exemption. All written comments and/or requests for a hearing must be received by the Department within forty five (45) days of the date of publication of this proposed five-year exemption in the **Federal Register**. All comments will be made available to the public.

Warning: If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Mr. Brian Mica of the Department, telephone (202) 693–8402. (This is not a toll-free number.)

Deutsche Investment Management Americas Inc. (DIMA) and Certain Current and Future Asset Management Affiliates of Deutsche Bank AG (Collectively, the Applicant or the DB QPAMs), Located in New York, New York

[Exemption Application No. D–11908]

Proposed Five-Year Exemption

The Department is considering granting a five-year exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[97]

Section I: Covered Transactions

If the proposed five-year exemption is granted, certain asset managers with specified relationships to Deutsche Bank AG (hereinafter, the DB 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),[98] notwithstanding: (1) The ''Korean Conviction'' against Deutsche Securities Korea Co., a South Korean affiliate of Deutsche Bank AG (hereinafter, DSK, as further defined in Section II(f)), entered on January 23, 2016; and (2) the ''US Conviction'' against DB Group Services UK Limited, an affiliate of Deutsche Bank based in the United Kingdom (hereinafter, DB Group Services, as

[97] For purposes of this proposed five-year exemption, references to section 406 of Title I of the Act, unless otherwise specified, should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[98] 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).

further defined in Section II(e)), scheduled to be entered on April 3, 2017 (collectively, the Convictions, as further defined in Section II(a)),[99] for a period of five years beginning on the later of: The U.S. Conviction Date (as further defined in Section II(d)); or the date on which a grant notice is published in the **Federal Register**, provided that the following conditions are satisfied:

(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 and DB Group Services that is the subject of the Convictions (for purposes of this Section I(a), ''participate in'' includes the knowing or tacit approval of the misconduct underlying the Convictions);

(b) 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 Convictions;

(c) The DB QPAMs will not employ or knowingly engage any of the individuals that participated in the criminal conduct that is the subject of the Convictions (for the purposes of this Section I(c), ''participated in'' includes the knowing or tacit approval of the misconduct underlying the Convictions);

(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 or the Code and managed by such DB QPAM to enter into any transaction with DSK or DB Group Services, or engage DSK or DB Group Services 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 DB QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Convictions;

(f) A DB QPAM did not exercise authority over 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) in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Convictions; or cause the QPAM, affiliates, or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Convictions;

(g) DSK and DB Group Services will not provide discretionary asset management services to ERISA-covered plans or IRAs, nor will otherwise act as a fiduciary with respect to ERISA-covered plan or IRA assets;

(h)(1) Each DB QPAM must immediately develop, implement, maintain, and follow written policies and procedures (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 corporate management and business activities, including the corporate management and business activities of DB Group Services and DSK;

(ii) The DB 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 violation 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, 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 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 five-year exemption; and

(vii) Any violation of, or failure to comply with, an item in subparagraphs (ii) through (vi), is corrected promptly upon discovery, and any such violation or compliance failure not promptly corrected is reported, upon the discovery of such 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 DB QPAM, 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. A DB 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) Each DB QPAM must immediately develop and implement a program of training (the Training), conducted at least annually, for all relevant DB QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. The Training must:

(i) 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 five-year exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing; and

(ii) Be conducted by an independent professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code;

(i)(1) Each DB QPAM submits to an audit conducted annually 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 the DB QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. Each annual audit must cover a consecutive twelve month period beginning on the effective date of this five-year exemption and must be completed no later than six (6) months after the period to which the audit applies;

[99] 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 criminal activity therein described.

(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 the Policies in accordance with the conditions of this five-year exemption, and has developed and implemented the Training, as required herein;

(4) The auditor's engagement must 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 each 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) For each audit, on or before the end of the relevant period described in Section I(i)(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:

(i) The adequacy of the DB QPAM's Policies and Training; the DB QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective DB QPAM's noncompliance with the written Policies and Training described in Section I(h) above. Any determination 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 action taken by such DB QPAM to address such recommendations must be included in an addendum to the Audit Report (which addendum is completed prior to the certification described in Section I(i)(7) below). Any determination by the auditor that the respective DB QPAM has implemented, maintained, and followed sufficient Policies and Training must 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 implemented, maintained, and followed the Policies and Training required by this five-year exemption. Furthermore, the auditor must not rely on the Annual Report created by the Compliance Officer as described in Section I(m) below in lieu of independent determinations and testing performed by the auditor as required by Section I(i)(3) and (4) above; and

(ii) The adequacy of the Annual Review described in Section I(m) and the resources provided to the Compliance officer in connection with such Annual Review;

(6) The auditor must notify the respective DB QPAM of any instance 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, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this exemption; addressed, corrected, or remedied any inadequacy 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 proposed five-year exemption and with the applicable provisions of ERISA and the Code;

(8) The Risk Committee of Deutsche Bank's Board of Directors is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking legal compliance officer of Deutsche Bank must review the Audit Report for each DB QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report;

(9) Each DB QPAM provides its certified Audit Report, by regular mail to: The Department's Office of Exemption Determinations (OED), 200 Constitution Avenue NW., Suite 400, Washington, DC 20210, or by private carrier to: 122 C Street NW., Suite 400, Washington, DC 20001–2109, no later than 45 days following its completion. The Audit Report will be part of the public record regarding this five-year exemption. Furthermore, each DB QPAM must make 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 must submit to OED: (A) Any engagement agreement(s) entered into pursuant to the engagement of the auditor under this exemption; and (B) any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this proposed exemption, no later than six (6) months after the effective date of this five-year exemption (and one month after the execution of any agreement thereafter);

(11) The auditor must 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 instance of noncompliance by the relevant DB QPAM; and an explanation of any corrective or remedial action 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 exemption and capable of making the determinations required of this exemption;

(j) Effective as of the effective date of this five-year exemption, with respect to any arrangement, agreement, or contract between a DB QPAM and an ERISA-covered plan or IRA for which a DB QPAM provides asset management or other discretionary fiduciary services, each DB QPAM agrees and warrants:

(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 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 (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 DB 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 Deutsche Bank and its affiliates; 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 DB 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 Convictions;

(8) Within four (4) months of the effective date of this proposed five-year exemption, each DB QPAM must provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which the DB QPAM provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a DB QPAM provides asset management or other discretionary fiduciary services, the DB QPAM must agree in writing to its obligations under this Section I(j) in an updated investment management agreement or advisory agreement between the DB QPAM and such clients or other written contractual agreement;

(k)(1) *Notice to ERISA-covered plan and IRA clients.* Within fifteen (15) days of the publication of this proposed five-year exemption in the **Federal Register**, each DB QPAM will provide a notice of the proposed five-year exemption, along with a separate summary describing the facts that led to the Convictions (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that each Conviction separately results in a failure to meet a condition in PTE 84–14, to each sponsor of an ERISA-covered plan and each beneficial owner of an IRA for which a DB QPAM provides asset management or other discretionary fiduciary services, or the sponsor of an investment fund in any case where a DB QPAM acts only as a sub-advisor to the investment fund in which such ERISA-covered plan and IRA invests. In the event that this proposed five-year exemption is granted, the **Federal Register** copy of the notice of final five-year exemption must be delivered to such clients within sixty (60) days of its publication in the **Federal Register**, and may be delivered electronically (including by an email that has a link to the exemption). Any prospective clients for which a DB QPAM provides asset management or other discretionary fiduciary services must receive the proposed and final five-year exemptions with the Summary and the Statement prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the DB QPAM; and

(2) *Notice to Non-Plan Clients.* Each DB QPAM will provide a **Federal Register** copy of the proposed five-year exemption, a **Federal Register** copy of the final five-year exemption; the Summary; and the Statement to each: (A) Current Non-Plan Client within four (4) months of the effective date, if any, of a final five-year exemption; and (B) Future Non-Plan Client prior to, or contemporaneously with, the client's receipt of a written asset management agreement, or other written contractual agreement, from the DB QPAM. For purposes of this subparagraph (2), a Current Non-Plan Client means a client of a DB QPAM that: Is neither an ERISA-covered plan nor an IRA; has assets managed by the DB QPAM as of the effective date, if any, of a final five-year exemption; and has received a written representation (qualified or otherwise) from the DB QPAM that such DB QPAM qualifies as a QPAM or qualifies for the relief provided by PTE 84–14. For purposes of this subparagraph (2), a Future Non-Plan Client means a prospective client of a DB QPAM that: Is neither an ERISA-covered plan nor an IRA; has assets managed by the DB QPAM after the effective date, if any, of a final five-year exemption; and has received a written representation (qualified or otherwise) from the DB QPAM that such DB QPAM qualifies as a QPAM or qualifies for the relief provided by PTE 84–14;

(l) The DB QPAMs must 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 Convictions;

(m)(1) Deutsche Bank designates a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer must conduct an annual review (the Annual Review) to determine the adequacy and effectiveness of the implementation of the Policies and Training. With respect to the Compliance Officer, the following conditions must be met:

(i) The Compliance Officer must be a legal professional with extensive experience with, and knowledge of, the regulation of financial services and products, including under ERISA and the Code; and

(ii) The Compliance Officer must have a direct reporting line to the highest-ranking corporate officer in charge of legal compliance that is independent of Deutsche Bank's other business lines;

(2) With respect to each Annual Review, the following conditions must be met:

(i) The Annual Review includes a review of: Any compliance matter related to the Policies or Training that was identified by, or reported to, the Compliance Officer or others within the compliance and risk control function (or its equivalent) during the previous year; any material change in the business activities of the DB QPAMs; and any change to ERISA, the Code, or regulations related to fiduciary duties and the prohibited transaction provisions that may be applicable to the activities of the DB QPAMs;

(ii) The Compliance Officer prepares a written report for each Annual Review (each, an Annual Report) that (A) summarizes his or her material activities during the preceding year; (B) sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action; (C) details any change to the Policies or Training to guard against any similar instance of noncompliance occurring again; and (D) makes recommendations, as necessary, for additional training, procedures, monitoring, or additional and/or changed processes or systems, and management's actions on such recommendations;

(iii) In each Annual Report, the Compliance Officer must certify in writing that to his or her knowledge: (A) The report is accurate; (B) the Policies and Training are working in a manner which is reasonably designed to ensure that the Policies and Training requirements described herein are met; (C) any known instance of noncompliance during the preceding year and any related correction taken to date have been identified in the Annual Report; (D) the DB QPAMs have complied with the Policies and Training in all respects, and/or corrected any instances of noncompliance in accordance with Section I(h) above; and (E) Deutsche Bank has provided the Compliance Officer with adequate resources, including, but not limited to, adequate staffing;

(iv) Each Annual Report must be provided to appropriate corporate officers of Deutsche Bank and each DB QPAM to which such report relates; the head of Compliance and the General Counsel (or their functional equivalent) of the relevant DB QPAM; and must be made unconditionally available to the independent auditor described in Section I(i) above;

(v) Each Annual Review, including the Compliance Officer's written Annual Report, must be completed at least three (3) months in advance of the date on which each audit described in Section I(i) is scheduled to be completed;

(n) Deutsche Bank disgorged all of its profits generated by the spot/futures-linked market manipulation activities of DSK personnel that led to the Conviction against DSK entered on January 25, 2016, in Seoul Central District Court;

(o) Each DB QPAM will maintain records necessary to demonstrate that the conditions of this exemption have been met, for six (6) years following the date of any transaction for which such DB QPAM relies upon the relief in the exemption;

(p)(1) During the effective period of this five-year exemption, Deutsche Bank immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) entered into by Deutsche Bank or any of its affiliates 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; and (2) Immediately provides the Department any information requested by the Department, as permitted by law, regarding such agreement and/or conduct and allegations that led to the agreement. After review of the information, the Department may require Deutsche Bank or its affiliates, as specified by the Department, to submit a new application for the continued availability of relief as a condition of continuing to rely on this exemption. If the Department denies the relief requested in the new application, or does not grant such relief within twelve (12) months of the application, the relief described herein is revoked as of the date of denial or as of the expiration of the twelve month period, whichever date is earlier;

(q) Each DB QPAM, in its agreements with ERISA-covered plan and IRA clients, or in other written disclosures provided to ERISA-covered plan and IRA clients, within 60 days prior to the initial transaction upon which relief hereunder is relied, and then at least once annually, will clearly and prominently inform the ERISA-covered plan and IRA client that the client has the right to obtain copies of the QPAM's written Policies adopted in accordance with this five-year exemption; and

(r) A DB QPAM will not fail to meet the terms of this exemption, solely because a different DB QPAM fails to satisfy a condition for relief under this exemption described in Sections I(c), (d), (h), (i), (j), (k), (l), (o), and (q).

Section II: Definitions

(a) The term ''Convictions'' means (1) the judgment of conviction against DB Group Services, in Case 3:15–cr–00062–RNC to be entered in the United States District Court for the District of Connecticut to a single count of wire fraud, in violation of 18 U.S.C. 1343, and (2) 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. For all purposes under this exemption, ''conduct'' of any person or entity that is the ''subject of [a] Conviction'' encompasses any conduct of Deutsche Bank and/or their personnel, that is described in the Plea Agreement (including the Factual Statement thereto), Court judgments (including the judgment of the Seoul Central District Court), criminal complaint documents from the Financial Services Commission in Korea, and other official regulatory or judicial factual findings that are a part of this record;

(b) The term ''DB QPAM'' means a ''qualified professional asset manager'' (as defined in Section VI(a)[100] of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which DSK or DK Group Services is a current or future ''affiliate'' (as defined in Section VI(d) of PTE 84–14). For purposes of this exemption, 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;

(c) The term ''Deutsche Bank'' means Deutsche Bank AG but, unless indicated otherwise, does not include its subsidiaries or affiliates;

(d) The term ''U.S. Conviction Date'' means the date that a judgment of conviction against DB Group Services, in Case 3:15–cr–00062–RNC, is entered in the United States District Court for the District of Connecticut;

(e) The term ''DB Group Services'' means DB Group Services UK Limited, an ''affiliate'' of Deutsche Bank (as defined in Section VI(c) of PTE 84–14) based in the United Kingdom;

(f) The term ''DSK'' means Deutsche Securities Korea Co., a South Korean ''affiliate'' of Deutsche Bank (as defined in Section VI(c) of PTE 84–14); and

(g) The term ''Plea Agreement'' means the Plea Agreement (including the Factual Statement thereto), dated April 23, 2015, between the Antitrust Division and Fraud Section of the Criminal Division of the U.S. Department of Justice (the DOJ) and DB Group Services resolving the actions brought by the DOJ in Case 3:15–cr–00062–RNC against DB Group Services for wire fraud in violation of Title 18, United States Code, Section 1343 related to the manipulation of the London Interbank Offered Rate (LIBOR).

[100] 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.

Effective Date: This proposed five-year exemption will be effective beginning on the later of: The U.S. Conviction Date; or the date of publication of the grant notice in the **Federal Register** and ending on the date that is five years thereafter. Should the Applicant wish to extend the effective period of exemptive relief provided by this proposed five-year exemption, the Applicant must submit another application for an exemption. In this regard, the Department expects that, in connection with such application, the Applicant should be prepared to demonstrate compliance with the conditions for this exemption and that the DB QPAMs, and those who may be in a position to influence their policies, have maintained the high standard of integrity required by PTE 84–14.

Department's Comment: As described in further detail below, on September 4, 2015, the Department published PTE 2015–15, which is a nine-month exemption that permits certain Deutsche Bank asset managers to continue to rely on PTE 84–14, notwithstanding the conviction of an affiliate in Korea. The effective period for PTE 2015–15 expired on October 24, 2016. On October 28, 2016, the Department issued PTE 2016–12,[101] a limited extension of PTE 2015–15 (the Extension), which extends the exemptive relief of PTE 2015–15 to the earlier of April 23, 2017 or the effective date of a final agency action by the Department in connection with Exemption Application No. D–11856. Exemption Application No. D–11856 is a proposed temporary one-year exemption (the temporary exemption), being published today elsewhere in the **Federal Register**, that allows DB QPAMs to continue to rely on PTE 84–14 notwithstanding the Korean Conviction and the U.S. Conviction, for a period of up to twelve months beginning on the date of the U.S. Conviction.

The five-year exemption proposed herein would permit certain asset managers affiliated with Deutsche Bank and its affiliates to continue to rely on PTE 84–14 for a period of five years from its effective date. Upon the effective date of the proposed five-year exemption, the Temporary Exemption, if still effective, would expire.

The proposed exemption would provide relief from certain of the restrictions set forth in sections 406 and 407 of ERISA. If granted, no relief from a violation of any other law would be provided by this exemption.

[101] PTE 2016–12 is published in the **Federal Register** at 81 FR 75153 (October 28, 2016).

Furthermore, the Department cautions that the relief in this proposed five-year exemption would terminate immediately if, among other things, an entity within the Deutsche Bank corporate structure is convicted of a crime described in Section I(g) of PTE 84–14 (other than the Convictions) during the effective period of the five-year 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 proposed five-year 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 proposed five-year exemption.

Summary of Facts and Representations[102]

Background

1. Deutsche Bank AG (together with its current and future affiliates, Deutsche Bank) is a German banking corporation and a commercial bank. Deutsche Bank, with and through its affiliates, subsidiaries and branches, provides a wide range of banking, fiduciary, recordkeeping, custodial, brokerage and investment services to, among others, corporations, institutions, governments, employee benefit plans, government retirement plans and private investors. Deutsche Bank had €68.4 billion in total shareholders' equity and €1,709 billion in total assets as of December 31, 2014.[103]

2. Deutsche Investment Management Americas Inc. (DIMA) is an investment adviser registered with the SEC under the Investment Advisers Act of 1940, as amended. DIMA and other wholly-owned subsidiaries of Deutsche Bank provide discretionary asset-management services to employee benefit plans and IRAs. Such entities include: (A) DIMA; (B) Deutsche Bank Securities Inc., which is a dual-registrant with the SEC under the Advisers Act as an investment adviser and broker-dealer; (C) RREEF America L.L.C., a Delaware limited liability company and investment adviser registered with the SEC under the Advisers Act; (D) Deutsche Bank Trust Company Americas, a corporation organized under the laws of the State of New York and supervised by the New York State Department of Financial Services, a member of the Federal Reserve and an FDIC-insured bank; (E) Deutsche Bank National Trust Company, a national banking association, organized under the laws of the United States and supervised by the Office of the Comptroller of the Currency, and a member of the Federal Reserve; (F) Deutsche Bank Trust Company, NA, a national banking association, organized under the laws of the United States and supervised by the OCC; (G) Deutsche Alternative Asset Management (Global) Limited, a London-based investment adviser registered with the SEC under the Advisers Act; (H) Deutsche Investments Australia Limited, a Sydney, Australia-based investment adviser registered with the SEC under the Advisers Act; (I) DeAWM Trust Company (DTC), a limited purpose trust company organized under the laws of New Hampshire and subject to supervision of the New Hampshire Banking Department; and the four following entities which currently do not rely on PTE 84–14 for the management of any ERISA-covered plan or IRA assets, but may in the future: (J) Deutsche Asset Management (Hong Kong) Ltd.; (K) Deutsche Asset Management International GmbH; (L) DB Investment Managers, Inc.; and (M) Deutsche Bank AG, New York Branch.

3. *Korean Conviction.* On January 25, 2016, Deutsche Securities Korea, Co. (DSK), an indirectly held, wholly-owned subsidiary of Deutsche Bank, was convicted in Seoul Central District Court (the Korean Court) of violations of certain provisions of Articles 176, 443, and 448 of the Korean Financial Investment Services and Capital Markets Act (FSCMA) (the Korean Conviction) for spot/futures linked market manipulation in connection with the unwind of an arbitrage position which in turn caused a decline on the Korean market. Charges under Article 448 of the FSCMA stemmed from vicarious liability assigned to DSK for the actions of its employee, who was convicted of violations of certain provisions of Articles 176 and 443 of the FCMA. Upon conviction, the Korean Court sentenced DSK to pay a criminal fine of 1.5 billion South Korean Won (KRW). Furthermore, the Korean Court ordered that Deutsche Bank forfeit KRW 43,695,371,124, while KRW 1,183,362,400 was ordered forfeited by DSK.

4. *US Conviction.* On April 23, 2015, the Antitrust Division and Fraud Section of the Criminal Division of the U.S. Department of Justice (collectively,

[102] The Summary of Facts and Representations is based on Deutsche Bank and DIMA's representations, unless indicated otherwise.

[103] Deutsche Bank represents that its audited financial statements are expressed in Euros and are not converted to dollars.

the DOJ) filed a one-count criminal information (the Criminal Information) in Case 3:15–cr–00062–RNC in the District Court for the District of Connecticut (the District Court) against DB Group Services UK Limited (DB Group Services). The Criminal Information charged DB Group Services with wire fraud in violation of Title 18, United States Code, Section 1343 related to the manipulation of the London Interbank Offered Rate (LIBOR) for the purpose of creating favorable trading positions for Deutsche Bank traders. DB Group Services agreed to resolve the actions brought by the DOJ through a plea agreement, dated April 23, 2015 (the Plea Agreement), which is expected to result in the District Court issuing a judgment of conviction (the US Conviction and together with the Korean Conviction, the Convictions). Under the terms of the Plea Agreement, DB Group Services plead guilty to the charges set out in the Criminal Information and forfeited $150,000,000 to the United States. Furthermore, Deutsche Bank AG and the DOJ entered into a deferred prosecution agreement, dated April 23, 2015 (the DPA). Pursuant to the terms of the DPA, Deutsche Bank agreed to pay a penalty of $625,000,000.

PTE 84–14

5. The Department notes that the rules set forth in section 406 of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and section 4975(c) of the Internal Revenue Code of 1986, as amended (the Code) proscribe certain ''prohibited transactions'' between plans and related parties with respect to those plans, known as ''parties in interest.'' [104] Under section 3(14) of ERISA, parties in interest with respect to a plan include, among others, the plan fiduciary, a sponsoring employer of the plan, a union whose members are covered by the plan, service providers with respect to the plan, and certain of their affiliates. The prohibited transaction provisions under section 406(a) of ERISA prohibit, in relevant part, sales, leases, loans or the provision of services between a party in interest and a plan (or an entity whose assets are deemed to constitute the assets of a plan), as well as the use of plan assets by or for the benefit of, or a transfer of plan assets to, a party in interest.[105]

6. Under the authority of section 408(a) of ERISA and section 4975(c)(2) of the Code, the Department has the authority to grant exemptions from such ''prohibited transactions'' in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).

7. Class Prohibited Transaction Exemption 84–14 (PTE 84–14) [106] exempts certain prohibited transactions between a party in interest and an ''investment fund'' (as defined in Section VI(b)) [107] in which a plan has an interest, if the investment manager satisfies the definition of ''qualified professional asset manager'' (QPAM) and satisfies additional conditions for the exemption. In this regard, PTE 84–14 was developed and granted based on the essential premise that broad relief could be afforded for all types of transactions in which a plan engages only if the commitments and the investments of plan assets and the negotiations leading thereto are the sole responsibility of an independent, discretionary, manager.[108] Deutsche Bank has corporate relationships with a wide range of entities that may act as QPAMs and utilize the exemptive relief provided in Class Prohibited Transaction Exemption 84–14 (PTE 84–14).

8. However, Section I(g) of PTE 84–14 prevents an entity that may otherwise meet the definition of QPAM from utilizing the exemptive relief provided by PTE 84–14, for itself and its client plans, if that entity or an affiliate thereof or any owner, direct or indirect, of a 5 percent or more interest in the QPAM has, within 10 years immediately preceding the transaction, been either convicted or released from imprisonment, whichever is later, as a result of certain specified criminal activity described in that section. The Department notes that Section I(g) was included in PTE 84–14, in part, based on the expectation that a QPAM, and those who may be in a position to influence its policies, maintain a high standard of integrity.[109] Accordingly, as a result of the Korean Conviction and the US Conviction, QPAMs with certain corporate relationships to DSK and DB Group Services, as well as their client plans that are subject to Part 4 of Title I of ERISA (ERISA-covered plans) or section 4975 of the Code (IRAs), will no longer be able to rely on PTE 84–14 without an individual exemption issued by the Department.

The DB QPAMs

9. Deutsche Bank represents that certain current and future ''affiliates'' of DSK and DB Group Services, as that term is defined in section VI(d) of PTE 84–14, may act as QPAMs in reliance on the relief provided in PTE 84–14 (these entities are collectively referred to as the ''DB QPAMs'' or the ''Applicant''). The DB QPAMs are currently comprised of several wholly-owned direct and indirect subsidiaries of Deutsche Bank including: (A) DIMA; (B) Deutsche Bank Securities Inc., which is a dual-registrant with the SEC under the Advisers Act as an investment adviser and broker-dealer; (C) RREEF America L.L.C., a Delaware limited liability company and investment adviser registered with the SEC under the Advisers Act; (D) Deutsche Bank Trust Company Americas, a corporation organized under the laws of the State of New York and supervised by the New York State Department of Financial Services, a member of the Federal Reserve and an FDIC-insured bank; (E) Deutsche Bank National Trust Company, a national banking association, organized under the laws of the United States and supervised by the Office of the Comptroller of the Currency, and a member of the Federal Reserve; (F) Deutsche Bank Trust Company, NA, a national banking association, organized under the laws of the United States and supervised by the OCC; (G) Deutsche Alternative Asset Management (Global) Limited, a London-based investment adviser registered with the SEC under the Advisers Act; (H) Deutsche Investments Australia Limited, a Sydney, Australia-based investment adviser registered with the SEC under the Advisers Act; (I) DeAWM Trust Company (DTC), a limited purpose trust company organized under the laws of New Hampshire and subject to supervision of the New Hampshire Banking Department; and the four following entities which currently do not rely on PTE 84–14 for the management of any ERISA-covered plan or IRA assets, but may in the future: (J) Deutsche Asset Management (Hong Kong) Ltd.; (K) Deutsche Asset Management International GmbH; (L) DB Investment

[104] For purposes of the Summary of Facts and Representations, references to specific provisions of Title I of ERISA, unless otherwise specified, refer also to the corresponding provisions of the Code.

[105] The prohibited transaction provisions also include certain fiduciary prohibited transactions under section 406(b) of ERISA. These include transactions involving fiduciary self-dealing; fiduciary conflicts of interest, and kickbacks to fiduciaries.

[106] 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).

[107] An ''investment fund'' includes single customer and pooled separate accounts maintained by an insurance company, individual trusts and common, collective or group trusts maintained by a bank, and any other account or fund to the extent that the disposition of its assets (whether or not in the custody of the QPAM) is subject to the discretionary authority of the QPAM.

[108] See 75 FR 38837, 38839 (July 6, 2010).

[109] See 47 FR 56945, 56947 (December 21, 1982).

Managers, Inc.; and (M) Deutsche Bank AG, New York Branch.[110]

10. The Applicant notes that discretionary asset management services are provided to ERISA-covered plans, IRAs and others under the following Asset & Wealth Management (AWM) business lines, each of which may be served by one or more of the DB QPAMs: (A) Wealth Management—Private Client Services and Wealth Management—Private Bank ($178.1 million in ERISA assets, $643.9 million in IRA assets and $1.8 million in rabbi trust assets); (B) Active Management ($299 million in ERISA assets, $227.9 million in governmental plan assets, and $141.7 million in rabbi trust assets); (C) Alternative and Real Assets ($7.4 billion in ERISA-covered and governmental plan assets); [111] (D) Alternatives & Fund Solutions ($20.8 million in ERISA accounts, $29 million in IRA holdings and $14.1 million in governmental plan holdings); and (E) Passive Management (no current ERISA or IRA assets).[112] Finally, DTC manages the DWS Stock Index Fund, a collective investment trust with $192 million in assets as of March 31, 2015.

11. The Applicant represents that the AWM business is separate from Group Services. The DB QPAMs that serve the AWM business have their own boards of directors. The Applicant represents that the AWM business has its own legal and compliance teams. The Applicant further notes that the DB QPAMs are subject to certain policies and procedures that are designed to, among other things, ensure that asset management decisions are made without inappropriate outside influence, applicable law and governing documents are followed, personnel act with professionalism and in the best interests of clients, clients are treated fairly, confidential information is protected, conflicts of interest are avoided, errors are reported and a high degree of integrity is maintained.

Market Manipulation Activities of DSK [113]

12. Deutsche Securities Korea Co. (DSK), an indirect wholly-owned subsidiary of Deutsche Bank, is a broker-dealer organized in Korea and supervised by the Financial Supervisory Service in Korea. The Absolute Strategy Group (ASG) of Deutsche Bank's Hong Kong Branch (DB HK) conducts index arbitrage trading for proprietary accounts in Asian markets, including Korea. On January 25, 2016, DSK was convicted in Seoul Central District Court (the Korean Court), under Articles 176, 443, and 448 of South Korea's Financial Investment Services and Capital Markets Act (FSCMA) for spot/futures-linked market price manipulation. The Korean Court issued a written decision (the Korean Decision) in connection with the Korean Conviction.

13. Deutsche Bank represents that index arbitrage trading is a trading strategy through which an investor such as Deutsche Bank seeks to earn a return by identifying and exploiting a difference between the value of futures contracts in respect of a relevant equity index and the spot value of the index, as determined by the current market price of the constituent stocks. For instance, where the futures contracts are deemed to be overpriced by reference to the spot value of the index (*i.e.,* if the premium is sufficiently large), then an index arbitrageur will short sell the relevant futures contracts (either the exchange-traded contracts or the put and call option contracts which together synthetically replicate the exchange-traded futures contracts) and purchase the underlying stocks. The short and long positions offset each other in order to be hedged (although the positions may not always be perfectly hedged).

14. Deutsche Bank represents that ASG pursued an index arbitrage trading strategy in various Asian markets, including Korea. In Korea, the index arbitrage position involved the Korean Composite Stock Price Index (KOSPI 200 Index), which reflects stocks commonly traded on the Korea Exchange (KRX). Deutsche Bank represents that, while ASG tried to track the KOSPI 200 Index as closely as possible, there is a limit on foreign ownership for certain shares such as telecommunication companies. Thus, once ASG's cash position reached this limitation, DSK carried the remainder; and ASG's book, combined with DSK's book for Korea telecommunication companies, reflected ASG's overall KOSPI 200 index arbitrage position.

15. On November 11, 2010, ASG unwound an arbitrage position on the KOSPI 200 Index through DSK. The ''unwind'' included a sale of $2.1 billion worth of stocks in the KRX during the final 10 minutes of trading (*i.e.,* the closing auction period) and comprised 88% of the volume of stock traded during this period. This large volume sale contributed to a drop of the KOSPI 200 Index by 2.7%.

16. Prior to the unwinding, but after the decision to unwind was made, ASG had taken certain derivative positions, including put options on the KOSPI 200 Index. Thus, ASG earned a profit when the KOSPI 200 Index declined as a result of the unwind trades (the derivative positions and unwind trades cumulatively referred to as the Trades). DSK had also purchased put options on that day that resulted in it earning a profit as a result of the drop of the KOSPI 200 Index. The aggregate amount of profit earned from such Trades was approximately $40 million.

17. The Seoul Central District Prosecutor's Office (the Korean Prosecutors) alleged that the Trades constitute spot/futures linked market manipulation, a criminal violation under Korean securities law. In this regard, the Korean Prosecutors alleged that ASG unwound its cash position of certain securities listed on the KRX (spot) through DSK, and caused a fluctuation in the market price of securities related to exchange-traded derivatives (the put options) for the purpose of gaining unfair profit from such exchange-traded derivatives. On August 19, 2011, the Korean Prosecutors indicted DSK and four individuals on charges of stock market manipulation to gain unfair profits. Two of the individuals, Derek Ong and Bertrand Dattas, worked for ASG at DB HK. Mr. Ong was a Managing Director and head of ASG, with power and authority with respect to the KOSPI 200 Index arbitrage trading conducted by Deutsche Bank. Mr. Dattas served as a Director of ASG and was responsible for the direct operations of the KOSPI 200 Index arbitrage trading. Philip Lonergan, the third individual, was employed by Deutsche Bank Services (Jersey) Limited. At the time of the transaction, Mr. Lonergan was seconded to DB HK and served as Head of Global Market Equity, Trading and Risk. Mr. Lonergan

[110] For reasons described below, exemptive relief is not being proposed for DBSI and the branches of Deutsche Bank AG (including the NY Branch), and as such, these entities are excluded from the definition of ''DB QPAM'' for purposes of the operative language of this proposed five-year exemption.

[111] The Alternatives and Real Assets business line also provides discretionary asset management services, through a separately managed account, to one church plan with total assets under management of $168.6 million and, through a pooled fund subject to ERISA, to two church plans with total assets under management of $7.9 million. According to Deutsche Bank, with respect to governmental plan assets, most management agreements are contractually subject to ERISA standards.

[112] With the exception of Passive Management, the statistics for each of the individual business lines listed here have been updated by Deutsche Bank and are current as of June 30, 2015, to the best of Deutsche Bank's knowledge.

[113] The Department has incorporated the facts related to the circumstances leading to the Korean Conviction as represented by Deutsche Bank in Application No. D–11696 and included in the **Federal Register** in the notice of proposed exemption for the aforementioned application at 80 FR 51314 (August 24, 2015).

served as Mr. Ong's regional superior and was in charge of risk management for his team. The fourth individual charged, Do-Joon Park, was employed by DSK, serving as a Managing Director of Global Equity Derivatives (GED) at DSK and was in charge of the index arbitrage trading using DSK's book that had been integrated into and managed by ASG. Mr. Park was also a de facto chief officer of equity and derivative product operations of DSK.

18. The Korean Prosecutors' case against DSK was based on Korea's criminal vicarious liability provision, under which DSK may be held vicariously liable for an act of its employee (*i.e.,* Mr. Park) if it failed to exercise due care in the appointment and supervision of its employees.[114]

19. The trial commenced in January 2012 in the Korean Court. The Korean Court convicted both DSK and Mr. Park on January 25, 2016. The Korean Court sentenced Mr. Park to five years imprisonment. Upon conviction, the Korean Court ordered DSK to pay a criminal fine of KRW 1.5 billion. Furthermore, the Korean Court ordered that Deutsche Bank forfeit KRW 43,695,371,124, while KRW 1,183,362,400 was ordered forfeited by DSK.[115]

LIBOR Manipulation Activities by DB Group Services

20. DB Group Services is an indirect wholly-owned subsidiary of Deutsche Bank located in the United Kingdom. On April 23, 2015, DB Group Services pled guilty in the United States District Court for the District of Connecticut to a single count of wire fraud, in violation of 18 U.S.C. 1343 (the Plea Agreement), related to the manipulation of the London Interbank Offered Rate (LIBOR) described below. In connection with the Plea Agreement with DB Group Services, the DOJ filed a Statement of Fact (the DOJ Plea Factual Statement) that details the underlying conduct that serves as the basis for the criminal charges and impending US Conviction.

21. According to the DOJ Plea Factual Statement, LIBOR is a benchmark interest rate used in financial markets around the world. Futures, options, swaps, and other derivative financial instruments traded in the over-the-counter market. The LIBOR for a given currency is derived from a calculation based upon submissions from a panel of banks for that currency (the Contributor Panel) selected by the British Bankers' Association (BBA). Each member of the Contributor Panel would submit its rates electronically. Once each Contributor Panel bank had submitted its rate, the contributed rates were ranked. The highest and lowest quartiles were excluded from the calculation, and the middle two quartiles (*i.e.,* 50% of the submissions) were averaged to formulate the LIBOR ''fix'' or ''setting'' for the given currency and maturity.

22. The DOJ Plea Factual Statement states that, from 2006 to 2011, Deutsche Bank's Global Finance and Foreign Exchange business units (GFFX) had employees in multiple entities associated with Deutsche Bank, in multiple locations around the world including London and New York. Deutsche Bank, through the GFFX unit, employed traders in both its Pool Trading groups (Pool) and its Money Market Derivatives (MMD) groups. Many of the GFFX traders based in London were employed by DB Group Services.

23. According to the DOJ Plea Factual Statement, Deutsche Bank's Pool traders engaged in, among other things, cash trading and overseeing Deutsche Bank's internal funding and liquidity. Deutsche Bank's Pool traders traded a variety of financial instruments. Deutsche Bank's Pool traders were primarily responsible for formulating and submitting Deutsche Bank's LIBOR and EURIBOR daily contributions. Deutsche Bank's MMD traders, on the other hand, were responsible for, among other things, trading a variety of financial instruments, some of which, such as interest rate swaps and forward rate agreements, were tied to LIBOR and EURIBOR. The DOJ Plea Factual Statement notes that both the Pool traders and the MMD traders worked in close proximity and reported to the same chain of command. DB Group Services employed many of Deutsche Bank's London-based Pool and MMD traders.

24. Deutsche Bank and DB Group Services's derivatives traders (the Derivatives Traders) were responsible for trading a variety of financial instruments, some of which, such as interest rate swaps and forward rate agreements, were tied to reference rates such as LIBOR and EURIBOR. According to the DOJ Plea Factual Statement, from approximately 2003 through at least 2010, the Derivatives Traders defrauded their counterparties by secretly manipulating U.S. Dollar (USD), Yen, and Pound Sterling LIBOR, as well as the EURO Interbank Offered Rate (EURIBOR, and collectively, the IBORs or IBOR). The Derivatives Traders requested that the IBOR submitters employed by Deutsche Bank and other banks send in IBORs that would benefit the Derivatives Traders' trading positions, rather than rates that complied with the definitions of the IBORs. According to the DOJ, Deutsche Bank employees engaged in this collusion through face-to-face requests, electronic communications, which included both emails and electronic chats, and telephone calls.

25. The DOJ Plea Factual Statement explains that when the Derivatives Traders' requests for favorable IBOR submissions were taken into account by the submitters, the resultant contributions affected the value and cash flows of derivatives contracts, including interest rate swap contracts. In accommodating these requests, the Derivatives Traders and submitters were engaged in a deceptive course of conduct in an effort to gain an advantage over their counterparties. As part of this effort: (1) The Deutsche Bank Pool and MMD Traders submitted materially false and misleading IBOR contributions; and (2) Derivatives Traders, after initiating and continuing their effort to manipulate IBOR contributions, entered into derivative transactions with counterparties that did not know that the Deutsche Bank personnel were often manipulating the relevant rate.

26. The DOJ Plea Factual Statement notes that from 2003 through at least 2010, DB Group Services employees regularly sought to manipulate USD LIBOR to benefit their trading positions and thereby benefit themselves and Deutsche Bank. During most of this period, traders at Deutsche Bank who traded products linked to USD LIBOR were primarily located in London and New York. DB Group Services employed almost all of the USD LIBOR traders who were located in London and involved in the misconduct. Throughout the period during which the misconduct occurred, the Deutsche Bank USD LIBOR submitters in London sat within feet of the USD LIBOR traders. This physical proximity enabled the traders and submitters to conspire to make and solicit requests for particular LIBOR submissions.

27. Pursuant to the Plea Agreement that DB Group Services entered into with the DOJ on April 23, 2015, pleading guilty to wire fraud for manipulation of LIBOR, DB Group Services also agreed: (A) To work with its parent company (Deutsche Bank) in fulfilling obligations undertaken by the Bank in connection with its own settlements; (B) to continue to fully cooperate with the DOJ and any other law enforcement or government agency

[114] Article 448 of the FSCMA allows for charges against an employer stemming from vicarious liability for the actions of its employees.

[115] KRW refers to a South Korean Won.

designated by the DOJ in a manner consistent with applicable laws and regulations; and (C) to pay a fine of $150 million.

28. On April 23, 2015, Deutsche Bank AG entered into a deferred prosecution agreement (DPA) with the DOJ, as a disposition for a 2-count criminal information charging Deutsche Bank with one count of wire fraud, in violation of Title 18, United States Code, Section 1343, and one count of price-fixing, in violation of the Sherman Act, Title 15, United States Code, Section 1. By entering into the DPA, Deutsche Bank AG agreed, among other things: (A) To continue to cooperate with the DOJ and any other law enforcement or government agency; (B) to retain an independent compliance monitor for three years, subject to extension or early termination, to be selected by the DOJ from among qualified candidates proposed by the Bank; (C) to further strengthen its internal controls as recommended by the monitor and as required by other settlements; and (D) to pay a penalty of $625 million.

29. On April 23, 2015, Deutsche Bank AG and Deutsche Bank AG, New York Branch (DB NY) also entered into a consent order with the New York State Department of Financial Services (NY DFS) in which Deutsche Bank AG and DB NY agreed to pay a penalty of $600 million. Furthermore, Deutsche Bank AG and DB NY engaged an independent monitor selected by the NY DFS in the exercise of the NY DFS's sole discretion, for a 2-year engagement. Finally, the NY DFS ordered that certain employees involved in the misconduct be terminated, or not be allowed to hold or assume any duties, responsibilities, or activities involving compliance, IBOR submissions, or any matter relating to U.S. or U.S. Dollar operations.

30. Furthermore, the United States Commodities Futures Trading Commission (CFTC) entered a consent order, dated April 23, 2015, requiring Deutsche Bank AG to cease and desist from certain violations of the Commodity Exchange Act, to pay a fine of $800 million, and to agree to certain undertakings.

31. The United Kingdom's Financial Conduct Authority (FCA) issued a final notice (Final Notice), dated April 23, 2015, imposing a fine of £226.8 million on Deutsche Bank AG. In its Final Notice, the FCA cited Deutsche Bank's inadequate systems and controls specific to IBOR. The FCA noted that Deutsche Bank had defective systems to support the audit and investigation of misconduct by traders; and Deutsche Bank's systems for identifying and recording traders' telephone calls and for tracing trading books to individual traders were inadequate. The FCA's Final Notice provided that Deutsche Bank took over two years to identify and produce all relevant audio recordings requested by the FCA. Furthermore, according to the Final Notice, Deutsche Bank gave the FCA misleading information about its ability to provide a report commissioned by Bundesanstalt für Finanzdienstleistungsaufsicht, Germany's Federal Financial Supervisory Authority (BaFin). In addition, the FCA notes in its Final Notice that Deutsche Bank provided it with a false attestation that stated that its systems and controls in relation to LIBOR were adequate, an attestation known to be false by the person who drafted it. The Final Notice provides that, in one instance, Deutsche Bank, in error, destroyed 482 tapes of telephone calls, despite receiving an FCA notice requiring their preservation, and provided inaccurate information to the regulator about whether other records existed.

32. Finally, BaFin set forth preliminary findings based on an audit of LIBOR related issues in a May 15, 2015, letter to Deutsche Bank. At that time, BaFin raised certain questions about the extent of certain senior managers' possible awareness of wrongdoing within Deutsche Bank.

Prior and Anticipated Convictions and Failure To Comply With Section I(g) of PTE 84–14

33. The Korean Conviction caused the DB QPAMs to violate Section I(g) of PTE 84–14. As a result, the Department granted PTE 2015–15, which allows the DB QPAMs to rely on the relief provided by PTE 84–14, notwithstanding the January 25, 2016 Korean Conviction. The Department granted PTE 2015–15 in order to protect ERISA-covered plans and IRAs from certain costs and/or investment losses that could have occurred to the extent the DB QPAMs lost their ability to rely on PTE 84–14 as a result of the Korean Conviction. On October 28, 2016, the Department published in the **Federal Register** PTE 2016–12 (81 FR 75153, October 28, 2016) (the Extension), extending the effective period of 2015–15, which was about to expire. PTE 2015–15 and the Extension are subject to enhanced conditions that are protective of the rights of the participants and beneficiaries of affected ERISA-covered plans and IRAs.

34. The Applicant represents that the US Conviction, tentatively scheduled for April 3, 2017, will also cause DB QPAMs to violate Section I(g) of PTE 84–14. Therefore, Deutsche Bank requests a single, new exemption that would permit the DB QPAMs, and their ERISA-covered plan and IRA clients, to continue to utilize the relief in PTE 84–14, notwithstanding both the Korean Conviction and the US Conviction.

35. The Department is proposing the five-year exemption herein to allow the DB QPAMs to rely on PTE 84–14 notwithstanding the Korean Conviction and the US Conviction, subject to a comprehensive suite of protective conditions designed to protect the rights of the participants and beneficiaries of the ERISA-covered plans and IRAs that are managed by DB QPAMs.

36. Concurrently with this proposed five-year exemption, elsewhere in the **Federal Register**, the Department is publishing a proposed temporary exemption for DB QPAMs to rely on PTE 84–14 notwithstanding the Korean Conviction and the US Conviction, for a period of up to one year (the Temporary Exemption). The Temporary Exemption will allow the Department to determine whether to grant this five-year exemption, and will protect ERISA-covered plans and IRAs from potential losses if such DB QPAMs suddenly lose their ability to rely on PTE 84–14 with respect to such plans and IRAs. The Temporary Exemption will be effective from the date of the US Conviction until the earlier of twelve months from such date or until the effective date of a final agency action made by the Department in connection with this proposed five-year exemption. The exemptive relief set forth in the Temporary Exemption would be replaced by that in the proposed five-year exemption.

37. This five-year exemption will not apply to Deutsche Bank Securities, Inc. (DBSI).[116] Section I(a) of PTE 2015–15 and the Extension, requires that ''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.'' In a letter to the Department dated July 15, 2016, Deutsche Bank raised the possibility that an individual,[117] while

[116] The Applicant represents that DBSI has not relied on the relief provided by PTE 84–14 since the date of the Korean Conviction.

[117] The Applicant identifies the individual as Mr. John Ripley, a senior global manager in DBSI who was based in the United States and who was a functional supervisor over the employees of DSK that were prosecuted for market manipulation. Furthermore, the Applicant states that Mr. Ripley was terminated by DBSI for ''loss of confidence'' in that he could have exercised more care and been more proactive in reviewing the trades at issue.

employed at DBSI, may have known or had reason to know of the criminal conduct of DSK that is the subject of the Korean Conviction. In a letter to the Department dated August 19, 2016, Deutsche Bank further clarified that ''there is no evidence that anyone at DBSI other than Mr. Ripley knew in advance of the trades conducted by the Absolute Strategy Group on November 11, 2010.'' Deutsche Bank states that it had previously interpreted Section I(a) of PTE 2015–15 as requiring only that ''any current director, officer or employee did not know of, have reason to know of, or participate in the conduct.'' The Department notes that Deutsche Bank did not raise any interpretive questions regarding Section I(a) of PTE 2015–15, or express any concerns regarding DBSI's possible noncompliance, during the comment period for PTE 2015–15. Nor did Deutsche Bank seek a technical correction or other remedy to address such concerns between the time that PTE 2015–15 was granted and the date of the Korean Conviction. The Department notes that a period of approximately nine months passed before Deutsche Bank raised an interpretive question regarding Section I(a) of PTE 2015–15. Accordingly, the Department is not proposing exemptive relief for DBSI in this five-year exemption.

The five-year exemption will also not apply with respect to Deutsche Bank AG (the parent entity) or any of its branches. The Applicant represents that neither Deutsche Bank AG nor its branches have relied on the relief provided by PTE 84–14 since the date of the Korean Conviction.

38. Finally, the Applicant represents that it currently does not have a reasonable basis to believe that any pending criminal investigation [118] of any of Deutsche Bank's affiliated corporate entities would cause a reasonable plan or IRA customer not to hire or retain the Bank's affiliated managers as a QPAM. Furthermore, this five-year exemption will not apply to any other conviction(s) of Deutsche Bank or its affiliates for crimes described in Section I(g) of PTE 84–14. The Department notes that, in such event, the Applicant and its ERISA-covered plan and IRA clients should be prepared to rely on exemptive relief other than PTE 84–14 for any prohibited transactions entered into after the date of such new conviction(s); withdraw from any arrangements that solely rely on PTE 84–14 for exemptive relief; or avoid engaging in any such prohibited transactions in the first place.

Remedial Measures To Address Criminal Conduct of DSK

39. Deutsche Bank represents that it has voluntarily disgorged its profits generated from exercising derivative positions and put options in connection with the activity associated with the Korean Conviction. DSK also suspended its proprietary trading from April 2011 to 2012, and thereafter DSK only engaged in limited proprietary trading (but not index arbitrage trading).[119] Further, in response to the actions of the Korean Prosecutors, Deutsche Bank enhanced its compliance measures and implemented additional measures in order to ensure compliance with applicable laws in Korea and Hong Kong, as well as within other jurisdictions where Deutsche Bank conducts business.

40. Deutsche Bank states that Mr. Ong and Mr. Dattas were terminated for cause by DB HK on December 6, 2011, and Mr. Lonergan was terminated on January 31, 2012. In addition, Mr. Park was suspended for six months due to Korean administrative sanctions, and remained on indefinite administrative leave, until being terminated effective January 25, 2016. John Ripley, a New York-based employee of Deutsche Bank Securities Inc. (DBSI) who was not indicted, was also terminated in October 2011.[120]

Remedial Measures To Address Criminal Conduct of DB Group Services

41. Deutsche Bank represents that it has significantly modified its compensation structure. Specifically, Deutsche Bank: Eliminated the use of ''percentage of trading profit'' contracts once held by two traders involved in the LIBOR case; extended the vesting/distribution period for deferred compensation arrangements; made compliance with its internal policies a significant determinant of bonus awards; and modified its compensation plans to facilitate forfeiture/clawback of compensation when employees are found after the fact to have engaged in wrongdoing. Deutsche Bank represents that the forfeiture/clawback provisions of its compensation plans have been altered so as to permit action against employees even when misconduct is discovered years later.

42. With respect to the LIBOR-related misconduct, Deutsche Bank represents that it has separated from or disciplined the employees responsible. With the exceptions described below, none of the employees determined to be responsible for the misconduct remains employed by Deutsche Bank. Deutsche Bank represents that, during the initial phase of its internal investigation into the LIBOR matters, it terminated the two employees most responsible for the misconduct, including the Global Head of Money Market and Derivatives Trading.

43. Deutsche Bank then terminated five benchmark submitters in its Frankfurt office, including the Head of Global Finance and Foreign Exchange in Frankfurt. Four of these employees successfully challenged their termination in a German Labor court, and one employee entered into a separation agreement with Deutsche Bank after initially indicating that he would challenge the termination decision. With respect to the four employees who challenged their termination, the Bank agreed to mediate the employee labor disputes and reached settlements with the four employees. Pursuant to the settlements, the two more senior employees remained on paid leave through the end of 2015 and then have no association with Deutsche Bank. The two more junior employees have returned to the Bank in non-risk-taking roles. They do not work for any DB QPAMs and have no involvement in the Bank's AWM business or the setting of interest rate benchmarks. Deutsche Bank represents that it also terminated four additional individuals, and another eight individuals left the bank before facing disciplinary action.

44. Deutsche Bank represents that it will take action to terminate any additional employees who are determined to have been involved in the improper benchmark manipulation conduct, as well as those who knew about it and approved it. Moreover, the Applicant states that Deutsche Bank has taken further steps, both on its own and in consultation with U.S. and foreign regulators, to discipline those whose performance fell short of DB's

[118] The Applicant references the Deutsche Bank AG Form 6–K, filed July 27, 2016, available at: *https://www.db.com/ir/en/download/6_K_Jul_2016.pdf*; and the Deutsche Bank AG Form 10–F filed March 11, 2016 and available at: *https://www.db.com/ir/en/download/Deutsche_Bank_20_F_2015.pdf*.

[119] Deutsche Bank notes that DSK was never permitted to trade on behalf of Deutsche Bank.

[120] According to the Korean prosecutors, Mr. Ripley served as a Head of Global ASG of Deutsche Bank, AG, and was a functional superior to Mr. Ong. Mr. Ripley was suspected of having advised to unwind all the KOSPI 200 index arbitrage trading for the purpose of management of the ending profits and losses of Global ASK and approved Mr. Ong's request to establish the speculative positions in the course of the unwinding. Though the Korean prosecutors named Mr. Ripley as a suspect, he was not named in the August 19, 2011, Writ of Indictment.

expectations in connection with the above-described conduct.

Statutory Findings—In the Interests of Affected Plans and IRAs

45. The Applicant represents that the proposed exemption is in the interests of affected ERISA-covered plans and IRAs. Deutsche Bank represents that the DB QPAMS provide discretionary asset management services under several business lines, including (A) Alternative and Real Assets (ARA); (B) Alternatives & Fund Solutions (AFS); (C) Active Management (AM); and (D) Wealth Management—Private Client Services and Wealth Management—Private Bank. Deutsche Bank asserts that plans will incur direct transaction costs in liquidating and reinvesting their portfolios. According to Deutsche Bank, the direct transaction costs of liquidating and reinvesting ERISA-covered plan, IRA and ERISA-like assets under the various business lines (other than core real estate) could range from 2.5 to 25 basis points, resulting in an estimated dollar cost of approximately $5–7 million. Deutsche Bank also states that an unplanned liquidation of the Alternatives and Real Assets business' direct real estate portfolios could result in portfolio discounts of 10–20% of gross asset value, in addition to transaction costs ranging from 30 to 100 basis points, for estimated total cost to plan investors of between $281 million and $723 million, depending on the liquidation period.

46. Deutsche Bank states that its managers provide discretionary asset management services, through both separately managed accounts and four pooled funds subject to ERISA, to a total of 46 ERISA-covered plan accounts, with total assets under management (AuM) of $1.1 billion. Deutsche Bank estimates that the underlying plans cover in total at least 640,000 participants. Deutsche Bank represents that its managers provide asset management services, through both separately managed accounts and pooled funds subject to ERISA, to a total of 22 governmental plan accounts, with total AuM of $7.1 billion. The underlying plans cover at least 3 million participants. With respect to church plans and rabbi trust accounts, Deutsche Bank investment managers separately manage accounts and a pooled fund subject to ERISA, to a total of 4 church plan and rabbi trust accounts, with total AuM of $318.3 million. With respect to ERISA-covered Plan, IRA, Governmental Plan and Church Plan Accounts in Non-Plan Asset Pooled Funds, Deutsche Bank represents that its asset managers manages 175 ERISA-covered plan accounts with interests totaling $4.23 billion, 178 IRAs with interests totaling $29 million, 66 governmental plan accounts with interests totaling $2.08 billion, and 14 church plan accounts with interests totaling $67.1 million.

47. Deutsche Bank contends that ERISA-covered, IRA, governmental plan and other plan investors that terminate or withdraw from their relationship with their DB QPAM manager may be harmed in several specific ways, including: The costs of searching for and evaluating a new manager; the costs of leaving a pooled fund and finding a replacement fund or investment vehicle; and the lack of a secondary market for certain investments and the costs of liquidation.[121]

48. Deutsche Bank represents that its ARA business line provides discretionary asset management services to, among others, 17 ERISA accounts and 18 governmental plan accounts. The largest account has $1.6 billion in AuM. ERISA-covered and governmental plans total $7.4 billion in AuM. Deutsche Bank estimates that the underlying plans cover at least 2.7 million participants. ARA provides these services through separately managed accounts and pooled funds subject to ERISA. ARA also provides discretionary asset management services, through a separately managed account, to one church plan with total AuM of $168.6 million and, through a pooled fund subject to ERISA, to two church plans with total AuM of $7.9 million.

49. Deutsche Bank argues that PTE 84–14 is the sole exemption available to ARA for investments in direct real estate for separately managed accounts. Deutsche Bank represents that, as a result of terminating ARA's management, a typical plan client may incur $30,000 to $40,000 in consulting fees in searching for a new manager as well as $10,000 to $30,000 in legal fees. Furthermore, with respect to direct real estate investments, Deutsche Bank states that plan clients may face direct transaction costs of 30–100 basis points for early liquidation, or a $4.8 million to $16 million loss for its largest ARA governmental plan client; as well as a 10–20% discount for early liquidation, or a $162.5 million to $325 million loss for the largest ARA governmental plan client. With respect to non-direct real estate investments, Deutsche Bank states that plan clients may face direct transaction costs of 20–60 basis points, or $933,000 for ARA's largest ERISA client.

50. Deutsche Bank notes that ARA manages seven unregistered real estate investment trusts and other funds that currently rely on one or more exceptions to the Department's plan asset regulation. Interests in the funds are held by 131 ERISA-covered plan accounts, 63 governmental plan accounts and 14 church plan accounts. Deutsche Bank represents that the largest holding in these funds by an ERISA-covered plan account is $647.4 million. Holdings by all ERISA plan accounts in these funds total $4.21 billion. The underlying ERISA-covered plans cover at least 2 million participants. The largest holding by a governmental plan account in these funds is $286.5 million. Holdings of all governmental plan accounts in these funds total $2.07 billion. The underlying plans cover at least 6.1 million participants. The largest holding by a church plan is $16 million. Holdings of all church plans in these funds total $67.1 million.

51. Deutsche Bank represents that its AFS business line manages 28 unregistered, closed-end, private equity funds, with $2.8 billion in total assets, in which ERISA-covered, IRA and governmental plans invest. Interests in these funds are held by, among others, 44 ERISA-covered plan accounts, 178 IRAs and 3 governmental plan accounts. Holdings by all ERISA-covered plan accounts total $20.8 million. Deutsche Bank notes that the underlying plans cover at least 57,000 participants. Holdings by all IRAs total $29 million. Holdings by all governmental plans total $14.1 million. These funds invest primarily in equity interests issued by other private equity funds. The funds currently rely on the 25% benefit plan investor participation exception under the Department's plan asset regulation.

52. Deutsche Bank contends that, in the event the AFS business line cannot rely upon the exemptive relief of PTE 84–14, all plans would have to undertake the time and expense of identifying suitable transferees, accept a discounted sale price, comply with applicable transfer rules and pay the funds a transfer fee, which may run to $5,000 or more. Deutsche Bank states that, in locating a replacement fund, a typical plan could incur 6–8 months of delay, $30,000–$40,000 in consultant fees for a private manager/fund search, 25–50 hours in client time and $10,000–$30,000 in legal fees to review subscription agreements and negotiate side letters.

[121] The Department notes that, if this temporary exemption is granted, compliance with the condition in Section I(j) of the exemption would require the DB QPAMs to hold their plan customers harmless for any losses attributable to, inter alia, any prohibited transactions or violations of the duty of prudence and loyalty.

53. Deutsche Bank represents that its AM business line provides discretionary asset management services to separately managed plan accounts, including five ERISA-covered plan accounts and three governmental plan accounts. The largest ERISA account is $164.2 million. Total ERISA AuM is $299.2 million. The underlying ERISA-covered plans cover at least 143,000 participants. The largest governmental plan account is $164.3 million. Total governmental plan AuM is $227.9 million. The underlying plans cover at least 731,000 participants. Deutsche Bank notes that AM also provides such services to one rabbi trust with total AuM of $141.7 million.

54. Deutsche Bank represents that the AM line manages these accounts with a variety of strategies, including: (A) Equities, (B) fixed income, (C) overlay, (D) commodities, and (E) cash. These strategies involve a range of asset classes and types, including: (A) U.S. and foreign fixed income (Treasuries, Agencies, corporate bonds, asset-backed securities, mortgage and commercial mortgage-backed securities, deposits); (B) US and foreign mutual funds and ETFs; (C) US and foreign futures, (D) currency; (E) swaps (interest rate and credit default); (F) US and foreign equities; and (G) short term investment funds.

55. Deutsche Bank estimates that, in the event the AM business line cannot rely upon the exemptive relief of PTE 84–14, plan clients would typically incur $30,000 to $40,000 in consulting fees related to a new manager search, up to 5 basis points in direct transaction costs, and $15,000–$30,000 in legal costs to negotiate each new futures, cleared derivatives, swap or other trading agreements.

56. Deutsche Bank represents that its Wealth Management—Private Client Services and Wealth Management—Private Bank business lines manage $178.1 million in ERISA assets, $643.9 million in IRA assets, and $1.8 million of rabbi trust assets (Wealth Management—Private Bank). Deutsche Bank asserts that causing plan clients to change managers will lead the plans and IRAs to incur transaction costs, estimated at 2.5 basis points overall.

Statutory Findings—Protective of the Rights of Participants of Affected Plans and IRAs

57. The Applicant has proposed certain conditions it believes are protective of plans and IRAs with respect to the transactions described herein. The Department has determined to revise and supplement the proposed conditions so that it can make its required finding that the requested exemption is protective of the rights of participants and beneficiaries of affected plans and IRAs.

58. Several of the conditions underscore the Department's understanding, based on Deutsche Bank's representations, that the affected DB QPAMs were not involved in the misconduct that is the subject of the Convictions. The five-year exemption, if granted as proposed, mandates that 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 and DB Group Services that is the subject of the Convictions (for purposes of this requirement, ''participate in'' includes an individual's knowing or tacit approval of the misconduct underlying the Convictions). Furthermore, the DB QPAMs (including their officers, directors, employees, and agents other than Deutsche Bank) cannot have received direct compensation, or knowingly received indirect compensation, in connection with the criminal conduct that is the subject of the Convictions.

59. The proposed five-year exemption defines the Convictions as: (1) The judgment of conviction against DB Group Services, in Case 3:15–cr–00062–RNC to be entered in the United States District Court for the District of Connecticut to a single count of wire fraud, in violation of 18 U.S.C. 1343 (the US Conviction); and (2) 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 (the Korean Conviction). The Department notes that the ''conduct'' of any person or entity that is the ''subject of [a] Conviction'' encompasses any conduct of Deutsche Bank and/or their personnel, that is described in the Plea Agreement (including the Factual Statement), Court judgments (including the judgment of the Seoul Central District Court), criminal complaint documents from the Financial Services Commission in Korea, and other official regulatory or judicial factual findings that are a part of this record.

60. The Department expects that DB QPAMs will rigorously ensure that the individuals associated with the misconduct will not be employed or knowingly engaged by such QPAMs. In this regard, the five-year exemption mandates that the DB QPAMs will not employ or knowingly engage any of the individuals that participated in the spot/futures-linked market manipulation or LIBOR manipulation activities that led to the Convictions, respectively. For purposes of this condition, ''participated in'' includes an individual's knowing or tacit approval of the misconduct that is the subject of the Convictions. Further, 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 or the Code and managed by such DB QPAM, to enter into any transaction with DSK or DB Group Services, nor otherwise engage DSK or DB Group Services to provide additional services to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or services may otherwise be within the scope of relief provided by an administrative or statutory exemption.

61. The DB QPAMs must 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 Convictions. Further, any failure of the DB QPAMs to satisfy Section I(g) of PTE 84–14 must result solely from the LIBOR Conviction and the Korean Conviction.

62. No relief will be provided by this five-year exemption to the extent that a DB QPAM exercised authority over 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) in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Convictions; or cause the QPAM, affiliates, or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Convictions. The conduct that is the subject of the Convictions includes that which is described in the plea agreement with the U.S. Department of Justice, dated April 23, 2015 (the Plea Agreement), which is expected to result in the District Court issuing the US Conviction; the deferred prosecution agreement between Deutsche Bank AG and the DOJ, dated April 23, 2015 (the DPA); and in connection with the January 25, 2016 conviction (the Korean Conviction) of DSK, in Seoul Central District Court (the Korean Court) for spot/futures linked market manipulation. Further, no five-year relief will be provided to the extent DSK or DB Group Services provide any discretionary asset management services to ERISA-covered plans or IRAs or

otherwise act as a fiduciary with respect to ERISA-covered plan or IRA assets.

63. *Policies.* The Department believes that robust policies and training are warranted where, as here, extensive criminal misconduct has occurred within a corporate organization that includes one or more QPAMs managing plan investments in reliance on PTE 84–14. Therefore, this proposed five-year exemption requires each DB QPAM to immediately develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that: The asset management decisions of the DB QPAM are conducted independently of Deutsche Bank's corporate management and business activities, including the corporate management and business activities of DB Group Services and DSK; 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; 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; any filings or statements made by the DB QPAM to regulators, including but not limited to, the Department, 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; 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; and the DB QPAM complies with the terms of this proposed exemption. Any violation of, or failure to comply with, the Policies must be corrected promptly upon discovery, and any such violation or compliance failure not promptly corrected must be reported, upon the discovery of such 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.[122] A DB 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 reports such instance of noncompliance as explained above.

64. *Training.* The Department has also imposed a condition that requires each DB QPAM to immediately develop and implement a program of training (the Training) for all relevant DB 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) and ethical conduct, the consequences for not complying with the conditions of this proposed exemption (including the loss of the exemptive relief provided herein), and prompt reporting of wrongdoing. Furthermore, the Training must be conducted by an independent professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code.

65. *Independent Transparent Audit.* The Department views a rigorous, transparent audit that is conducted by an independent party as essential to ensuring that the conditions for exemptive relief described herein are followed by the DB QPAMs. Therefore, Section I(i) of this proposed exemption requires that each DB QPAM submits to an audit conducted annually 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 the DB QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. Each annual audit must cover a consecutive twelve month period and must be completed no later than six (6) months after the period to which the audit applies. The first twelve-month audit period hereunder begins on the effective date of this proposed five-year exemption.

The audit condition requires that, 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. The auditor's engagement must specifically require the auditor to determine whether each DB QPAM has complied with the Policies and Training conditions described herein, and must further require the auditor to test each DB QPAM's operational compliance with the Policies and Training. On or before the end of the relevant period described in Section I(i)(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 the DB QPAM's Policies and Training; the DB QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective DB QPAM's noncompliance with the written Policies and Training.

Any determination 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 action taken by such DB QPAM to address such recommendations must be included in an addendum to the Audit Report. Any determination by the auditor that the respective DB QPAM has implemented, maintained, and followed sufficient Policies and Training must 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 implemented, maintained, and followed the Policies and Training required by this five-year exemption. Finally, the Audit Report must address the adequacy of the Annual Review required under this exemption and the resources provided to the Compliance officer in connection with such Annual Review. Furthermore, the auditor must notify the respective DB QPAM of any

[122] With respect to any ERISA-covered plan or IRA sponsored by an ''affiliate'' (as defined in Part 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.

instance 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.

This five-year exemption requires that certain senior personnel of Deutsche Bank review the Audit Report, make certifications, and take various corrective actions. In this regard, the General Counsel, or one of the three most senior executive officers of the DB QPAM to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this exemption; addressed, corrected, or remedied any inadequacy 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 proposed five-year exemption and with the applicable provisions of ERISA and the Code. The Risk Committee of Deutsche Bank's Board of Directors is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking legal compliance officer of Deutsche Bank must review the Audit Report for each DB QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report.

In order to create a more transparent record in the event that the proposed relief is granted, each DB QPAM must provide its certified Audit Report to the Department no later than 45 days following its completion. The Audit Report will be part of the public record regarding this five-year exemption. Furthermore, each DB QPAM must make 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. Additionally, each DB QPAM and the auditor must submit to the Department any engagement agreement(s) entered into pursuant to the engagement of the auditor under this exemption; and any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this proposed exemption, no later than six (6) months after the effective date of this five-year exemption (and one month after the execution of any agreement thereafter). Finally, if the exemption is granted, the auditor must provide the Department, 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 instance of noncompliance by the relevant DB QPAM; and an explanation of any corrective or remedial action taken by the applicable DB QPAM.

In order to enhance oversight of the compliance with the exemption, Deutsche Bank must notify the Department at least 30 days prior to any substitution of an auditor, and Deutsche Bank must demonstrate to the Department's satisfaction that any new auditor is independent of Deutsche Bank, experienced in the matters that are the subject of the exemption, and capable of making the determinations required of this exemption.

66. *Contractual Obligations.* This five-year exemption requires DB QPAMs to enter into certain contractual obligations in connection with the provision of services to their clients. It is the Department's view that the condition in Section I(j) is essential to the Department's ability to make its findings that the proposed five-year exemption is protective of the rights of the participants and beneficiaries of ERISA-covered plan and IRA clients. In this regard, effective as of the effective date of this five-year exemption with respect to any arrangement, agreement, or contract between a DB QPAM and an ERISA-covered plan or IRA for which a DB QPAM provides asset management or other discretionary fiduciary services, each DB QPAM agrees and warrants: 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); 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; and to indemnify and hold harmless the ERISA-covered plan and IRA for any damages resulting from a DB QPAM's violation of applicable laws, a DB QPAM's breach of contract, or any claim brought in connection with the failure of such DB 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 Convictions. Furthermore, DB QPAMs must agree not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the DB QPAM for violating ERISA or the Code or engaging in prohibited transactions; 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; not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the DB 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; 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; and not to include exculpatory provisions disclaiming or otherwise limiting liability of the DB 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 Deutsche Bank.

Within four (4) months of the effective date of this proposed five-year exemption, each DB QPAM will provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which a DB QPAM provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a DB QPAM provides asset management or discretionary other fiduciary services, the DB QPAM will agree in writing to its obligations under this Section I(j) in an updated investment management agreement or advisory agreement between the DB QPAM and such clients or other written contractual agreement.

67. *Notice Requirements.* The proposed exemption contains extensive notice requirements, some of which

extend not only to ERISA-covered plan and IRA clients of DB QPAMs, but which also apply to the non-Plan clients of DB QPAMs. In this regard, the Department understands that many firms may promote their ''QPAM'' designation in order to earn asset management business, including business from non-ERISA plans. Therefore, in order to fully inform any clients that may have retained DB QPAMs as asset managers because such DB QPAMs have represented themselves as able to rely on PTE 84–14, the Department has determined to condition exemptive relief upon the following notice requirements.

Within fifteen (15) days of the publication of this proposed five-year exemption in the **Federal Register**, each DB QPAM will provide a notice of the proposed five-year exemption, along with a separate summary describing the facts that led to the Convictions (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that each Conviction separately results in a failure to meet a condition in PTE 84–14, to each sponsor of an ERISA-covered plan and each beneficial owner of an IRA for which a DB QPAM provides asset management or other discretionary fiduciary services, or the sponsor of an investment fund in any case where a DB QPAM acts only as a sub-advisor to the investment fund in which such ERISA-covered plan and IRA invests. In the event that this proposed five-year exemption is granted, the **Federal Register** copy of the notice of final five-year exemption must be delivered to such clients within sixty (60) days of its publication in the **Federal Register**, and may be delivered electronically (including by an email that has a link to the exemption). Any prospective clients for which a DB QPAM provides asset management or other discretionary fiduciary services must receive the proposed and final five-year exemptions with the Summary and the Statement prior to, or contemporaneously with, the client's receipt of a written asset management agreement or other contractual agreement from the DB QPAM.

In addition, each DB QPAM will provide a **Federal Register** copy of the proposed five-year exemption, a **Federal Register** copy of the final five-year exemption; the Summary; and the Statement to each: (A) Current Non-Plan Client within four (4) months of the effective date, if any, of a final five-year exemption; and (B) Future Non-Plan Client prior to, or contemporaneously with, the client's receipt of a written asset management agreement or other contractual agreement from the DB QPAM. A ''Current Non-Plan Client'' is a client of a DB QPAM that: Is neither an ERISA-covered plan nor an IRA; has assets managed by the DB QPAM as of the effective date, if any, of a final five-year exemption; and has received a written representation (qualified or otherwise) from the DB QPAM that such DB QPAM qualifies as a QPAM or qualifies for the relief provided by PTE 84–14. A ''Future Non-Plan Client'' is a prospective client of a DB QPAM that is neither an ERISA-covered plan nor an IRA that has assets managed by the DB QPAM after the effective date, if any, of a final five-year exemption, and has received a written representation (qualified or otherwise) from the DB QPAM that such DB QPAM is a QPAM, or qualifies for the relief provided by PTE 84–14.

68. This proposed five-year exemption also requires Deutsche Bank to designate a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer will have several obligations that it must comply with, as described in Section I(m) above. These include conducting an annual review (the Annual Review) to determine the adequacy and effectiveness of the implementation of the Policies and Training; and preparing a written report for each Annual Review (each, an Annual Report) that, among other things, summarizes his or her material activities during the preceding year and sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action. Each Annual Report must be provided to appropriate corporate officers of Deutsche Bank and each DB QPAM to which such report relates; the head of Compliance and the General Counsel (or their functional equivalent) of the relevant DB QPAM; and must be made unconditionally available to the independent auditor described above.

69. Each DB QPAM must maintain records necessary to demonstrate that the conditions of this proposed five-year exemption have been met, for six (6) years following the date of any transaction for which such DB QPAM relies upon the relief in the five-year exemption.

70. In order for DB QPAMs to rely on the exemption provided herein, Deutsche Bank must have disgorged all of its profits generated by the spot/futures-linked market manipulation activities of DSK personnel that led to the Conviction against DSK entered on January 25, 2016, in Seoul Central District Court.

71. The proposed five-year exemption mandates that, during the effective period of this five-year exemption, Deutsche Bank discloses to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) entered into by Deutsche Bank or any of its affiliates 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. Furthermore, Deutsche Bank must immediately provide the Department any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement. After review of the information, the Department may require Deutsche Bank or its affiliates, as specified by the Department, to submit a new application for the continued availability of relief as a condition of continuing to rely on this exemption. In this regard, the QPAM (or other party submitting the application) will have the burden of justifying the relief sought in the application. If the Department denies the relief requested in the new application, or does not grant such relief within twelve (12) months of the application, the relief described herein is revoked as of the date of denial or as of the expiration of the twelve month period, whichever date is earlier.

72. Finally, each DB QPAM, in its agreements with ERISA-covered plan and IRA clients, or in other written disclosures provided to ERISA-covered plan and IRA clients, within 60 days prior to the initial transaction upon which relief hereunder is relied, will clearly and prominently inform the ERISA-covered plan or IRA client that the client has the right to obtain copies of the QPAM's written Policies adopted in accordance with this five-year exemption.

Statutory Findings—Administratively Feasible

73. Deutsche Bank represents that the proposed five-year exemption is administratively feasible because it does not require any monitoring by the Department but relies on an independent auditor to determine that the exemption conditions are being complied with. Furthermore, the requested five-year exemption does not require the Department's oversight because, as a condition of this proposed five-year exemption, neither DB Group Services nor DSK will provide any fiduciary or QPAM services to ERISA-covered plans and IRAs.

74. Given the revised and new conditions described above, the Department has tentatively determined that the five-year relief sought by the Applicant satisfies the statutory requirements for an exemption under section 408(a) of ERISA.

Notice to Interested Persons

Notice of the proposed exemption will be provided to all interested persons within 15 days of the publication of the notice of proposed five-year exemption in the **Federal Register**. The notice will be provided to all interested persons in the manner described in Section I(k)(1) of this proposed exemption and will contain the documents described therein and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the pending exemption. All written comments and/or requests for a hearing must be received by the Department within forty five (45) days of the date of publication of this proposed exemption in the **Federal Register**. All comments will be made available to the public.

All comments will be made available to the public. *Warning:* If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Scott Ness of the Department, telephone (202) 693–8561. (This is not a toll-free number.)

Citigroup, Inc. (Citigroup or the Applicant), Located in New York, New York

[Application No. D–11909]

Proposed Five Year Exemption

The Department is considering granting a five-year exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[123]

Section I: Covered Transactions

If the proposed five-year exemption is granted, certain asset managers with specified relationships to Citigroup (the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs, as defined further in Sections II(a) and II(b), respectively) will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Class Exemption 84–14 (PTE 84–14 or the QPAM Exemption),[124] notwithstanding the judgment of conviction against Citicorp (the Conviction), as defined in Section II(c)),[125] for engaging in a conspiracy to: (1) Fix the price of, or (2) eliminate competition in the purchase or sale of the euro/U.S. dollar currency pair exchanged in the Foreign Exchange (FX) Spot Market, for a period of five years beginning on the date the exemption is granted, provided the following conditions are satisfied:

(a) Other than a single individual who worked for a non-fiduciary business within Citigroup's Markets and Securities Services business, and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs (including their officers, directors, agents other than Citicorp, and employees of such QPAMs who had responsibility for, or exercised authority in connection with the management of plan assets) did not know of, did not have reason to know of, or participate in the criminal conduct 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) Other than a single individual who worked for a non-fiduciary business within Citigroup's Markets and Securities Services business, and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs (including their officers, directors, and agents other than Citigroup, and employees of such Citigroup 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 Citigroup Affiliated 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 the purposes of this paragraph (c), ''participated in'' includes the knowing or tacit approval of the misconduct underlying Conviction);

(d) A Citigroup Affiliated 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 Citigroup Affiliated QPAM, to enter into any transaction with Citicorp or the Markets and Securities Services business of Citigroup, or to engage Citicorp or the Markets and Securities Services business of Citigroup, 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 a Citigroup Affiliated QPAM or a Citigroup Related QPAM to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction;

(f) A Citigroup Affiliated QPAM or a Citigroup Related QPAM did not exercise authority over 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) in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Conviction; or cause the Citigroup Affiliated QPAM or the Citigroup Related QPAM or its affiliates or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Conviction;

(g) Citicorp and the Markets and Securities Services business of Citigroup will not provide discretionary asset management services to ERISA-covered plans or IRAs, or otherwise act as a fiduciary with respect to ERISA-covered plan or IRA assets;

(h)(1) Within four (4) months of the Conviction, each Citigroup Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that:

(i) The asset management decisions of the Citigroup Affiliated QPAM are

[123] For purposes of this proposed five-year exemption, references to section 406 of Title I of the Act, unless otherwise specified, should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[124] 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).

[125] 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 violation of the Sherman Antitrust Act, Title 15 United States Code, Section 1.

conducted independently of the corporate management and business activities, including the corporate management and business activities of the Markets and Securities Services business of Citigroup;

(ii) The Citigroup Affiliated 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 violation of these duties and provisions with respect to ERISA-covered plans and IRAs;

(iii) The Citigroup Affiliated 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 Citigroup Affiliated QPAM to regulators, including, but not limited to, the Department, 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 Citigroup Affiliated 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 plans and IRA clients;

(vi) The Citigroup Affiliated QPAM complies with the terms of this five-year exemption; and

(vii) Any violation of, or failure to comply with an item in subparagraphs (ii) through (vi), is corrected promptly upon discovery, and any such violation or compliance failure not promptly corrected is reported, upon the discovery of such 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 Citigroup Affiliated QPAM, 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 Citigroup; 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 Citigroup or beneficially owned by an employee of Citigroup or its affiliates, such fiduciary does not need to be independent of Citigroup. A Citigroup Affiliated 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 (4) months of the date of the Conviction, each Citigroup Affiliated QPAM must develop and implement a program of training (the Training), conducted at least annually, for all relevant Citigroup Affiliated QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. The Training must:

(i) 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 five-year exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing; and

(ii) Be conducted by an independent professional who has been prudently selected and who has appropriate technical and training and proficiency with ERISA and the Code;

(i)(1) Each Citigroup Affiliated QPAM submits to an audit conducted annually 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 the Citigroup Affiliated QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. Each annual audit must cover a consecutive twelve (12) month period starting with the twelve (12) month period that begins on the effective date of the five-year exemption, and each annual audit 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 Citigroup Affiliated QPAM and, if applicable, Citigroup, 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 Citigroup Affiliated QPAM has developed, implemented, maintained, and followed the Policies in accordance with the conditions of this five-year exemption, and has developed and implemented the Training, as required herein;

(4) The auditor's engagement must specifically require the auditor to test each Citigroup Affiliated QPAM's operational compliance with the Policies and Training. In this regard, the auditor must test a sample of each 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) For each audit, on or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to Citigroup and the Citigroup Affiliated 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:

(i) The adequacy of the Citigroup Affiliated QPAM's Policies and Training; the Citigroup Affiliated QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective Citigroup Affiliated QPAM's noncompliance with the written Policies and Training described in Section I(h) above. Any determination 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 Citigroup Affiliated QPAM must be promptly addressed by such Citigroup Affiliated QPAM, and any action taken by such Citigroup Affiliated QPAM to address such recommendations must be included in an addendum to the Audit Report (which addendum is completed prior to the certification described in Section I(i)(7) below). Any determination by the auditor that the respective Citigroup Affiliated QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that the Citigroup Affiliated QPAM has complied with the requirements under this subsection must be based on evidence that demonstrates the Citigroup Affiliated QPAM has actually implemented, maintained, and followed the Policies and Training required by this five-year exemption. Furthermore, the auditor must not rely on the Annual

Report created by the compliance officer (the Compliance Officer) as described in Section I(m) below in lieu of independent determinations and testing performed by the auditor as required by Section I(i)(3) and (4) above; and

(ii) The adequacy of the Annual Review described in Section I(m) and the resources provided to the Compliance Officer in connection with such Annual Review;

(6) The auditor must notify the respective Citigroup Affiliated QPAM of any instance 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 Citigroup Affiliated QPAM to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this exemption; addressed, corrected, or remedied any inadequacy 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 proposed five-year exemption, and with the applicable provisions of ERISA and the Code;

(8) The Risk Committee of Citigroup's Board of Directors is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking legal compliance officer of Citigroup must review the Audit Report for each Citigroup Affiliated QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report;

(9) Each Citigroup Affiliated QPAM provides its certified Audit Report, by regular mail to: The Department's Office of Exemption Determinations (OED), 200 Constitution Avenue NW., Suite 400, Washington, DC 20210, or by private carrier to: 122 C Street NW., Suite 400, Washington, DC 20001–2109, no later than 30 days following its completion. The Audit Report will be part of the public record regarding this five-year exemption. Furthermore, each Citigroup Affiliated QPAM must make 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 Citigroup Affiliated QPAM;

(10) Each Citigroup Affiliated QPAM and the auditor must submit to OED: (A) Any engagement agreement(s) entered into pursuant to the engagement of the auditor under this five-year exemption; and (B) any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this five-year exemption, no later than six (6) months after the Conviction Date (and one month after the execution of any agreement thereafter);

(11) The auditor must 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 instance of noncompliance by the relevant Citigroup Affiliated QPAM; and an explanation of any corrective or remedial action taken by the applicable Citigroup Affiliated QPAM; and

(12) Citigroup must notify the Department at least thirty (30) days prior to any substitution of an auditor, except that no such replacement will meet the requirements of this paragraph unless and until Citigroup demonstrates to the Department's satisfaction that such new auditor is independent of Citigroup, experienced in the matters that are the subject of the exemption, and capable of making the determinations required of this exemption;

(j) Effective as of the effective date of this five-year exemption, with respect to any arrangement, agreement, or contract between a Citigroup Affiliated QPAM and an ERISA-covered plan or IRA for which a Citigroup Affiliated QPAM provides asset management or other discretionary fiduciary services, each Citigroup Affiliated QPAM agrees and warrants:

(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, as applicable, with respect to each such ERISA-covered plan and IRA;

(2) To indemnify and hold harmless the ERISA-covered plan or IRA for any damages resulting from a Citigroup Affiliated QPAM's violation of applicable laws, a Citigroup Affiliated QPAM's breach of contract, or any claim brought in conection with the failure of such Citigroup Affiliated 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;

(3) Not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the Citigroup Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(4) 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 Citigroup Affiliated 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 Citigroup, and its affiliates;

(5) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the Citigroup Affiliated 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;

(6) 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;

(7) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the Citigroup Affiliated 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 which is independent of Citigroup, and its affiliates; and

(8) Within four (4) months of the date of the Conviction, each Citigroup Affiliated QPAM must provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which a Citigroup Affiliated QPAM

provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a Citigroup Affiliated QPAM provides asset management or other discretionary services, the Citigroup Affiliated QPAM will agree in writing to its obligations under this Section I(j) in an updated investment management agreement between the Citigroup Affiliated QPAM and such clients or other written contractual agreement;

(k)(1) *Notice to ERISA-covered plan and IRA clients.* Within fifteen (15) days of the publication of this proposed five-year exemption in the **Federal Register**, each Citigroup Affiliated QPAM will provide a notice of the proposed five-year exemption, along with a separate summary describing the facts that led to the Conviction (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that the Conviction results in a failure to meet a condition in PTE 84–14, to each sponsor of an ERISA-covered plan and each beneficial owner of an IRA for which a Citigroup Affiliated QPAM provides asset management or other discretionary services, or the sponsor of an investment fund in any case where a Citigroup Affiliated QPAM acts only as a sub-advisor to the investment fund in which such ERISA-covered plan and IRA invests. In the event that this proposed five-year exemption is granted, the **Federal Register** copy of the notice of final five-year exemption must be delivered to such clients within sixty (60) days of its publication in the **Federal Register**, and may be delivered electronically (including by an email that has a link to the exemption). Any prospective clients for which a Citigroup Affiliated QPAM provides asset management or other discretionary services must receive the proposed and final five-year exemptions with the Summary and the Statement prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the Citigroup Affiliated QPAM; and

(2) *Notice to Non-Plan Clients.* Each Citigroup Affiliated QPAM will provide a **Federal Register** copy of the proposed five-year exemption, a **Federal Register** copy of the final five-year exemption; the Summary; and the Statement to each: (A) Current Non-Plan Client within four (4) months of the effective date, if any, of a final five-year exemption; and (B) Future Non-Plan Client prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the Citigroup Affiliated QPAM. For purposes of this subparagraph (2), a Current Non-Plan Client means a client of a Citigroup Affiliated QPAM that: Is neither an ERISA-covered plan nor an IRA; has assets managed by the Citigroup Affiliated QPAM as of the effective date, if any, of a final five-year exemption; and has received a written representation (qualified or otherwise) from the Citigroup Affiliated QPAM that such Citigroup Affiliated QPAM qualifies as a QPAM or qualifies for the relief provided by PTE 84–14. For purposes of this subparagraph (2), a Future Non-Plan Client means a client of a Citigroup Affiliated QPAM that is neither an ERISA-covered plan nor an IRA that, has assets managed by the Citigroup Affiliated QPAM as of the effective date, if any, of a final five-year exemption, and has received a written representation (qualified or otherwise) from the Citigroup Affiliated QPAM that such Citigroup Affiliated QPAM is a QPAM, or qualifies for the relief provided by PTE 84–14;

(l) The Citigroup Affiliated QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction;

(m)(1) Citigroup designates a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer must conduct an annual review (the Annual Review) to determine the adequacy and effectiveness of the implementation of the Policies and Training. With respect to the Compliance Officer, the following conditions must be met:

(i) The Compliance Officer must be a legal professional with extensive experience with, and knowledge of, the regulation of financial services and products, including under ERISA and the Code; and

(ii) The Compliance Officer must have a direct reporting line to the highest-ranking corporate officer in charge of legal compliance that is independent of Citigroup's other business lines;

(2) With respect to each Annual Review, the following conditions must be met:

(i) The Annual Review includes a review of: Any compliance matter related to the Policies or Training that was identified by, or reported to, the Compliance Officer or others within the compliance and risk control function (or its equivalent) during the previous year; any material change in the business activities of the Citigroup Affiliated QPAMs; and any change to ERISA, the Code, or regulations related to fiduciary duties and the prohibited transaction provisions that may be applicable to the activities of the Citigroup Affiliated QPAMs;

(ii) The Compliance Officer prepares a written report for each Annual Review (each, an Annual Report) that (A) summarizes his or her material activities during the preceding year; (B) sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action; (C) details any change to the Policies or Training to guard against any similar instance of noncompliance occurring again; and (D) makes recommendations, as necessary, for additional training, procedures, monitoring, or additional and/or changed processes or systems, and management's actions on such recommendations;

(iii) In each Annual Report, the Compliance Officer must certify in writing that to his or her knowledge: (A) The report is accurate; (B) the Policies and Training are working in a manner which is reasonably designed to ensure that the Policies and Training requirements described herein are met; (C) any known instance of noncompliance during the preceding year and any related correction taken to date have been identified in the Annual Report; (D) the Citigroup Affiliated QPAMs have complied with the Policies and Training in all respects, and/or corrected any instances of noncompliance in accordance with Section I(h) above; and (E) Citigroup has provided the Compliance Officer with adequate resources, including, but not limited to, adequate staffing;

(iv) Each Annual Report must be provided to appropriate corporate officers of Citigroup and each Citigroup Affiliated QPAM to which such report relates; the head of compliance and the General Counsel (or their functional equivalent) of the relevant Citigroup Affiliated QPAM; and must be made unconditionally available to the independent auditor described in Section I(i) above;

(v) Each Annual Review, including the Compliance Officer's written Annual Report, must be completed at least three (3) months in advance of the date on which each audit described in Section I(i) is scheduled to be completed;

(n) Each Citigroup Affiliated QPAM will maintain records necessary to demonstrate that the conditions of this exemption have been met, for six (6) years following the date of any transaction for which such Citigroup Affiliated QPAM relies upon the relief in the exemption;

(o) During the effective period of the five-year exemption, Citigroup: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or a Non-Prosecution Agreement (an NPA) with the U.S. Department of Justice, entered into by Citigroup or any of its affiliates in connection with 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 conduct and allegations that led to the agreement. The Department may, following its review of that information, require Citigroup or a party specified by the Department, to submit a new application for the continued availability of relief as a condition of continuing to rely on this exemption. If the Department denies the relief requested in that application, or does not grant such relief within twelve (12) months of the application, the relief described herein would be revoked as of the date of denial or as of the expiration of the twelve month period, whichever date is earlier;

(p) Each Citigroup Affiliated QPAM, in its agreements with ERISA-covered plan and IRA clients, or in other written disclosures provided to ERISA-covered plan and IRA clients, within 60 days prior to the initial transaction upon which relief hereunder is relied, and then at least once annually, will clearly and prominently: Inform the ERISA-covered plan and IRA client that the client has the right to obtain copies of the QPAM's written Policies adopted in accordance with the exemption; and

(q) A Citigroup Affiliated QPAM or a Citigroup Related QPAM will not fail to meet the terms of this exemption, solely because a different Citigroup Affiliated QPAM or Citigroup Related QPAM fails to satisfy a condition for relief described in Sections I(c), (d), (h), (i), (j), (k), (l), (n) and (p).

Section II: Definitions

(a) The term ''Citigroup Affiliated QPAM'' means a ''qualified professional asset manager'' (as defined in section VI(a) [126] of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which Citigroup is a current or future ''affiliate'' (as defined in section VI(d)(1) of PTE 84–14). The term ''Citigroup Affiliated QPAM'' excludes the parent entity, Citigroup and Citigroup's Banking Division.

(b) The term ''Citigroup Related QPAM'' means any current or future ''qualified professional asset manager'' (as defined in section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14, and with respect to which Citigroup owns a direct or indirect five percent or more interest, but with respect to which Citigroup is not an ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14).

(c) 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;

(d) The term ''Citicorp'' means Citicorp, Inc., the parent entity, but does not include any subsidiaries or other affiliates;

(e) The term ''Conviction'' means the judgment of conviction against Citigroup for violation of the Sherman Antitrust Act, 15 U.S.C. 1, which is scheduled to be entered in the District Court for the District of Connecticut (the District Court) (Case Number 3:15–cr–78–SRU), in connection with Citigroup, through one of its euro/U.S. dollar (EUR/USD) traders, entering into and engaging in a combination and conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, the EUR/USD currency pair exchanged in the FX spot market by agreeing to eliminate competition in the purchase and sale of the EUR/USD currency pair in the United States and elsewhere. For all purposes under this five-year, ''conduct'' of any person or entity that is the ''subject of [a] Conviction'' encompasses any conduct of Citigroup and/or their personnel, that is described in the Plea Agreement, (including the Factual Statement), and other official regulatory or judicial factual findings that are a part of this record; and

(f) The term ''Conviction Date'' means the date that a judgment of Conviction against Citicorp is entered by the District Court in connection with the Conviction.

Effective Date: This proposed five-year exemption, will be effective beginning on the date of publication of such grant in the **Federal Register** and ending on the date that is five years thereafter. Should the Applicant wish to extend the effective period of exemptive relief provided by this proposed five-year exemption, the Applicant must submit another application for an exemption. In this regard, the Department expects that, in connection with such application, the Applicant should be prepared to demonstrate compliance with the conditions for this exemption and that the Citigroup Affiliated QPAMs, and those who may be in a position to influence their policies, have maintained the high standard of integrity required by PTE 84–14.

Department's Comment: Concurrently with this proposed five-year exemption, the Department is publishing a proposed one-year exemption for Citigroup Affiliated QPAMs to continue to rely on PTE 84–14. That one-year exemption is intended to allow the Department sufficient time, including a longer comment period, to determine whether to grant this five-year exemption. The proposed one-year exemption is designed to protect ERISA-covered plans and IRAs from the potential costs and losses, described below, that would be incurred if such Citigroup Affiliated QPAMs were to suddenly lose their ability to rely on PTE 84–14 as of the Conviction date.

The proposed five-year exemption would provide relief from certain of the restrictions set forth in sections 406 and 407 of ERISA. No relief from a violation of any other law would be provided by this exemption, including any criminal conviction described herein.

The Department cautions that the relief in this proposed five-year exemption would terminate immediately if, among other things, an entity within the Citigroup 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 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 proposed five-year 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 proposed exemption.

Summary of Facts and Representations [127]

Background

1. Citigroup is a global diversified financial services holding company incorporated in Delaware and headquartered in New York, New York. Citigroup and its affiliates provide

[126] 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 has acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM.

[127] The Summary of Facts and Representations is based on the Applicant's representations, unless indicated otherwise.

consumers, corporations, governments and institutions with a broad range of financial products and services, including consumer banking and credit, corporate and investment banking, securities brokerage, trade and securities services and wealth management. Citigroup has approximately 241,000 employees and operations in over 160 countries and jurisdictions. As of December 31, 2014, Citigroup had approximately $1.8 trillion of assets under management and held $889 billion in deposits.

2. Citigroup currently operates, for management reporting purposes, via two primary business segments which include: (a) Citigroup's Global Consumer Banking businesses (GCB); and (b) Citigroup's Institutional Clients Group (ICG).

GCB includes a global, full-service consumer franchise delivering a wide array of retail banking, commercial banking, Citi-branded credit cards and investment services through a network of local branches, offices and electronic delivery systems. GCB had 3,280 branches in 35 countries around the world. For the year ended December 31, 2014, GCB had $399 billion of average assets and $331 billion of average deposits.

ICG provides a broad range of banking and financial products and services to corporate, institutional, public sector and high-net-worth clients in approximately 100 countries. ICG transacts with clients in both cash instruments and derivatives, including fixed income, foreign currency, equity and commodity products. ICG is divided into several business lines including: (a) Citi Corporate and Investment Banking; (b) Treasury and Trade Solutions; (c) Markets and Securities Services; and (d) Citi Private Bank (CPB).

3. The Applicant represents that Citigroup has several affiliates that provide investment management services.[128] Citigroup provides investment advisory services to clients world-wide through a number of different programs offered by various businesses that are tailored to meet the needs of its diverse clientele. Within the United States, Citigroup offers its investment advisory programs primarily through the following: (a) CPB and Citigroup's Global Consumers Group (GCG), acting through Citigroup Global Markets Inc. (CGMI); and (b) Citibank, N.A. (Citibank) and Citi Private Advisory, LLC (CPA) (collectively, the Advisory Businesses). The Applicant represents that CPA and CGMI are each investment advisers, registered under the Advisers Act. The Applicant also represents that CPB, CGMI, Citibank, and CPA are QPAMs.

Within the United States, Citigroup's Advisory Businesses are conducted within CPB and GCG. Together, CPB and GCG provide services to over 44,000 customer advisory accounts with assets under management totaling over $33 billion. Of these, there are over 20,000 accounts for ERISA pension plans and individual retirement accounts (IRAs) (collectively, Retirement Accounts), with assets under management of approximately $3.8 billion.

Although each of the advisory programs offered by the Advisory Businesses is unique, most utilize independent third-party managers on a discretionary or nondiscretionary basis, as determined by the client. Other programs such as Citi Investment Management (CIM), which operates through both the CGMI and CPB business units, primarily provide advice concerning the selection of individual securities for CPB clients.

CPB, GCG, CBNA, CGMI and their affiliates provide administrative, management and/or technical services designed to implement and monitor client's investment guidelines, and in certain nondiscretionary programs, offer recommendations on investing and re-investing portfolio assets for the client's consideration. CPB provides private banking services, and offers its clients access to a broad array of products and services available through bank and non-bank affiliates of Citigroup. GCG services include U.S. and international retail banking, U.S. consumer lending, international consumer finance, and commercial finance. Citibank is a wholly-owned subsidiary of Citigroup and a national banking association which provides fiduciary advisory services.

4. CGMI is a wholly-owned subsidiary of Citigroup whose principal activities include retail and institutional private client services which include: (a) Advice with respect to financial markets; (b) the execution of securities and commodities transactions as a broker or dealer; (c) securities underwriting; (d) investment banking; (e) investment management (including fiduciary and administrative services); and (f) trading and holding securities and commodities for its own account. CGMI holds a number of registrations, including registration as an investment adviser, a securities broker-dealer, and a futures commission merchant.

CPA is also a wholly-owned subsidiary of Citigroup and provides advisory services to private investment funds that are organized to invest primarily in other private investment funds advised by third-party managers.

The Applicant represents that trading decisions and investment strategy of current Citigroup Affiliated QPAMs for their clients is not shared with Citigroup employees outside of the Advisory Business, nor do employees of the Advisory Business consult with other Citigroup affiliates prior to making investment decisions on behalf of clients.

5. On May 20, 2015, the Applicant filed an application for exemptive relief in connection with a conviction that would make the relief in PTE 84–14 unavailable to any current or future Citigroup-related investment managers. In this regard, the U.S. Department of Justice (Department of Justice) conducted an investigation of certain conduct and practices of Citigroup in the FX spot market. Thereafter, Citicorp, a Delaware corporation that is a financial services holding company and the direct parent company of Citibank, entered into a plea agreement with the Department of Justice (the Plea Agreement), to be approved by the U.S. District Court for the District of Connecticut (the District Court), pursuant to which Citicorp has pleaded guilty to one count of an antitrust violation of the Sherman Antitrust Act, 15 U.S.C. 1 (15 U.S.C. 1).

As set forth in the Plea Agreement, from at least December 2007 and continuing to at least January 2013 (the Relevant Period), Citicorp, through one London-based euro/U.S. dollar (EUR/USD) trader employed by Citibank, entered into and engaged in a conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, the EUR/USD currency pair exchanged in the FX spot market by agreeing to eliminate competition in the purchase and sale of the EUR/USD currency pair in the United States and elsewhere. The criminal conduct that is the subject of the Conviction included near daily conversations, some of which were in code, in an exclusive electronic chat room used by certain EUR/USD traders, including the EUR/USD trader

[128] Section VI(d) of PTE 84–14 defines an ''affiliate'' of a person, for purposes of Section I(g), as: (1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person, (2) any director of, relative of, or partner in, any such person, (3) any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner, and (4) any employee or officer of the person who—(A) is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent or more of the yearly wages of such person), or (B) has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets.

employed by Citibank. The criminal conduct that is the subject of the Conviction forms the basis for the Department of Justice's antitrust charge that Citicorp violated 15 U.S.C. 1.

Under the terms of the Plea Agreement, the Department of Justice and Citicorp have agreed that the District Court should impose a sentence requiring Citicorp to pay a criminal fine of $925 million. The Plea Agreement also provides for a three-year term of probation, with conditions to include, among other things, Citigroup's continued implementation of a compliance program designed to prevent and detect the criminal conduct that is the subject of the Conviction throughout its operations, as well as Citigroup's further strengthening of its compliance and internal controls as required by other regulatory or enforcement agencies that have addressed the criminal conduct that is the subject of the Conviction, including: (a) The U.S. Commodity Futures Trading Commission (the CFTC), pursuant to its settlement with Citibank on November 11, 2014, requiring remedial measures to strengthen the control framework governing Citigroup's FX trading business; (b) the Office of the Comptroller of the Currency, pursuant to its settlement with Citibank on November 11, 2014, requiring remedial measures to improve the control framework governing Citigroup's wholesale trading and benchmark activities; (c) the U.K. Financial Conduct Authority (FCA), pursuant to its settlement with Citibank on November 11, 2014; and (d) the U.S. Board of Governors of the Federal Reserve System (FRB), pursuant to its settlement with Citigroup entered into concurrently with the Plea Agreement with Department of Justice, requiring remedial measures to improve Citigroup's controls for FX trading and activities involving commodities and interest rate products.

6. The Applicant states that in January 2016, Nigeria's Federal Director of Public Prosecutions filed charges against a Nigerian subsidiary of Citibank and fifteen individuals (some of whom are current or former employees of that subsidiary) relating to specific credit facilities provided to a certain customer in 2000 to finance the import of goods. The Applicant represents that these charges are the latest of a series of charges that were filed and then withdrawn between 2007 and 2011. The Applicant also represents that to its best knowledge, it does not have a reasonable basis to believe that the discretionary asset management activities of any Citigroup QPAMs are subject to these charges. Further, the Applicant represents that it does not have a reasonable basis to believe that there are any pending criminal investigations involving Citigroup or any of its affiliates that would cause a reasonable plan or IRA customer not to hire or retain the institution as a QPAM.

7. Notwithstanding the aforementioned charges, once the Conviction is entered, the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs, as well as their client plans that are subject to Part 4 of Title I of ERISA (ERISA-covered plans) or section 4975 of the Code (IRAs), will no longer be able to rely on PTE 84–14, pursuant to the anti-criminal rule set forth in section I(g) of the class exemption, absent an individual exemption. The Applicant is seeking an individual exemption that would permit the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs, and their ERISA-covered plan and IRA clients to continue to utilize the relief in PTE 84–14, notwithstanding the anticipated Conviction, provided that such QPAMs satisfy the additional conditions imposed by the Department in the proposed five-year exemption herein.

8. The Applicant represents that the criminal conduct that is the subject of the Conviction was neither widespread nor pervasive. The Applicant states that such criminal conduct consisted of isolated acts perpetrated by a single EUR/USD trader employed in Citigroup's Markets and Securities Services business in the United Kingdom who was removed from the activities of the Citigroup Affiliated QPAMs, both geographically and organizationally. The Applicant represents that this London-based EUR/USD trader was not an officer or director of Citigroup, and did not have any involvement in, or influence over, Citigroup or any of the Citigroup Affiliated QPAMs. The Applicant states that this London-based EUR/USD trader had minimal management responsibilities, which related exclusively to Citigroup's G10 Spot FX trading business, outside of the United States. As represented by the Applicant, once senior management became aware of the criminal conduct that is the subject of the Conviction, Citibank took action to terminate the employee.

9. The Applicant represents that the Citigroup Affiliated QPAMs, did not know of, did not have reason to know of, and did not participate in the criminal conduct that is the subject of the Conviction. The Applicant also represents that no current or former employee of Citigroup or of any Citigroup Affiliated QPAM who previously has been or who subsequently may be identified by Citigroup, or any U.S. or non-U.S. regulatory or enforcement agencies, as having been responsible for the criminal conduct that is the subject of the Conviction will have any involvement in providing asset management services to plans and IRAs or will be an officer, director, or employee of the Applicant or of any Citigroup Affiliated QPAM.

Citigroup's Business Separation/Compliance/Training

10. The Applicant represents that Citigroup's Advisory Businesses are operated independently from Citigroup's Markets and Securities Services, the segment of Citigroup in which foreign exchange trading is conducted.[129] Although the Advisory Business falls under the umbrellas of ICG and GCG, it operates separately in all material respects from the sales and trading businesses that comprise that business segment. The Advisory Business maintains separate: (a) Management and reporting lines; (b) compliance programs; (c) compensation arrangements; (d) profit and loss reporting (with different comptrollers), (e) human resources and training programs, and (f) legal coverage. The Applicant represents that the Advisory Businesses maintain a separate, dedicated compliance function, and have protocols to preserve the separation between employees in the Advisory Business and those in Markets and Securities Services.

11. The Applicant represents that Citigroup's independent control functions, including Compliance, Finance, Legal and Risk, set standards according to which Citigroup and its businesses are expected to manage and oversee risks, including compliance with applicable laws, regulatory requirements, policies and standards of ethical conduct. Among other things, the independent control functions provide advice and training to Citigroup's businesses and establish tools, methodologies, processes and oversight of controls used by the businesses to foster a culture of compliance and control and to satisfy those standards.

[129] The Applicant represents that each of Citigroup's primary business units operates a large number of separate and independent businesses. These lines of business generally have: (a) A group of employees working solely on matters specific to its line of business, (b) separate management and reporting lines; (c) tailored compliance regimens; (d) separate compensation arrangements; (e) separate profit and loss reporting; (vi) separate human resources personnel and training, (f) dedicated risk and compliance officers and (g) dedicated legal coverage.

12. The Applicant represents that compliance at Citigroup is an independent control function within Franchise Risk and Strategy that is designed to protect Citigroup not only by managing adherence to applicable laws, regulations and other standards of conduct, but also by promoting business behavior and activity that is consistent with global standards for responsible finance. The Applicant states that Citigroup has implemented company-wide initiatives designed to further embed ethics in Citigroup's culture. This includes training for more than 40,000 senior employees that fosters ethical decision-making and underscores the importance of escalating issues, a video series featuring senior leaders discussing ethical decisions, regular communications on ethics and culture, and the development of enhanced tools to support ethical decision-making.

Statutory Findings—In the Interest of Affected Plans and IRAs

13. The Applicant represents that, if the exemption is denied, the Citigroup Affiliated QPAMs may be unable to effectively manage assets subject to ERISA or the prohibited transaction provisions of the Code where PTE 84–14 is needed to avoid engaging in a prohibited transaction. The Applicant further represents that plans and participants would be harmed because they would be unnecessarily deprived of the current and future opportunity to utilize the Applicant's experience in and expertise with respect to the financial markets and investing. The Applicant anticipates that, if the exemption is denied, some of Citigroup's 20,000 existing Retirement Account clients may feel forced to terminate their advisory relationship with Citigroup, incurring expenses related to: (a) Consultant fees and other due diligence expenses for identifying new managers; (b) transaction costs associated with a change in investment manager, including the sale and purchase of portfolio investments to accommodate the investment policies and strategy of the new manager, and the cost of entering into new custodial arrangements; and (c) lost investment opportunities in connection with the change.[130]

Statutory Findings—Protective of the Rights of Participants of Affected Plans and IRAs

14. The Applicant has proposed certain conditions it believes are protective of participants and beneficiaries of ERISA-covered plans and IRAs with respect to the transactions described herein. The Department has determined that it is necessary to modify and supplement the conditions before it can tentatively determine that the requested exemption meets the statutory requirements of section 408(a) of ERISA. In this regard, the Department has tentatively determined that the following conditions adequately protect the rights of participants and beneficiaries of affected plans and IRAs with respect to the transactions that would be covered by this proposed five-year exemption.

The five-year exemption, if granted as proposed, is only available to the extent: (a) Other than with respect to a single individual who worked for a non-fiduciary business within Citigroup's Markets and Securities Services business and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, Citigroup Affiliated QPAMs, including their officers, directors, agents other than Citigroup, and employees, did not know of, have reason to know of, or participate in the criminal conduct of Citigroup that is the subject of the Conviction (for purposes of this requirement, the term ''participate in'' includes an individual's knowing or tacit approval of the misconduct underlying the Conviction); (b) any failure of those QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction; and (c) other than a single individual who worked for a non-fiduciary business within Citigroup's Markets and Securities Services business, and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs (including their officers, directors, agents other than Citigroup, and employees of such Citigroup QPAMs) did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct that is the subject of the Conviction.

15. The Department expects the Citigroup Affiliated QPAMs will rigorously ensure that the individual associated with the misconduct will not be employed or knowingly engaged by such QPAMs. In this regard, the five-year exemption mandates that the Citigroup Affiliated QPAMs will not employ or knowingly engage any of the individuals that participated in the FX manipulation that is the subject of the Conviction. For purposes of this condition, the term ''participated in'' includes an individual's knowing or tacit approval of the behavior that is the subject of the Conviction.

16. Further, the Citigroup Affiliated 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 Citigroup Affiliated QPAM to enter into any transaction with Citigroup or the Markets and Securities Services business of Citigroup, or to engage Citigroup or the Markets and Securities Services business of Citigroup 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.

17. The Citigroup Affiliated QPAMs and the Citigroup Related QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction. Further, any failure of the Citigroup Affiliated QPAMs or the Citigroup Related QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction.

No relief will be provided by this five-year exemption, if a Citigroup Affiliated QPAM or a Citigroup Related QPAM exercised authority over plan assets in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Conviction; or cause the Citigroup Affiliated QPAM or the Citigroup Related QPAM or its affiliates or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Conviction. Also, no relief will be provided by this five-year exemption to the extent Citigroup or the Markets and Securities Services business of Citigroup provides any discretionary asset management services to ERISA-covered plans or IRAs, or otherwise acts as a fiduciary with respect to ERISA-covered plan or IRA assets.

18. The Department believes that robust policies and training are warranted where, as here, the criminal misconduct has occurred within a corporate organization that is affiliated with one or more QPAMs managing plan or IRA assets. Therefore, this proposed five-year exemption requires

[130] The Department notes that, if this five-year exemption is granted, compliance with the condition in Section I(j) of the exemption would require the Citigroup Affiliated QPAMs to hold their plan customers harmless for any losses attributable to, inter alia, any prohibited transactions or violations of the duty of prudence and loyalty.

that within four (4) months of the Conviction, each Citigroup Affiliated QPAM must develop, implement, maintain, and follow written policies (the Policies) requiring and reasonably designed to ensure that: The asset management decisions of the Citigroup Affiliated QPAM are conducted independently of the management and business activities of Citigroup, including the management and business activities of the Markets and Securities business of Citigroup; the Citigroup Affiliated 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 violation of these duties and provisions with respect to ERISA-covered plans and IRAs; the Citigroup Affiliated QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to ERISA-covered plans and IRAs; any filings or statements made by the Citigroup Affiliated 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; the Citigroup Affiliated 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; and the Citigroup Affiliated QPAM complies with the terms of this five-year exemption.

Any violation of, or failure to comply with these Policies must be 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 Citigroup Affiliated QPAM, the independent auditor responsible for reviewing compliance with the Policies, and an appropriate fiduciary of any affected ERISA-covered plan or IRA, which such fiduciary is independent of Citigroup. A Citigroup Affiliated 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 reports such instance of noncompliance as explained above.

19. The Department has also imposed a condition that requires each Citigroup Affiliated QPAM, within four (4) months of the date of the Conviction, to develop and implement a program of training (the Training), conducted at least annually, for all relevant Citigroup Affiliated 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 five-year exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing. Further, the Training must be conducted by an independent professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code.

20. *Independent Transparent Audit.* The Department views a rigorous and transparent audit that is conducted annually by an independent party, as essential to ensuring that the conditions for exemptive relief described herein are followed by the Citigroup Affiliated QPAMs. Therefore, Section I(i) of this proposed five-year exemption requires that each Citigroup Affiliated QPAM submits to an audit, conducted annually 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 the Citigroup Affiliated QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. In addition, each annual audit must cover a consecutive twelve (12) month period starting with the twelve (12) month period that begins on the effective date of the five-year exemption. Each annual audit must be completed no later than six (6) months after the period to which the audit applies.

21. Among other things, the audit condition requires that, 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 Citigroup Affiliated QPAM and, if applicable, Citigroup, 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.

In addition, the auditor's engagement must specifically require the auditor to determine whether each Citigroup Affiliated QPAM has complied with the Policies and Training conditions described herein, and must further require the auditor to test each Citigroup Affiliated QPAM's operational compliance with the Policies and Training. The auditor must issue a written report (the Audit Report) to Citigroup and the Citigroup Affiliated 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 the Citigroup Affiliated QPAM's Policies and Training; the Citigroup Affiliated QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective Citigroup Affiliated QPAM's noncompliance with the written Policies and Training.

Any determination 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 Citigroup Affiliated QPAM must be promptly addressed by such Citigroup Affiliated QPAM, and any action taken by such Citigroup Affiliated QPAM to address such recommendations must be included in an addendum to the Audit Report. Further, any determination by the auditor that the respective Citigroup Affiliated QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that the Citigroup Affiliated QPAM has complied with the requirements, as described above, must be based on evidence that demonstrates the Citigroup Affiliated QPAM has actually implemented, maintained, and followed the Policies and Training required by this five-year exemption. Finally, the Audit Report must address the adequacy of the Annual Review required under this exemption and the resources provided to the Compliance Officer in connection with such Annual Review. Moreover, the auditor must notify the respective Citigroup Affiliated QPAM of any instance 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.

22. This exemption requires that certain senior personnel of Citigroup review the Audit Report and make certain certifications and take various corrective actions. In this regard, the General Counsel, or one of the three most senior executive officers of the Citigroup Affiliated QPAM to which the Audit Report applies, must certify, in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this five-year exemption; addressed, corrected, or remedied an inadequacy 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 proposed five-year exemption and with the applicable provisions of ERISA and the Code. The Risk Committee of Citigroup's Board of Directors is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking legal compliance officer of Citigroup must review the Audit Report for each Citigroup Affiliated QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report.

23. In order to create a more transparent record in the event that the proposed relief is granted, each Citigroup Affiliated QPAM must provide its certified Audit Report to the Department no later than thirty (30) days following its completion. The Audit Report will be part of the public record regarding this five-year exemption.

Further, each Citigroup Affiliated QPAM must make 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 Citigroup Affiliated QPAM. Additionally, each Citigroup Affiliated QPAM and the auditor must submit to the Department any engagement agreement(s) entered into pursuant to the engagement of the auditor under this five-year exemption. Also, they must submit to the Department any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this proposed five-year exemption, no later than six (6) months after the Conviction Date (and one month after the execution of any agreement thereafter).

Finally, if the exemption is granted, the auditor must provide the Department, 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 instance of noncompliance by the relevant Citigroup Affiliated QPAM; and an explanation of any corrective or remedial action taken by the applicable Citigroup Affiliated QPAM.

In order to enhance oversight of the compliance with the exemption, Citigroup must notify the Department at least thirty (30) days prior to any substitution of an auditor, and Citigroup must demonstrate to the Department's satisfaction that any new auditor is independent of Citigroup, experienced in the matters that are the subject of the exemption, and capable of making the determinations required of this five-year exemption.

24. *Contractual Obligations.* This five-year exemption requires the Citigroup Affiliated QPAMs to enter into certain contractual obligations in connection with the provision of services to their clients. It is the Department's view that the condition in Section I(j) is essential to the Department's ability to make its findings that the proposed five-year exemption is protective of the rights of the participants and beneficiaries of ERISA-covered and IRA plan clients of Citigroup Affiliated QPAMs under section 408(a) of ERISA. In this regard, effective as of the effective date of this five-year exemption, with respect to any arrangement, agreement, or contract between a Citigroup Affiliated QPAM and an ERISA-covered plan or IRA for which a Citigroup Affiliated QPAM provides asset management or other discretionary fiduciary services, each Citigroup Affiliated QPAM must agree and warrant: (a) 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 (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, as applicable, with respect to each such ERISA-covered plan and IRA; (b) 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 Citigroup Affiliated 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; (c) not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the Citigroup Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions; (d) 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 Citigroup Affiliated QPAM for violating ERISA or the Code, or engaging in prohibited transactions, except for a violation or a prohibited transaction caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary which is independent of Citigroup, and its affiliates; (e) not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the Citigroup Affiliated 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 the actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors; and (f) not to impose any fee, penalty, or charge 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 each such fee is applied consistently and in like manner to all such investors. Furthermore, any contract, agreement or arrangement between a Citigroup Affiliated QPAM and its ERISA-covered plan or IRA client must not contain exculpatory provisions disclaiming or otherwise limiting liability of the Citigroup Affiliated QPAM for a violation of such agreement's terms, except for liability caused by error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary which is independent of Citigroup, and its affiliates.

30. With respect to current ERISA-covered plan and IRA clients for which

a Citigroup Affiliated QPAM provides asset management or other discretionary fiduciary services, within four (4) months of the date of publication of this notice of five-year exemption in the **Federal Register**, the Citigroup Affiliated QPAM will provide a notice of its obligations under Section I(j) to each such ERISA-covered plan and IRA client. For all other prospective ERISA-covered plan and IRA clients for which a Citigroup Affiliated QPAM provides asset management or other discretionary services, the Citigroup Affiliated QPAM will agree in writing to its obligations under this Section I(j) in an updated investment management agreement between the Citigroup Affiliated QPAM and such clients or other written contractual agreement.

31. *Notice Requirements.* The proposed exemption contains extensive notice requirements, some of which extend not only to ERISA-covered plan and IRA clients of Citigroup Affiliated QPAMs, but which also go to non-Plan clients of Citigroup Affiliated QPAMs. In this regard, the Department understands that many firms may promote their ''QPAM'' designation in order to earn asset management business, including from non-ERISA plans. Therefore, in order to fully inform any clients that may have retained Citigroup Affiliated QPAMs as asset managers because such Citigroup Affiliated QPAMs have represented themselves as able to rely on PTE 84–14, the Department has determined to condition exemptive relief upon the following notice requirements.

Within fifteen (15) days of the publication of this proposed five-year exemption in the **Federal Register**, each Citigroup Affiliated QPAM will provide a notice of the proposed five-year exemption, along with a separate summary describing the facts that led to the Conviction (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that the Conviction results in the failure to meet a condition in PTE 84–14, to each sponsor of an ERISA-covered plan and each beneficial owner of an IRA for which a Citigroup Affiliated QPAM provides asset management or other discretionary services, or the sponsor of an investment fund in any case where a Citigroup Affiliated QPAM acts only as a sub-adviser to the investment fund in which such ERISA-covered plan and IRA invests. In the event that this proposed five-year exemption is granted, the **Federal Register** copy of the notice of final five-year exemption must be delivered to such clients within sixty (60) days of its publication in the **Federal Register**, and may be delivered electronically (including by an email that has a link to the exemption). Any prospective clients for which a Citigroup Affiliated QPAM provides asset management or other discretionary services must receive the proposed and final five-year exemptions with the Summary and the Statement prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the Citigroup Affiliated QPAM.

In addition, each Citigroup Affiliated QPAM will provide a **Federal Register** copy of the proposed five-year exemption, a **Federal Register** copy of the final five-year exemption; the Summary; and the Statement to each: (A) Current Non-Plan Client within four (4) months of the effective date, if any, of a final five-year exemption; and (B) Future Non-Plan Client prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the Citigroup Affiliated QPAM. A ''Current Non-Plan Client'' is a client of a Citigroup Affiliated QPAM that: Is neither an ERISA-covered plan nor an IRA; has assets managed by the Citigroup Affiliated QPAM after the effective date, if any, of a final five-year exemption; and has received a written representation (qualified or otherwise) from the Citigroup Affiliated QPAM that such Citigroup Affiliated QPAM qualifies as a QPAM or qualifies for the relief provided by PTE 84–14. A ''Future Non-Plan Client'' is a client of a Citigroup Affiliated QPAM that is neither an ERISA-covered plan nor an IRA that has assets managed by the Citigroup Affiliated QPAM after the effective date, if any, of a final five-year exemption, and has received a written representation (qualified or otherwise) from the Citigroup Affiliated QPAM that such Citigroup Affiliated QPAM is a QPAM, or qualifies for the relief provided by PTE 84–14.

32. This proposed five-year exemption also requires Citigroup to designate a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer will have several obligations that it must comply with, as described in Section I(m) above. These include conducting an annual review (the Annual Review) to determine the adequacy and effectiveness of the implementation of the Policies and Training; the preparation of a written report for each Annual Review (each, an Annual Report) that, among other things, summarizes his or her material activities during the preceding year; and sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action. Each Annual Report must be provided to appropriate corporate officers of Citigroup and each Citigroup Affiliated QPAM to which such report relates; the head of compliance and the General Counsel (or their functional equivalent) of the relevant Citigroup Affiliated QPAM; and must be made unconditionally available to the independent auditor described above.

33. Each Citigroup Affiliated QPAM must maintain records necessary to demonstrate that the conditions of this exemption have been met for six (6) years following the date of any transaction for which such Citigroup Affiliated QPAM relies upon the relief in the proposed five-year exemption.

34. The proposed five-year exemption mandates that, during the effective period of this five-year exemption, Citigroup must immediately disclose to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) that Citigroup or an affiliate enters into with the Department of Justice, to the extent such DPA or NPA involved conduct described in Section I(g) of PTE 84–14 or section 411 of ERISA. In addition, Citigroup must immediately provide 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 agreement. The Department may, following its review of that information, require Citigroup or a party specified by the Department, to submit a new application for the continued availability of relief as a condition of continuing to rely on this exemption. In this regard, the QPAM (or other party submitting the application) will have the burden of justifying the relief sought in the application. If the Department denies the relief requested in that application, or does not grant such relief within twelve (12) months of the application, the relief described herein would be revoked as of the date of denial or as of the expiration of the twelve (12) month period, whichever date is earlier.

35. Finally, each Citigroup Affiliated QPAM, in its agreements with ERISA-covered plan and IRA clients, or in other written disclosures provided to ERISA-covered plan and IRA clients, within sixty (60) days prior to the initial transaction upon which relief hereunder is relied, will clearly and prominently: Inform the ERISA-covered plan or IRA client that the client has the right to obtain copies of the QPAM's written

Policies adopted in accordance with this five-year exemption.

Statutory Findings—Administratively Feasible

36. The Applicant represents that the proposed exemption is administratively feasible because it does not require any monitoring by the Department. Furthermore, the requested five-year exemption does not require the Department's oversight because, as a condition of this proposed five-year exemption, neither Citigroup nor the Markets and Securities Services business of Citigroup will provide any fiduciary or QPAM services to ERISA-covered plans and IRAs.

Summary

37. Given the revised and new conditions described above, the Department has tentatively determined that the relief sought by the Applicant satisfies the statutory requirements for a five-year exemption under section 408(a) of ERISA.

Notice to Interested Persons

Notice of the proposed exemption will be provided to all interested persons within 15 days of the publication of the notice of proposed five-year exemption in the **Federal Register**. The notice will be provided to all interested persons in the manner described in Section I(k)(1) of this proposed five-year exemption and will contain the documents described therein and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the pending exemption. All written comments and/or requests for a hearing must be received by the Department within forty five (45) days of the date of publication of this proposed exemption in the **Federal Register**. All comments will be made available to the public.

Warning: If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as a Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph Brennan of the Department at (202) 693–8456. (This is not a toll-free number.)

Barclays Capital Inc. (BCI or the Applicant), Located in New York, New York

[Application No. D–11910]

Proposed Five Year Exemption

The Department is considering granting a five-year exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[131]

Section I: Covered Transactions

If the proposed five-year exemption is granted, certain asset managers with specified relationships to Barclays PLC (BPLC) (the Barclays Affiliated QPAMs and the Barclays Related QPAMs, as defined further in Sections II(a) and II(b), respectively) will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Class Exemption 84–14 (PTE 84–14 or the QPAM Exemption),[132] notwithstanding the judgment of conviction against BPLC (the Conviction), as defined in Section II(c)),[133] for engaging in a conspiracy to: (1) Fix the price of, or (2) eliminate competition in the purchase or sale of the euro/U.S. dollar currency pair exchanged in the Foreign Exchange (FX) Spot Market, for a period of five years beginning on the date the exemption is granted, provided the following conditions are satisfied:

(a) Other than certain individuals who: Worked for a non-fiduciary business within BCI; had no responsibility for, and exercised no authority in connection with, the management of plan assets; and are no longer employed by BPLC, the Barclays Affiliated QPAMs and the Barclays Related QPAMs (including their officers, directors, agents other than BPLC, and employees of such QPAMs who had responsibility for, or exercised authority in connection with the management of plan assets) did not know of, did not have reason to know of, or participate in the criminal conduct 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 Barclays Affiliated QPAMs and the Barclays Related QPAMs (including their officers, directors, agents other than BPLC, and employees of such Barclays 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) A Barclays Affiliated QPAM 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 Barclays Affiliated 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 Barclays Affiliated QPAM to enter into any transaction with BPLC or BCI, or engage BPLC 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 a Barclays Affiliated QPAM or a Barclays Related QPAM to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction;

(f) A Barclays Affiliated QPAM or a Barclays Related QPAM did not exercise authority over 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) in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Conviction; or cause the Barclays Affiliated QPAM or the Barclays Related QPAM or its affiliates or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Conviction;

(g) BPLC and BCI will not provide discretionary asset management services to ERISA-covered plans or IRAs, nor will otherwise act as a fiduciary with respect to ERISA-covered plan or IRA assets;

[131] For purposes of this proposed exemption, references to section 406 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[132] 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).

[133] 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 violation of the Sherman Antitrust Act, Title 15 United States Code, Section 1.

(h)(1) Prior to a Barclays Affiliated QPAM's engagement by any ERISA-covered plan or IRA for discretionary asset management services, where the QPAM represents that it qualifies as a QPAM, the Barclays Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that:

(i) The asset management decisions of the Barclays Affiliated QPAM are conducted independently of the corporate management and business activities of BPLC and BCI;

(ii) The Barclays Affiliated 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 violation of these duties and provisions with respect to ERISA-covered plans and IRAs;

(iii) The Barclays Affiliated 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 Barclays Affiliated QPAM to regulators, including, but not limited to, the Department, 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 Barclays Affiliated 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 plans and IRA clients;

(vi) The Barclays Affiliated QPAM complies with the terms of this five-year exemption, if granted; and

(vii) Any violation of, or failure to comply with, an item in subparagraphs (ii) through (vi), is corrected promptly upon discovery, and any such violation or compliance failure not promptly corrected is reported, upon the discovery of such 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 Barclays Affiliated QPAM, 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 BPLC; 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 BPLC or beneficially owned by an employee of BPLC or its affiliates, such fiduciary does not need to be independent of BPLC. A Barclays Affiliated 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) Prior to a Barclays Affiliated QPAM's engagement by any ERISA covered plan or IRA for discretionary asset management services, the Barclays Affiliated QPAM must develop and implement a program of training (the Training), conducted at least annually, for all relevant Barclays Affiliated QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. The Training must:

(i) 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 five-year exemption, if granted (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing; and

(ii) Be conducted by an independent professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code;

(i)(1) Each Barclays Affiliated QPAM submits to an audit conducted annually 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 the Barclays Affiliated QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. Each annual audit must cover a consecutive twelve (12) month period starting with the twelve (12) month period that begins on the date that a Barclays Affiliated QPAM is first engaged by any ERISA-covered plan or IRA for discretionary asset management services reliant on PTE 84–14, and each annual audit 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 Barclays Affiliated QPAM and, if applicable, BPLC, 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 Barclays Affiliated QPAM has developed, implemented, maintained, and followed the Policies in accordance with the conditions of this five-year exemption, if granted, and has developed and implemented the Training, as required herein;

(4) The auditor's engagement must specifically require the auditor to test each Barclays Affiliated QPAM's operational compliance with the Policies and Training. In this regard, the auditor must test a sample of each 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) For each audit, on or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to BPLC and the Barclays Affiliated 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:

(i) The adequacy of the Barclays Affiliated QPAM's Policies and Training; the Barclays Affiliated QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective Barclays Affiliated QPAM's noncompliance with the written Policies and Training described in Section I(h) above. Any determination 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 Barclays Affiliated QPAM must be promptly addressed by such Barclays Affiliated QPAM, and any action taken by such Barclays Affiliated QPAM to address such recommendations must be included in an addendum to the Audit Report (which addendum is completed prior to the certification described in Section I(i)(7) below). Any determination by the auditor that the respective Barclays Affiliated QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that the Barclays Affiliated QPAM has complied with the requirements under this subsection must be based on evidence that demonstrates the Barclays Affiliated QPAM has actually implemented, maintained, and followed the Policies and Training required by this five-year exemption. Furthermore, the auditor must not rely on the Annual Report created by the compliance officer (the Compliance Officer) as described in Section I(m) below in lieu of independent determinations and testing performed by the auditor as required by Section I(i)(3) and (4) above; and

(ii) The adequacy of the Annual Review described in Section I(m) and the resources provided to the Compliance Officer in connection with such Annual Review;

(6) The auditor must notify the respective Barclays Affiliated QPAM of any instance 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 Barclays Affiliated QPAM to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has: reviewed the Audit Report and this exemption, if granted; addressed, corrected, or remedied any inadequacy 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 proposed five-year exemption, if granted, and with the applicable provisions of ERISA and the Code;

(8) The Risk Committee of BPLC's Board of Directors is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking legal compliance officer of BPLC must review the Audit Report for each Barclays Affiliated QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report;

(9) Each Barclays Affiliated QPAM provides its certified Audit Report by regular mail to: The Department's Office of Exemption Determinations (OED), 200 Constitution Avenue NW., Suite 400, Washington, DC 20210, or by private carrier to: 122 C Street NW., Suite 400, Washington, DC 20001–2109, no later than 30 days following its completion. The Audit Report will be part of the public record regarding this five-year exemption, if granted. Furthermore, each Barclays Affiliated QPAM must make 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 Barclays Affiliated QPAM;

(10) Each Barclays Affiliated QPAM and the auditor must submit to OED: (A) Any engagement agreement(s) entered into pursuant to the engagement of the auditor under this five-year exemption, if granted; and (B) any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this five-year exemption, if granted, no later than six (6) months after the Conviction Date (and one month after the execution of any agreement thereafter);

(11) The auditor must 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 instance of noncompliance by the relevant Barclays Affiliated QPAM; and an explanation of any corrective or remedial action taken by the applicable Barclays Affiliated QPAM; and

(12) BPLC must notify the Department at least thirty (30) days prior to any substitution of an auditor, except that no such replacement will meet the requirements of this paragraph unless and until BPLC demonstrates to the Department's satisfaction that such new auditor is independent of BPLC, experienced in the matters that are the subject of the exemption, if granted, and capable of making the determinations required of this exemption, if granted;

(j) Effective as of the effective date of this five-year exemption, if granted, with respect to any arrangement, agreement, or contract between a Barclays Affiliated QPAM and an ERISA-covered plan or IRA for which a Barclays Affiliated QPAM provides asset management or other discretionary fiduciary services, each Barclays Affiliated QPAM agrees and warrants:

(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) To indemnify and hold harmless the ERISA-covered plan or IRA for any damages resulting from a Barclays Affiliated QPAM's violation of applicable laws, a Barclays Affiliated QPAM's breach of contract, or any claim brought in connection with the failure of such Barclays Affiliated 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;

(3) Not to require (or otherwise cause) the ERISA covered plan or IRA to waive, limit, or qualify the liability of the Barclays Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(4) 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 Barclays Affiliated 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 BPLC, and its affiliates;

(5) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the Barclays Affiliated 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;

(6) 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;

(7) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the Barclays Affiliated 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 which is independent of BPLC; and

(8) Within four (4) months of the date of the Conviction, each Barclays Affiliated QPAM must provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which a Barclays Affiliated QPAM provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a Barclays Affiliated QPAM provides asset management or other discretionary services, the Barclays Affiliated QPAM will agree in writing to its obligations under this Section I(j) in an updated investment management agreement between the Barclays Affiliated QPAM and such clients or other written contractual agreement;

(k) *Notice to Future Covered Clients.* Each BPLC affiliated asset manager provides each Future Covered Client with a **Federal Register** copy of the proposed five-year exemption, along with a separate summary describing the facts that led to the Conviction (the Summary), which have been submitted to the Department, and a prominently displayed statement that the Conviction resulted in a failure to meet a condition of PTE 84–14. The provision of these documents must occur prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the BPLC affiliated asset manager. For purposes of this paragraph, a ''Future Covered Client'' means a client of the BPLC affiliated asset manager that, beginning after the date, if any, that a final exemption is published in the **Federal Register**, has assets managed by such asset manager, and has received a representation from the asset manager that the asset manager is a QPAM, or qualifies for the relief provided by PTE 84–14; [134]

(l) The Barclays QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction;

(m)(1) BPLC designates a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer must conduct an annual review (the Annual Review) to determine the adequacy and effectiveness of the implementation of the Policies and Training. With respect to the Compliance Officer, the following conditions must be met:

(i) The Compliance Officer must be a legal professional with extensive experience with, and knowledge of, the regulation of financial services and products, including under ERISA and the Code; and

(ii) The Compliance Officer must have a direct reporting line to the highest-ranking corporate officer in charge of legal compliance that is independent of BPLC's other business lines;

(2) With respect to each Annual Review, the following conditions must be met:

(i) The Annual Review includes a review of: Any compliance matter related to the Policies or Training that was identified by, or reported to, the Compliance Officer or others within the compliance and risk control function (or its equivalent) during the previous year; any material change in the business activities of the Barclays Affiliated QPAMs; and any change to ERISA, the Code, or regulations related to fiduciary duties and the prohibited transaction provisions that may be applicable to the activities of the Barclays Affiliated QPAMs;

(ii) The Compliance Officer prepares a written report for each Annual Review (each, an Annual Report) that (A) summarizes his or her material activities during the preceding year; (B) sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action; (C) details any change to the Policies or Training to guard against any similar instance of noncompliance occurring again; and (D) makes recommendations, as necessary, for additional training, procedures, monitoring, or additional and/or changed processes or systems, and management's actions on such recommendations;

(iii) In each Annual Report, the Compliance Officer must certify in writing that to his or her knowledge: (A) The report is accurate; (B) the Policies and Training are working in a manner which is reasonably designed to ensure that the Policies and Training requirements described herein are met; (C) any known instance of noncompliance during the preceding year and any related correction taken to date have been identified in the Annual Report; (D) the Barclays Affiliated QPAMs have complied with the Policies and Training in all respects, and/or corrected any instances of noncompliance in accordance with Section I(h) above; and (E) Barclays has provided the Compliance Officer with adequate resources, including, but not limited to, adequate staffing;

(iv) Each Annual Report must be provided to appropriate corporate officers of BPLC and each Barclays Affiliated QPAM to which such report relates; the head of compliance and the General Counsel (or their functional equivalent) of the relevant Barclays Affiliated QPAM; and must be made unconditionally available to the independent auditor described in Section I(i) above;

(v) Each Annual Review, including the Compliance Officer's written Annual Report, must be completed at least three (3) months in advance of the date on which each audit described in Section I(i) is scheduled to be completed;

(n) Each Barclays Affiliated QPAM will maintain records necessary to demonstrate that the conditions of this exemption, if granted, have been met, for six (6) years following the date of any transaction for which such Barclays Affiliated QPAM relies upon the relief in the exemption, if granted;

(o) During the effective period of this five-year exemption, if granted, BPLC: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or a Non-Prosecution Agreement (an NPA) entered into by BPLC or any of its affiliates 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; and

(2) Immediately provides the Department any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement. After review of the information, the Department may require BPLC, its affiliates, or related parties, as specified by the Department, to submit a new application for the continued availability of relief as a condition of continuing to rely on this exemption. If the Department denies the relief requested in the new application, or does not grant such relief within twelve (12) months of application, the relief described herein is revoked as of the date of denial or as of the expiration of the twelve (12) month period, whichever date is earlier;

(p) Each Barclays Affiliated QPAM, in its agreements with ERISA-covered plan

[134] The Applicant states that there are no pooled funds subject to ERISA or section 4975 of the Code with respect to which the QPAM cannot identify plan and IRA investors. However, the Applicant states that if, at the time of the publication of the proposed exemption there are such funds, the Applicant will send a copy of the notice of the proposed exemption to each distribution agent for such fund, requesting that such agent forward the Notice to Interested Persons to its clients.

and IRA clients, or in other written disclosures provided to ERISA-covered plan and IRA clients, within 60 days prior to the initial transaction upon which relief hereunder is relied, and then at least once annually, will clearly and prominently: Inform the ERISA-covered plan and IRA client that the client has the right to obtain copies of the QPAM's written Policies adopted in accordance with this exemption, if granted; and

(q) A Barclays Affiliated QPAM or a Barclays Related QPAM will not fail to meet the terms of this exemption, if granted, solely because a different Barclays Affiliated QPAM or a Barclays Related QPAM fails to satisfy a condition for relief described in Sections I(c), (d), (h), (i), (j), (k), (n) and (p).

Section II: Definitions

(a) The term ''Barclays Affiliated QPAM'' means a ''qualified professional asset manager'' (as defined in Section VI(a) [135] of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which BPLC is a current or future ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14). The term ''Barclays Affiliated QPAM'' excludes the parent entity, BPLC and BCI's Investment Bank division.

(b) The term ''Barclays Related QPAM'' means any current or future ''qualified professional asset manager'' (as defined in Section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14, and with respect to which BPLC owns a direct or indirect five percent or more interest, but with respect to which BPLC is not an ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14).

(c) The term ''BPLC'' means Barclays PLC, the parent entity, and does not include any subsidiaries or other affiliates.

(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.

(e) The term ''Conviction'' means the judgment of conviction against BPLC in the United States District Court for the District of Connecticut (the Court), Case No. 3:15–cr–00077–SRU–1, for participating in a combination and conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, euro/U.S. dollar currency pairs exchanged in the foreign currency exchange spot market by agreeing to eliminate competition in the purchase and sale of such currency pairs in the United States and elsewhere, in violation of the Sherman Antitrust Act, 15 U.S.C. 1.

(f) The term ''Conviction Date'' means the date that a judgment of conviction against BCI is entered by the Court in connection with the Conviction.

Effective Date: This proposed five-year exemption, if granted, will be effective beginning on the date of publication of such grant in the **Federal Register** and ending on the date that is five years thereafter. Should the Applicant wish to extend the effective period of exemptive relief provided by this proposed five-year exemption, the Applicant must submit another application for an exemption. In this regard, the Department expects that, in connection with such application, the Applicant should be prepared to demonstrate compliance with the conditions for this exemption and that the Barclays Affiliated QPAMs, and those who may be in a position to influence their policies, have maintained the high standard of integrity required by PTE 84–14.

Department's Comment: Concurrently with this proposed five-year exemption, the Department is publishing a proposed one-year exemption for Barclays Affiliated QPAMs to continue to rely on PTE 84–14. That one-year exemption, if granted, is intended to allow the Department sufficient time, including a longer comment period, to determine whether to grant this five-year exemption. The proposed one-year exemption, if granted, is designed to protect ERISA-covered plans and IRAs from the potential costs and losses, described below, that would be incurred if such Barclays Affiliated QPAMs were to suddenly lose their ability to rely on PTE 84–14 as of the Conviction date.

The proposed five-year exemption, if granted, would provide relief from certain of the restrictions set forth in sections 406 and 407 of ERISA. No relief from a violation of any other law would be provided by this exemption, if granted, including any criminal conviction described herein.

The Department cautions that the relief in this proposed five-year exemption, if granted, would terminate immediately if, among other things, an entity within the BPLC 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 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 proposed five-year 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 proposed exemption.

Summary of Facts and Representations [136]

Background

1. BCI is a broker-dealer registered under the Securities Exchange Act of 1934, as amended, and was, until December 28, 2015, an investment adviser registered under the Investment Advisers Act of 1940, as amended. As a registered broker-dealer, BCI is regulated by the U.S. Securities and Exchange Commission and Financial Industry Regulatory Authority.

BCI is incorporated in the State of Connecticut and headquartered in New York, with 18 U.S. branch offices. BCI is wholly-owned by Barclays Group US Inc., a wholly-owned subsidiary of Barclays Bank PLC, which, in turn, is a wholly-owned subsidiary of BPLC, a non-operating holding company.

Barclays Bank PLC wholly owns, indirectly, one bank subsidiary in the United States—Barclays Bank Delaware, a Delaware chartered commercial bank supervised and regulated by the Federal Deposit Insurance Corporation, the Delaware Office of the State Bank Commissioner and the Consumer Financial Protection Bureau. Barclays Bank Delaware does not manage ERISA plan or IRA assets currently, but may do so in the future.

BPLC's asset management business, Barclays Wealth and Investment Management (BWIM), offers wealth management products and services for many types of clients, including individual and institutional clients. BWIM operates through over 20 offices worldwide. Prior to December 4, 2015, BWIM functioned in the United States through BCI.

On December 4, 2015, BCI consummated a sale of its U.S. operations of BWIM, including Barclays Wealth Trustees, to Stifel Financial Corp. As a result of the transaction, as of that date, neither BCI nor any of its affiliates continued to manage ERISA-covered plan or IRA assets. However,

[135] 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.

[136] The Summary of Facts and Representations is based on the Applicant's representations, unless indicated otherwise.

BCI or its current or future affiliates could manage such assets in the future.

2. On May 20, 2015, the Department of Justice filed a one-count criminal information (the Information) in the United States District Court for the District of Connecticut charging BPLC, an affiliate of BCI, with participating in a combination and a conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, Euro/USD currency pairs exchanged in the foreign currency exchange spot market by agreeing to eliminate competition in the purchase and sale of such currency pairs in the United States and elsewhere, in violation of the Sherman Antitrust Act, 15 U.S.C. 1. For example, BPLC engaged in communications with other financial services firms in an electronic chat room limited to specific EUR/USD traders, each of whom was employed, at certain times, by one of the financial services firms engaged in the FX Spot Market.

BPLC also participated in a conspiracy to decrease competition in the purchase and sale of the EUR/USD currency pair. BPLC and other financial services firms coordinated the trading of the EUR/USD currency pair in connection with certain benchmark currency ''fixes'' which occurred at specific times each trading day. In addition, BPLC and other financial services firms refrained from certain trading behavior, by withholding bids and offers, when another firm held an open risk position, so that the price of the currency traded would not move in a direction adverse to the firm with the open risk position.

Also, on May 20, 2015, pursuant to a plea agreement (the Plea Agreement), BPLC entered a plea of guilty for the violation of Sherman Antitrust Act, 15 U.S.C. 1. Under the Plea Agreement, BPLC pled guilty to the charge set out in the Information. The judgment of Conviction has not yet been entered.

BPLC agreed to pay a criminal fine of $710 million to the Department of Justice, of which $650 million is attributable to the charge set out in the Information. The remaining $60 million is attributable to conduct covered by the non-prosecution agreement that BPLC entered into on June 26, 2012, with the Criminal Division, Fraud Section of the Department of Justice related to BPLC's submissions of benchmark interest rates, including the London InterBank Offered Rate (known as LIBOR). In addition, Barclays Bank PLC, a wholly-owned subsidiary of BPLC, entered into a settlement agreement with the U.K. Financial Conduct Authority to pay a monetary penalty of £284.432 million ($440.9 million).

As part of the settlement, Barclays Bank PLC consented to the entry of an Order Instituting Proceedings Pursuant to Sections 6(c)(4)(A) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions by the Commodity Futures Trading Commission (CFTC) imposing a civil money penalty of $400 million (the CFTC Order). In addition, Barclays Bank PLC and its New York branch consented to the entry of an Order to Cease and Desist and Order of Assessment of a Civil Money Penalty Issued Upon Consent Pursuant to the Federal Deposit Insurance Act, as Amended, by the Board of Governors of the Federal Reserve System (the Federal Reserve) imposing a civil money penalty of $342 million (the Board Order). Barclays Bank PLC and its New York branch also consented to the entry of a Consent Order under New York Bank Law 44 and 44–a by the New York Department of Financial Services (DFS) imposing a civil money penalty of $485 million [137] (the DFS Order and, together with the Plea Agreement, the CFTC Order and the Board Order, the FX Settlements).

Failure To Comply With Section I(g) of PTE 84–14 and Proposed Relief

3. PTE 84–14 is a class exemption that permits certain transactions between a party in interest with respect to an employee benefit plan and an investment fund in which the plan has an interest and which is managed by a ''qualified professional asset manager'' (QPAM), if the conditions of the exemption are satisfied. These conditions include Section I(g), which precludes a person who may otherwise meet the definition of a QPAM from relying on the relief provided by PTE 84–14 if that person or its ''affiliate'' [138] has, within 10 years immediately preceding the transaction, been either convicted or released from imprisonment, whichever is later, as a result of certain specified criminal activity described therein.[139] The Department notes that a QPAM, and those who may be in a position to influence its policies, are expected to maintain a high standard of integrity.

4. The Applicant represents that BPLC is currently affiliated (within the meaning of Part VI(d) of PTE 84–14) with only two entities that could meet the definition of ''QPAM'' in Part VI(a) of PTE 84–14, namely Barclays Bank Delaware and Barclays Bank PLC, New York Branch, both of which are subject to its control (within the meaning of Part VI(d)(1) of PTE 84–14). The Applicant states that BPLC or a subsidiary may, in the future, invest in non-controlled, minimally related QPAMs that could constitute Barclays Related QPAMs, as defined in the proposed exemption.[140] The Applicant states that it may acquire a new affiliate at any time, and creates new affiliates frequently, in either case that could constitute Barclays Affiliated QPAMs or Barclays Related QPAMs, as defined in the proposed exemption. To the extent that these new affiliates manage ERISA-covered plans or IRAs, these future affiliates would also be covered by the exemption, if granted.

Remedial Actions To Address the Misconduct of BPLC—Pursuant to the Plea Agreement

5. The Applicant states that the Department of Justice and BPLC negotiated a settlement reflected in the Plea Agreement, in which BPLC agreed to lawfully undertake the following pursuant to the Plea Agreement:

(a) Pay a total monetary penalty in the amount of $710 million;

(b) Not commit another crime under U.S. federal law or engage in the conduct that gave rise to the Plea Agreement, during a probation term of three years;

(c) Notify the probation officer upon learning of the commencement of any

[137] On November 17, 2015, Barclays Bank PLC (BBPLC) announced that it had reached a subsequent settlement with DFS in respect of its investigation into BBPLC's electronic trading of FX and FX electronic trading system, that it had agreed to pay a civil money penalty of $150 million and that BBPLC would take certain remedial steps, including submission of a proposed remediation plan concerning the underlying conduct to the independent consultant who was initially installed pursuant to a Memorandum of Understanding entered between BBPLC and DFS, and whose engagement terminated February 19, 2016.

[138] Section VI(d) of PTE 84–14 defines the term ''affiliate'' for purposes of Section I(g) as ''(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person, (2) Any director of, relative of, or partner in, any such person, (3) Any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner, and (4) Any employee or officer of the person who—(A) Is a highly compensated employee (as defined in Section 4975(e)(2)(H) of the Code) or officer (earning 10 percent or more of the yearly wages of such person), or (B) Has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets.''

[139] For purposes of Section I(g) of PTE 84–14, a person shall be deemed to have been ''convicted'' from the date of the judgment of the trial court, regardless of whether that judgment stands on appeal.

[140] For example, the Applicant states that BPLC may provide seed investments for new managers in exchange for minority interests. However, the Applicant points out that these managers, which had nothing to do with the conduct underlying the Conviction, would be unable to rely on PTE 84–14 for the benefit of their plan clients absent such relief.

federal criminal investigation in which BPLC is a target, or federal criminal prosecution against it;

(d) Prominently post and maintain on its Web site and, within 30 days after pleading guilty, make best efforts to send spot FX customers and counterparties (other than customers and counterparties who BPLC can establish solely engaged in buying or selling foreign currency through its consumer bank units and not its spot FX sales or trading staff) a retrospective disclosure notice regarding certain historical conduct involving FX Spot Market transactions with customers via telephone, email and/or electronic chat, during the probation term;

(e) Implement a compliance program designed to prevent and detect the conduct underlying the Plea Agreement throughout its operations including those of its affiliates and subsidiaries and provide an annual progress report to the Department of Justice and the probation officer;

(f) Further strengthen its compliance and internal controls as required by the CFTC and the U.K. Financial Conduct Authority and any other regulatory or enforcement agencies that have addressed the conduct underlying the Plea Agreement, which shall include, but not be limited to, a thorough review of the activities and decision-making by employees of BPLC's legal and compliance functions with respect to the historical conduct underlying he Plea Agreement, and promptly report to the Department of Justice and the probation officer all of its remediation efforts required by these agencies, as well as remediation and implementation of any compliance program and internal controls, policies and procedures related to the misconduct underlying he Plea Agreement;

(g) Report to the Department of Justice all credible information regarding criminal violations of U.S. antitrust laws and of U.S. law concerning fraud, including securities or commodities fraud, by BPLC or any of its employees, as to which BPLC's Board of Directors, management (that is, all supervisors within the bank), or legal and compliance personnel are aware;

(h) Bring to the Antitrust Division's attention all federal criminal investigations in which BPLC is identified as a subject or a target, and all administrative or regulatory proceedings or civil actions brought by any federal or state governmental authority in the United States against BPLC or its employees, to the extent that such investigations, proceedings or actions allege facts that could form the basis of a criminal violation of U.S. antitrust laws, and also bring to the Criminal Division, Fraud Section's attention all federal criminal or regulatory investigations in which BPLC is identified as a subject or a target, and all administrative or regulatory proceedings or civil actions brought by any federal governmental authority in the United States against BPLC or its employees, to the extent that such investigations, proceedings or actions allege violation of U.S. law concerning fraud, including securities or commodities fraud;

(i) Cooperate fully and truthfully (along with certain related entities in which it had, indirectly or directly, a greater than 50% ownership interest as of the date of the Plea Agreement) with the Department of Justice in its investigation and prosecution of the conduct underlying the Plea Agreement, or any other currency pair in the FX Spot Market, or any foreign exchange forward, foreign exchange option or other foreign exchange derivative, or other financial product, to the extent such other financial product has been disclosed to the Department of Justice (excluding a certain sealed investigation). This would include producing non-privileged non-protected materials, wherever located; using its best efforts to secure continuing cooperation of the current or former directors, officers and employees of BPLC and its Related Entities; and identifying witnesses who, to BPLC's knowledge, may have material information regarding the matters under investigation;

(j) Cooperate fully with the Department of Justice and any other law enforcement authority or government agency designated by the Department of Justice, in a manner consistent with applicable law and regulations, with regard to a certain sealed investigation; and

(k) Expeditiously seek relief from the Department by filing an application for the QPAM Exemption and will provide all information requested by the Department in a timely manner.

Remedial Actions To Address the Misconduct of BPLC—Structural Enhancements

6. The Applicant represents that BPLC and its subsidiaries and affiliates, including Barclays Bank PLC and its New York branch (collectively, the Bank) have implemented and will continue to implement policies and procedures designed to prevent the recurrence of the conduct that is the subject of the FX Settlements as required by the Plea Agreement. The Applicant states that the Bank's efforts in this regard are recognized in the Plea Agreement itself, which acknowledges ''the substantial improvements to [BPLC's] compliance and remediation program to prevent recurrence of the charged offense.''

The Applicant states that the Bank's efforts in this regard also have been recognized by the CFTC, the Federal Reserve, the DFS and the U.K. Financial Conduct Authority. For example, the Applicant states that the Board Order notes that the Bank recently completed a number of initiatives aimed at strengthening its governance and controls framework to control and monitor risk in the FX business, and that the Federal Reserve Bank of New York concluded that the current design of the Bank's FX governance and controls framework is generally sound. The Applicant further states that the DFS Order notes that the Bank has implemented remedial measures to address the conduct identified in the Order.

The Applicant also states that the U.K. Financial Conduct Authority, in its settlement agreement, also acknowledges that the Bank has undertaken and is continuing to undertake remedial action and recognizes that the Bank has committed significant resources to improving the business practices and associated controls relating to its FX operations.

The Applicant states that the CFTC Order notes the Bank's review of its business practices and systems and controls, which included remedial efforts across the Bank at the Group, Compliance and Front Office levels. The Applicant represents that at the Group level, an independent review of the Bank's business practices was conducted, which, among other things, led to the introduction of a new code of conduct which sets out the ethical and professional behaviors expected of employees. The Applicant states that at the Group level and with respect to its investment banking operations, the Bank has undertaken significant work to strengthen the role of Compliance. The Applicant represents that the work has included increasing Compliance's visibility on board and management committees, developing a process and reporting framework to support monitoring and verification activity undertaken by Compliance, holding standardized and structured monthly business line meetings between Compliance and the Global Head of the business they cover, formalizing a breach review process to ensure consistent and effective treatment of Compliance policy breaches, enhancing and transitioning to a centralized model for trade surveillance and e-communications surveillance, and increasing Compliance's budget for staff and training.

Remedial Actions To Address the Misconduct of BPLC—Additional Structural Enhancements

7. The Applicant states that the Bank has made substantial investments in the independent, external review of its governance, operational model, and risk and control programs, conducted by Sir Anthony Salz, including interviews of more than 600 employees, clients, and competitors, as well as consideration of more than 9,000 responses to an internal staff survey.

The Applicant represents that the Bank has taken steps to clearly articulate its policies and values and disseminate that information firm-wide through trainings.

The Applicant states that the Bank continues to develop a strong institutionalized framework of supervision and accountability running from the desk level to the top of the organization. For example, the Applicant states that Barclays established in 2013 a dedicated Board-level committee, the Board Conduct, Operational and Reputation Risk Committee, that is responsible for ensuring, on behalf of the Board, the efficiency of the processes for identification and management of conduct risk, reputation risk and operational risk. This committee reports to the BPLC's Board of Directors. In addition, the Applicant states that the Bank has established numerous business-specific committees—comprising senior business personnel and regional executives, among others—that are responsible for considering the principal risks as they relate to the associated businesses. The Applicant represents that each of these committees meets on a quarterly basis, and all report up to the Board Conduct, Operational and Reputation Risk Committee.

The Applicant represents that the Bank continues to institute an enhanced global compliance and controls system, supported by substantial financial and human resources, and charged with enforcing and continually monitoring adherence to BPLC's policies. The Applicant states that Junior Compliance employees receive approximately 600 hours of Compliance-related training over a two-year period. The Applicant states that more senior Compliance personnel receive additional training.

Statutory Findings—Protective of the Rights of Participants of Affected Plans and IRAs

8. The Applicant has proposed certain conditions it believes are protective of participants and beneficiaries of ERISA-covered plans and IRAs with respect to the transactions described herein. The Department has determined that it is necessary to modify and supplement the conditions before it can tentatively determine that the requested exemption meets the statutory requirements of section 408(a) of ERISA. In this regard, the Department has tentatively determined that the following conditions adequately protect the rights of participants and beneficiaries of affected plans and IRAs with respect to the transactions that would be covered by this proposed five-year exemption, if granted.

The five-year exemption, if granted, as proposed, is only available to the extent that, (a) other than certain individuals who: (i) Worked for a non-fiduciary business within BCI; (ii) had no responsibility for, and exercised no authority in connection with, the management of plan assets; and (iii) are no longer employed by BPLC, the Barclays Affiliated QPAMs and the Barclays Related QPAMs (including their officers, directors, agents other than BPLC, and employees of such QPAMs who had responsibility for, or exercised authority in connection with the management of plan assets) did not know of, did not have reason to know of, or participate in the criminal conduct of BPLC that is the subject of the Conviction (for purposes of this requirement, the term ''participate in'' includes the knowing or tacit approval of the misconduct underlying the Conviction); (b) any failure of the Barclays Affiliated QPAM or a Barclays Related QPAM to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction; and (c) the Barclays Affiliated QPAMs and (including their officers, directors, agents other than BPLC, and employees of such Barclays QPAMs) did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct that is the subject of the Conviction.

9. The Department expects the Barclays Affiliated QPAMs will rigorously ensure that the individuals associated with the misconduct will not be employed or knowingly engaged by such QPAMs. In this regard, the five-year exemption, if granted, mandates that the Barclays Affiliated QPAMs will not employ or knowingly engage any of the individuals that participated in the FX manipulation that is the subject of the Conviction. For purposes of this condition, the term ''participated in'' includes an individual's knowing or tacit approval of the behavior that is the subject of the Conviction.

10. Further, a Barclays Affiliated 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 Barclays Affiliated QPAM to enter into any transaction with BPLC or BCI or engage BPLC or BCI 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.

11. The Barclays Affiliated QPAMs and the Barclays Related QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction. Further, any failure of a Barclays Affiliated QPAM or a Barclays Related QPAM to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction.

No relief will be provided by this five-year exemption, if granted, if a Barclays Affiliated QPAM or a Barclays Related QPAM exercised authority over the assets of an ERISA-covered plan or an IRA in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Conviction; or cause the Barclays Affiliated QPAM or the Barclays Related QPAM, or its affiliates or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Conviction. Also, no relief will be provided by this five-year exemption, if granted, to the extent BPLC or BCI provides any discretionary asset management services to ERISA-covered plans or IRAs, or otherwise acts as a fiduciary with respect to ERISA-covered plan or IRA assets.

12. The Department believes that robust policies and training are warranted where, as here, the criminal misconduct has occurred within a corporate organization that is affiliated with one or more QPAMs managing plan or IRA assets. Therefore, this proposed five-year exemption, if granted, requires that prior to a Barclays Affiliated QPAM's engagement by any ERISA-covered plan or IRA for discretionary asset management services, where the QPAM represents that it qualifies as a QPAM, the Barclays Affiliated QPAM must develop,

implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that: The asset management decisions of the Barclays Affiliated QPAM are conducted independently of the corporate management and business activities of BPLC, including the management and business activities of BCI; the Barclays Affiliated 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 violation of these duties and provisions with respect to ERISA-covered plans and IRAs; the Barclays Affiliated QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to ERISA-covered plans and IRAs; any filings or statements made by the Barclays Affiliated 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; the Barclays Affiliated 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; and the Barclays Affiliated QPAM complies with the terms of this five-year exemption, if granted.

13. Any violation of, or failure to comply with, these Policies must be 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 Barclays Affiliated QPAM, the independent auditor responsible for reviewing compliance with the Policies, and an appropriate fiduciary of any affected ERISA-covered plan or IRA, which fiduciary is independent of BPLC. A Barclays Affiliated 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 reports such instance of noncompliance as explained above.

14. The Department has also imposed a condition that requires each Barclays Affiliated QPAM, prior to its engagement by any ERISA covered plan or IRA, to develop and implement a Training program, conducted at least annually, for all relevant Barclays Affiliated 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 five-year exemption, if granted, (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing. Further, the Training must be conducted by an independent professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code.

15. *Independent Transparent Audit.* The Department views a rigorous and transparent audit that is conducted annually by an independent party, as essential to ensuring that the conditions for exemptive relief described herein are followed by the Barclays Affiliated QPAMs. Therefore, Section I(i) of this proposed five-year exemption, if granted, requires that each Barclays Affiliated QPAM submits to an audit, conducted annually 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 the Barclays Affiliated QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. In addition, each annual audit must cover a consecutive twelve (12) month period starting with the twelve (12) month period that begins on the date that a Barclays Affiliated QPAM is first engaged by any ERISA-covered plan or IRA for discretionary asset management services reliant on PTE 84–14 and each annual audit must be completed no later than six (6) months after the period to which the audit applies.

16. Among other things, the audit condition requires that, 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 Barclays Affiliated QPAM and, if applicable, BPLC, 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.

In addition, the auditor's engagement must specifically require the auditor to determine whether each Barclays Affiliated QPAM has complied with the Policies and Training conditions described herein, and must further require the auditor to test each Barclays Affiliated QPAM's operational compliance with the Policies and Training. The auditor must issue a written report (the Audit Report) to BPLC and the Barclays Affiliated 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 the Barclays Affiliated QPAM's Policies and Training; the Barclays Affiliated QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective Barclays Affiliated QPAM's noncompliance with the written Policies and Training.

17. Any determination 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 Barclays Affiliated QPAM must be promptly addressed by such Barclays Affiliated QPAM, and any action taken by such Barclays Affiliated QPAM to address such recommendations must be included in an addendum to the Audit Report. Further, any determination by the auditor that the respective Barclays Affiliated QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that the Barclays Affiliated QPAM has complied with the requirements, as described above, must be based on evidence that demonstrates the Barclays Affiliated QPAM has actually implemented, maintained, and followed the Policies and Training required by this five-year exemption. Finally, the Audit Report must address the adequacy of the Annual Review required under this exemption and the resources provided to the Compliance Officer in connection with such Annual Review. Moreover, the auditor must notify the respective Barclays Affiliated QPAM of any instance 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.

18. This exemption, if granted, requires that certain senior personnel of BPLC review the Audit Report and make certain certifications and take various corrective actions. In this regard, the General Counsel or one of the three most senior executive officers of the Barclays Affiliated QPAM to which the Audit Report applies, must certify, in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this five-year exemption, if granted; addressed, corrected, or remedied an inadequacy 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 proposed five-year exemption, if granted, and with the applicable provisions of ERISA and the Code. The Risk Committee of BPLC's Board of Directors is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking legal compliance officer of BPLC must review the Audit Report for each Barclays Affiliated QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report.

19. In order to create a more transparent record in the event that the proposed relief is granted, each Barclays Affiliated QPAM must provide its certified Audit Report to the Department no later than thirty (30) days following its completion. The Audit Report will be part of the public record regarding this five-year exemption, if granted. Further, each Barclays Affiliated QPAM must make 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 Barclays Affiliated QPAM. Additionally, each Barclays Affiliated QPAM and the auditor must submit to the Department any engagement agreement(s) entered into pursuant to the engagement of the auditor under this five-year exemption, if granted. Also, they must submit to the Department any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this proposed five-year exemption, if granted, no later than six (6) months after the Barclays Affiliated QPAM is first engaged by any ERISA covered plan or IRA for discretionary asset management services reliant on PTE 84–14 (and one month after the execution of any agreement thereafter).

Finally, if the exemption is granted, the auditor must provide the Department, 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 instance of noncompliance by the relevant Barclays Affiliated QPAM; and an explanation of any corrective or remedial action taken by the applicable Barclays Affiliated QPAM.

In order to enhance oversight of the compliance with the exemption, if granted, BPLC must notify the Department at least thirty (30) days prior to any substitution of an auditor, and BPLC must demonstrate to the Department's satisfaction that any new auditor is independent of BPLC, experienced in the matters that are the subject of the exemption, if granted, and capable of making the determinations required of this five-year exemption, if granted.

20. *Contractual Obligations.* This five-year exemption, if granted, requires the Barclays Affiliated QPAMs to enter into certain contractual obligations in connection with the provision of services to their clients. It is the Department's view that the condition in Section I(j) is essential to the Department's ability to make its findings that the proposed five-year exemption is protective of the rights of the participants and beneficiaries of ERISA-covered and IRA plan clients of Barclays Affiliated QPAMs under section 408(a) of ERISA. In this regard, effective as of the effective date of this five-year exemption, if granted, with respect to any arrangement, agreement, or contract between a Barclays Affiliated QPAM and an ERISA-covered plan or IRA for which a Barclays Affiliated QPAM provides asset management or other discretionary fiduciary services, each Barclays Affiliated QPAM must agree: (a) To comply with ERISA and the Code, as applicable, with respect to such ERISA-covered plan or IRA, and 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; (b) 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 Barclays Affiliated 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; (c) not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the Barclays Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions; (d) 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 Barclays Affiliated QPAM for violating ERISA or the Code, or engaging in prohibited transactions, except for a violation or a prohibited transaction caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary which is independent of BPLC, and its affiliates; (e) not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the Barclays Affiliated 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 the actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors; and (f) 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 practice, 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. Furthermore, any contract, agreement or arrangement between a Barclays Affiliated QPAM and its ERISA-covered plan or IRA client must not contain exculpatory provisions disclaiming or otherwise limiting liability of the Barclays Affiliated QPAM for a violation of such agreement's terms, except for liability caused by error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary which

is independent of BPLC and its affiliates.

21. Within four (4) months of the date of the Conviction, each Barclays Affiliated QPAM must provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which a Barclays Affiliated QPAM provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a Barclays Affiliated QPAM provides asset management or other discretionary services, the Barclays Affiliated QPAM will agree in writing to its obligations under this Section I(j) in an updated investment management agreement between the Barclays Affiliated QPAM and such clients or other written contractual agreement. In no event may any of these obligations be waived, qualified, or limited by any other agreement, side letter, or investment term.

22. *Notice Requirements.* The proposed exemption contains extensive notice requirements, some of which extend not only to ERISA-covered plan and IRA clients of Barclays Affiliated QPAMs, but which also go to non-Plan clients of Barclays Affiliated QPAMs. In this regard, the Department understands that many firms may promote their ''QPAM'' designation in order to earn asset management business, including from non-ERISA plans. Therefore, each BPLC affiliated asset manager will provide each Future Covered Client with a **Federal Register** copy of the proposed five-year exemption, along with a separate summary describing the facts that led to the Conviction (the Summary), which have been submitted to the Department, and a prominently displayed statement that the Conviction resulted in a failure to meet a condition of PTE 84–14. The provision of these documents must occur prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the BPLC affiliated asset manager. For purposes of this paragraph, a ''Future Covered Client'' means a client of the BPLC affiliated asset manager that, beginning after the date, if any, that a final exemption is published in the **Federal Register**, has assets managed by such asset manager, and has received a representation from the asset manager that the asset manager is a QPAM, or qualifies for the relief provided by PTE 84–14.

23. This proposed five-year exemption, if granted, also requires BPLC to designate a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer will have several obligations that it must comply with, as described in Section I(m) above. These include conducting an annual review (the Annual Review) to determine the adequacy and effectiveness of the implementation of the Policies and Training; the preparation of a written report for each Annual Review (each, an Annual Report) that, among other things, summarizes his or her material activities during the preceding year; and sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action. Each Annual Report must be provided to appropriate corporate officers of BPLC and each Barclays Affiliated QPAM to which such report relates; the head of compliance and the General Counsel (or their functional equivalent) of the relevant Barclays Affiliated QPAM; and must be made unconditionally available to the independent auditor described above.

24. Each Barclays Affiliated QPAM must maintain records necessary to demonstrate that the conditions of this exemption, if granted, have been met, for six (6) years following the date of any transaction for which such Barclays Affiliated QPAM relies upon the relief in the proposed five-year exemption, if granted.

25. The Department stresses that it is proposing this five-year exemption based on representations from BCI that it has changed and improved its corporate culture and compliance capabilities. Consistent with this, the proposed five-year exemption mandates that, during the effective period, BPLC must immediately disclose to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) that BPLC or an affiliate enters into with the U.S. Department of Justice, to the extent such DPA or NPA involved conduct described in Section I(g) of PTE 84–14 or section 411 of ERISA. In addition, BPLC must immediately provide 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 agreement.

The Department may, following its review of that information, require BPLC or a party specified by the Department, to submit a new application for the continued availability of relief as a condition of continuing to rely on this exemption. In this regard, the QPAM (or other party submitting the application) will have the burden of justifying the relief sought in the application. If the Department denies the relief requested in that application, or does not grant such relief within twelve (12) months of the application, the relief described herein would be revoked as of the date of denial or as of the expiration of the twelve (12) month period, whichever date is earlier.

26. Finally, each Barclays Affiliated QPAM, in its agreements with ERISA-covered plan and IRA clients, or in other written disclosures provided to ERISA-covered plan and IRA clients, within sixty (60) days prior to the initial transaction upon which relief hereunder is relied, will clearly and prominently: Inform the ERISA-covered plan or IRA client that the client has the right to obtain copies of the QPAM's written Policies adopted in accordance with this five-year exemption, if granted.

Statutory Findings—Administratively Feasible

27. The Applicant represents that the proposed exemption, if granted, is administratively feasible because it does not require any ongoing monitoring by the Department. Furthermore, the requested five-year does not require the Department's oversight because, as a condition of this proposed five-year exemption, neither BPLC nor BCI may provide any fiduciary or QPAM services to ERISA-covered plan or IRAs.

Summary

28. Given the revised and new conditions described above, the Department has tentatively determined that the relief sought by the Applicant satisfies the statutory requirements for an exemption under section 408(a) of ERISA.

Notice to Interested Persons

As BCI ceased acting as a discretionary asset manager as of December 4, 2015, notice of the proposed exemption (the Notice) will be given solely by publication of the Notice in the **Federal Register**. All written comments and/or requests for a hearing must be received by the Department within thirty (30) days of the publication of the Notice in the **Federal Register**.

All comments will be made available to the public. *Warning:* Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Ms. Anna Mpras Vaughan of the Department at (202) 693–8565. (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 of the Act and/or the Code, including any prohibited transaction 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) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional 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

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 10th day of November 2016.

Lyssa E. Hall,

Director, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

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Part III

Department of the Interior

Fish and Wildlife Service

U.S. Fish and Wildlife Service Mitigation Policy; Notice

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–ES–2015–0126; FXHC11220900000–156–FF09E33000]

U.S. Fish and Wildlife Service Mitigation Policy

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of final policy.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce revisions to our Mitigation Policy, which has guided Service recommendations on mitigating the adverse impacts of land and water developments on fish, wildlife, plants, and their habitats since 1981. The revisions are motivated by changes in conservation challenges and practices since 1981, including accelerating loss of habitats, effects of climate change, and advances in conservation science. The revised Policy provides a framework for applying a landscape-scale approach to achieve, through application of the mitigation hierarchy, a net gain in conservation outcomes, or at a minimum, no net loss of resources and their values, services, and functions resulting from proposed actions. The primary intent of the Policy is to apply mitigation in a strategic manner that ensures an effective linkage with conservation strategies at appropriate landscape scales.

DATES: This Policy is effective on November 21, 2016.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this Policy, including an environmental assessment, are available on the Internet at *http://www.regulations.gov* at Docket Number FWS–HQ–ES–2015–0126.

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703–358–2442.

SUPPLEMENTARY INFORMATION: The revised Policy integrates all authorities that allow the Service either to recommend or to require mitigation of impacts to Federal trust fish and wildlife resources, and other resources identified in statute, during development processes. It is intended to serve as a single umbrella policy under which the Service may issue more detailed policies or guidance documents covering specific activities in the future. Citations for the many statutes and other authorities referenced in this document are in Appendix A.

Background

The primary intent of revising the 1981 Mitigation Policy (1981 Policy) is to apply mitigation in a strategic manner that ensures an effective linkage with conservation strategies at appropriate landscape scales, consistent with the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015), the Secretary of the Interior's Order 3330 entitled ''Improving Mitigation Policies and Practices of the Department of the Interior'' (October 31, 2013), and the Departmental Manual Chapter (600 DM 6) on Implementing Mitigation at the Landscape-scale (October 23, 2015). Within this context, our revisions of the 1981 Policy: (a) Clarify that this Policy addresses all resources for which the Service has authorities to recommend mitigation for impacts to resources; and (b) provide an updated framework for applying mitigation measures that will maximize their effectiveness at multiple geographic scales.

By memorandum, the President directed all Federal agencies that manage natural resources to avoid and minimize damage to natural resources and to effectively offset remaining impacts, consistent with the principles declared in the memorandum and existing statutory authority. Under the memorandum, all Federal mitigation policies shall clearly set a net benefit goal or, at minimum, a no net loss goal for natural resources, wherever doing so is allowed by existing statutory authority and is consistent with agency mission and established natural resource objectives. This Policy implements the President's directions for the Service.

Secretarial Order 3330 established a Department-wide mitigation strategy to ensure consistency and efficiency in the review and permitting of infrastructure development projects and in conserving natural and cultural resources. The Order charged the Department's Energy and Climate Change Task Force with developing a report that addresses how to best implement consistent, Department-wide mitigation practices and strategies. The report of the Task Force, ''A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior'' (April 2014), describes guiding principles for mitigation to improve process efficiency, including the use of landscape-scale approaches rather than project-by-project or single-resource mitigation approaches. This revision of the Service's Mitigation Policy complies with a deliverable identified in the Strategy that seeks to implement the guiding principles set forth in the Secretary's Order, the corresponding Strategy, and subsequent 600 DM 6.

In 600 DM 6, the Department of the Interior established policy intended to improve permitting processes and help achieve beneficial outcomes for project proponents, affected communities, and the environment. By implementing this Manual Chapter, the Department will:

(a) Effectively mitigate impacts to Department-managed resources and their values, services, and functions;

(b) provide project developers with added predictability and efficient and timely environmental reviews;

(c) improve the resilience of resources in the face of climate change;

(d) encourage strategic conservation investments in lands and other resources; increase compensatory mitigation effectiveness, durability, transparency, and consistency; and

(e) better utilize mitigation measures to help achieve Departmental goals.

The final Policy implements the Department's directions for the Service. As with the 1981 Policy, the Service intends, with this revision, to conserve, protect, and enhance fish, wildlife, plants, and their habitats for future generations. Effective mitigation is a powerful tool for furthering this mission.

Changes From the Draft Policy

This final Policy differs from the proposed revised Policy in a few substantive respects, which we list below, and contains many editorial changes in response to comments we received that requested greater clarity of expression regarding various aspects of the Policy purpose, authorities, scope, general principles, framework for formulating mitigation measures, and definitions. The most common editorial change to the final Policy addresses the concern that the proposed revised Policy was unclear regarding the Service's authorities to either recommend or require mitigation. The proposed revised Policy frequently used the phrase ''recommend or require'' as a general descriptor for Service-formulated mitigation measures, because we have authority to require mitigation in some contexts, but not in others. The final Policy adds new text to the Authority section that identifies those circumstances under which we have specific authority to require, consistent with other applicable laws and regulations, one or more forms of mitigation for impacts to fish and wildlife resources.

This Policy provides a common framework for the Service to apply when identifying mitigation measures across the full range of our authorities, including those for which we may require mitigation, but the Policy cannot and does not alter or substitute for the regulations implementing any of our authorities. We summarize below the few substantive changes to the proposed revised Policy, listed by section.

In section 4 of the Policy, General Policy and Principles, we added a principle to emphasize the importance of the avoidance tier of the mitigation hierarchy. This new principle reinforces existing direction in the proposed revised Policy that Service staff will recommend avoidance of all impacts to high-value habitats as the only effective means of mitigating impacts at these locations.

In section 5.5, Habitat Valuation, we clarify that habitats of ''high-value'' to an evaluation species are scarce and of high suitability and high importance. As with the proposed revised Policy, the final Policy directs Service personnel to seek avoidance of all impacts to high-value habitats.

In section 5.6.3, Compensation, we added a paragraph that describes onsite compensation and distinguishes it from rectifying impacts. We added another paragraph that indicates how third parties may assume the responsibilities for implementing proponent-responsible compensation. Other revisions to this section are editorial in nature, intended to better communicate Service intentions about the use of compensation in mitigating impacts to species. These revisions include reorganizing material into new subsections at 5.6.3.1, Equivalent Standards, and at 5.6.3.2, Research and Education.

In section 6, Definitions, we added definitions for ''baseline'' and ''habitat credit exchange'' and modified the definition of ''practicable.''

In Appendix A, Authorities and Direction for Service Mitigation Recommendations, we updated the listed authorities, regulations, and guidance documents where necessary. To better reflect their relationship with this Policy and to respond to comments received, we have modified the discussions of the Bald and Golden Eagle Protection Act, Clean Water Act, Fish and Wildlife Conservation Act, Marine Mammal Protection Act, Migratory Bird Treaty Act, and Natural Resource Damage Assessment and Restoration processes.

We made clarifying edits and additions to Appendix C, Compensatory Mitigation in Financial Assistance Awards Approved or Administered by the U.S. Fish and Wildlife Service. We added a sentence in the first paragraph recognizing that the regulations at 50 CFR part 84 authorize the use of Natural Resource Damage Assessment funds as a match in the National Coastal Wetlands Conservation Program. In part B, we added ''the proposed use of mitigation funds on land acquired with Federal financial assistance'' as a common issue related to mitigation in financial assistance. In part G, we clarified the circumstances under which the Service can approve financial assistance to satisfy mitigation requirements of State, tribal, or local governments. In part H, we revised the topic question from ''Can a mitigation proposal be located on land acquired under a Service financial assistance award?'' to ''Can a project on land already designated for the conservation of natural resources generate credits for compensatory mitigation?'' and revised the answer accordingly. We added a topic to those included in the proposed revised Policy at part I: ''Does the Service's Mitigation Policy affect financial assistance programs and awards managed by other Federal entities?'' This addition describes the various circumstances in which this question is relevant.

Discussion

The Service's motivations for revising the 1981 Policy include:

- Accelerating loss, including degradation and fragmentation, of habitats and subsequent loss of ecosystem function since 1981;
- Threats that were not fully evident in 1981, such as effects of climate change, the spread of invasive species, and outbreaks of epizootic diseases, are now challenging the Service's conservation mission;
- The science of fish and wildlife conservation has substantially advanced in the past three decades;
- The Federal statutory, regulatory, and policy context of fish and wildlife conservation has substantially changed since the 1981 Policy; and
- A need to clarify the Service's definition and usage of mitigation in various contexts, including the conservation of species listed as threatened or endangered under the Endangered Species Act of 1973, as amended (ESA), which was expressly excluded from the 1981 Policy.

Mitigation Defined

In the context of impacts to environmental resources (including their values, services, and functions) resulting from proposed actions, ''mitigation'' is a general label for measures that a proponent takes to avoid, minimize, and compensate for such impacts. The 1981 Policy adopted the definition of mitigation in the Council on Environmental Quality (CEQ) National Environmental Policy Act (NEPA) regulations (40 CFR 1508.20). The CEQ mitigation definition remains unchanged since codification in 1978 and states that ''Mitigation includes:

- Avoiding the impact altogether by not taking a certain action or parts of an action;
- minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and
- compensating for the impact by replacing or providing substitute resources or environments.''

This definition is adopted in this Policy, and the use of its components in various contexts is clarified. In 600 DM 6, the Department of the Interior states that mitigation, as enumerated by CEQ, is compatible with Departmental policy; however, as a practical matter, the mitigation elements are categorized into three general types that form a sequence: Avoidance, minimization, and compensatory mitigation for remaining unavoidable (also known as residual) impacts. The 1981 Policy further stated that the Service considers the sequence of the CEQ mitigation definition elements to represent the desirable sequence of steps in the mitigation planning process. The Service generally affirms this hierarchical approach in this Policy. We advocate first avoiding and then minimizing impacts that critically impair our ability to achieve conservation objectives for affected resources. We also provide guidance that recognizes how action- and resource-specific circumstances may warrant departures from the preferred mitigation sequence; for example, when impacts to a species may occur at a location that is not critical to achieving the conservation objectives for that species, or when current conditions are likely to change substantially due to the effects of a changing climate. In such circumstances, relying more on compensating for the impacts at another location may more effectively serve the conservation objectives for the affected resources. This Policy provides a logical framework for the Service to consistently make such choices.

Scope of the Revised Mitigation Policy

The Service's mission is to conserve, protect, and enhance fish, wildlife, and plants, and their habitats for the continuing benefit of the American people. This mission includes a responsibility to make mitigation recommendations or to specify mitigation requirements during the review of actions based on numerous authorities related to specific plant and animal species, habitats, and broader ecological functions. Our authorities to engage actions that may affect these resources extends to all U.S. States and territories, on public and on private property. This unique standing necessitates that we clarify our integrated interests and expectations when seeking mitigation for impacts to fish, wildlife, plants, and their habitats.

This Policy serves as overarching Service guidance applicable to all actions for which the Service has specific authority to recommend or require the mitigation of impacts to fish, wildlife, plants, and their habitats. In most cases, applications of this Policy are advisory. Service recommendations provided under the guidance of this Policy are intended to help action proponents incorporate appropriate means and measures into their actions that will most effectively conserve resources affected by those actions. As necessary and as budgetary resources permit, we intend to adapt or develop Service program-specific policies, handbooks, and guidance documents, consistent with the applicable statutes, to integrate the spirit and intent of this Policy.

New Threats and New Science

Since the publication of the Service's 1981 Policy, land use changes in the United States have reduced the habitats available to fish and wildlife. By 1982, approximately 72 million acres of the lower 48 States had already been developed. Between 1982 and 2012, the American people developed an additional 44 million acres for a total of 114 million acres developed. Of all historic land development in the United States, excluding Alaska, over 37 percent has occurred since 1982. Much of this newly developed land had been existing habitats, including 17 million acres converted from forests.

A projection that the U.S. population will increase from 310 million to 439 million between 2010 and 2050 suggests that land conversion trends like these will continue. In that period, development in the residential housing sector alone may add 52 million (42 percent more) units, plus 37 million replacement units. By 2060, a loss of up to 38 million acres (an area the size of Florida) of forest habitats alone is possible. Attendant pressures on remaining habitats will also increase fragmentation, isolation, and degradation through myriad indirect effects. The loss of ecological function will radiate beyond the extent of direct habitat losses. Given these projections, the near-future challenges for conserving species and habitats are daunting. As more lands and waters are developed for human uses, it is incumbent on the Service to help project proponents successfully and strategically mitigate impacts to fish and wildlife and prevent systemic losses of ecological function.

Accelerating climate change is resulting in impacts that pose a significant challenge to conserving species, habitat, and ecosystem functions. Climatic changes can have direct and indirect effects on species abundance and distribution, and may exacerbate the effects of other stressors, such as habitat fragmentation and diseases. The conservation of habitats within ecologically functioning landscapes is essential to sustaining fish, wildlife, and plant populations and improving their resilience in the face of climate change impacts, new diseases, invasive species, habitat loss, and other threats. Therefore, this Policy emphasizes the integration of mitigation planning with a landscape approach to conservation.

Over the past 30 years, the concepts of adaptive management (resource management decisionmaking when outcomes are uncertain) have gained general acceptance as the preferred science-based approach to conservation. Adaptive management is an iterative process that involves: (a) Formulating alternative actions to meet measurable objectives; (b) predicting the outcomes of alternatives based on current knowledge; (c) conducting research that tests the assumptions underlying those predictions; (d) implementing alternatives; (e) monitoring the results; and (f) using the research and monitoring results to improve knowledge and adjust actions and objectives accordingly. Adaptive management further serves the need of most natural resources managers and policy makers to provide accountability for the outcomes of their efforts, *i.e.,* progress toward achieving defensible and transparent objectives.

Working with many partners, the Service is increasingly applying the principles of adaptive management in a landscape approach to conservation. Mitigating the impacts of actions for which the Service has advisory or regulatory authorities continues to play a significant role in accomplishing our conservation mission under this approach. Our aim with this Policy is to align mitigation with conservation strategies at appropriate landscape scales so that mitigation most effectively contributes to achieving the conservation objectives we are pursuing with our partners, and to align mitigation recommendations and requirements with Secretarial Order 3330 and 600 DM.

A Focus on Habitat Conservation

Although many Service authorities pertain to specific taxa or groups of species, most specifically recognize that these resources rely on functional ecosystems to survive and persist for the continuing benefit of the American people. Mitigation is a powerful tool for sustaining species and the habitats upon which they depend; therefore, the Service's Mitigation Policy must effectively deal with impacts to the ecosystem functions, properties, and components that sustain fish, wildlife, plants, and their habitats. The 1981 Policy focused on habitat: ''the area which provides direct support for a given species, population, or community.'' It defined criteria for assigning the habitats of project-specific evaluation species to one of four resource categories, using a two-factor framework based on the relative scarcity of the affected habitat type and its suitability for the evaluation species, with mitigation guidelines for each category. We maintain a focus on habitats in this Policy by using evaluation species and a valuation framework for their affected habitats, because habitat conservation is still generally the best means of achieving conservation objectives for species. However, our revisions of the evaluation species and habitat valuation concepts are intended to address more explicitly the landscape context of species and habitat conservation to improve mitigation effectiveness and efficiency. In addition, we recognize that some situations warrant measures that are not habitat based to address certain species-specific impacts.

Applicability to the Endangered Species Act

The 1981 Policy did not apply to the conservation of species listed as threatened or endangered under the ESA. Excluding listed species from the 1981 Policy was based on: (a) A recognition that all Federal actions that could affect listed species and designated critical habitats must comply with the consultation provisions of section 7 of the ESA; and (b) a position that ‘‘the traditional concept of mitigation’’ did not apply to such actions. This Policy supersedes this exclusion for the Service. Mitigation, which we define in this Policy as measures to avoid, minimize, and compensate for impacts, is an essential means of achieving the overarching purpose of the ESA, which is to conserve listed species and the ecosystems upon which they depend.

Effective mitigation prevents or reduces further declines in populations and/or habitat resources that would otherwise slow or impede recovery of listed species. It is fully consistent with the purposes of the ESA for the Service to identify measures that mitigate the impacts of proposed actions to listed species and designated critical habitat. Although this Policy is intended, in part, to clarify the role of mitigation in endangered species conservation, nothing herein replaces, supersedes, or substitutes for the ESA or its implementing regulations.

Under ESA section 7, the Service has consistently recognized or applied mitigation in the form of:

(a) Measures that are voluntarily included as part of a proposed Federal action that avoid, minimize, rectify, reduce over time, or compensate for unavoidable (also known as residual) impacts to a listed species;

(b) components of reasonable and prudent alternatives (RPAs) to avoid jeopardizing the continued existence of listed species or destroying or adversely modifying designated critical habitat; and

(c) reasonable and prudent measures (RPMs) within an incidental take statement to minimize the impacts of anticipated incidental taking on the affected listed species.

As another example, the 1982 amendments to the ESA created incidental take permitting provisions (section 10(a)(1)(B)) with specific requirements (sections 10(a)(2)(A)(ii) and 10(a)(2)(B)(ii)) for applicants to minimize and mitigate impacts to listed species to the maximum extent practicable.

Summary of Comments and Responses

The March 8, 2016, notice announcing our proposed revisions to the U.S. Fish and Wildlife Service (Service) Mitigation Policy (Policy) (81 FR 12380) requested written comments, information, and recommendations from governmental agencies, tribes, the scientific community, industry groups, environmental interest groups, and any other interested members of the public.

That notice established a 60-day comment period ending May 9, 2016. Several commenters requested an extension of time to provide their comments, asked the Service to revise and recirculate the Policy for comment, or asked the Service to withdraw the Policy to allow interested parties additional time to comment. We subsequently published a notice on May 12, 2016 (81 FR 29574), reopening the comment period for an additional 30 days, through June 13, 2016.

During the comment period, we received approximately 189 comments from Federal, State, and local government entities, industry, trade associations, conservation organizations, nongovernmental organizations, private citizens, and others. The range of comments varied from those that provided general statements of support or opposition to the draft Policy, to those that provided extensive comments and information supporting or opposing the draft Policy or specific aspects thereof. The majority of comments submitted included detailed suggestions for revisions addressing major concepts as well as editorial suggestions for specific wording or line edits.

All comments submitted during the comment period have been fully considered in preparing the final Policy. All substantive information provided has been incorporated, where appropriate, directly into this final Policy or is addressed below. The comments we received were grouped into general issues specifically relating to the draft Policy, and are presented below along with the Service's responses to these substantive comments.

A. Clarify How the Policy Guides Formulation of Service Mitigation Recommendations vs. Requirements

Comment (1): Many commenters indicated that the proposed Policy was unclear regarding the Service's authorities to require mitigation, and requested clarification to distinguish between requirements and recommendations. Several of these commenters noted that various authorities cited for the Policy, such as the ESA, Fish and Wildlife Coordination Act (FWCA), and NEPA, do not require actions to maintain or improve the status of affected resources, or to apply a landscape approach to their conservation, which are features of the Policy.

Response: We agree with comments that the proposed Policy provided an unclear distinction between circumstances under which the Policy would guide the Service's formulation of: (a) Mitigation requirements, *i.e.,* measures that the Service may impose upon an action proponent as conditions of Service funding, approval, or regulatory decision; vs. (b) mitigation recommendations, *i.e.,* measures that we advise an action proponent to adopt for conservation purposes. We used the phrase ‘‘recommend or require’’ because the Service has authority to require mitigation in some contexts, but not in others, and our aim with this Policy is to provide a common framework for the Service to implement across the full range of our authorities. However, we recognize the need to clearly distinguish these two general contexts, and have revised the final Policy accordingly.

Circumstances under which the Service currently has specific authority to *require,* consistent with applicable laws and regulations, one or more forms of mitigation for impacts to fish and wildlife resources include the following:

1. Actions that the Service carries out, *i.e.,* the Service is the action proponent;
2. Actions that the Service funds;
3. Actions to restore damages to fish and wildlife resources caused by oil spills and other hazardous substance releases, under the Oil Pollution Act (OPA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);
4. Actions of other Federal agencies that require an incidental take statement under section 7 of the ESA (measures to minimize the impacts of incidental taking on the species);
5. Actions that require an incidental take permit under section 10 of the ESA (measures to minimize and mitigate the impacts of the taking on the species to the maximum extent practicable);
6. Fishway prescriptions under section 18 of the Federal Power Act (FPA), which minimize, rectify, or reduce over time through management, the impacts of non-Federal hydropower facilities on fish passage;
7. License conditions under section 4(e) of the FPA for non-Federal hydropower facilities affecting Service properties (*e.g.,* a National Wildlife Refuge) for the protection and

utilization of the Federal reservation consistent with the purpose for which such reservation was created or acquired;

8. Actions that require a Letter of Authorization or Incidental Harassment Authorization under the Marine Mammal Protection Act (MMPA); and

9. Actions that require a permit for non-purposeful (incidental) take of eagles under the Bald and Golden Eagle Protection Act (BGEPA).

The circumstances cited above under which the Service currently has specific authority to *require,* consistent with applicable laws and regulations, one or more forms of mitigation for impacts to fish and wildlife resources are further clarified in subsequent responses to comments, the Policy, and its appendices.

In all other circumstances not listed above, the Policy will guide the Service's formulation of recommendations, not requirements, to proponents of actions that cause impacts to fish and wildlife resources and which are within the defined scope (section 3) of the Policy.

B. Policy Is Based on Existing Authority

Comment (2): Several commenters stated that the draft Policy attempted to inappropriately create new authority for the Service to engage in mitigation processes, circumventing appropriate legislative or rulemaking processes. They stated that the Policy could not be used to expand Service authority to take actions beyond those authorized by Congress, noting that the Policy itself is not an independent grant of authority and the imposition of any mitigation measures advocated by it would be constrained by authority provided by the applicable statute. The commenters requested we clarify that the Policy does not expand existing Service authorities.

Response: The commenters are correct that the Policy cannot create or assume new authority for making mitigation recommendations. This Policy does not exceed existing statutory or regulatory authority to engage in mitigation processes for the purpose of making mitigation recommendations, and in limited cases, specifying mitigation requirements. Processes established by applicable statutes and regulations remain in effect and are not superseded by this Policy. In implementing this Policy and carrying out our broader mission, the Service recognizes these authorities and processes, and their limitations.

C. Scope of the Policy

Comment (3): One commenter stated their concerns that the scope of the Policy appeared to limit the discretion of an action agency, potentially holding the action agency or applicant responsible for mitigation beyond an action agency's own authority, mission, and responsibilities.

Response: The Service recognizes that the authorities and processes of different agencies may limit or provide discretion regarding the level of mitigation for a project. This Policy is not controlling upon other agencies. There may be limitations (*e.g.,* agency-specific authorities and 600 DM 6) on the implementation of measures that would achieve the Policy's goal of net conservation gain or a minimum of no net loss, when the costs of such mitigation are reimbursable by project beneficiaries under laws and regulations controlling agencies' activities (*e.g.,* Bureau of Reclamation).

Comment (4): Two commenters stated their belief that the Policy inappropriately expands Service authority to lands beyond National Wildlife Refuges or other Service-managed lands, and beyond the authorities of the ESA.

Several commenters wanted the Policy to contain explicit guidance on the function of the Service's mitigation authorities under each statute and on implementation of the new Policy in relation to those authorities. Two commenters were concerned about the way the Service will coordinate its responsibilities with similar duties carried out by other agencies and how the Policy applies in situations when more than one statute applies to a particular action.

Response: The Service's authorities to recommend mitigation are described in section 2 and in Appendix A. The Policy's overall coverage is described in the Scope, section 3. The commenters are correct that the Policy's coverage is dictated by the underlying statutory authorities. If a relevant statute provides the Service with authority to make mitigation recommendations, the Service may provide recommendations that cover the resources that are described in that statute. The Policy cannot create or assume new authority for making mitigation recommendations or exceed existing statutory or regulatory authority, and it does not extend the geographic or taxonomic extent of coverage beyond existing Service practice. Authorities for making mitigation recommendations may be applicable, regardless of the location of the action, and whether the action has an effect on a species listed under the ESA. For example, the Service routinely reviews projects to provide mitigation recommendations for inter-jurisdictional fish under NEPA, FWCA, FPA, and the Clean Water Act (CWA) for projects that are planned on lands and waters not owned or managed by the Service.

This Policy covers engagement under all of the Service's mitigation authorities, and does not replace interagency procedure established in another document. The Policy was developed in accordance with the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015), and the Secretary of the Interior's Order 3330 entitled ''Improving Mitigation Policies and Practices of the Department of the Interior'' (October 31, 2013). Having multiple agency mitigation policies using common principles, terms, and approaches provides greater consistency and predictability for the public.

Comment (5): Two commenters stated that the Service cannot prioritize fish, wildlife, plants, and their habitats above all other resources. One said that the Policy must incorporate the Mining and Minerals Policy Act of 1970 (30 U.S.C. 21a) that states that it is the policy of the Federal Government in the national interest to foster and encourage private enterprise in the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, and to promote the orderly and economic development of domestic mineral resources and reserves. They also stated the Policy must incorporate the National Materials and Minerals Policy, Research and Development Act, (30 U.S.C. 1601 *et seq.*), which states it is the continuing policy of the United States to promote an adequate and stable supply of materials necessary to maintain national security, economic well-being, and industrial production, with appropriate attention to a long-term balance between resource production, energy use, a healthy environment, natural resources conservation, and social needs. The commenter noted that the Service ignored these statutes and proposed requirements that restrict and discourage mineral development in violation of these laws. They added that any mitigation must be balanced against Congress' policy of encouraging mineral development.

Response: The Service recognizes the national importance of resource development referenced by the commenter, along with many other types of economic development and activities. Statutes that encourage such development are not modified by this Policy. By enacting the various statutes that provide for natural resource mitigation authority across multiple Federal agencies, Congress has recognized that fish and wildlife resources provide commercial, recreational, social, and ecological value to the American people. These statutes providing mitigation authority do not supersede statutes encouraging economic development. Conversely, statutes encouraging economic development do not supersede those providing mitigation authorities. Mitigation is a process by which agencies, proponents, and partners can facilitate sustainable development while simultaneously addressing the long-term conservation of native plants, animals, and ecosystems.

Comment (6): One commenter stated there were constitutional limits on requiring mitigation, referencing the *Koontz* v. *St. Johns River Water Management District* case decided by the U.S. Supreme Court 570 US 2588 (2013). This commenter noted that any compensatory mitigation measures must have an essential nexus with the proposed impacts and be roughly proportional, or have a reasonable relationship between the permit conditions required and the impacts of the proposed development being addressed by those permit conditions.

Response: Like all agencies, the Service has responsibility to implement its authorities consistent with any applicable case law. The Service will implement the Policy in a manner that is consistent with the *Koontz* case and any other relevant court decisions. We have included the following language in the Policy in section 5.6, Means and Measures: All appropriate mitigation measures have a clear connection with the anticipated effects of the action and are commensurate with the scale and nature of those effects.

D. Trust Resources

Comment (7): Several commenters addressed the concept of Federal trust fish and wildlife resources. They noted that in section 3.2, the Policy states that it applies to Service trust resources, but gives Service staff discretion to engage in mitigation processes on an expanded basis under appropriate authorities. They were unclear what authorities were being referenced and recommended that they be clarified, especially if they were expanding the Service's efforts. They asked that we clarify what the term ''expanded basis'' means.

Commenters stated that the Service's authority is limited to migratory birds, threatened or endangered species, eagles, and certain marine mammals. They said that States have authority for all other species. They also requested acknowledgement that States have sole authority for resource management and that the Service should restrict the Policy to only federally protected species.

Response: This Policy applies to all resources listed or described within the Service's various mitigation authorities. The language used within those authorities to describe the covered resources determines the scope of Service recommendations made under each authority. Some authorities apply to resources defined very broadly. The types of resources for which the Service is authorized to recommend mitigation include those that contribute broadly to ecological functions that sustain species. For example, the definitions of the terms ''wildlife'' and ''wildlife resources'' in the Fish and Wildlife Coordination Act include birds, fishes, mammals, and all other classes of wild animals, and all types of aquatic and land vegetation upon which wildlife is dependent. The purpose of the National Environmental Policy Act (NEPA) also establishes an expansive focus in promoting efforts that will prevent or eliminate damage to the environment, including fish and wildlife resources, while stimulating human health and welfare. In NEPA, Congress recognized the profound impact of human activity on the natural environment, particularly through population growth, urbanization, industrial expansion, resource exploitation, and new technologies. NEPA further recognized the critical importance of restoring and maintaining environmental quality, and declared a Federal policy of using all practicable means and measures to create and maintain conditions under which humans and nature can exist in productive harmony. These statutes address systemic concerns and provide authority for protecting habitats and landscapes.

In this Policy, we note that the Service has traditionally described its trust resources as migratory birds, federally listed endangered and threatened species, certain marine mammals, and inter-jurisdictional fish. Our engagement in mitigation processes is likely to focus on those trust resources, but under certain authorities, the Service's recommendations are not strictly limited to covering only trust resources. This Policy does not establish new authority. We respect the role of States and State authorities. We have revised section 3.2 to replace the term ''expanded basis'' to avoid the perception that the Policy is expanding authorities.

E. Applicability to Endangered and Threatened Species

Comment (8): Several commenters recommended excluding species that are listed as endangered or threatened under the ESA as resources to which the Policy would apply, and several others supported such applicability. Reasons cited by the commenters for excluding listed species included: (a) The Service does not explain the circumstances that have changed and warrant reversing the listed-species exclusion of the 1981 Policy; (b) the Policy cannot substitute for ESA-specific requirements; (c) the ESA does not provide authority to require mitigation; and (d) Policy concepts such as ''net conservation gain,'' ''high-value habitat,'' and a ''landscape approach'' to conservation are inconsistent with ESA statutory authority and regulatory requirements.

Response: The Policy addresses all fish and wildlife resources for which the Service has authority to recommend or require mitigation, including ESA-listed species, because of our need to more strategically provide such recommendations. The primary purpose of the ESA is to provide a means for conserving the ecosystems upon which listed species depend. Avoiding, minimizing, and compensating for impacts is as important, if not more so, to the conservation of listed species as it is to any other resource of conservation concern (*e.g.,* wetlands), because listed species are in danger of extinction or are likely to become so in the foreseeable future. The Service can and should advise others about how they may help conserve listed species when their proposed actions would cause impacts to their populations, because conserving listed species is part of our agency's mission. Identifying those means and measures that would, at minimum, result in no net loss to the status of affected listed species will inform action proponents about what they can do, consistent with their authorities and abilities, to prevent further status declines or contribute to their recovery. As mentioned earlier, the 1982 amendments to the ESA are another example of the changed circumstances since the 1981 Policy, and changes in knowledge, conservation, and management of listed species support this Policy's concepts.

Comment (9): In ESA section 7(a)(2) consultations, several commenters noted that reasonable and prudent alternatives (RPAs) to actions that jeopardize listed species or destroy or adversely modify designated critical habitat are not required to meet the no-net-loss or net gain goal of the Policy.

Response: When an agency has proposed an action that the Service has determined in a biological opinion is likely to jeopardize listed species or destroy or adversely modify designated critical habitat, we agree that RPA(s) to that action are not required to meet the no-net loss/net gain goal of the Policy. The definition of RPAs at 50 CFR 402.02 applies to the formulation of RPAs, not this Policy. In discussions with both the action agency and any applicant involved, the Service is required to suggest RPAs, if available, to the action agency and to rely on the expertise of both in identifying RPAs.

The ESA does not prohibit impacts to critical habitat, but section 7(a)(2) does prohibit Federal actions from destroying or adversely modifying critical habitat, without special exemption under section 7(h). We do not anticipate conflicts between the advisory recommendations under this Policy provided in advance of the initiation of consultation and subsequent review of actions under section 7(a)(2) relative to critical habitat. However, we have added language in the Policy that specifically cautions Service personnel about providing compensation recommendations in the context of actions that may affect designated critical habitat. Recommendations for measures that mitigate impacts (all five types) to the listed species *within* critical habitat will receive preference over compensation *outside* critical habitat to avoid the possibility that adverse effects to the physical and biological features of critical habitat could appreciably diminish its conservation value.

Comment (10): In ESA section 7(a)(2) consultations, several commenters requested that the Service clarify whether the reasonable and prudent measures (RPMs) and the accompanying nondiscretionary terms and conditions that the Service includes in incidental take statements may require compensating for the impacts of take on the species. Most stated that RPMs are limited to actions that minimize take, and may not include requirements to compensate for taking impacts. In support of such comments, some quoted the Services' 1998 Consultation Handbook language at page 4–50, which states in a section about RPMs: ''Section 7 requires minimization of the level of take. It is not appropriate to require mitigation for the impacts of incidental take.''

Response: The Service's authority to require or recommend mitigation, including all forms of mitigation covered by the CEQ's definition of mitigation, are governed by the ESA and the regulations addressing consultations at 50 CFR part 402. While this Policy addresses ESA compensatory mitigation to a limited extent, further detail regarding the role of compensatory mitigation in implementing the ESA will be provided through authority-specific step-down policy (see proposed Endangered Species Act—Compensatory Mitigation Policy at 81 FR 61032–61065, September 2, 2016).

Comment (11): Two commenters asked that we clarify this sentence in the Discussion material on Applicability to the Endangered Species Act: ''This Policy encourages the Service to utilize a broader definition of mitigation where allowed by law.''

Response: We removed the sentence from the Discussion material in this final Policy.

F. Policy Addresses Multiple Authorities

Comment (12): Several commenters addressed aspects of the Service's authority under the Bald and Golden Eagle Protection Act (BGEPA). One commenter supported the acknowledgement that compensatory mitigation for bald and golden eagles may include preservation of those species' habitats and enhancing their prey base. They noted that existing regulations establishing a permit program for the non-purposeful take of bald and golden eagles recognize these options but that these options have not been used. One commenter stated the Service was incorrect in stating in the proposed Policy: ''the statute and implementing regulations allow the Service to require habitat preservation and/or enhancement as compensatory mitigation for eagle take.'' They said that Congress has not exercised jurisdiction over the habitats of eagles, meaning the Service lacks authority to require mitigation for impacts to eagle habitats. One commenter suggested the Policy should articulate whether compensatory mitigation would be in addition to current requirements of a 1-for-1 take offset.

Response: The Service has revised the BGEPA material in Appendix A section (A)(1) to address the concepts raised by the commenters. Although BGEPA does not directly protect eagle habitat beyond nest structures, nothing in the statute precludes the use of habitat restoration, enhancement, and protection as compensatory mitigation. Because golden eagle populations are currently constrained by a high level of unauthorized human-caused mortality rather than habitat loss, permits for golden eagle take require mitigation to be in the form of a reduction to a human-caused source of mortality. However, habitat restoration and enhancement could potentially offset permitted take in some situations, once standards and metrics are developed to ensure the habitat-based mitigation provided will adequately compensate for the detrimental impacts of the permit.

As we developed this Policy, the Service is simultaneously in the process of developing revised regulations that will establish the specific mitigation ratio (prior to being adjusted to account for uncertainties and risks in the mitigation method) for eagle permits.

Comment (13): Three commenters stated that section 404(m) of the CWA does not provide the Service with any substantive authority to ''secure mitigation'' as stated in Appendix A (A)(2). They suggested the Service's role is limited to commenting upon section 404 permits and providing recommendations to the U.S. Army Corps of Engineers (Corps) and that final decisionmaking rests with that agency.

Response: We have edited Appendix A to remove the word ''secure,'' replacing it with ''recommend.'' This change better reflects the Service's authority, provided in the CWA, to provide mitigation recommendations during permitting processes. The Service makes such recommendations with the intention that they be considered and adopted by the Corps as their permit conditions or requirements, but the commenters are correct that the Service's recommendations themselves are advisory.

Comment (14): Two commenters were concerned that the language in the Policy provides an inappropriate method of requiring mitigation measures on projects permitted under CWA section 404 where the Service could not do so under its own authority, by asking the Corps to impose them.

Response: The language regarding the CWA in Appendix A (A)(2) does not introduce any new authority or process. It describes the existing means by which the Service, under statutory authority in the CWA, provides recommendations to the Corps. The Service uses those recommendations to advise the Corps on the effects of proposed permitting actions on aquatic habitats and wildlife and how to mitigate those effects. The Corps then decides whether to adopt the Service's advice in making their CWA permitting decision.

Comment (15): One commenter was concerned that the Policy could be applied to activities authorized under CWA section 404 Nationwide Permits (NWP) that have only minimal environmental impacts. They said that the Service should expressly exclude activities authorized by NWPs from the Policy because such activities have only minimal environmental impacts and any current mitigation requirements are unwarranted.

Response: Mitigation does apply to the NWP program. The Corps addresses mitigation for NWP-authorized activities in General Condition 23 (77 FR 10285, February 21, 2012). Activities authorized by NWPs are not excluded from this Policy. Also see the agency coordination provisions of General Condition 31, Pre-construction Notification, in the NWPs issued by the Corps on February 21, 2012 (77 FR 10286). For the listed NWPs and in the circumstances described in General Condition 31, the Service is afforded a review opportunity, after which the U.S. Army Corps District Engineer will consider any comments from Federal and State agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

Comment (16): One commenter suggested clarifying the application of the Policy to the Service's role in CWA section 404 permits and mitigation by adding the following sentence to Section 3.4, Applicability to Service Actions: This Policy applies to the Service's review of all CWA permits, both in coordination and consultation roles.

Response: We agree with the commenter that the Policy applies to the Service's review of CWA section 404 permits. We did not add the suggested sentence but address the Service's application of our statutory authority to make recommendations that mitigate the impacts of these permitted actions on aquatic environments in Appendix A (A)(2).

Comment (17): Two commenters addressed the Service's authority under the Fish and Wildlife Coordination Act. One commenter said the Policy should acknowledge that the FWCA is advisory in nature. Another commenter said that the Policy should acknowledge that the FWCA provides a basis for recommending mitigation of impacts to ecological functions.

Response: Mitigation recommendations the Service makes under the FWCA to Federal agencies planning water resource development projects are advisory. Section 2(a) of the FWCA requires agencies to consult with the Service whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, channelized, controlled, or modified for any purpose whatever, with a view to the conservation and development of fish and wildlife resources. Section 2(b) of the FWCA requires that Service reports and recommendations be given full consideration and included in project reports to Congress or to any other relevant agency or person for authorization or approval. These aspects of FWCA compliance are required. Adoption of Service recommendations by the Federal water resource construction agency is not required.

The FWCA applies to those resources described in section 8 of the statute, where the terms ''wildlife'' and ''wildlife resources'' are defined to include birds, fishes, mammals, and all other classes of wild animals, and all types of aquatic and land vegetation upon which wildlife is dependent. In practice, Service recommendations made under FWCA are likely to focus on linkages of effects to trust resources, as prioritized by Service field and regional offices, but recommendations can cover resources as the statute defines. Because of the breadth of this coverage, we agree with the commenter that Service recommendations under the FWCA can include measures intended to address systemic ecological functions and agree that the purposes of the statute envision this application.

Comment (18): Several commenters addressed the Service's authority under the Migratory Bird Treaty Act (MBTA). One commenter said the Service was incorrect in describing implied authority to permit incidental take of migratory birds under the MBTA and noted that the Service has no authority to require compensatory mitigation for incidental take of migratory birds. Several commenters said that mitigation for migratory birds exceeds MBTA authority and that the Policy should exclude potential incidental impacts to migratory birds under the MBTA until the Service establishes statutory or regulatory authority to require landowners to obtain incidental take authorization prior to undertaking otherwise lawful activities. They added that the MBTA does not directly address mitigation or habitat impacts.

One commenter said the Service was incorrect in writing that the Fish and Wildlife Conservation Act implicitly provided for mitigation of impacts to migratory birds. They said that the language does not authorize the Service to engage in any management activities associated with migratory birds, particularly over private parties, only directing the Service to monitor and assess population trends and species status of migratory nongame birds.

Response: The Service has consistently interpreted the MBTA to apply to the incidental take of migratory birds. Currently, there is no express authority to permit the incidental take of migratory birds under the MBTA. Thus, the Service uses an enforcement discretion approach whereby the Service provides technical assistance to project proponents with strategies to avoid or minimize project-related take of migratory birds that is not the purpose of the otherwise legal action. Under this approach, the Service recommends voluntary measures that can mitigate the direct take of migratory birds and works with project proponents to address impacts to migratory bird habitat, including voluntary compensation for loss of migratory bird habitat. In May 2015, the Service published a notice of intent to conduct a National Environmental Policy Act review of a proposed rule that would establish the authority to permit incidental take as provided by the Act itself. An environmental impact statement will evaluate multiple alternatives for authorizing the incidental take of migratory birds. Subsequently, the Service will develop a regulation that provides the clear authority to permit incidental take and require mitigation measures to avoid and minimize incidental take, and compensation for unavoidable take. Until the regulation is finalized, the Service will continue working with project proponents and industries to manage impacts to migratory birds and their habitats.

The Service does not have specific statutory authority pursuant to the MBTA to *require* Federal action agencies and/or their permittees to provide compensatory mitigation for unavoidable impacts to (loss of) migratory bird habitat resulting from federally conducted or approved, authorized, or funded projects or activities. However, many Federal agency-specific authorities, as well as procedural authorities such as NEPA and the FWCA, require consultation with the Service, State natural resource agencies, and others, and evaluation of environmental effects of proposed actions, which may include considering impacts to migratory bird habitat. Through these authorities, the Service may recommend compensatory mitigation for unavoidable impacts to migratory bird habitat. Federal action agencies may include terms and conditions in permits, licenses, and certificates that mitigate a full range of adverse environmental effects, such as recommendations to compensate for unavoidable impacts to migratory bird habitat, if they determine they have authority, consistent with their statutes and regulations, to require such compensatory mitigation.

In addition, Executive Order (E.O.) 13186 directs Federal agencies ''taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations'' to sign a Memorandum of Understanding (MOU) with the Service ''that shall promote the conservation of migratory bird populations.''

In Appendix A, we have modified the text of section (A)(7) to clarify the requirements of the Fish and Wildlife Conservation Act and have made minor clarifying edits to the MBTA text of section (A)(10).

Comment (19): Four commenters addressed the Marine Mammal Protection Act (MMPA) discussion in Appendix A (A)(9). One commenter suggested that the Service provide more clarification on existing authorities under the MMPA. These included specifying that this section of Appendix A only discusses incidental take authorizations for non-commercial fishing activities; clarifying requirements as they apply to military readiness activities; providing additional information on other means of affecting the least practicable adverse impact; and clarifying that the permissible methods of taking and the mitigation and reporting are required measures as provided under Incidental Take Regulations (ITRs) and Incidental Harassment Authorizations (IHAs).

Response: Although the MMPA section of Appendix A was intended to provide a general overview for part of this Act, we agree that Appendix A of the Mitigation Policy could benefit from these additional clarifications. We have revised Appendix A to address these points as appropriate.

Comment (20): Commenters stated that the Policy is incompatible with the MMPA in that it adopts a new position inconsistent with the existing regulations or otherwise effects a substantive change in the MMPA.

Response: This Policy does not alter or amend any existing regulation, law, or policy other than the 1981 Policy itself. Instead, where mitigation measures are compatible with the standards of other statutes, *e.g.,* the MMPA, the Service would recommend their use. On the other hand, there are mitigation measures that may be required under statutes besides the MMPA regardless of this Mitigation Policy, *e.g.,* mitigation measures to ensure the least practicable adverse impact on a marine mammal species or stock and its habitat, and on their availability for subsistence use.

Comment (21): Commenters stated that the draft mitigation Policy is incompatible with the MMPA in that it indicates that recipients of incidental take authorizations would be required to take actions to achieve a net conservation gain or no net loss to the affected marine mammal species or stock. They commented that the Service does not have such authority under the MMPA.

Response: The MMPA states that species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. In this manner, the mitigation Policy is compatible with the MMPA in that it implies there should be no conservation loss. However, the Service agrees that the MMPA does not require recipients to achieve a net conservation gain or no net loss to marine mammals. It was not the intent of this Policy to make such a requirement. Instead, should the Service make the required findings under section 101(a)(5) of the MMPA and authorize incidental take, it would prescribe the permissible methods of taking and other means of ensuring the least practicable adverse impact on the marine mammal species or stock and its habitat, and on the availability for subsistence use as a part of that authorization. We have revised Appendix A of the Policy to clarify this point.

Comment (22): One commenter suggested that the Policy should include language to ensure that review and consultation under Section 106 of the National Historic Preservation Act of 1996 (NHPA) (16 U.S.C 470 *et seq.*), as amended in 1992, takes place at the early planning stage of the action and not wait until mitigation is being considered.

Response: We have revised section 3.4 of the Policy to state that the Service's responsibilities begin ''during early planning for design of the action.'' In addition, we have added the following language: ''Consistent with the NEPA, and the NEPA and NHPA Section 106 Handbook, these reviews will be integrated into the decisionmaking process at the earliest possible point in planning for the action rather than wait until mitigation is considered.''

Comment (23): One commenter said that in Appendix B, to help meet its overarching Tribal Trust Doctrine responsibilities under the NHPA, the Service should initiate Section 106 consultation with Indian tribes early within the time of mitigation planning for the FWS proposed action (instead of after the preferred mitigation approach is selected).

Response: We have revised Appendix B accordingly. The Service will initiate Section 106 consultation with Indian tribes during early planning for Service-proposed actions, to ensure their rights and concerns are incorporated into project design. Consultation will continue throughout all stages of the process, including during consideration of mitigation, and will follow the Service's Tribal Consultation Handbook and the Service's Native American Policy.

Comment (24): One commenter specifically questioned the treatment of Natural Resource Damage Assessment actions conducted under CERCLA, OPA, and the CWA, stating that the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, dated November 3, 2015, requires that separate guidance be developed for when restoration banking or advance restoration would be appropriate.

Response: When a release of hazardous materials or an oil spill injures natural resources under the jurisdiction of State, tribal, or Federal agencies, the type of restoration conducted depends on the resources injured by the release and, by nature of the action, must happen after impacts occur. Thus, this Policy's preference for compensatory mitigation measures that are implemented and earn credits in advance of project impacts cannot apply. However, pending promulgation of further DOI guidance, the tools provided in section 5 maintain flexibility useful in implementing restoration to restore injured resources under the jurisdiction of multiple governments, by providing support for weighing or modifying project elements to reach Service goals. Therefore, in agreement with the commenter, we have made edits to section 5.6 and to Appendix A to clarify the relationship of this Policy with Natural Resource Damage Assessment and the Presidential Memorandum on Mitigation.

Comment (25): Two commenters said that combining the fish and wildlife resources provisions of the Stream Protection Rule under the Surface Mining Control and Reclamation Act (SMCRA) with the language of the proposed Mitigation Policy could result in the Service inserting mitigation requirements not otherwise called for in a SMCRA permit.

Response: At the time this Policy was completed, the proposed Stream Protection Rule, published July 27, 2015 (80 FR 44436), was not yet finalized. The statutory language of SMCRA and its implementing regulations, including the Stream Protection Rule when finalized, will determine the scope of resources covered by Service recommendations under that statute. This Policy does not exceed existing statutory or regulatory authority to engage in mitigation processes for the purpose of making mitigation recommendations, and in limited cases, specifying mitigation requirements. Processes established by applicable statutes and regulations are not superseded by this Policy.

G. Exemptions

Comment (26): Several commenters provided observations regarding exemptions from the Policy. One commenter said that the Policy should further identify those activities and projects that are exempt, adding that the Policy should make clear that any new procedural or other requirements apply only to new project applications or proposals. Several commenters said that the Policy should not apply to actions for which a complete application is already submitted. They stated that the Policy should apply neither to actions already under review nor to actions where coordination was initiated prior to publication of the final Policy.

Response: In section 3.3, Exclusions, we describe the circumstances when the Policy does not apply, but we do not specifically exempt any category of action. The Policy applies when one or more of our authorities apply to the review of a particular action for purposes of making mitigation recommendations. It is the language of those authorities that specifies their coverage of particular actions and resources. In section 3.3, we establish that the Policy does not apply when the Service has already agreed to a mitigation plan for pending actions, except in the specified circumstances. Complete applications that are submitted prior to the finalization of this Policy, but that are not yet under review, do not satisfy those circumstances. If an action is under active review as of the date of final publication of this Policy, Service personnel may elect to apply this Policy to that action. For actions where coordination was initiated prior to the final Policy, Service personnel would determine whether that coordination constitutes active review.

Comment (27): Two commenters said the Policy should exempt landowners who have participated or are currently participating in voluntary programs designed to conserve endangered species.

Response: We do not specifically exempt any category of action in section 3.3. This Policy, as an umbrella policy, integrates all of the Service's authorities for engaging in mitigation. We cannot legally exempt the landowners referenced by the commenters on the basis of their status pursuant to an agreement entered into under a single authority, because their future actions may trigger applicability of one or more other authorities. The Policy does not, however, override or modify any such agreements or substitute for the regulations governing those agreements.

Comment (28): Four commenters stated that the Policy should explicitly exempt activities with *de minimus* impacts. They said that projects with small and/or temporary impacts should not be burdened by mitigation measures.

Response: We do not specifically exempt any category of action and do not exempt actions on the basis of the size of activities planned or on the size of their impacts. The Policy provides a framework to guide Service personnel in their review of actions, including their application of the mitigation hierarchy and their recommendations for mitigation. Application of this guidance will assist Service personnel in determining whether to engage actions in mitigation planning and then in the formulation of mitigation recommendations. Application of this guidance could result, in appropriate circumstances, in a decision not to engage in mitigation planning for actions with *de minimus* impacts, but we do not specifically exempt actions based on the scale of anticipated impacts.

Comment (29): One commenter stated the Policy should include an exemption for conservation projects sponsored by local, State, or Federal resource agencies that seek beneficial restoration and implement conservation objectives.

Response: We do not specifically exempt any category of action and do not exempt actions on the basis of their primary purpose. We acknowledge that actions designed to restore or create habitats are generally less likely to require, for example, compensatory mitigation, and support their role in fulfilling the Service's larger mission. The Policy does not establish new or increased scrutiny of conservation or restoration actions than under existing statutes and regulations. The Service may apply this Policy in review of a conservation action that is intended to benefit one resource, but may adversely affect others for which the Service is authorized to provide mitigation recommendations and/or mitigation requirements.

Comment (30): Two commenters stated that this Policy should not apply to military testing, training, or readiness activities. They stated that such an exclusion is necessary to be consistent with the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015).

Response: The Service interprets the Presidential Memorandum, which instructs agencies to develop or update their mitigation policies, to exempt agencies that conduct military testing, training, and readiness activities from the requirement to update or create policies for those activities. The Presidential Memorandum cannot exempt any particular activity from the applicability of existing statutory authority that provides for mitigation.

Comment (31): One commenter stated the Policy should define or describe ''habitat'' and recommended that the Service exclude dredge material placement sites, and other such manmade areas, from mitigation planning processes.

Response: Habitat develops on sites with a history of human manipulation, including levees, reclaimed mine sites, timber harvest sites, agricultural areas, and dredged material placement sites. The commenter does not reference a particular timeframe over which their proposed exemption would be valid. We note that sites with a history of human manipulation may have been disturbed or modified hundreds of years prior, with multiple episodes of habitat recovery and re-disturbance in the intervening years. The Policy does not exclude areas solely because they are manmade or disturbed habitats. Mitigation requirements and recommendations will be informed by the framework established in this Policy, including section 5.5, Valuation.

H. Net Conservation Gain/No Net Loss

Comment (32): Many commenters addressed the Policy's mitigation planning goal to improve (*i.e.,* a net gain) or, at minimum, to maintain (*i.e.,* no net loss) the current status of affected resources. A number of commenters supported the goal while a number of commenters opposed the inclusion of a net conservation gain. Many commenters stated that the Service lacks the statutory authority to implement the net gain goal for mitigation planning. Several commenters suggested that a net gain goal imposes a new standard for mitigation and that mitigation requirements should be commensurate with the level of impacts. Others expressed concern about the costs associated with achieving a net gain.

Response: The Policy applies to those resources identified in statutes and regulations that provide the Service with the authority to make mitigation recommendations or specify mitigation requirements and are described in section 2 and in Appendix A. The purpose of the net conservation goal in mitigation planning is to improve conservation outcomes to affected resources, but the Policy does not require project proponents to achieve those outcomes. The Policy provides a framework for Service recommendations to conserve fish, wildlife, plants, and their habitats that are negatively affected by proposed actions. The identification of those means and measures that would result in a net conservation gain to the affected resources will not only help prevent further declines but contribute to a net improvement in the status of affected species and their habitats. The Service will seek a net gain in conservation outcomes in developing mitigation measures consistent with our mission to identify and promote opportunities to decrease the gap between the current and desired status of a resource.

Comment (33): Several commenters questioned the ability to achieve the net conservation gain and how it would be measured. Other commenters stated that the Policy should provide the methodology to assess or measure the net conservation gain.

Response: It is beyond the scope of the Policy to provide specific quantifiable measures to achieve the net conservation gain goal. The Service's mitigation goal is to achieve a net conservation gain or, at a minimum, no net loss of the affected resources. The Policy provides the framework for assessing the effects of an action and formulating mitigation measures (sections 5.1 through 5.9) to achieve this goal, which will be specific to the conservation objectives of the affected resources.

Comment (34): Several commenters stated that neither no net loss, nor net conservation gain, are compatible with the standards of the ESA sections 7 and 10. One commenter asked that we clarify that the net conservation gain goal does not modify or expand proponents' obligations under ESA sections 7 or 10 permitting programs. One commenter stated that the Policy's goal would have limited relevance to section 10 decisions other than serving as an aspiration or goal for negotiating conservation measures. One commenter asked that we specify how the Policy's goal will be applied to processing incidental take permit applications under section 10(a)(2)(B)(ii), especially for projects predicted to directly kill listed species. This commenter added that neither no net loss nor net gain is an appropriate goal under section 10 if the goal implies that impacts at the individual level will not be minimized to the maximum extent practicable.

Response: This Policy is intended to guide mitigation for impacts to listed species. It does not expand the Service's authorities for recommending or requiring mitigation under the ESA. As an administrator of the ESA, the Service has an obligation to work with others to recover listed species and preclude the need to list species, including guiding compensatory mitigation to offset the adverse impacts of actions to threatened and endangered species. The Service anticipates further defining the mitigation goal in relation to compensatory mitigation for impacts to listed species and designated critical habitat in the forthcoming Endangered Species Act Compensatory Mitigation Policy.

Comment (35): One commenter recommended the use of regional conservation goals and objectives in developing landscape-scale mitigation where the conservation goals and objectives are clear, explicit, and defensible. The commenter recommended that the Policy define a conservation goal as a ''formal statement describing the future status of a species or habitat.''

Response: We acknowledge that there may be variability in conservation plans developed by different entities, and agree that the commenter's descriptions are among the possibilities. This Policy describes an overall goal of a net conservation gain. The Service's mitigation planning goal is to improve (*i.e.,* a net gain) or, at minimum, to maintain (*i.e.,* no net loss) the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority, primarily for important, scarce, or sensitive resources, or as required or appropriate. Service mitigation recommendations or requirements will specify the means and measures that achieve this goal, as informed by established conservation objectives and strategies. This Policy defines conservation objectives as a measurable expression of a desired outcome for a species or its habitat resources. Population objectives are expressed in terms of abundance, trend, vital rates, or other measurable indices of population status. Habitat objectives are expressed in terms of the quantity, quality, and spatial distribution of habitats required to attain population objectives, as informed by knowledge and assumptions about factors influencing the ability of the landscape to sustain species.

I. Landscape-Scale Approach

Comment (36): Two commenters stated the Policy should include nearshore, estuarine, and marine habitats in describing landscapes. They asked that we clarify that the concept is inclusive of ecologically connected areas of the aquatic environment, such as watersheds.

Response: We concur with the commenters that the definition of and concept of landscape and a landscape approach must include aquatic environments. The concept does include ecologically connected areas of the aquatic environment such as watersheds. The existing definition of landscape in section 6 accommodates this inclusion.

Comment (37): Three commenters suggested providing more clarity regarding what it means to take a landscape approach to mitigation in the absence of an existing conservation plan. They said that a landscape approach in the absence of an appropriate plan will necessitate an analytical process and the Policy should identify the information that should be used in such a process. They suggested adopting language from the rule on Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR parts 325 and 332 (Corps) and 40 CFR part 230 (Environmental Protection Agency (EPA)), 33 U.S.C. 1344, that describes the Corps and EPA watershed approach in the absence of appropriate plans.

Response: The availability of plans will be variable, and the Policy's instruction to Service staff to take a landscape approach when conservation plans are not available is sound. The diversity in the habitats, species, project impacts, and mitigation in the implementation of the Service's suite of mitigation authorities make detailed specification of landscape approach instructions beyond the scope of this umbrella policy. In concurrence with the commenters, we have added text to the end of section 5.1, Integrating Mitigation with Conservation Planning.

Comment (38): Multiple commenters expressed concerns regarding how the landscape approach will be implemented, suggesting that clarity be provided through specific criteria, guidance on process, and how data will be used or appropriateness of data, for consistent application.

Response: The Service has written the national Policy in a manner that facilitates further clarification on a regional scale. As with many of the decisions made in impact analysis, determination of appropriate assessment methodologies including landscape scale must occur on a project-by-project basis, under the authority at hand, with information most appropriate for the site or region of impact. Section 5.3.3 allows the Service flexibility in methodology to meet this need by allowing use of any methodology that allows comparison of present to predicted conditions, measures beneficial and adverse impacts by a common metric, and predicts effects over time. We look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs and additional guidance to seek mutual goals and avoid inconsistency.

J. Advance Mitigation Planning at Larger Scales

Comment (39): Two commenters stated that the term ''Advance Mitigation Planning at Larger Scales'' in section 5.1, Integrating Mitigation with Conservation Planning, might be confused with the Policy's preference for Advance Mitigation in section 5.7.1, Preferences.

Response: We agree and have changed the term within section 5.1 to read ''Proactive Mitigation Planning at Larger Scales.''

K. Climate Change

Comment (40): Many commenters addressed the Policy's inclusion of climate change in assessing the effects of a proposed action and mitigation. One commenter stated the Policy should make it a requirement that climate change be assessed, while others urged the Service to refrain from using climate change projections to govern mitigation efforts. Several commenters stated that climate change predictions and the effects to species and their habitats are uncertain and that the current state of climate projections are not of a scale sufficient to assess project-related impacts or mitigation. Several commenters suggested the Policy include guidance on how the effects of climate change should be determined. One commenter stated the Service should ensure that the temporal scope of the analyses is well defined and supported by data and that the impacts to species and their habitats can be assessed with reliable predictability.

Response: Consistent with the Departmental Manual Chapter (600 DM 6), this Policy recommends that climate change be considered when evaluating the effects of an action and developing appropriate mitigation measures. The Service recognizes that the science of climate change is advancing and assessment methodologies are continually being refined to address the effects of climate change to specific resources and at differing scales. Because of the broad scope of resources covered by this Policy and the evolving state of climate change science and assessment methodologies, including specific information on these topics is beyond the scope of the Policy. Therefore, the Policy is written with language to ensure that it does not become quickly outdated as methodologies evolve. As stated in section 5.3, Assessment, the Service will use the best available information and methodologies when considering the effects of climate change to the resources covered by this Policy and in designing mitigation measures.

Comment (41): One commenter provided an in-depth discussion of the broad-scale consequences of greenhouse gas emissions, climate change, and carbon sequestration.

Response: The Service shares the commenter's emphasis of the importance of climate change as a systemic challenge that must be a focus of integrated natural resource management. That is why it is written in the Policy to inform the scale, nature, and location of mitigation measures when employing the Policy's fundamental principle of using the landscape approach (section 4.c). It is not possible to provide exhaustive details for addressing climate change in this umbrella policy. Our mitigation authorities give us ability to recommend mitigation for impacts to species and habitats, but we do not have explicit authorities to recommend offsets for carbon emissions. In the course of integrating mitigation with conservation planning (section 5.1), assessing project impacts and formulating mitigation measures (section 5.3), and recommending siting of compensatory mitigation (section 5.7.1), this Policy directs Service staff to integrate consideration of climate change.

L. Collaboration and Coordination

Comment (42): Several commenters supported the Policy's clear desire for collaboration and coordination with stakeholders. However, other commenters were concerned with the lack of detail in regard to coordination with State, tribal, or other local conservation partners during various steps in the process, and the extent to which data, analyses, and expertise of these entities will be used, and conflict with existing planning efforts avoided. Multiple comments indicated the importance of early coordination with State, tribal, and Federal organizations, local conservation partners, and private landowners, especially to avoid delay in the process. Some commenters requested minimum standards for plans or data, and indicated multiple types of plans or data that would be useful (*e.g.,* ESA Recovery Plans, State Wildlife Action Plans, watershed plans, State natural heritage data, and plans associated with State or metropolitan transportation planning processes). One commenter in particular pointed to the importance of collaborating to avoid conflicts and ''negative externalities'' for Alaska and its citizens. Multiple commenters requested we specifically list State and local entities in section 5.2.

Response: State and local conservation partners often have data or planning documents important to project mitigation scenarios. Thus, we acknowledge the benefits of collaboration and coordination in the early planning and design of mitigation in section 5.2. We look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs to seek mutual goals and avoid inconsistency. Therefore, we revised the text in sections 4(c) and 5.2(a) and (d) to better reference local government entities.

Comment (43): One commenter requested reaffirmation that States can, with guidance and participation of the Service, develop and implement mitigation programs to achieve Service mitigation goals, while aligning with local conservation plans and multiple use objectives. Several commenters requested identification of specific Service representatives to engage in these planning efforts, and clarification on process, especially to avoid disputes related to inconsistency. One commenter requested the Service require State concurrence with recommendations when related to resources under State authority; others were specifically concerned with the Policy's interface with current mitigation systems.

Response: We agree that alignment with local mitigation efforts mutually benefits conservation agencies, and this Policy formally recognizes the shared responsibility with State, local, and tribal governments, and other Federal agencies and stakeholders. We look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs to seek common goals and avoid inconsistency.

Comment (44): Several commenters requested more information specifically on how conflicts between agencies or regulations, plans, or mitigation or permitting requirements would be handled.

Response: Conflicts between agencies are handled through direct engagement and through existing mechanisms that will be unchanged by this Policy. For example, in NEPA, regulations at 40 CFR part 1504 establish procedures for referring Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects to the Council on Environmental Quality. The same regulations provide means for early resolution of such disagreements. In CWA permitting processes, disagreements over issuance of specific permits or on policy issues between the Service and Corps or between EPA and the Corps are resolved following procedures established at section 404(q) of that act and detailed within a Memorandum of Agreement between the agencies. The Corps/EPA joint 2008 Compensatory Mitigation Rule also features a dispute resolution process for agencies to resolve disagreements concerning the approval of mitigation banks or in-lieu-fee programs. We will continue to use existing processes.

Comment (45): One commenter requested that the Service include requirements that all mitigation data, including data associated with amount and type of mitigation, ecological outcomes, landscape scale and conservation plans used in mitigation planning, and monitoring be made public in an easily accessible manner, such as being submitted electronically to publicly available databases.

Response: We agree that data should be made broadly available to facilitate future conservation at a landscape level, dependent on the relevant regulations under which the mitigation is required. If there is the potential for disclosure of personal, private, or proprietary information, there are limitations on the Service's or other agencies' ability to require public availability. While most of the Service's mitigation authorities allow for recommendations, the ability to disclose monitoring data may be at the discretion of another agency. A blanket requirement to post all monitoring data to public databases would, therefore, be beyond the scope of this Policy.

M. Assessment

Comment (46): One commenter stated that indirect effects from some actions are greater than the direct effects and should, therefore, be made more prominent in the Policy.

Response: We added indirect and cumulative impacts to section 5.3 of the Policy.

Comment (47): Several commenters expressed concern regarding the use of best professional judgment during and as subjective predictions of impact, as described in section 5.3.4. Some commenters seemed particularly concerned about coincidental changes in magnitude of probable impacts caused by indirect sources, or those falling outside Service jurisdiction, such as climate change.

Response: The Service, in section 5.3, allows use of ''best professional judgment'' using information described in the remainder of that section (recognition of and adjustment for uncertainty, use of information provided by the action proponent, and best available methodologies to predict impact). Thus, even where predictions may be uncertain, the Service will support decisions on the best available scientific information. As with many of the decisions made in impact analysis, prediction of impacts through time must occur on a project-by-project basis, under the authority at hand, with information most appropriate for the site or region of impact. We look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs and additional guidance to seek mutual goals and avoid inconsistency.

Comment (48): Multiple commenters stated that assessment methodologies should be designed to ensure predictable mitigation credits, measure both beneficial and adverse effects, and be based on biological and/or habitat conditions that are accurate, sensitive, repeatable, and transparent. Two commenters were concerned that the Service should provide additional guidance to Federal and State agencies to avoid inefficiencies, and provide clarification in methodologies.

Response: As with many of the decisions made in impact analysis, determination of appropriate assessment methodologies must occur on a project-by-project basis, under the authority at hand, with information most appropriate for the site or region of impact. Section 5.3.3 allows the Service flexibility in methodology to meet this need by allowing use of any methodology that compares present to predicted conditions, measures beneficial and adverse impacts by a common metric, and predicts effects over time. We look forward to using existing means of engagement with the States, tribes, and other partners through existing authorities while developing programs and additional guidance to seek mutual goals and avoid inconsistency.

Comment (49): One commenter suggested that ''key ecological attributes'' (KEA) be used as a landscape-scale mitigation framework to guide impact assessment and ensure ''like for like'' benefits. The commenter categorized KEAs as: (1) Size (measure of a resource's area of occurrence or population abundance); (2) condition (measure of the biological composition, structure, and biotic interactions that characterize the space in which the resource occurs); and (3) landscape context (assessment of the resource's environment including the ecological processes and regimes that maintain it, and connectivity that allows species to access habitats and resources or allows them to respond to environmental change through dispersal or migration).

Response: While use of the assessment approach involving application of KEAs would be consistent with the assessment principles and attributes of the best available effect assessment methodologies that we describe in section 5.3, we do not specify use of specific methodologies because the Policy's breadth of geographical, ecological, and authority coverage warrant flexibility.

Comment (50): One commenter stated the Policy should provide science quality standards while another commenter stated that science provided by a project proponent to support a mitigation action should be evaluated fairly.

Response: As stated in the Policy, the Service will use the best available science in formulating and monitoring the long-term effectiveness of its mitigation recommendations and decisions, consistent with all applicable Service science policy. This will include an objective evaluation of science-based information provided by the project proponent.

N. Evaluation Species

Comment (51): Numerous commenters expressed opinions and concerns on how the evaluation species should be selected. Suggestions focused on coordination with States and other parties and on selecting species identified in local government plans that have met appropriate standards or in State Wildlife Action Plans.

Response: The Policy is not meant to be exhaustive in identifying the resources or characteristics of evaluation species. The Service recognizes that there may be existing plans (*e.g.,* local government plans, State Wildlife Action plans) other than those identified in the Policy as well as other characteristics that may be useful in mitigation planning depending on the specific action and the affected resources. We agree that the use of existing plans such as State Wildlife Action plans or other sources that have established species conservation objectives will be useful in selecting evaluation species within the affected area. The Service will work with project proponents and other stakeholders in reviewing existing plans and identifying evaluation species for a specific action following the guidance outlined in section 5.4, Evaluation Species.

Comment (52): One commenter stated that section 5.4, Evaluation Species should be expanded to focus beyond evaluation species to species and their habitats for use in impact assessments and mitigation planning.

Response: Section 5.4 in the Policy adequately addresses the identification and characteristics of evaluation species, and does not need to be expanded. The purpose of selecting evaluation species is part of the Policy's framework to evaluate affected habitats and make mitigation recommendations based on their scarcity, suitability, and importance to achieving conservation objectives as discussed in section 5.5, Habitat Valuation.

Comment (53): A number of commenters suggested that the Policy's approach to evaluation species will expand the Service's jurisdiction to all wildlife and that mitigation will be required for species (and habitats) for which there is no direct statutory or regulatory obligation.

Response: Evaluation species are a utility used by agencies in mitigation planning. The Service defines them as the fish, wildlife, and plant resources in the affected area that are selected for effects analysis and mitigation planning. We need evaluation species because we cannot exhaustively assess all impacts and formulate mitigation for all resources affected by a proposed action. The purpose of Service mitigation planning is to develop a set of recommendations that, if implemented with the proposed action as a package, would achieve conservation objectives for the affected resources. Accordingly, the Service would select evaluation species for which conservation objectives have the greatest overlap with the effects of a proposed action. The Service will select others to represent the suite of fish and wildlife impacts caused by an action. The Policy provides guidance for selecting evaluation species and is not a means of expanding our jurisdiction. Evaluation species are, in effect, a planning tool and were a major feature of the 1981 Policy.

Comment (54): A number of commenters addressed the selection of evaluation species in those instances identified in the Policy where an evaluation species does not need to occur within the affected habitat: Species identified in an approved plan that includes the affected area, or the species is likely to occur in the affected area during the reasonably foreseeable future with or without the proposed action due to natural species succession. One commenter stated that the Policy places clear and defined limits on what constitutes both the ''reasonably foreseeable future'' and ''natural species succession'' when selecting evaluation species so mitigation actions are not overly expansive. Some commenters questioned the Service's authority to expand the scope of analysis to species that do not occur in the affected area but could occur at some point in the foreseeable future due to natural species succession.

Response: The selection of evaluation species that is not currently present in the affected area was a component of the Service's 1981 Policy. Under this Policy, the Service retains the ability to consider such selections, as authorities permit. Such selections will be subject to the conditions described in section 5.4 and are not a means of expanding the Service's authorities.

Comment (55): A few commenters stated that there is no basis for evaluating other non-listed species when assessing actions under the ESA, while another commenter expressed concern that the consultation and permitting for specific species will be complicated by the addition of evaluation species resulting in additional analysis and costs.

Response: Nothing in this Policy supersedes statutes and regulations governing treatment of federally listed species. Section 5.4, Evaluation Species, provides guidance on the selection of evaluation species that the Service will recommend in the assessment of affected resources and mitigation planning. The Service will recommend the smallest set of evaluation species necessary to relate the effects of an action to the full suite of affected resources. In instances where the Service is required to issue a biological opinion, permit, or regulatory determination for a specific species, that species will be, at a minimum, identified as an evaluation species. The recommendation to use additional evaluation species will depend on the specific project and affected resources. Use of evaluation species beyond federally listed species will improve conservation outcomes for other resources affected by an action, but the Policy does not require such usage.

Comment (56): One commenter stated that the Policy creates a new category of species by using evaluation species.

Response: Evaluation species is not a new term and has been brought forth from the Service's 1981 Policy. Section 5.4, of the Policy, Evaluation Species, provides additional guidance on the selection and use of evaluation species to assess impacts and develop mitigation strategies.

O. Habitat Valuation

Comment (57): Several commenters requested the Service provide additional details on habitat valuation in section 5.5 of the Policy. To avoid the potential for ''lengthy disputes'' between the Service and other stakeholders in mitigation planning, some recommended including measurable/repeatable metrics in the Policy for quantifying habitat scarcity, suitability, and importance. Others wanted a very clear standard for identifying ''habitats of high-value,'' for which the Policy guidance is to avoid all impacts.

Response: The scope of the Policy covers all authorities that give the Service a role in mitigating the impacts of actions to fish and wildlife resources, which encompasses a broad range of action types and species. The types and quality of available information vary widely across this range; therefore, highly prescriptive methods of habitat valuation are not advisable. Scarcity, suitability, and importance are the characteristics most relevant to our purpose for habitat valuation, which is to inform the relative emphasis we place on avoiding, minimizing, and compensating for impacts to the conservation of evaluation species. Our definitions of these parameters are sufficiently clear to provide useful guidance to Service personnel in formulating mitigation recommendations to action proponents. However, we have revised the Policy to clarify that ''habitats of high-value'' are those that are rare and both highly suitable for, and important to, the conservation of the evaluation species.

Our authority to require specific mitigation actions of action proponents is limited, and is governed by the regulations of the statute that confers such authority, not this Policy. Our goal with this Policy is to provide a common framework for the Service to apply when identifying mitigation measures across the full range of our authorities to promote better conservation outcomes for species. Service personnel are obligated to explain mitigation recommendations, including our valuation of the affected habitats. Action proponents may adopt or reject Service recommendations about how they may maintain or improve the status of species as part of their proposed actions. Therefore, we do not anticipate ''lengthy disputes'' between the Service and action proponents over habitat valuations.

Comment (58): Several commenters recommended that the Service use habitat valuation as the basis for variable mitigation standards or goals, similar to the 1981 Policy.

Response: This Policy adopts a minimum goal of no-net-loss for mitigating impacts to evaluation species, regardless of the value of the affected habitat, which is a fundamental change relative to the 1981 Policy. Instead of determining variable objectives that apply to affected habitats, variable habitat value informs the priority we assign to avoid, minimize, and compensate for impacts to evaluation species. Our rationale for this change is that all occupied habitats contribute to the current status of an evaluation species. Discounting the contribution of lower value habitat would increase the difficulty of achieving conservation objectives for evaluation species. However, we recognize that to maintain or improve a species' status, it is more efficient to avoid and minimize impacts to higher value habitats, and to minimize and strategically compensate for impacts to lower value habitats. The Service will engage action proponents in mitigation planning only when we have authority to do so and when an action may adversely affect resources of conservation interest to a degree that warrants application of the Policy.

Comment (59): Two commenters recommended the Service retain the four Resource Categories of the 1981 Policy.

Response: In the 1981 Policy, the Resource Categories established variable mitigation objectives based on habitat value, which was a function of scarcity and suitability. Under this Policy, the objective is a minimum of no net loss, regardless of habitat value. Instead, habitat value informs the priority we assign to avoid, minimize, and compensate for impacts. By adding habitat ''importance'' to the scarcity and suitability parameters of the 1981 Policy, the revised Policy more explicitly integrates mitigation recommendations with conservation strategies applicable to the evaluation species. Our valuation considers all three parameters, and we will seek to avoid and minimize impacts to habitats of higher value, and to minimize and compensate for impacts to habitats of lower value. We considered prescribing a prioritization of mitigation types through a revised resource category system but determined that it added little practical value beyond stating that we should recommend avoiding impacts to rare habitats that are of both high suitability and importance (the equivalent of Resource Category 1 in the 1981 Policy) and give greater emphasis to compensating for impacts to low-value habitats.

Comment (60): Three commenters expressed specific concerns about the three habitat-valuation parameters, each recommending possible revisions/substitutions. One stated that our definition of importance was mostly a function of scarcity and/or suitability, and suggested substituting ''irreplaceability'' and ''landscape position'' as more independent parameters. Another suggested that ''unique and irreplaceable'' was the criterion for recommending avoiding all impacts to a habitat, as opposed to high-value assessed by all three valuation parameters. The third urged the Service to use ''vulnerability'' as an additional parameter.

Response: Our definitions of the three habitat-valuation parameters are distinct and do not overlap, but we recognize potential correlations between the parameters (*e.g.,* rare habitats of high suitability are very likely also of high importance). Our definition of importance captures the significance of a location in the conservation of a species, regardless of its scarcity or suitability, and we disagree that importance is mostly a function of scarcity and suitability. The definition of importance refers to both the ability to replace the affected habitat and its role in the conservation of the evaluation species as a core habitat, a linkage between habitats, or its provision of a species-relevant ecological function. Therefore, ''irreplaceability'' and ''landscape position'' are already considered in the importance parameter.

A ''unique'' habitat is the rarest valuation possible on the scarcity parameter, and an ''irreplaceable'' habitat rates high on the importance parameter. The third parameter, suitability, is defined as ''the relative ability of the affected habitat to support one or more elements of the evaluation species' life history compared to other similar habitats in the landscape context.'' A unique habitat would have no other similar habitats in the relevant landscape context for comparative purposes; therefore, its suitability is not assessable. In practice, if a unique and irreplaceable habitat is supporting an evaluation species, we will consider it as a ''high-value'' habitat under this Policy.

Our view of ''vulnerability'' as a habitat-valuation parameter is that it is difficult to define and assess consistently. A workable definition would likely overlap substantially with the scarcity parameter, which is more readily evaluated given data about the spatial distribution of a habitat type in the relevant landscape context, and also with the replicability concept under the importance parameter. Regardless whether a non-overlapping definition is possible, adding vulnerability as a fourth habitat-valuation parameter would then dilute the influence of the other three. Scarcity and suitability, which were features of the 1981 Policy, and importance, which is applicable to interpreting how conservation plans describe the significance of particular areas, are each amenable to reasonably consistent assessment by Service personnel. These three parameters sufficiently serve the purpose of habitat valuation under this Policy, which is to prioritize the type of mitigation we recommend.

Comment (61): One commenter suggested that when more than one evaluation species uses an affected habitat, some situations may warrant not using the highest valuation to govern the Service's mitigation recommendations, contrary to the Policy's guidance in section 5.6.3. The commenter offered the following example of such a situation. An affected habitat is used by two evaluation species; but regulatory requirements (*e.g.,* ESA compliance) apply to the species associated with the lower habitat valuation, and conservation bank credits are available to compensate for impacts to this species. Two other commenters requested clarification of the Service's methodology for valuation of a habitat used by multiple evaluation species.

Response: Because the goal of the Policy is to improve, or at minimum, maintain the current status of evaluation species, the Policy's guidance to assign the highest valuation among evaluation species associated with an affected habitat most efficiently achieves this goal for all evaluation species. Avoiding or minimizing impacts to the higher value habitat reduces the level of compensation necessary to achieve the Policy goal for both species. The availability of conservation bank credits, while advantageous, should not dictate Service recommendations for achieving the Policy goal.

Although species to which regulatory requirements apply, such as species listed under the ESA, are automatic evaluation species under the Policy, the Policy does not assign priorities among evaluation species. Accordingly, our habitat-valuation methodology is the same whether one or multiple evaluation species use an affected habitat. The scarcity parameter is not species-specific; however, the suitability and importance parameters are. A particular affected habitat is not necessarily of the same suitability for and importance to different evaluation species and may, therefore, receive different valuations. The highest valuation informs the relative priority for avoiding, minimizing, and compensating for impacts.

P. Mitigation Hierarchy

Comment (62): We received comments from many entities related to our use of the mitigation hierarchy concept in the Policy. Most expressed support for strict adherence to the avoid-minimize-compensate sequence of the hierarchy and concern that the Policy's recognition of circumstances warranting a departure from this preferred sequence provides Service personnel an inappropriate amount of discretion. Others supported such departures and requested greater specificity in defining the circumstances that would justify greater emphasis on compensation.

Response: The first three general principles listed in section 4 will guide the Service's application of the mitigation hierarchy: (a) The goal is to improve or, at minimum, to maintain the current status of affected resources; (b) observe an appropriate mitigation sequence; and (c) integrate mitigation into a broader ecological context with applicable landscape-level conservation plans. Action- and resource-specific application of these principles under the framework of section 5 will determine the relative emphasis that Service mitigation recommendations afford to measures that avoid, minimize, and compensate for impacts.

We are clarifying Service determinations of ''high-value habitat,'' for which the Service recommendation is to avoid all impacts. Consistent with our commitment to the mitigation hierarchy under Principle ''b'' of section 4, the Service will not recommend compensation as the sole means of mitigating impacts when practicable options for avoiding or minimizing impacts are available. However, to achieve the Policy's goal of maintaining or improving the status of evaluation species, all Service mitigation recommendations will necessarily include some degree of compensation, unless it is the rare circumstance where it is possible to avoid all impacts while still accomplishing the purpose of the action or we are compelled to recommend the no-action alternative. Our habitat-valuation guidance (section 5.5) informs the relative emphasis we place on the mitigation types in the hierarchy. Higher valued habitats warrant primarily avoidance and minimization measures, in that order, to the maximum extent practicable. Compensation is likely, but not necessarily, a more effective means of maintaining or improving the status of species affected in lower valued habitats. Applicable conservation plans for the evaluation species (Principle ''c'' of section 4) will inform Service personnel whether compensation should receive greater emphasis. Service personnel are obligated to explain recommendations per the guidance of section 5.8, Documentation.

Comment (63): One commenter stated the Policy should include a mechanism to credit a project proponent for implementing avoidance or minimization measures.

Response: Avoidance and minimization are components of the mitigation hierarchy. Impacts that are avoided will negate the need for further mitigation measures. Impacts that are minimized will lessen the need to reduce, rectify, and compensate for residual impacts.

Comment (64): One commenter requested the Policy clarify how mitigation credits will be calculated at banking sites and that the Policy should provide for the ability to ''stack'' credits. Another commenter suggested the Policy include the definition of the term ''credit.''

Response: This is not a compensatory mitigation policy. It is beyond the scope of this Policy to provide detailed procedural or operational information. Based on the applicable authority, such implementation detail for compensatory mitigation processes is provided in other regulatory or policy documents. For example, details for CWA processes is provided through regulation (Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR parts 325 and 332 (USACE) and 40 CFR part 230 (EPA), 33 U.S.C. 1344). For ESA processes, the Service expects to finalize such guidance through policy (see proposed ESA Compensatory Mitigation Policy at (81 FR 61032–61065, September 2, 2016)).

Q. Avoidance

Comment (65): Several commenters strongly supported the Policy's statements on avoidance, or said the Policy should increase the emphasis on avoidance generally, and especially with respect to the most highly valued resources. They suggested the Policy more strongly acknowledge that some habitats are unique and irreplaceable, making the ''no action'' alternative the only way of achieving conservation goals for species that depend on those habitats. They added that ensuring the long-term protection of high-value habitat is especially critical for imperiled species.

Some commenters said the Policy should not require avoidance of all impacts to high-value habitats, as strict adherence to this measure has the potential to stop crucial infrastructure projects. They said requiring avoidance of high-value habitats and imposing limitations on timing, location, and operation of the project will result in added project costs. They proposed that avoidance recommendations be made or implemented on a case-by-case basis. Some commenters suggested the Policy clarify the Service's authority for recommending a ''no action'' alternative. One commenter said the Service cannot recommend avoidance of all impacts when such a position would deny a property owner any beneficial use of their property. Otherwise, a regulatory taking would result. Commenters said that because the Service has no basis to deny an action, the Policy should expressly state it does not allow for the Service to veto proposed projects on which it consults.

Response: We agree the proposed Policy's existing statements regarding recommendation of avoidance of impacts to high-value habitats are important themes, as they were in the 1981 Policy. For clarity, we have edited section 4, General Policy and Principles, to add a principle highlighting the

Service's policy of recommending avoidance of high-value habitats.

This Policy provides a common framework for identifying mitigation measures. It does not create authorities for requiring mitigation measures to be implemented. The authorities for reviewing projects and providing mitigation recommendations or requirements derive from the underlying statutes and regulations. On a case-by-case basis, as noted in the Policy at section 5.7, Recommendations, we may recommend the ''no action'' alternative when appropriate and practicable means of avoiding significant impacts to high-value habitats and associated species are not available. These recommendations will be linked to avoiding impacts to high-value habitats. Depending on the spatial configuration and location of habitats relative to project elements, recommending avoidance of all impacts to high-value habitats will not always equate to recommending no action.

Also, we note that the Policy does not indicate avoidance of all high-value habitats is required. The Policy provides guidance to Service staff for making a recommendation to avoid all high-value habitats or to adopt a ''no action'' alternative in certain circumstances. If we provide such materials to an action agency for consideration in their authorization process, a regulatory taking would not result from making recommendations. This Policy will not effectively compel a property owner to suffer a physical invasion of property and will not deny all economically beneficial or productive use of the land or aquatic resources. This Policy provides a common framework for the Service to apply when identifying mitigation measures across the full range of our authorities, including those for which we may require mitigation. This broad program direction for the Service's application of its various authorities does not itself result in any particular action concerning a specific property. In addition, this Policy substantially advances a legitimate government interest (conservation of species and their habitat) and does not present a barrier to all reasonable and expected beneficial use of private property.

Comment (66): Three commenters said identifying and requiring avoidance of all high-value habitat conflicts with the statutory and regulatory requirements of the ESA. They pointed out that regulations at 50 CFR 402.14(i)(2) state reasonable and prudent measures cannot alter basic design, location, scope, duration, or timing of an action. They said the Service would prohibit any activity impacting areas determined to be high-value habitat and that no such parallel requiring complete avoidance exists under the ESA. They said the Service has no authority to mandate the complete avoidance of designated critical habitat or require all impacts to critical habitat be offset with mitigation measures that achieve a net gain or no net loss.

Response: The Policy does not prohibit any activity impacting areas determined to be high-value habitat. The Policy provides guidance to Service staff for making a recommendation to avoid all high-value habitats or to adopt a ''no action'' alternative in certain circumstances. Through the Policy, we are neither requiring nor mandating the complete avoidance of designated critical habitat. Regulations and procedures that implement the ESA are not superseded. The Policy does apply to all species and their habitats for which the Service has authorities to recommend mitigation on a particular action, including listed species and critical habitat. Although the Policy is intended, in part, to clarify the role of mitigation in endangered species conservation, nothing in it replaces, supersedes, or substitutes for the ESA implementing regulations. In early stages of interagency consultation under the ESA, we routinely provide advice to action agencies on avoiding impacts to listed species and designated critical habitats that may be reflected in subsequent project descriptions or in action agency permits or authorizations. The provision of that advice is consistent with the Policy's guidance to Service staff on recommending avoidance of all high-value habitats.

Comment (67): One commenter said requiring onsite avoidance can lead to piecemeal mitigation and undermines the goal of supporting regional mitigation planning. They suggested removing the preference for onsite avoidance over compensatory mitigation to better support regional mitigation planning goals.

Response: The Service agrees that defaulting to avoidance can, in some cases, result in a less desirable outcome than pursuing compensatory mitigation elsewhere that better serves broader landscape-level conservation goals. However, in the Policy, we note that those cases involve impacts to lower value habitats. Even then, the Service will consider avoidance, consistent with the mitigation hierarchy. For the most highly valued habitats, the Policy guides Service staff to recommend avoidance. If adopted, recommendations to avoid impacts to high-value habitats directly support regional mitigation planning by ensuring the scarcest, most suitable, and most important habitats within a landscape remain unaltered.

Comment (68): Three commenters discussed whether avoidance of all impacts to high-value habitats is always necessary or desirable. They asked what the Service's response would be when an action is likely to be implemented despite recommendations to avoid high-value habitats. They suggested the Policy recognize that avoidance of all impacts to high-value habitats is not always necessary or practicable, and that unavoidable impacts to those resources will sometimes be authorized.

Response: Through this Policy, we provide guidance to Service staff that recommendations should seek to avoid all impacts to habitats they determine to be of high-value. Therefore, our policy is that it is always desirable to avoid impacts to high-value habitats. We recognize circumstances will vary, and in section 5.7, Recommendations, we note that when appropriate and practicable means of avoiding significant impacts to high-value habitats and associated species are not available, the Service may recommend the ''no action'' alternative. We further recognize that our recommendations, either to avoid all impacts to high-value habitats or to adopt the no action alternative if necessary, will not be adopted or implemented by action agencies in all cases.

R. Compensatory Mitigation

Comment (69): Several commenters said they strongly supported application of equivalent standards for compensatory mitigation mechanisms as advocated by the Policy. One commenter said that, without equivalency, mitigation programs with lower standards will have competitive pricing advantages that create a ''race to the bottom'' as developers seek the lowest cost compliance option, producing lower conservation outcomes and undermining chances of species recovery. Several said the Policy should give greater emphasis to the sentence: ''The Service will ensure the application of equivalent ecological, procedural, and administrative standards for all compensatory mitigation mechanisms.'' These commenters felt that, while the Policy's intent to support equivalent standards is clear, the statement is not easily located within a paragraph in section 5.6.3. They suggested creating a new paragraph with this sentence as the lead, or creating a new subsection titled ''Equivalent Standards'' under the existing section 5.6. Two commenters said equivalent standards should be required by the Policy. One commenter said a monitoring and verification process should be required of all mitigation.

Response: We agree with the commenters that equivalent standards must be applied to ensure compensatory mitigation is successfully implemented regardless of the mechanism used to provide the mitigation. A level playing field allows for more transparency, fairness, and a greater likelihood of successful mitigation. In this Policy, we do not state that equivalent standards are required because of the breadth of authorities and processes it covers. In many cases, our authority is advisory, with the permitting authority resting with another agency. In such cases, requiring equivalent standards is another agency's provision to implement or enforce. This Policy covers multiple authorities, so it would be inaccurate to state that it can require equivalent standards in all cases. However, the Policy's statement of support for application of equivalent standards is accurate in all cases. Similarly, we support the monitoring and verification processes suggested by one commenter, but cannot provide a blanket requirement for such processes through this Policy. We agree with the commenters who suggested that our support for equivalent standards is not well highlighted or located within the Policy. We have now placed the information under a header for a new section 5.6.3.1, Equivalent Standards.

Comment (70): One commenter supported the Policy's definition of ''additionality,'' while two commenters expressed concern for the use of the term ''baseline'' in defining additionality and suggested the Policy distinguish between baseline and pre-project or pre-existing conditions.

Response: For purposes of the Policy, the baseline is the existing condition that will be used as the starting point by which to compare the adverse or beneficial effects of an action. In assessing compensatory mitigation, the Service will evaluate if the proposed mitigation measures are demonstrably new and would not have occurred without the compensatory mitigation measure and if they provide a conservation benefit above the baseline condition (*i.e.,* additionality). We have included the definition of baseline in section 6.

Comment (71): Several commenters requested the Service recognize in the Policy the ability of proponents to transfer responsibility for compensatory mitigation actions they initiate to a third party.

Response: We have revised the Policy to recognize that third parties may assume responsibility for implementing proponent-responsible compensation. This Policy advocates equivalent ecological, procedural, and administrative performance standards among all compensatory mitigation mechanisms. Therefore, conversion of a proponent-responsible plan to one administered by a third party is inconsequential relative to the Policy's goals. The third party accepting responsibility for the compensatory actions would assume all of the proponent's obligations to ensure success and durability.

Comment (72): One commenter suggested the Policy indicate that Service-approved conservation banks for aquatic and aquatic-dependent species may also serve the purpose of compensating for impacts to waters regulated under the CWA, but that the Corps has discretion to use a conservation bank for those purposes.

Response: We agree that a wetland protected and managed as a conservation bank to compensate for impacts to species may also serve as a wetland mitigation bank, provided the Corps has approved the bank for that purpose. Because the Policy addresses mitigation for impacts to fish and wildlife species and not impacts to regulated wetlands, per se, the comment exceeds the scope of this Policy and does not warrant a specific revision. However, we intend to address operational considerations for compensatory mitigation mechanisms in step-down policies, such as the proposed ESA Compensatory Mitigation Policy (81 FR 61032–61065, September 2, 2016).

Comment (73): One commenter questioned whether measures that are considered ''onsite compensation'' in the context of permitting processes under the CWA (*i.e.,* restoring, enhancing, and/or preserving wetlands on or adjacent to the impact site) are considered a form of minimization under the Policy. The commenter noted section 5.6.3 indicates that compensation occurs ''generally in an area outside the action's affected area,'' but also refers to compensation sites that are either ''within or adjacent to the impact site.''

Response: The Policy adopts the five mitigation types defined in the NEPA regulations. We include ''rectifying the impact by repairing, rehabilitating, or restoring the affected environment'' (rectify) and ''reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action'' (reduce) under the ''minimizing'' label, but have not discarded these definitions, which have specific utility for species conservation. Our purpose for consolidating the five NEPA mitigation types into three was to align the general language of this Policy with that of the existing three-tiered DOI and CWA mitigation policies (avoid, minimize, and compensate). We group ''rectify'' and ''reduce'' with ''minimization'' to recognize the priority of these types of measures over compensation in the mitigation hierarchy, because such measures are, by definition, onsite measures focused specifically on the action-affected resources. We recognize that, unlike proactive minimization measures, measures to rectify and reduce impacts over time occur after impacts and are, therefore, more similar to compensation measures. Compensation replaces, or provides substitute resources or environments for, the affected resources, not necessarily within the affected area. Replacing or providing an onsite substitute for an affected resource meets the definition of rectify, but in the three-tier scheme of mitigation under CWA processes, is typically called onsite compensation. Because this Policy addresses species and not waters of the United States, some differences in terminology with mitigation under the CWA are unavoidable.

Under this Policy, which has not discarded the definition of rectify, ''onsite compensation'' has a narrower meaning. Onsite compensation involves provision of a habitat resource within the action area that was *not* adversely affected by the action, but would effectively address the action's effect on the conservation of the evaluation species. For example, an action reduces food resources for an evaluation species, but water availability in dry years is a more limiting factor to the species' status in the affected area. Increasing the reliability of water resources onsite may represent a practicable measure that will more effectively maintain or improve the species' status over some degree of rectifying the loss of food resources alone, even though the action did not affect water availability. This Policy would identify measures to restore food resources as rectification and measures to increase water availability as onsite compensation.

Comment (74): Five commenters addressed the Policy's reference to habitat credit exchanges among available compensatory mitigation mechanisms. Two commenters expressed support for the inclusion of habitat credit exchanges, but one commenter said that they should be excluded because there are no existing examples that demonstrate the viability of the concept. Three commenters said the Policy should emphasize that equivalent standards apply to habitat credit exchanges as well as all other compensatory mitigation mechanisms. Two commenters said the Policy should further define habitat credit exchanges.

Response: We agree with the majority of the commenters that defining and clarifying the role of habitat credit exchanges as a potential compensatory mechanism is prudent. In section 6, we have added the definition of habitat credit exchange. We confirm that all compensatory mitigation mechanisms, including habitat credit exchanges, must meet equivalent standards. Habitat credit exchanges in concept are not new. They are the species equivalent to the environmental market mechanisms established for carbon and water quality trading. Exchanges are emerging where wide-ranging species cross multiple natural and geo-political boundaries and a mechanism to engage vast numbers of participants is desired. At its core, a habitat credit exchange is a trading platform and, therefore, may encompass other compensatory mitigation mechanisms such as conservation banks.

Comment (75): One commenter expressed concern that ''performance standards'' are included among the 12 considerations for compensatory mitigation mechanisms in section 5.6.3, but are not mentioned in section 5.8 about documenting final Service recommendations. The commenter recommended the Service require performance standards in mitigation plans that address the full range of measures adopted (avoidance, minimization, and compensation), not just compensatory measures.

Response: We agree mitigation plans should include performance standards that address the effectiveness (degree to which objectives are achieved) of any mitigation means and measures (avoid, minimize, compensate) for which the outcome is relatively uncertain. Although such uncertainty is generally greatest for compensatory measures involving future habitat improvements to offset unavoidable impacts, the success of planned avoidance and minimization measures is not always assured and may require monitoring. To handle uncertainty, section 5.8 indicates that Service-recommended/approved mitigation plans should specify measurable objectives, associated effectiveness monitoring, and additional adaptive management (*i.e.,* corrective) actions as indicated by monitoring results. These final plans address the full range of mitigation means and measures that are reasonable and appropriate to ensure the proposed action improves or, at minimum, maintains the current status of affected species and their habitats. We did not use the phrase ''performance standards'' in section 5.8 as we did in section 5.6.3, and it is not necessary to do so. A compensatory mitigation plan that is prepared independently of a general mitigation plan for an impact-causing action (*e.g.,* the instrument for operating a conservation bank or in-lieu fee program) will serve the compensation needs of one or more such actions, and both types of plans require objectives and appropriate effectiveness monitoring (*i.e.,* performance standards).

Comment (76): One commenter recommended the Policy explicitly require an equivalent assessment of impacts and offsets (*i.e.,* the amount of compensation necessary to, at minimum, maintain the current status of the affected species after applying avoidance and minimization measures).

Response: Section 5.3, Assessment, provides general guidance for estimating impacts and benefits. This guidance applies to assessing the effects of actions both with and without mitigation options. Section 5.3 directs Service staff to use best available effects-assessment methodologies that meet various criteria, including the ability to estimate adverse and beneficial effects using ''common'' (*i.e.,* shared or equivalent) metrics. We have revised this language to clarify that ''common'' means ''equivalent,'' and have added an example to illustrate the concept. The example involves assessing effects to a species' food resource. The metric is the density or spatial extent of the food resource. Predicted decreases and increases in this metric represent adverse and beneficial effects, respectively.

Comment (77): One commenter stated that the Service should not require the use of a mitigation or conservation bank over other mitigation mechanisms, and that the Service lacks authority to require financial assurances of action proponents.

Response: We are clarifying the circumstances under which the Service may require the implementation of mitigation under the guidance of this Policy. Such circumstances are limited, and we expect our application of the Policy will most often occur in an advisory capacity to action proponents. The Policy expresses a preference for compensatory mitigation in advance of impacts, but the use of conservation banks or other compensation in advance of impacts is not a firm requirement, even when the Service is funding, approving, or carrying out the proposed action. To the same extent that the Service cannot require mitigation under all of the authorities that apply to a particular action, the Service cannot require financial assurances of action proponents in all cases (*e.g.,* outside the ESA Habitat Conservation Plan context). Nevertheless, we are retaining the reference to financial assurances throughout the Policy as a prudent component of mitigation plans. Such assurances are a reasonable and practicable underpinning for reducing the uncertainty about achieving the objectives associated with mitigation plans, especially with compensatory activities intended to secure future benefits to the affected species.

Comment (78): One commenter believed the Policy preference to compensate for impacts in advance of actions causing impacts would discourage voluntary actions to conserve species in order to avoid the need to list them as endangered or threatened under the ESA. The commenter suggested Service listing decisions would discount any habitat improvements that are identified, or could serve as advance compensation, presumably because the proponents of future actions causing impacts to the species would seek to claim such improvements as compensatory offsets. Over time, advance compensation improves the status of the species only to the extent that its benefits exceed the impacts of those future actions relying upon it; therefore, advance compensation does not necessarily preclude the need to list a species.

Response: This Policy does not address listing decisions under the ESA. This comment addresses the purposes of the Service's proposed ''Policy Regarding Voluntary Prelisting Conservation Actions'' (79 FR 42525–42532, July 22, 2014), which is not yet finalized. The proposed Voluntary Prelisting Conservation Actions policy describes the Service's proposal to give credit to such actions in the event of a subsequent listing of the species. In the context of both section 7 and section 10 of the ESA, the Service proposes to recognize a proponent's previous conservation actions as offsets to the adverse effects of a proposed action within the framework of an established conservation plan for the species in States that participate in the prelisting conservation program. Regardless how the Service finalizes the Voluntary Prelisting Conservation Actions policy, this Policy expresses Service support for compensation in advance of impacts to species, and the Service will account for advance compensation actions in its formulation of mitigation recommendations.

Comment (79): Several commenters recommended the Policy address preferences for ''in-kind'' vs. ''out-of-kind'' compensatory measures. Some urged the Service to explicitly endorse out-of-kind measures, while others advised us to express a strong preference for in-kind measures as in the 2008 Mitigation Policy for CWA section 404 permitting.

Response: We do not use the terminology of ''in-kind'' vs. ''out-of-kind'' compensation in this Policy. Unlike the Mitigation Policy for CWA section 404 permitting, where the subject resources are waters of the United States, the subject resources of this Policy are species. All compensatory mitigation recommended by the Service under this Policy is ''in-kind'' for the affected evaluation species (*i.e.,* it must offset an action's unavoidable impacts to the same species). We do not express a preference for implementing compensatory measures in the same type of habitat(s) affected by the action. Based on a species' conservation needs and applicable plans/strategies to address those needs, Service personnel will determine whether in-kind or out-of-kind habitat compensation will provide the most practicable means of ensuring a proposed action improves or, at minimum, maintains the current status of the affected evaluation species.

Comment (80): Two commenters recommended that the Policy recognize an action proponent's authorities/abilities to implement all mitigation measures onsite only, or to implement compensatory measures only within a particular jurisdiction.

Response: The Service should not provide recommendations that others have no discretion to consider, and this Policy does not direct Service personnel to do so. Measures that avoid and minimize impacts apply within the area affected by the action, and proponents should generally have sufficient discretion to adopt and implement all such measures. The Service will respect the jurisdictional limitations of proponents to implement compensatory measures outside the affected area.

Comment (81): A few commenters expressed concern that early or voluntary mitigation actions would not be recognized or given the appropriate crediting.

Response: The Service supports early and voluntary mitigation actions and is committed to collaborating and coordinating with project proponents to assess the accrual of additional conservation benefits from such actions.

Comment (82): A number of commenters addressed the concept of duration in relation to the durability of mitigation measures. Several commenters questioned the standard to maintain the intended purpose of the mitigation measure ''for as long as the impacts of the action persist on the landscape.'' These commenters suggested the duration of the mitigation site be correlated to the monitoring and maintenance period after which the mitigation sites should be allowed to evolve through natural successional processes rather than be required to maintain a specific condition. Another commenter recommended more objective or established timeframes such as length of the ''planning horizon'' or ''in perpetuity'' to characterize the duration of the mitigation. One commenter suggested the burden of proof be on the project proponent to demonstrate that impacts of a temporary duration have been removed before being released from a mitigation obligation.

Response: The Service will recommend or require that mitigation measures be durable, and at minimum, maintain their intended purpose for as long as impacts of the action persist on the landscape. The Service acknowledges site-specific conditions may need to evolve through natural processes. For example, we expect riverine systems to scour and revegetate in cycles, causing species composition to vary at any one point in time but supporting targeted resources in the long term. In other circumstances, active management (*e.g.,* controlled burning, grazing) may be needed to retain the intended purpose of the mitigation site for affected resources. Mitigation measures for permanent impacts will rely on permanent mitigation. When it can be demonstrated that impacts to affected resources are temporary, durability accounts for the time the effects of the action persist.

Comment (83): One commenter noted the definition of ''durability'' only includes the concept of duration and not the implementation assurances needed to ensure the mitigation is durable, while another commenter suggested that reference be made to the elements ''a. thru i.'' as set forth in 81 FR 12380 at 12391 (March 8, 2016) as essential to the definition.

Response: Durability is one of the fundamental principles that will guide Service mitigation recommendations to ensure mitigation measures maintain their intended purpose for affected resources for as long as impacts persist on the landscape. We agree with the commenters that implementation assurances are needed to ensure mitigation is durable. Section 5.6.3 identifies those elements intended to ensure successful implementation and durability of compensatory mitigation measures, including site-protection mechanisms, performance standards, monitoring, long-term and adaptive management, and provisions for financial assurances.

Comment (84): Several commenters supported the approach described in the Policy regarding the limits on use of research or education as compensatory mitigation. Three commenters suggested that use of research/education as compensatory mitigation should be expanded. One commenter suggested we add additional implementation detail. For clarity, one commenter suggested moving the research/education material under a new header or section.

Response: We agree with the commenters who said compensatory mitigation should provide tangible benefits and that research/education should be included in a mitigation package only in those limited circumstances described in the Policy. Exhaustive implementation detail on this topic is beyond the scope of this umbrella policy, which covers all Service mitigation authorities wherever they are carried out. Such detail may be contained in future step-down guidance or will be determined on a case-by-case basis by Service staff. We have reorganized the material into a new section 5.6.3.2.

S. Adaptive Management

Comment (85): In general, commenters appeared to agree with the concept of adaptive management, as discussed in the Background section and other areas of the Policy. Several commenters suggested refinements to the Policy to increase certainty for project proponents. One commenter was concerned with regard to adaptive management's nexus with protections for federally listed species.

Response: We agree the iterative process used during adaptive management serves to facilitate progress toward achieving defensible and transparent objectives. As this Policy is meant to guide the overall approach to mitigation planning while allowing the greatest flexibility for Service program needs, we expect further guidance will document specific requirements on specific elements included in documentation, including those related to adaptive management. Nothing in this Policy supersedes statutes and regulations governing treatment of federally listed species.

T. Documentation

Comment (86): Commenters asked that final recommendations include, in writing, all steps and clearly identify party responsibilities regarding implementation and performance of mitigation measures. One commenter requested more consistency between the 12 elements identified in section 5.6.3 and the section on final recommendations. Another commenter requested clarification of whether information provided by the Service through the Policy is a requirement or considered technical assistance.

Response: The Policy indicates that documentation should be commensurate in scope and level of detail with the significance of the potential impacts to resources, in addition to providing an explanation of the basis for Service recommendations. As this Policy is meant to guide the overall approach to mitigation planning while allowing the greatest flexibility for Service program needs, we expect further guidance will document specific requirements on specific elements included in documentation. Section 5.6.3 describes the use of compensatory mitigation, one of the five general types of impact mitigation described under section 5.6, Means and Measures. Section 5.6.3 includes several measures meant to ensure successful implementation and durability, specific to instances where compensatory mitigation is employed. The text in section 5.8, Documentation, has been modified to include the phrase: ''Where compensation is used to address impacts, additional information outlined in section 5.6.3 may be necessary.''

U. Monitoring

Comment (87): Many commenters were concerned how this Policy would add predictability, efficiency, and timeliness. Some were particularly concerned about potentially variable interpretation among Service field offices. One recommended actual Policy implementation elements be separated due to complexity and provided as guidance, while two others stated the Policy was not specific enough to evaluate and ensure consistency. Several commenters requested a standardized process or system, with clear guidelines and methods for implementation, be established to determine effectiveness, monitor durability, and track performance to ensure compliance and deliver conservation benefits. One commenter was concerned that wildlife and habitat assessments envisioned by the Policy could entail complex analyses, while others said mitigation should be based on biological conditions and reliable, repeatable, and quantitative science-based methods to measure benefits and outcomes and inform adaptive management. Others suggested use of key ecological attributes (KEAs) to measure outcomes. Some were concerned that there was no requirement for monitoring, while others supported standardized self-reporting. One commenter noted the monitoring requirement may conflict within the Policy itself (Appendix B, section C) with regard to the responsibility of the Service to monitor compliance.

Response: The Service, being national in scope of operations, has written the proposed Policy in a manner that allows for further clarification on a regional scale. Regarding the request that a ''standardized process'' or ''system'' be established, where such (a) system(s) would be of benefit, it would be more practicable to establish it at a regional or programmatic scale, and would be handled through step-down guidance. The principle articulated in paragraph (f) of section 4 specifically states: ''The Service will use the best available science in formulating and monitoring the long-term effectiveness of its mitigation recommendations and decisions, consistent with all applicable Service science policy.'' The principle articulated in paragraph (f) states ''The Service will recommend or require that mitigation measures are durable, and at a minimum, maintain their intended purpose for as long as impacts of the action persist on the landscape.'' Thus, where appropriate, a process using KEAs may be applied. Regarding requirements for monitoring, the Policy states the Service's final mitigation recommendations should communicate in writing ''c. effectiveness monitoring; d. additional adaptive management actions as may be indicated by monitoring results; and e. reporting requirements.'' Regarding the statement indicating the need or inability to ''require'' monitoring, this Policy serves as an overarching guidance applicable to all actions for which the Service has specific authority to recommend or require the mitigation of impacts to fish, wildlife, plants, and their habitats. The text in the Policy was modified to clarify its intent with regard to monitoring compliance. This includes Appendix B, which now clarifies Service responsibilities for applying the Policy when formulating our own proposed actions under the NEPA decisionmaking process, versus being used as guidance for providing mitigation recommendations when reviewing the proposed actions of other Federal agencies under NEPA.

V. Recommendations and Preferences

Comment (88): One commenter was concerned that certain language in the Policy appeared to devalue proponent-responsible compensatory mitigation and cautioned against conflating preferences with standards. This commenter pointed to the Department of the Interior's Departmental Manual Chapter (600 DM 6) on Implementing Mitigation at the Landscape-scale (October 23, 2015), that lists the high and equivalent standards to which all mechanisms for compensatory mitigation should be held in section 6.7. They noted preferences are not included in that list, so while the ideas of ''equivalent standards'' and a policy's ''preferences'' are both principles, a preference is not an equivalent standard. They said each mitigation measure does not need to adhere to each preference, only to each equivalent standard. They suggested that the following statement be removed from section 5.6.3 of the Policy, as it seemingly asserts all mitigation measures must achieve the preferences: ''As outlined by DM 6.6 C, this means that compensatory mitigation measures will. . .implement and earn credits in advance of impacts . . . .''

Response: We do not intend to devalue proponent-responsible mitigation, and we recognize it is a vital compensatory-mitigation mechanism, whether implemented by private project developers, agencies, or third-party mitigation implementers. We acknowledge flexibility is warranted in recommendations for the compensatory mitigation measures and mechanisms most likely to achieve the Policy's goal, and we established a preference for advance mitigation because it is the compensatory mitigation timing most likely to achieve that goal. We recognize either concurrent mitigation or mitigation occurring after impacts may be necessary in some cases, and may represent the best ecological outcome in others. The Policy does not establish an explicit preference for conservation or mitigation banks or other compensatory mitigation mechanisms. Conservation or mitigation banks do typically secure resource benefits before impacts occur, and may be more likely to satisfy this preference, but any other compensatory mitigation mechanism that does so is also consistent with the Service's preference. We agree with the suggestion to remove reference of our preference for advance mitigation from the language that precedes the list of equivalent standards, located in the new section 5.6.3.1, Equivalent Standards, and have made that targeted edit to avoid further confusion between preferences and equivalent standards.

Comment (89): One commenter asked for clarification of the following statement on advance compensatory mitigation within section 5.7.1, Preferences: The extent of the compensatory measures that are not completed until after action impacts occur will account for the interim loss of resources consistent with the assessment principles (section 5.3).

Response: The sentence the commenter mentions addresses temporal loss. Temporal loss is the delay between the loss of resource functions caused by an impact and the replacement of resource functions at a compensatory mitigation site. Additional compensatory mitigation may be required to compensate for temporal loss. When the compensatory mitigation project is initiated prior to, or concurrent with, the impacts, additional compensation for temporal loss may not be necessary, unless the resource has a long development time. We have added an additional sentence to clarify the statement.

Comment (90): One commenter said the Policy should use a priority and preference, similar to the Corps' and EPA's joint rule on Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR parts 325 and 332, and 40 CFR part 230 (EPA), 33 U.S.C. 1344. In that regulation, the agencies establish an explicit preference for mitigation banking, followed by in-lieu fee programs, and finally, proponent-responsible mitigation.

Response: This Policy is an umbrella policy that integrates all of the Service's authorities for engaging in mitigation processes. One reason we have not pursued an outright preference for banks or other mechanisms is that our authorities to recommend mitigation extend beyond the current track record for banks, which is limited to aquatic habitats and listed species. Instead of following the regulatory model from the CWA practice of stating an explicit, hierarchical preference that begins with banks, we establish a preference for advanced mitigation. While conservation or mitigation banks do typically secure resource benefits before impacts occur, and may be more likely to satisfy this preference, any compensatory mitigation mechanism that secures resource benefits before impacts occur may also be consistent with the Service's preference.

We expect additional detail regarding compensatory mitigation mechanisms will be included in future step-down policies that are specific to compensatory mitigation. In this Policy, we use terminology that supports and accommodates future Service policies rather than pre-determines their content. For example, we do not yet know what compensatory mitigation mechanisms will be preferred in future Bald and Golden Eagle Protection Act regulations, so it would be inappropriate to state firm preferences here.

Comment (91): One commenter suggested we revise section 5.7, Recommendations, to indicate that compensatory mitigation should encourage more sustainable contributions of the goods and services provided to the public. This commenter said mitigation can have larger public benefits and services and that the Service should encourage mitigation actions that have additional natural, cultural, historical, or recreational values and benefits.

Response: We agree mitigation actions can provide the benefits the commenter describes. In section 5.1, we describe our support of the development of mitigation plans that identify high-priority resources prior to specific proposed actions. The most effective early mitigation planning is integrated with conservation planning and planning for human infrastructure, including transportation; water and energy development; as well as working lands, recreation, and cultural values. Although such integration is not a requirement of a process under any particular mitigation authority, the Service recognizes the potential power of plans that simultaneously addresses multiple ecological and human needs from broad stakeholder perspectives.

W. Advance Mitigation

Comment (92): Several commenters addressed the Policy's inclusion of a preference for advance mitigation. Several said they strongly endorsed statements throughout the Policy that recognize the value of compensatory mitigation completed in advance of impacts. Others said the preference should be removed or altered, but their reasoning differed. Some opposed a categorical requirement that mitigation be implemented prior to impacts, while others suggested the Policy go further than a preference and make advance mitigation a requirement. Some commenters said a preference was appropriate, but suggested the Policy use consistent language in referring to a preference.

Response: Section 5.7.1 describes a preference for advance mitigation. It is not a requirement. As policy, we prefer that compensatory mitigation be implemented before the impacts of an action occur, making affected resources less vulnerable to temporal impacts and a net loss. Advance mitigation reduces risk and uncertainty. Demonstrating that mitigation is successfully implemented in advance of impacts provides ecological and regulatory certainty that is rarely matched by a proposal of mitigation to be accomplished concurrent with, or following, the impacts of an action. Most of the Service's mitigation authorities provide the ability to specify mitigation recommendations rather than requirements, and the Service would not be able to create a requirement for advance mitigation through policy. Accordingly, when providing mitigation recommendations to another action agency for consideration in their permitting or project decision, this Policy's guidance to Service staff is that they indicate their preference for advance mitigation. We have made minor edits to more consistently refer to this preference.

Comment (93): Several commenters said the Policy's preference for advance mitigation is incompatible with project-planning realities, is not feasible or appropriate for some projects, and is not always possible. They suggested we revise the Policy to allow mitigation to occur concurrent with, and in some circumstances following, impacts to be consistent with the Corps' mitigation framework. Some commenters suggested simultaneous construction of the project and mitigation remain an option.

Other commenters expressed the need for flexibility regarding the preference for conservation reasons. One commenter said overemphasizing the timing of mitigation could limit the Policy's goal of net conservation gain. They suggested the Policy de-emphasize mitigation timing in favor of tailored mitigation that addresses the needs of unique species and habitats. They were also concerned that a preference for advance mitigation would give priority to for-profit conservation/mitigation banks, and may not adequately tailor mitigation for the impacted resources. Another commenter noted that some initial flexibility may be necessary as new mitigation programs are created at the State and local levels.

Response: Because advance mitigation is the Service's preference and not a requirement, the Policy is compatible with circumstances where compensatory mitigation is concurrent with or after project impacts. It is our preference that compensatory mitigation be implemented prior to project impacts, but we recognize that authorities and project planning circumstances might prevent implementation of advance mitigation in some cases. While concurrent mitigation is an option when circumstances allow, proponents may expect advance mitigation to remain the Service's preference in most cases.

We agree that flexibility is necessary in recommendations for compensatory mitigation measures and mechanisms that are most likely to successfully secure resources. Advance mitigation is the Service's preference, as it is the compensatory mitigation timing that is most likely to achieve success in regard to procuring funding. We recognize that concurrent mitigation or mitigation occurring after impacts may be necessary in some cases or may represent the best ecological outcome in others. The Policy does not establish an explicit preference for conservation or mitigation banking or other compensatory mitigation mechanisms. Conservation or mitigation banking typically secures resources before impacts occur, but any compensatory mitigation mechanism that does so may also be considered consistent with the Service's preference.

Comment (94): One commenter wrote that it is possible for in-lieu fee programs to implement advanced mitigation, although they have not done so historically. This commenter also said a preference for advanced mitigation applied to in-lieu fee programs would increase their likelihood of success.

Response: The Policy's preference for advance mitigation applies to all compensatory mitigation mechanisms. Although conservation or mitigation banking secures resources before impacts occur, any compensatory mitigation mechanism implemented before impacts occur may also satisfy this preference. In-lieu fee programs can implement a ''jump-start'' that establishes and maintains a supply of credits that offer mitigation in advance of impacts.

X. Public and Private Lands

Comment (95): Several commenters focused on the way the Policy addresses siting of compensatory mitigation relative to land ownership status in section 5.7.2, Recommendations for Locating Mitigation on Public or Private Lands. Several expressed support for the Policy's statement that mitigation will generally be required on lands with the same ownership classification as those where impacts occur. Some commenters believe the Policy should establish even stronger controls on public land mitigation, saying that impacts on private lands should not be mitigated on public lands. These commenters reasoned that mitigation on public lands has limited value and should not be allowed. One commenter said the Policy should recognize that when any compensatory mitigation is sited on Federal lands, unless a full-cost compensation is made for the fair market value (at a minimum) of the land utilized, then the public is subsidizing the development that caused the resource impacts. One commenter said no policy should create unfair competition with private industry, or create a disincentive to private investment in compensatory mitigation. They felt this could occur if there were no restrictions on siting compensatory mitigation for private-land impacts on public land locations. One commenter noted that some land managers would like to use compensatory mitigation funds to resolve preexisting problems on public lands, usually unrelated to the action and resources under active analysis. The commenter said this view is understandable but contrary to the mitigation hierarchy.

Several commenters suggested fewer barriers or checks on mitigating private-land impacts on public lands, and the removal of the statement that compensatory mitigation should generally occur on lands with the same ownership classification as at the location of impacts. These commenters said requiring mitigation on lands with the same ownership classification is unnecessarily restrictive, adding that, when implemented, the standards for compensatory mitigation will force a positive result regardless of land ownership. One commenter said public land managers do not and will not have the funding necessary to stabilize and recover some resources, and it is, therefore, imperative that private conservation investments, including mitigation for adverse activities, be applied on public lands if it will provide maximum conservation benefit for the affected resource.

Response: Compensatory mitigation can occur on public lands, and in some cases, such siting may lead to the best ecological outcome. Compensatory mitigation for impacts on public lands can be sited on both public and private lands. Also, compensatory mitigation for impacts on private lands can be located on public lands, but it is that combination, or that particular change in ownership classification, where Service staff should be attentive to additional considerations before confidently making such a recommendation. Section 5.7.2 describes factors Service staff should consider. This cautious approach is warranted within the Policy's instruction to Service staff, for the reasons described below.

We recognize that funds to properly manage or restore public lands are often insufficiently available today, absent infusion of mitigation dollars. This argument may have merit in some cases, but we remain concerned about consequences. It is possible that funding availability is reduced and opportunities to restore or protect at-risk habitats on private lands are precluded when compensatory mitigation is sited on public lands. If passed, those opportunities on private lands are often permanently gone. Given the irregular footprint of public lands across much of the United States, we are also concerned about strategic conservation of wildlife if the aggregation of mitigation onto public lands is further streamlined without articulating at least some test or application of criteria prior to making such recommendations. If we remove all checks on locating compensatory mitigation for private land impacts on public lands, we may risk making the ''export'' of habitats from private to public lands a routine practice, as it may often be the lower cost option. This outcome would counter the Service's intent that the Policy be applied using a landscape-level approach.

We agree with the commenters who said there is potential for the public to subsidize the development that causes resource impacts if access to public lands for compensatory mitigation is streamlined to an inappropriate extent. This could potentially facilitate impacts or de-incentivize avoidance on private lands by artificially reducing the costs of compensatory mitigation for project proponents.

We are also concerned about the unintended consequence of reducing private conservation investment. Streamlined access to public lands for proponents needing to provide mitigation for impacts on private lands could undermine private conservation investment and banking opportunities, or weaken the economic conditions necessary for bank establishment by artificially reducing proponents' mitigation costs (*e.g.,* land acquisition costs might not be fully incorporated).

Comment (96): Several commenters discussed conditions or means for ensuring compensatory mitigation on public lands is durable and held to the same standards as when conducted on private lands.

One commenter said the Policy should require the public land agency include the compensatory mitigation requirements as specific conditions in the special use permit or other required authorizations. This commenter also said a long-term management plan should be included in the use authorization, permit, or other legally binding document. They said that in order to ensure long-term management plans are binding, they should be established through a contractual agreement between the public land management agency and a third party with a conservation mission.

One commenter said compensatory mitigation on Federal lands for impacts on private lands must include full-cost compensation for the use of public lands, either through monetary compensation or implementation of additional projects to further the purposes of the Federal lands.

One commenter said land managers must demonstrate that actions taken in already-protected areas meet mitigation objectives and are not used solely for the benefit of existing protected area management goals. They added that when compensatory mitigation is sited within protected areas, land managers must uphold accountability by maintaining a ledger of mitigation actions undertaken and completed in addition to existing conservation obligations.

One commenter said the Policy, at minimum, should give preference to private lands with high conservation potential yet currently lacking conservation assurances (*i.e.,* legal and financial assurances in place to achieve protection in perpetuity) before considering the use of public lands for mitigation.

Two commenters said the Policy should require public land managers commit to long-term protection and management, and that they implement and fully fund alternative compensatory mitigation in the event of a change in law that allows incompatible uses to occur on mitigation lands. They said this would provide better certainty to project proponents when mitigating on public lands.

Response: We agree that the identification of mechanisms for ensuring the durability and additionality of compensatory mitigation on public lands is both important and challenging. As an umbrella policy, this Policy integrates all of the Service's authorities for engaging in all aspects of mitigation, and is not specifically a compensatory mitigation policy. It is beyond the scope of the Policy to provide detailed procedural information for all compensatory mitigation scenarios. Also, as many of our mitigation authorities are advisory, it would be inappropriate to present detailed compensatory mitigation procedures in this Policy for such advisory authorities, when that information may already be presented in the existing regulations or guidance of other agencies. We agree that compensatory mitigation on Federal lands for impacts occurring on private lands must incorporate accounting for the difference between the cost of using public lands compared to private lands. Otherwise, agencies will not be able to maintain a level playing field for both public and private lands and for all types of compensatory mitigation mechanisms. Detailed specification of measures to ensure such accounting is beyond the scope of this Policy.

Public lands that are proposed for siting compensatory mitigation may include Federal, State, county, and municipal lands. The existence and nature of mechanisms to ensure durability and additionality varies widely across land management agencies. Given this variation, it is prudent for this Policy to provide general guidelines for Service staff to examine before recommending mitigation of private land impacts on public lands. As described in section 5.7.2, these include additionality, durability, legal consistency, and whether the proposal would lead to the best possible conservation outcome.

Comment (97): One commenter addressed the Service's Final Policy on the National Wildlife Refuge System and Compensatory Mitigation under the Section 10/404 Program (64 FR 49229–49234, September 10, 1999). They said siting compensatory mitigation for impacts permitted under the CWA on National Wildlife Refuge System lands is not appropriate and that those lands were not established for fulfilling private wetland impact mitigation requirements. They added that the Service must fulfill its responsibility for fully functioning Federal lands and should in no instances lower its standards when contemplating compensatory mitigation; to do otherwise would subsidize private mitigation. This commenter was concerned that section 5.7.2 undermined the 1999 Policy.

Response: We appreciate the commenter's observations and share their concerns regarding compensatory wetland mitigation on National Wildlife Refuge System lands. Those concerns led to, and were addressed by the 1999 Policy. Section 5.7.2 does not undermine the 1999 Policy. Regardless of the content of section 5.7.2, when the public land proposed for siting compensatory mitigation for permitted impacts under the CWA is a National Wildlife Refuge, that proposal is specifically covered by, and must comply with, the 1999 Policy. Our revisions of the 1981 Policy do not modify or supersede the 1999 Policy.

Y. Implementation

Comment (98): One commenter recommended an economic analysis because they believed there would be additional burdens and cost of implementing the Policy.

Response: We understand that confusion regarding whether the Service's comments are requirements or merely recommendations may have led some to believe the scope of the Policy has been substantially expanded. The burdens and costs associated with this Policy will remain largely the same as under the 1981 Policy and under existing agency practice.

Comment (99): Commenters requested the Service articulate a clear timeline in which the Policy will be implemented across the agency. A 2-year timeline was recommended, as it would allow enough time to sufficiently (a) adopt the Policy, (b) train and educate staff, and (c) apply the Policy in the field. Others questioned the undue burden to staff and availability of funding to implement the Policy. Similarly, commenters requested information on how the Service plans to implement the Policy, given staffing and budget constraints.

Response: The Service, being national in scope of operations, has written the proposed Policy in a manner that allows for further clarification on a regional scale. Regarding the request that a ''standardized process'' or ''system'' be established, where such a system(s) would be of benefit, it would be more practicable to establish it at a regional or programmatic scale, and would be handled through step-down guidance. During development of such guidance, the Service will facilitate discussions and training with staff to ensure consistency and reduce workload.

Comment (100): Many expressed concern with how the Policy may be inconsistent or conflict with regulations or policies from States, and other Federal agencies responding to the Presidential Memorandum on Mitigation (National Marine Fisheries Service, Corps, National Atmospheric and Oceanic Administration, Federal Energy Regulatory Commission, etc.), given the need to promulgate joint regulations. Some urged the Service to coordinate this Policy internally, particularly with policies promulgated under the Endangered Species Act and CERCLA, OPA, and the CWA during natural resource damage assessment. One commenter requested clarity where more than one statute applies, others suggested the Service provide training internally and externally to other agencies, and some recommended examples and templates be constructed.

Response: The Policy is consistent with the Presidential Memorandum on Mitigation. The guidance development referenced in the Presidential Memorandum on Mitigation is under consideration within the Department of Interior at the time this Policy is being finalized and the Service will continue to seek consistency in future guidance. We have made edits to Appendix A to clarify the relationship of this Policy with natural resource damage assessment and the Presidential Memorandum on Mitigation.

Comment (101): One commenter questioned the use of ''reasonably foreseeable,'' requesting clarification of what impacts would be considered such and what criteria would be applied to make that determination.

Response: The Service will implement use of the phrase ''reasonably foreseeable,'' similar to that used in NEPA. Under this scenario, actions that are likely to occur or are probable, rather than those that are merely possible, would be considered reasonably foreseeable. See CEQ guidance at 46 FR 18026 (March 23, 1981).

Comment (102): Several commenters were concerned that the Policy lacks clear mitigation protocol, resulting in moving targets for land users interested in developing and executing projects in good faith. Some commenters stated that the Policy will substantially increase uncertainty, without providing additional environmental benefits, especially given the broad range of regulatory protections already in place.

Response: The Service, being national in scope of operations, has written the proposed Policy in a manner that allows for further clarification on a regional scale. Thus, site differences could be considered during impact evaluation, for example, circumstances such as differences in productivity of habitat prior to the project, expected duration and severity of impact, or other local conditions. A less flexible policy could cause rigid adherence to a protocol, which may be more suitable in one region than another.

Comment (103): One commenter suggested the Service did not comply with procedural requirements to finalize the Policy, in particular the Administrative Procedure Act (APA) and the Regulatory Flexibility Act (RFA).

Response: The Service complied with all necessary regulatory requirements in publishing the final Policy. The Policy does not require compliance with the APA or the RFA because it is not regulatory. The Policy simply revises and replaces the 1981 Policy that guided the Service's mitigation recommendations for 35 years. This Policy is advisory in nature and outlines the Service's recommended approach to addressing accelerating loss of habitats, effects of climate change, and a strategic approach to conservation at appropriate landscape scales. It addresses all resources for which the Service has legal authorities to recommend mitigation for impacts to resources and provides an updated framework for mitigation measures that will maximize their effectiveness at multiple geographic scales.

Comment (104): Several commenters suggested we allow the public to comment on a complete portfolio of policies, handbooks, and guidance documents that implement the Policy at one time.

Response: Many of the Service's guidance products are completed, while others are either in development or have yet to be drafted, making it logistically impossible to complete such a filing. This Policy is intended to be an umbrella policy under which more detailed policies or guidance documents covering specific activities may be developed in the future.

Z. Editorial and Organizational Comments

Comment (105): Many commenters provided specific technical, editorial, and organizational suggestions or corrections, including suggestions for new or modified definitions.

Response: We have addressed technical, editorial, and organizational suggestions and corrections as appropriate throughout the document.

Comment (106): Many commenters questioned the specifics of multiple definitions, requested clarification or refinement, or mentioned the need for additional or narrowed definitions (*e.g.,* baseline, additionality, equivalent standards, preferences and credits, emerging mechanisms, conservation objective, net conservation gain, impacts or effects, landscape, ecologically relevant scales, broad ecological functions, ecologically functioning landscapes).

Response: With regard to refining the definitions, the Service is consistent with the Departmental Manual and Presidential Memorandum. As with many of the decisions made during analyses of impacts, definitions of many terms may take on the nuances of the project and/or authority under which the mitigation is being discussed. We have preserved the flexibility and look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs and additional guidance to seek mutual goals and avoid inconsistency, including newly emerging mechanisms for analyses, mitigation, and monitoring.

Comment (107): One commenter was concerned the definition of ''compensatory mitigation'' insinuates there will always be ''remaining unavoidable impacts'' that must be compensated, and suggests revisions. The same commenter states that the definition of mitigation hierarchy should include where departure from the sequential approach may achieve a better conservation income.

Response: If there are no residual impacts after ''all appropriate and practicable avoidance and minimization measures have been applied,'' no compensatory mitigation would be required. Departure from the mitigation hierarchy is detailed in section 5.5, where we describe how relative emphasis will be given to mitigation types within the mitigation hierarchy depending on the landscape context and action-specific circumstances that influence the effectiveness of available mitigation. No change was made to these definitions.

AA. Appendix C. Compensatory Mitigation in Financial Assistance Awards Approved or Administered by the U.S. Fish and Wildlife Service

Comment (108): Five commenters suggested or requested clarifications regarding Appendix C, which addresses the limited role that specific types of mitigation can play in financial assistance programs. Two commenters said they supported limiting the use of public conservation funds to meet regulatory mitigation requirements, as the use of such funding to also generate credits undermines the effectiveness of both conservation and mitigation programs. They said that funding from any public entity that is specifically dedicated to conservation should not be used to generate credits, and suggested those funds be used to achieve baseline conditions. They suggested the Policy clarify that public conservation funds can be used to meet baseline.

Response: The commenters propose that, if funds from a public entity are specifically dedicated to conservation, they could be used to achieve baseline conditions, which they define as ''the level of resource function above which mitigation credits may be sold.'' However, even if baseline were defined as recommended, the achievement of baseline would still be an essential part of the process leading to the generation of mitigation credits.

This Policy prohibits the use of the Federal share or the required minimum match of a financial assistance project to satisfy Federal mitigation requirements, except in exceptional situations described in the Policy. This prohibition is consistent with the basic principles of the regulations implementing the compensatory mitigation requirements of the CWA, which is the authority for most funds spent on mitigation. The regulations were published in the **Federal Register** on April 10, 2008 (73 FR 19594), by: (a) The Department of Defense, resulting in regulations at 33 CFR parts 325 and 332; and (b) the EPA, resulting in regulations at 40 CFR part 230. Sections 332.3(j)(2) and 230.93(j)(2) state that, except for projects undertaken by Federal agencies, or where Federal funding is specifically authorized to provide compensatory mitigation, federally funded aquatic resource restoration or conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program activities, *cannot be used for the purpose of generating compensatory mitigation credits* for activities authorized by [Department of the Army] permits. *However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, but supplemental to, such programs* in order to maximize the overall ecological benefits of the restoration or conservation project. [*Emphasis added.*]

The preamble of the final rule for these regulations clarifies the intent of §§ 230.93(j)(2) and 332.3(j)(2) by stating that, for example, if a Federal program has a 50 percent landowner match requirement, neither the federally funded portion of the project, nor the landowner's 50 percent match, which is part of the requirements for obtaining Federal funding, may be used for compensatory mitigation credits. However, if the landowner provides a greater than 50 percent match, any improvements provided by the landowner over and above those required for Federal funding could be used as compensatory mitigation credits.

The Policy acknowledges these regulations for mitigation required by the CWA (Dept. of the Army permits). It also adopts the underlying principles of these regulations as the foundation of the Policy for mitigation required by authorities other than the CWA. Restricting the role of financial assistance funds for mitigation purposes is a reasonable requirement to avoid the equivalent of a Federal subsidy to those who are legally obligated to compensate for the environmental impacts of their proposed projects.

Comment (109): Two commenters said limiting the use of funds counted as matching funds toward Federal grants as mitigation is inconsistent with several existing State and Federal policy statements. They noted that in 2008, seven agencies including the Service, other Federal agencies, and several Oregon State agencies issued joint recommendations limiting the use of public conservation dollars to generate credits for mitigation. The recommendations state, ''The agencies believe that funds from programs identified as Public Resource Protection and Restoration Programs should not be used to finance mitigation projects undertaken to satisfy regulatory requirements. To do so would be inconsistent with the mandated and/or intended purposes and limitations of these programs.'' The recommendations further state ''. . . multisource funded projects should include accounting that is detailed and transparent enough to accurately measure the relative habitat and conservation values derived through each funding source.'' They also stated that Metropolitan Regional Governments and other sources of public conservation funds have consistently limited the use of pubic conservation funds to support mitigation, but allow mitigation funds to be used as match.

Response: The Policy allows matching funds to be used to generate credits only if: (a) The match used for the credits is over and above the required minimum; (b) funding for the award has been statutorily authorized and/or appropriated for use as compensatory mitigation for specific projects or categories of projects; or (c) the project funded by the Federal financial assistance award requires mitigation as a condition of a permit. These restrictions are based on the premise that neither Federal funds nor any required contribution for obtaining Federal funds should subsidize those who are legally obligated to compensate for the environmental impacts of the projects they propose. This was an underlying principle in the regulations that implement the compensatory mitigation requirements of the CWA, which is the authority for most funds spent on compensatory mitigation.

The regulations on compensatory mitigation under the CWA were published jointly in the **Federal Register** on April 10, 2008 (73 FR 19594), by: (a) The Department of Defense, resulting in regulations at 33 CFR parts 325 and 332; and (b) the Environmental Protection Agency, resulting in regulations at 40 CFR part 230. For excerpts from these regulations that are relevant to this comment, please see our response to comment #108 above.

Consistent with the DOD and EPA regulations, the Appendix C, section (C)(1)(a) of the Policy allows the match in a Federal financially assisted project to be used to generate mitigation credits if: The mitigation credits are solely the result of any match over and above the required minimum. This surplus match must supplement what will be accomplished by the Federal funds and the required minimum match to maximize the overall ecological benefits of the restoration or conservation project.

Comment (110): Five commenters said they want to encourage collective action to achieve conservation outcomes, and leveraging multiple funding sources will lead to bigger projects with greater environmental benefits. They said the Policy seems to support a scenario where the EPA could fund $1 million of a project, a city could fund $2 million, but the city could not take any mitigation credits if it claimed those funds as match for the Federal grant. The commenters said this scenario could limit opportunities to create greater conservation or environmental benefit at a landscape scale.

Response: Under the commenters' scenario, if a city provided match above the required minimum, the Policy would not present a barrier for this ''surplus'' match to generate mitigation credits as long as the program's establishing authority(ies) or regulations do not prohibit it. However, if a program requires a minimum match, that required minimum has effectively already been dedicated to conservation by the rules of the program. In those programs where a minimum match is required, the Federal funds and the minimum match are essential components of the financial assistance. The award would not be possible without that minimum match, so the Policy does not allow either of these essential components to generate mitigation credits.

This was a basic principle in the regulations that implement the compensatory mitigation requirements of the CWA, which is the authority for most funds spent on compensatory mitigation. The Service's revised Policy is based on the same principle. If we were to allow the match required as a prerequisite for an award to generate mitigation credits, it would effectively subsidize those who are legally obligated to compensate for the environmental impacts of their proposed projects.

Comment (111): Two commenters suggested the following text to reflect the importance of leveraging multiple funding sources in achieving landscape-scale outcomes: Public conservation funds cannot be used to meet regulatory compliance obligations. Where multiple sources of funding are used in conjunction with credit-generating activities, it is the permittee's responsibility to demonstrate compliance with this requirement. Public conservation funds can be used to meet baseline conditions.

Response: The Policy authorizes the use of specific funding sources that are, or could be interpreted as ''public conservation funds.'' The references to such funding in the Policy are:

(a) Federal funding statutorily authorized and/or appropriated for use as compensatory mitigation for specific projects or categories of projects (Appendix C, section E(1)(b)).

(b) Federal funds needed to mitigate environmental damage caused by a federally funded project (Appendix C, section E(1)(c)).

(c) Revenue from a Natural Resource Damage Assessment and Restoration Fund settlement as long as the financial assistance program does not prohibit its use (Appendix C, section F).

The Policy also affirms that States, tribes, and local governments are free to use Federal financial assistance (*i.e.,* public conservation funds) to satisfy the mitigation requirements of State laws or regulations as long as that use is not contrary to any law, regulation, or policy of the State, tribal, or local government (Appendix C, section G(2)).

We did not accept the commenter's recommended language because it could lead to incorrect interpretations of the Policy.

The commenter also recommended ''public conservation funds'' be used to meet baseline conditions under the commenter's definition of ''baseline.'' We addressed this issue in a previous response.

Comment (112): One commenter said it is not workable to prohibit a site that has received Federal funds to generate credits. They suggested the Policy encourage the pooling of resources and the investment of mitigation dollars in the most valuable sites regardless of whether Federal funds have been invested on the site, especially for those uses not directly related to restoring greater sage-grouse habitat. The commenter said they believe thoughtful discussions and pertinent accounting will ensure Federal funds are not used to generate credits to offset the impacts of the private sector or create a conflict with the rules of additionality.

Response: The authority for most funds spent on mitigation is the CWA. The regulations that implement the CWA's compensatory mitigation requirements were published jointly in the **Federal Register** on April 10, 2008 (73 FR 19594), by: (a) The Department of Defense, resulting in regulations at 33 CFR parts 325 and 332; and (b) the Environmental Protection Agency, resulting in regulations at 40 CFR part 230. Sections 332.3(a)(3) and 230.93(a)(3) indicate that compensatory mitigation projects may be sited on public or private lands. Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, *over and above* those provided by public programs already in place. [*Emphasis added.*]

Sections 332.3(j)(2) and 230.93(j)(2) of 40 CFR part 230 state that, except for projects undertaken by Federal agencies, or where Federal funding is specifically authorized to provide compensatory mitigation, federally funded aquatic resource restoration or conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program activities, cannot be used for the purpose of generating compensatory mitigation credits for activities authorized by [Department of the Army] permits. However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, *but supplemental to,* such programs in order to maximize the overall ecological benefits of the restoration or conservation project. [*Emphasis added.]*

The CWA may have a limited effect on the habitat of the greater sage-grouse, but the underlying principles of its regulations are reasonable and appropriate for applicability to other statutory authorities for mitigation. Limiting any credits from projects on public lands to those based on resource functions provided *over and above* those already in place, avoids a government subsidy to those already legally obligated to compensate for impacts of their projects. The Policy adopts the basic principles of the CWA's compensatory mitigation regulations as the foundation for all sources of compensatory mitigation.

Comment (113): One commenter noted Appendix C includes information on the use of Service funds relative to the need to obtain permits from the Corps' regulatory program. To avoid confusing these requirements with the Corps' Civil Works requirements, they suggested adding a statement that Appendix C does not affect policies on cost-sharing or non-Federal contributions for the Corps' Civil Works Program.

Response: The Policy directly affects only those Federal financial assistance programs and awards in which the Service has the authority to approve or disapprove applications. It also affects real property or equipment either acquired or improved with a Service-administered financial assistance award where the recipient must continue to manage the real property or equipment for its originally authorized purpose as long as it is needed for that purpose. The Policy has no effect on other Federal agencies' policies on match or cost share as long as those policies do not affect: (a) Restrictions in this Policy on the use of Service-administered financial assistance awards for generating compensatory mitigation credits, and (b) the Service's responsibilities as identified in Federal statutes or their implementing regulations. The Policy does not take precedence over the requirements of any Federal statute or regulation, whether that statute or regulation applies to a Service program or a program of another Federal agency. We added a new section I to Appendix C to clarify these issues.

Comment (114): One commenter said the Service's proposed revised Policy is inconsistent on in-lieu fee mitigation in the context of financial assistance programs. They sought further explanation of the rationale of allowing Federal funds to satisfy mitigation requirements of State, tribal, or local governments.

Response: The revised Policy prohibits the use of proceeds from the purchase of credits in an in-lieu fee program as match unless both of the following apply:

(a) The proceeds are over and above the required minimum match. This surplus match must supplement what will be accomplished by the Federal funds and the required minimum match to maximize the overall ecological benefits of the project.

(b) The statutory authority(ies) for the financial-assistance program and program-specific regulations (if any) do not prohibit the use of match or program funds for mitigation.

This prohibition is consistent with the underlying principles of the regulations implementing the compensatory mitigation requirements of the CWA, which is the authority for most funds spent on mitigation. Please see relevant excerpts from the regulations published jointly by The Department of Defense and the EPA within our response to comment #108 above.

The Service's revised Policy defers to these regulations for mitigation required by the CWA (Dept. of the Army permits). It also adopts the underlying principles of these regulations as the foundation for mitigation required by authorities other than the CWA. Restricting the ability of financial assistance programs to generate compensatory mitigation credits is a reasonable requirement to avoid the equivalent of a Federal subsidy to those who are legally obligated to compensate for the environmental impacts of their proposed projects.

The rationale of allowing the use of Federal funds to satisfy mitigation requirements of State, tribal, or local governments is based on 33 CFR 332.3(j)(1) and 40 CFR 230.93(j)(1), which have the force and effect of law only for the compensatory mitigation requirements of the CWA. However, the basic approach of these regulations is reasonable and appropriate for use as the foundation of a Service policy on mitigation in the context of financial assistance when the authority for mitigation is in a statute other than the CWA.

The regulations at 33 CFR 332.3(j)(1) and 40 CFR 230.93(j)(1) read:

(j) *Relationship to other Federal, State, tribal, and local programs.* (1) Compensatory mitigation projects for DA [Department of the Army] permits may also be used to satisfy the environmental requirements of other programs, such as State, tribal, or local wetlands regulatory programs, other Federal programs such as the Surface Mining Control and Reclamation Act, Corps civil works projects, and Department of Defense military construction projects, consistent with the terms and requirements of these programs and subject to the following considerations: (i) The compensatory mitigation project must include appropriate compensation required by the DA permit for unavoidable impacts to aquatic resources authorized by that permit. (ii) Under no circumstances may the same credits be used to provide mitigation for more than one permitted activity. However, where appropriate, compensatory mitigation projects including mitigation banks and in-lieu fee projects, may be designed to holistically address requirements under multiple programs and authorities for the same activity.

The wording of Appendix C, section G may have led the commenter to incorrectly conclude that Service-administered financial assistance may be awarded explicitly for the purpose of satisfying the mitigation requirements of a State, tribal, or local government. We changed the wording of section G to avoid any misunderstanding on this issue.

Comment (115): One commenter asked what, if any, impacts might be considered for administration of the Service's Wildlife and Sport Fish Restoration Program (WSFR) and State fish and wildlife agency obligations related to that program. They requested potential programmatic impacts be noted in the Policy, and the existing Joint Federal/State Task Force on Federal Assistance Policy (JTF) be engaged. This commenter appreciated the Policy's emphasis on collaboration and coordination, but suggested we also cite 43 CFR part 24, *Department of the Interior Fish and Wildlife Policy: State-Federal Relationships.* They also said the Service should consult with the States and other affected governments before selecting plans to guide mitigation, and that great deference should be given to State-prepared plans.

Response: It is difficult to assess the impact of the Policy on WSFR because the Service has never had any comprehensive national policy on the role of mitigation in its financial assistance programs. The CWA is the authority for most funds spent on mitigation, and it is the only Federal statutory authority for mitigation that addresses mitigation in the context of financial assistance. The Policy does not (and cannot) change the CWA regulations on compensatory mitigation, which have been in effect since 2008. The Policy will give grants managers in the Service and in recipient agencies a better awareness and understanding of these regulations.

In addition to the 2008 CWA regulations, an element of continuity in this Policy is its treatment of the Natural Resource Damage Assessment and Restoration Fund. This Policy incorporates the findings of a 1999 Solicitor's Opinion determining that revenue from this fund was eligible as match.

As for the commenter's recommendation that we consult with the States and other affected governments before selecting plans to guide mitigation, on March 8, 2016, we published the proposed revised Policy in the **Federal Register**, and invited all interested parties to comment during a 60-day comment period. On May 12, 2016, we extended the comment period for an additional 30 days. We are pleased to have received the recommendations of the Association of Fish and Wildlife Agencies, which represents State fish and wildlife agencies.

As for the comment that we engage the Joint Federal/State Task Force on Federal Assistance Policy on the potential impacts to the WSFR program, we welcome any JTF engagement on the implementation of Appendix C. We are also open to future input that: (a) Clearly improves implementation of Appendix C; (b) fully complies with existing statutes and regulations; (c) carries out the general policy and principles stated in section 4 of the Policy, with special attention to the goal of a net conservation gain; (d) maintains a consistent approach in satisfying the requirements of all statutory authorities for mitigation to the extent possible; (e) ensures *additionality* (see section 6) for any proposed change in locating compensatory mitigation on public or private lands already designated for the conservation of natural resources; and (f) does not subsidize those who are legally obligated to compensate for the environmental impacts of their proposed projects.

Section G of Appendix C of the revised Policy may be of special interest to the Association of Fish and Wildlife Agencies, as it affirms the rights of States, tribes, and local governments to structure the mitigation requirements of their own laws and regulations however they choose. The Service's revised Policy does not affect mitigation required by State, tribal, or local law.

We added the 43 CFR part 24 reference to Appendix A, section C per the comment.

To address the comment that we give great deference to State-prepared plans that guide mitigation, we will convert the existing section H in Appendix C to section I, and add the following to the new section H: When evaluating existing plans under sections H.2.a or b, the Service must defer to State and tribal plans to determine which additional benefits to count toward achieving the mitigation planning goal as long as the plans are consistent with Federal law, regulation, and this Policy.

Comment (116): One commenter noted that the way financial assistance programs addressed in Appendix A are described in section 3.5 may become outdated. The number of financial assistance programs recently increased to 61. Instead of using a number that will change frequently, they suggested revising the first sentence to read:

The Service has more than 60 financial assistance programs, which collectively disburse. . . .

Response: We made the suggested revision.

Comment (117): One commenter addressed the interaction between the Service's financial assistance programs described in Appendix C with section 4, General Policy and Principles. The commenter was concerned that the following concept in paragraph (g) would be applied inconsistently unless additional guidance was provided: ''The Service will recommend or require that compensatory mitigation be . . . additional to any *existing or foreseeably expected* conservation efforts planned for the future.'' The commenter said the following scenarios need clarification:

(1) A master plan for a land-management unit has an objective that calls for a specific conservation action to be accomplished in the next 15 years. If funding has not yet been appropriated or allocated to accomplish the conservation action, would the master-plan objective qualify as a ''foreseeably expected'' conservation effort planned for the future?

(2) The establishing statutory authority of a land-management agency makes that agency responsible for specific management actions, but the agency does not have enough funds to carry out these management actions? Would those management actions for which the agency is statutorily responsible qualify as an ''existing or foreseeably expected'' conservation effort?

(3) The partners in a grant-funded land-acquisition project have committed to use non-Federal and non-match funds to complete specific types of restoration or enhancement on the project area. These commitments contributed to the project being recommended for funding by the grant program's ranking panel. Would these commitments qualify as an ''existing or foreseeably expected'' conservation effort?

Response: The regulations implementing the compensatory mitigation requirements of the CWA at 33 CFR 332.7(a) and 40 CFR 230.97(a) state that:

Long-term protection may be provided through real estate instruments such as conservation easements held by entities such as Federal, State, tribal, or local resource agencies, nonprofit conservation organizations, or private land manager; the transfer of title to such entities; or by restrictive covenants. For government property, long-term protection may be provided through Federal facility management plans or integrated natural resources management plans.

These regulations regard facility-management plans and integrated natural-resources management plans as providing long-term protection. We used this as part of the basis for clarifying what would qualify as ''existing or foreseeably expected conservation efforts planned for the future.'' We addressed the issues and scenarios raised by the commenter in Appendix C, section H.

Comment (118): One commenter addressed the interaction between the Service's financial assistance programs described in Appendix C and provisions of section 5.7.2, Recommendations for Locating Mitigation on Public or Private Lands. They asked for clarification on whether the following would be considered public land:

(a) Real property owned by ''instrumentalities'' of government, such as a regional water management district?

(b) An interest in real property that is less than full fee title, such as a conservation easement or a leasehold estate?

(c) Real property owned by tribal governments?

(d) Real property held by nongovernmental entities, but acquired with Federal financial assistance. In such cases, the Federal awarding agency does not have an ownership interest in the property, but it does have the following legal rights defined in regulation:

(1) Approving encumbrances to the title,

(2) Approving or giving instructions for disposition of real property no longer needed for its originally authorized purpose, and

(3) Receiving a share of the proceeds resulting from disposition of real property when the Federal awarding agency authorizes sale on the open market or transfer to the grant recipient.

Response: Examples (a), (b), and (c) would be public land for purposes of the Policy. However, if the government or public agency owns a fee with exceptions to title as in example (b), the Policy applies only to the interest owned by a government or public agency. It has no effect on interests not owned by a government or public agency. Example (d) would be considered public land only if the interest in real property is owned by the Federal Government; a State, tribal, or local government; or an agency or instrumentality of one of these governments. We have provided clarification in Appendix C, section H.

Comment (119): One commenter said terms in section 5.7.2, Recommendations for Locating Mitigation on Public or Private Lands, had implications for the material in Appendix C and were unclear. Specifically, they asked for an explanation of the difference between the proposed language of this Policy in section 5.7.2: ''measures the public agency is foreseeably expected to implement absent the mitigation'' and the language of the regulations jointly issued by the EPA at 40 CFR 230.93(a)(3) and the Corps at 33 CFR 332.3(a)(3): ''Credits for compensatory mitigation projects on *public* land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above *those provided by public programs already planned or in place.*''

Response: The language in section 5.7.2 and in the EPA/Corps regulation has different purposes, but both are applications of the principle of *additionality,* which this Policy defines as: A compensatory mitigation measure is additional when the benefits of a compensatory mitigation measure improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure.

The measures described in section 5.7.2 are effectively those described in the regulatory language as: Those provided by public programs already planned.

Appendix C, section H explains how to determine what qualifies as ''baseline conditions . . . that a public land management agency is foreseeably expected to implement absent the mitigation.''

Comment (120): One commenter addressed Appendix C, section H, Can a mitigation proposal be located on land acquired under a Federal financial assistance award? They said despite this section title, section 5.7.2, Recommendations for Locating Mitigation on Public or Private Lands, seems to apply to everything covered by the Policy, including financial assistance awards. They suggested that if section 5.7.2 applies to financial assistance awards, we clarify that Appendix C, section H supplements section 5.7.2.

Response: Most lands acquired under Service-approved or administered financial assistance awards are dedicated to conservation, but not all are public land. We have revised section H to acknowledge the applicability of section 5.7.2 to land already designated for conservation.

Comment (121): One commenter said the Authorities and Direction for Service Mitigation Recommendations listed in Appendix A needed additional references related to the financial assistance programs described in Appendix C. They suggested the following authorities for the two Service grant programs that have an authorizing statute or regulation prohibiting the use mitigation in the program be added to Appendix A:

North American Wetlands Conservation Act, 16 U.S.C. 4401 *et seq.*

National Coastal Wetlands Conservation Grants, 16 U.S.C. 3954, 50 CFR part 84.

Response: We added the North American Wetlands Conservation Act, 16 U.S.C. 4401 *et seq.* to Appendix A, section B, Additional Legislative Authorities. We added the National Coastal Wetlands Conservation Grants, 16 U.S.C. 3954, 50 CFR part 84 to Appendix A, section C, Implementing Regulations.

Comment (122): One commenter addressed the ineligibility of the use of mitigation in the National Coastal Wetlands Conservation program. They suggested that inserting the following as the ninth sentence in the introductory paragraph would avoid any potential misunderstandings: Consistent with the Service's Mitigation Policy, the regulations at 50 CFR part 84 authorize the use of Natural Resource Damage Assessment funds as match in the National Coastal Wetlands Conservation Program.

Response: We added the sentence as recommended.

Comment (123): For further clarity, one commenter recommended editing in Appendix C, section B, Where do most mitigation issues occur in financial assistance? Specifically, they suggested the first sentence in the answer to Question B be replaced with: Most mitigation issues in financial assistance relate to: (a) The proposed use of mitigation funds on land acquired with Federal financial assistance, and (b) the use as match of mitigation funds and in-kind contributions derived from mitigation funds.

Response: We replaced the first sentence as recommended by the commenter.

Comment (124): One commenter noted that in a recent mitigation project proposed for siting on land acquired with Federal financial assistance, the landowner asserted that the mitigation project should be acceptable to the Service because it was acceptable to the Corps. To address such implementation questions, the commenter suggested adding a new section that examines the responsibilities of the Corps and the Service for approving specific decisions related to the limited role of mitigation in financial assistance programs. They said, where appropriate, the new section would give the legal basis of their respective roles.

Response: The District Engineer of the Corps has the authority to impose conditions on a Department of the Army (DA) permit under the CWA, including conditions on the type and location of compensatory mitigation. However, no mitigation project, whether it is under the authority of the CWA or any other Federal statute, can interfere with the purposes of a financially assisted project. If the conditions in a DA permit will affect a financially assisted project for which the Service is responsible, those conditions must be acceptable to the Service before the permitted activity is initiated.

Even if a mitigation project under the CWA will not affect one of its financially assisted projects, the Service may be a member of the Interagency Review Team that reviews documentation for the establishment of mitigation banks and in-lieu fee programs. The respective roles of the Corps and the Service in carrying out the compensatory mitigation requirements of the CWA are described in more detail in 33 CFR parts 325 and 332, and 40 CFR part 230.

For mitigation projects that will affect a financially assisted project in a program where it approves or administers awards, the Service is responsible for the following decisions:

(a) Can real property and equipment acquired under a Service-administered financial assistance award be used for purposes of compensatory mitigation?

The Service makes this decision based on 2 CFR 200.311(b) and 2 CFR 200.313(a–c), which addresses real property and equipment (respectively), with special reference to the Service's authority to approve encumbrances and its right to receive a share of proceeds from a disposition when property is no longer needed for the purposes of the original award. 50 CFR 80.132–135 also apply to real property acquired under the Wildlife Restoration program, Sport Fish Restoration program, and Enhanced Hunter Education and Safety programs, and will guide mitigation in financial assistance programs.

(b) Can real property that includes a capital improvement funded by a Service-administered financial assistance award be used for purposes of compensatory mitigation during the useful life of the capital improvement?

The Service makes this decision based on 2 CFR 200.311(b). Regulations at 50 CFR 80.132–135 may also be applicable to a capital improvement funded by an award from the Wildlife Restoration program, Sport Fish Restoration program, and Enhanced Hunter Education and Safety programs. ''Capital improvement'' means (a) a structure that costs at least $25,000 to build; or (b) the alteration, renovation, or repair of a structure that increases the structure's useful life by at least 10 years or its market value by at least $25,000. A financial assistance program may have its own definitions of capital improvement for purposes of compensatory mitigation as long as it includes all capital improvements as defined here.

(c) Can real property managed, maintained, or operated with funding from a Service-administered financial assistance award be used for purposes of compensatory mitigation?

The Service makes this decision based on 2 CFR 200.300.311(a) and (b). Regulations at 50 CFR 80.134 also apply to real property managed, maintained, or operated by an award from the Wildlife Restoration program, Sport Fish Restoration program, and Enhanced Hunter Education and Safety programs.

(d) Are funds or in-kind contributions that have been used or will be used to satisfy compensatory-mitigation requirements eligible as match in a Service-administered financial assistance program?

The Service makes this decision based on 2 CFR 200.300; 2 CFR 200.403(a); and 2 CFR 200.404(a), (b), and (d). For compensatory mitigation required by the CWA, the Service makes this decision in compliance with 33 CFR 332.3(j)(2) and 40 CFR 230.93(j)(2). The final rule for these regulations was published in the **Federal Register** on April 10, 2008 (73 FR 19594). Its preamble clarifies the intent of §§ 332.3(j)(2) and 230.93(j)(2) in the following example: . . . if a Federal program has a 50 percent landowner match requirement, neither the federally funded portion of the project, nor the landowner's 50 percent match, which is part of the requirements for obtaining

Federal funding, may be used for compensatory mitigation credits. However, if the landowner provides a greater than 50 percent match, any improvements provided by the landowner over and above those required for federal funding could be used as compensatory mitigation credits.

National Environmental Policy Act (NEPA)

We have analyzed this Policy in accordance with the criteria of the National Environmental Policy Act, as amended (NEPA) (42 U.S.C. 4332(c)), the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), and the Department of the Interior's NEPA procedures (516 DM 2 and 8; 43 CFR part 46). Issuance of policies, directives, regulations, and guidelines are actions that may generally be categorically excluded under NEPA (43 CFR 46.210(i)). Based on comments received, we determined that a categorical exclusion can apply to this Policy, but nevertheless, the Service chose to prepare an environmental assessment (EA) to inform decision makers and the public regarding the possible effects of the policy revisions. We announced our intent to prepare an EA pursuant to NEPA when we published the proposed revised policy. We requested comments on the scope of the NEPA review, information regarding important environmental issues that should be addressed, the alternatives to be analyzed, and issues that should be addressed at the programmatic stage in order to inform the site-specific stage during the comment period on the proposed revised policy. Comments from the public were considered in the drafting of the final EA. The final EA is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–HQ–ES–2015–0126.

Authority

The multiple authorities for this action include the: Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*); Fish and Wildlife Coordination Act, as amended, (16 U.S.C. 661–667(e)); National Environmental Policy Act (42 U.S.C. 4371 *et seq.*); and others identified in section 2 and Appendix A of this Policy.

Mitigation Policy of the U.S. Fish and Wildlife Service

1. Purpose

This Policy applies to all actions for which the U.S. Fish and Wildlife Service (Service) has specific authority to either recommend or to require the mitigation of impacts to fish, wildlife, plants, and their habitats. Most applications of this Policy are advisory. The purpose of this Policy is to provide guidance to Service personnel in formulating and delivering recommendations and requirements to action agencies and project proponents so that they may avoid, minimize, and compensate for action-caused impacts to species and their habitats.

The guidance of this Policy:

- Provides a framework for formulating measures to maintain or improve the status of affected species through an application of the mitigation hierarchy informed by a valuation of their affected habitats;
- will help align Service-recommended mitigation with conservation objectives for affected resources and the strategies for achieving those objectives at ecologically relevant scales;
- will allow action agencies and proponents to anticipate Service recommendations and plan for mitigation measures early, thus avoiding delays and assuring equal consideration of fish and wildlife conservation with other action purposes; and
- allows for variations appropriate to action- and resource-specific circumstances.

This Policy supersedes the Fish and Wildlife Service Mitigation Policy (46 FR 7644–7663) published in the **Federal Register** on January 23, 1981. Definitions for terms used throughout this Policy are provided in section 6.

2. Authority

The Service has jurisdiction over a broad range of fish and wildlife resources. Service authorities are codified under multiple statutes that address management and conservation of natural resources from many perspectives, including, but not limited to, the effects of land, water, and energy development on fish, wildlife, plants, and their habitats. We list below the statutes that provide the Service, directly or indirectly through delegation from the Secretary of the Interior, specific authority for conservation of these resources and that give the Service a role in mitigation planning for actions affecting them. We further discuss the Service's mitigation planning role under each statute and list additional authorities in Appendix A.

- Bald and Golden Eagle Protection Act, 16 U.S.C. 668 *et seq.* (Eagle Act)
- Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.* (ESA)
- Federal Land and Policy Management Act, 43 U.S.C. 1701 *et seq.* (FLPMA)
- Federal Power Act, 16 U.S.C. 791–828c (FPA)
- Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1251 *et seq.* (CWA)
- Fish and Wildlife Conservation Act, 16 U.S.C. 2901–2912
- Fish and Wildlife Coordination Act, as amended, 16 U.S.C 661–667(e) (FWCA)
- Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. 1361 *et seq.* (MMPA)
- Migratory Bird Treaty Act, 16 U.S.C. 703–712 (MBTA)
- National Environmental Policy Act, 42 U.S.C. 4371 *et seq.* (NEPA)
- National Wildlife Refuge System Administration Act, 16 U.S.C. 668dd *et seq.*

While all of the statutes listed above give the Service an advisory role in fish and wildlife mitigation, not all of them give the Service authority to require others to implement the mitigation measures we identify. Circumstances under which the Service has specific authority to require, consistent with applicable laws and regulations, one or more forms of mitigation for impacts to fish and wildlife resources include:

- Actions that the Service carries out, *i.e.,* the Service is the action proponent;
- actions that the Service funds;
- actions to restore damages to fish and wildlife resources caused by spills of oil and other hazardous materials under the Oil Pollution Act and the Comprehensive Environmental Response, Compensation, and Liability Act;
- actions of other Federal agencies that require an incidental take statement under section 7 of the ESA (measures to minimize the impact of the incidental taking on the species);
- actions of non-Federal entities that require an incidental take permit under section 10 of the ESA (measures to minimize and mitigate the impacts of the taking on the species to the maximum extent practicable);
- fishway prescriptions under section 18 of the FPA, which minimize, rectify, or reduce over time through management, the impacts of non-Federal hydropower facilities on fish passage;
- license conditions under section 4(e) of the FPA for non-Federal hydropower facilities affecting Service properties (*e.g.,* a National Wildlife Refuge) for the protection and utilization of the Federal reservation consistent with the purpose for which such reservation was created or acquired;
- actions that require a ''Letter of Authorization'' or ''Incidental

Harassment Authorization'' under the MMPA; and

- actions that require a permit for non-purposeful (incidental) take of eagles under the Eagle Act.

Our aim with this Policy is to provide a common framework for Service discretion across the full range of our authorities, including those listed above for which the Service may require mitigation, but the Policy does not alter or substitute for the regulations implementing any of these authorities.

3. Scope

3.1. Actions

This Policy applies to all Service activities related to evaluating the effects of proposed actions and subsequent recommendations or requirements to mitigate impacts to resources, defined in section 3.2. For purposes of this Policy, actions include: (a) Activities conducted, authorized, licensed, or funded by Federal agencies (including Service-proposed activities); (b) non-Federal activities to which one or more of the Service's statutory authorities apply to make mitigation recommendations or specify mitigation requirements; and (c) the Service's provision of technical assistance to partners in collaborative mitigation planning processes that occur outside of individual action review.

3.2. Resources

This Policy may apply to specific resources based on any Federal authority or combination of authorities, such as treaties, statutes, regulations, or Executive Orders, that empower the Federal Government to manage, control, or protect fish, wildlife, plants, and their habitats that are affected by proposed actions. Such Federal authority need not be exclusive, comprehensive, or primary, and in many cases, may overlap with that of States or tribes or both.

This Policy applies to those resources identified in statute or implementing regulations that provide the Service authority to make mitigation recommendations or specify mitigation requirements for the actions described in section 3.1. The scope of resources addressed by this Policy is inclusive of, but not limited to, the Federal trust fish and wildlife resources concept.

The Service has traditionally described its trust resources as migratory birds, federally listed endangered and threatened species, certain marine mammals, and inter-jurisdictional fish. Some authorities narrowly define or specifically identify covered taxa, such as threatened and endangered species, marine mammals, or the species protected by the Migratory Bird Treaty Act. This Policy applies to trust resources; however, Service Regions and field stations retain discretion to recommend mitigation for other resources under appropriate authorities.

The types of resources for which the Service is authorized to recommend mitigation also include those that contribute broadly to ecological functions that sustain species. The definitions of the terms ''wildlife'' and ''wildlife resources'' in the Fish and Wildlife Coordination Act include birds, fishes, mammals, and all other classes of wild animals, and all types of aquatic and land vegetation upon which wildlife is dependent. Section 404 of the Clean Water Act (33 CFR 320.4) codifies the significance of wetlands and other waters of the United States as important public resources for their habitat value, among other functions.

The Endangered Species Act envisions a broad consideration when describing its purposes as providing a means whereby the ecosystems upon which endangered and threatened species depend may be conserved and when directing Federal agencies at section 7(a)(1) to utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of listed species. The purpose of the National Environmental Policy Act (NEPA) also establishes an expansive focus in promoting efforts that will prevent or eliminate damage to the environment while stimulating human health and welfare. In NEPA, Congress recognized the profound impact of human activity on the natural environment, particularly through population growth, urbanization, industrial expansion, resource exploitation, and new technologies. NEPA further recognized the critical importance of restoring and maintaining environmental quality, and declared a Federal policy of using all practicable means and measures to create and maintain conditions under which humans and nature can exist in productive harmony. These statutes address systemic concerns and provide authority for protecting habitats and landscapes.

3.3. Exclusions

This Policy does not apply retroactively to completed actions or to actions specifically exempted under statute from Service review. It does not apply where the Service has already agreed to a mitigation plan for pending actions, except where: (a) New activities or changes in current activities would result in new impacts; (b) a law enforcement action occurs after the Service agrees to a mitigation plan; (c) an after-the-fact permit is issued; or (d) where new authorities or failure to implement agreed-upon recommendations, warrant new mitigation planning. Service personnel may elect to apply this Policy to actions that are under review as of the date of its final publication.

3.4. Applicability to Service Actions

This Policy applies to actions that the Service proposes, including those for which the Service is the lead or co-lead Federal agency for compliance with NEPA. However, it applies only to the mitigation of impacts to fish, wildlife, plants, and their habitats that are reasonably foreseeable from such proposed actions. When it is the Service that proposes an action, the Service acknowledges its responsibility, during early planning for design of the action, to consult with Tribes, and to consider the effects to, and mitigation for, impacts to resources besides fish, wildlife, plants, and their habitats (*e.g.,* cultural and historic resources, traditional practices, environmental justice, public health, recreation, other socio-economic resources, etc.). Consistent with NEPA (42 U.S.C. 4332(A)) (40 CFR 1500.2 and 1501.2) and the CEQ and the Advisory Council on Historic Preservation (ACHP), *NEPA NHPA Section 106 Handbook,* these reviews will be integrated into the decisionmaking process at the earliest possible point in planning for the action. This Policy neither provides guidance nor supersedes existing guidance for mitigating impacts to resources besides those defined in section 3.2, Resources.

NEPA requires the action agency to evaluate the environmental effects of alternative proposals for agency action, including the environmental effects of proposed mitigation (*e.g.,* effects on historic properties resulting from habitat restoration). Considering impacts to resources besides fish and wildlife requires the Service to coordinate with entities having jurisdiction by law, special expertise, or other applicable authority. Appendix B further discusses the Service's consultation responsibilities with tribes related to fish and wildlife impact mitigation, *e.g.,* statutes that commonly compel the Service to address the possible environmental impacts of mitigation activities for fish and wildlife resources. It also supplements existing Service NEPA guidance by describing how this Policy integrates with the Service's decisionmaking process under NEPA.

3.5. Financial Assistance Programs and Mitigation

The Service has more than 60 financial assistance programs, which collectively disburse more than $1 billion annually to non-Federal recipients through grants and cooperative agreements. Most programs leverage Federal funds by requiring or encouraging the commitment of matching cash or in-kind contributions. Recipients have acquired approximately 10 million acres in fee title, conservation easements, or leases through these programs. To foster consistent application of financial assistance programs with respect to mitigation processes, Appendix C addresses the limited role that specific types of mitigation can play in financial assistance programs.

4. General Policy and Principles

The mission of the Service is working with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. In furtherance of this mission, the Service has a responsibility to ensure that impacts to fish, wildlife, plants, and their habitats in the United States, its territories, and possessions are considered when actions are planned, and that such impacts are mitigated so that these resources may provide a continuing benefit to the American people. Consistent with Congressional direction through the statutes listed in the ''Authority'' section of this Policy, the Service will provide timely and effective recommendations to conserve, protect, and enhance fish, wildlife, plants, and their habitats when proposed actions may reduce the benefits thereof to the public.

Fish and wildlife and their habitats are resources that provide commercial, recreational, social, and ecological value to the Nation. For Tribal Nations, specific fish and wildlife resources and associated landscapes have traditional cultural and religious significance. Fish and wildlife are conserved and managed for the people by State, Federal, and tribal governments. If reasonably foreseeable impacts of proposed actions are likely to reduce or eliminate the public benefits that are provided by such resources, these governments have shared responsibility or interest in recommending means and measures to mitigate such losses. Accordingly, in the interest of serving the public, it is the policy of the U.S. Fish and Wildlife Service to seek to mitigate losses of fish, wildlife, plants, their habitats, and uses thereof resulting from proposed actions.

The following fundamental principles will guide Service-recommended mitigation, as defined in this Policy, across all Service programs.

a. *The goal is a net conservation gain.* The Service's mitigation planning goal is to improve (*i.e.,* a net gain) or, at minimum, to maintain (*i.e.,* no net loss) the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority. As informed by established conservation objectives and strategies, Service mitigation recommendations will focus primarily on important, scarce, or sensitive resources, and will specify the means and measures that achieve the planning goal.

b. *Observe an appropriate mitigation sequence.* The Service recognizes it is generally preferable to take all appropriate and practicable measures to avoid and minimize adverse effects to resources, in that order, before compensating for remaining impacts. However, to achieve the best possible conservation outcomes, the Service recognizes that some limited circumstances may warrant a departure from this preferred sequence. The Service will prioritize the applicable mitigation types based on a valuation of the affected resources as described in this Policy in a landscape conservation context.

c. *Avoid high-value habitats.* The Service will seek avoidance of all impacts to high-value habitats. High-value habitats make an exceptional contribution to the conservation of species. Preventing impacts to these habitats is the most effective means of maintaining the current status of a species, which is the minimum goal of this Policy.

d. *A landscape approach will inform mitigation.* The Service will integrate mitigation into a broader ecological context with applicable landscape-level conservation plans, where available, when developing, approving, and implementing plans, and by steering mitigation efforts in a manner that will best contribute to achieving conservation objectives. The Service will consider climate change and other stressors that may affect ecosystem integrity and the resilience of fish and wildlife populations, which will inform the scale, nature, and location of mitigation measures necessary to achieve the best possible conservation outcome. The Service will foster partnerships with Federal and State partners, tribes, local governments, and other stakeholders to design mitigation strategies that will prevent fragmented landscapes and restore core areas and connectivity necessary to sustain species.

e. *Ensure consistency and transparency.* The Service will use timely and transparent processes that provide predictability and uniformity through the consistent application of standards and protocols as may be developed to achieve effective mitigation.

f. *Science-based mitigation.* The Service will use the best available science in formulating and monitoring the long-term effectiveness of its mitigation recommendations and decisions, consistent with all applicable Service science policy.

g. *Durability.* The Service will recommend or require that mitigation measures are durable, and at a minimum, maintain their intended purpose for as long as impacts of the action persist on the landscape. The Service will recommend or require that action proponents provide assurances of durability, including financial assurances, to support the development, maintenance, and long-term effectiveness of the mitigation measures.

h. *Effective compensatory mitigation.* The Service will recommend implementing compensatory mitigation before the impacts of an action occur. The Service will recommend compensatory mitigation that provides benefits to the affected species that are additional to the benefits of existing conservation efforts or those planned for the reasonably foreseeable future. To ensure consistent implementation of compensatory mitigation, the Service will support the application of equivalent standards, regardless of the mechanism used to provide compensatory mitigation.

5. Mitigation Framework

This section of the Policy provides the conceptual framework and guidance for implementing the general policy and principles declared in section 4 in an action- and landscape-specific mitigation context. Implementation of the general policy and principles as well as the direction provided in 600 DM 6 occurs by integrating landscape scale decisionmaking within the Service's existing process for assessing effects of an action and formulating mitigation measures. The key terms used in describing this framework are defined in section 6, Definitions.

The Service recommends or requires mitigation under one or more Federal authorities (section 2) when necessary and appropriate to avoid, minimize, and/or compensate for impacts to resources (section 3.2) resulting from proposed actions (section 3.1). Our goal for mitigation is to achieve a net conservation gain or, at minimum, no net loss of the affected resources (section 4). Sections 5.1 through 5.9, summarized below, provide an overview of the mitigation framework and describe how the Service will engage actions as part of its process of assessing the effects of an action and formulating mitigation measures that would achieve this goal. Variations appropriate to action-specific circumstances are permitted; however, the Service will provide action proponents with the reasons for such variations.

Synopsis of the Service Mitigation Framework

5.1. Integrating Mitigation Planning with Conservation Planning. The Service will utilize landscape-scale approaches and landscape conservation planning to inform mitigation, including identifying areas for mitigation that are most important for avoiding and minimizing impacts, improving habitat suitability, and compensating for unavoidable impacts to species. Proactive mitigation plans can achieve efficiencies for attaining conservation objectives while streamlining the planning and regulatory processes for specific landscapes and/or classes of actions within a landscape.

5.2. Collaboration and Coordination. At both the action and landscape scales, the Service will collaborate and coordinate with action proponents and with our State, Federal, and tribal conservation partners in mitigation.

5.3. Assessment. Assessing the effects of proposed actions and proposed mitigation measures is the basis for formulating a plan to meet the mitigation policy goal. This Policy does not endorse specific methodologies, but does describe several principles of effects assessment and general characteristics of methodologies that the Service will use in implementing this Policy.

5.4. Evaluation Species. The Service will identify the species evaluated for mitigation purposes. The Service should select the smallest set of evaluation species necessary, but include all species for which the Service is required to issue biological opinions, permits, or regulatory determinations. When actions would affect multiple resources of conservation interest, evaluation species should serve to best represent other affected species or aspects of the environment. This section describes characteristics of evaluation species that are useful in planning mitigation.

5.5. Habitat Valuation. The Service will assess the value of affected habitats to evaluation species based on their scarcity, suitability, and importance to achieving conservation objectives. This valuation will determine the relative emphasis the Service will place on avoiding, minimizing, and compensating for impacts to habitats of evaluation species.

5.6. Means and Measures. The means and measures that the Service recommends for achieving the mitigation policy goal are action- and resource-specific applications of the three general types of impact mitigation (avoid, minimize, and compensate). This section provides an expanded definition of each type, explains its place in this Policy, and lists generalized examples of its intended use in Service mitigation recommendations and requirements.

5.7. Recommendations. This section describes general standards for Service recommendations, and declares specific preferences for various characteristics of compensatory mitigation measures, *e.g.,* timing, location.

5.8. Documentation. Service involvement in planning and implementing mitigation requires documentation that is commensurate in scope and level of detail with the significance of the potential impacts to resources. This section provides an outline of documentation elements that are applicable at three different stages of the mitigation planning process: Early planning, effects assessment, and final recommendations.

5.9. Followup. Determining whether Service mitigation recommendations were adopted and effective requires monitoring, and when necessary, corrective action.

5.1. Integrating Mitigation With Conservation Planning

The Service's mitigation goal is to improve or, at minimum, maintain the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority (see section 4). This Policy provides a framework for formulating mitigation means and measures (see section 5.6) intended to efficiently achieve the mitigation planning goal based upon best available science. This framework seeks to integrate mitigation recommendations and requirements into conservation planning to better protect or enhance populations and those features on a landscape that are necessary for the long-term persistence of biodiversity and ecological functions. Functional ecosystems enhance the resilience of fish and wildlife populations challenged by the widespread stressors of climate change, invasive species, and the continuing degradation and loss of habitat through human alteration of the landscape. Achieving the mitigation goal of this Policy involves:

- Avoiding and minimizing those impacts that most seriously compromise resource sustainability;
- rectifying and reducing over time those impacts where restoring or maintaining conditions in the affected area most efficiently contributes to resource sustainability; and
- strategically compensating for impacts so that actions result in an improvement in the affected resources, or at a minimum, result in a no net loss of those resources.

The Service recognizes that we will engage in mitigation planning for actions affecting resources in landscapes for which conservation objectives and strategies to achieve those objectives are not yet available, well developed, or formally adopted. The landscape-level approach to resource decisionmaking described in this Policy and in the Departmental Manual (600 DM 6.6D) applies in contexts with or without established conservation plans, but it will achieve its greatest effectiveness when integrated with such planning.

When appropriate, the Service will seek a net gain in the conservation outcome of actions we engage for purposes of this Policy. It is consistent with the Service's mission to identify and promote opportunities for resource enhancement during action planning, *i.e.,* to decrease the gap between the current and desired status of a resource. Mitigation planning often presents practicable opportunities to implement mitigation measures in a manner that outweighs impacts to affected resources. When resource enhancement is also consistent with the mission, authorities, and/or responsibilities of action proponents, the Service will encourage proponents to develop measures that result in a net gain toward achieving conservation objectives for the resources affected by their actions. Such proponents include, but are not limited to, Federal agencies when responsibilities such as the following apply to their actions:

- Carry out programs for the conservation of endangered and threatened species (Endangered Species Act, section 7(a)(1));
- consult with the Service regarding both mitigation and enhancement in water resources development (Fish and Wildlife Coordination Act, section 2);

• enhance the quality of renewable resources (National Environmental Policy Act, section 101(b)(6)); and/or
• restore and enhance bird habitat (Executive Order 13186, section 3(e)(2)).

To serve the public interest in fish and wildlife resources, the Service works under various authorities (see section 2) with partners to establish conservation objectives for species, and to develop and implement plans for achieving such objectives in various landscapes. We define a landscape as an area encompassing an interacting mosaic of ecosystems and human systems that is characterized by common management concerns (see section 6, Definitions). Relative to this Policy, such management concerns relate to conserving species. The geographic scale of a landscape is variable, depending on the interacting elements that are meaningful to particular conservation objectives and may range in size from large regions to a single watershed or habitat type. When proposed actions may affect species in a landscape addressed in one or more established conservation plans, such plans will provide the basis for Service recommendations to avoid and minimize particular impacts, rectify and reduce over time others, and compensate for others. The criteria in this Policy for selecting evaluation species (section 5.4) and assessing the value of their affected habitats (section 5.5) are designed to place mitigation planning in a landscape conservation context by applying the various types of mitigation where they are most effective at achieving the mitigation policy goal.

The Service recognizes the inefficiency of automatically applying under all circumstances each mitigation type in the traditional mitigation sequence. As DM 6 also recognizes, in limited situations, specific circumstances may exist that warrant an alternative from this sequence, such as when seeking to achieve the maximum benefit to affected resources and their values, services, and functions. For example, the cost and effort involved in avoiding impacts to a habitat that is likely to become isolated or otherwise unsuitable for evaluation species in the foreseeable future may result in less conservation when compared to actions that achieve a greater conservation benefit if used to implement offsite compensatory mitigation in area(s) that are more important in the long term to achieving conservation objectives for the affected resource(s). Conversely, onsite avoidance is the priority where impacts would substantially impair progress toward achieving conservation objectives.

The Service will rely upon existing conservation plans that are based upon the best available scientific information, consider climate-change adaptation, and contain specific objectives aimed at the biological needs of the affected resources. Where existing conservation plans are not available that incorporate all of these elements or are not updated with the best available scientific information, Service personnel will otherwise incorporate the best available science into mitigation decisions and recommendations and continually seek better information in areas of greatest uncertainty. Service personnel will use a landscape approach based on analysis of information regarding resource needs, including priorities for impact avoidance and potential compensatory mitigation sites. Such information includes development trends and projected habitat loss or conversion, cumulative impacts of past development activities, the presence and needs of species, and restoration potential. Service personnel may access this information in existing mapping products, survey data, reports, studies, or other sources.

Proactive Mitigation Planning at Larger Scales

The Service supports the planning and implementation of proactive mitigation plans in a landscape conservation context, *i.e.,* mitigation developed before actions are proposed, particularly in areas where multiple similar actions are expected to adversely affect a similar suite of species. Proactive mitigation plans should complement or tier from existing conservation plans relevant to the affected resources (*e.g.,* recovery plans, habitat conservation plans, or nongovernmental plans). Effective and efficient proactive mitigation identifies high-priority resources and areas on a regional or landscape scale, prior to and without regard to specific proposed actions, in which to focus: (a) Resource protection for avoiding impacts; (b) resource enhancement or protection for compensating unavoidable impacts; and (c) measures to improve the resilience of resources in the face of climate change or otherwise increase the ability to adapt to climate and other landscape change factors. In many cases, the Service can take advantage of available Federal, State, tribal, local, or nongovernmental plans that identify such priorities.

Developing proactive mitigation should involve stakeholders in a transparent process for defining objectives and the means to achieving those objectives. Planning for proactive mitigation should establish standards for determining the appropriate scale, type, and location of mitigation for impacts to specific resources within a specified area. Adopted plans that incorporate these features are likely to substantially shorten the time needed for regulatory review and approval as actions are subsequently proposed. Proactive mitigation plans, not limited to those developed under a programmatic NEPA decisionmaking process or a Habitat Conservation Plan process, will provide efficiencies for project-level Federal actions and will also better address potential cumulative impacts.

Procedurally, proactive mitigation should draw upon existing land-use plans and databases associated with human infrastructure, including transportation, and water and energy development, as well as ecological data and conservation plans for floodplains, water quality, high-value habitats, and key species. Stakeholders and Service personnel process these inputs to design a conservation network that considers needed community infrastructure and clearly prioritizes the role of mitigation in conserving natural features that are necessary for long-term maintenance of ecological functions on the landscape. As development actions are proposed, an effective proactive regional mitigation plan will provide a transparent process for identifying appropriate mitigation opportunities within the regional framework and selecting the mitigation projects with the greatest aggregated conservation benefits.

5.2. Collaboration and Coordination

The Service shares responsibility for conserving fish and wildlife with State, local, and tribal governments and other Federal agencies and stakeholders. Our role in mitigation may involve Service biological opinions, permits, or other regulatory determinations as well as providing technical assistance. The Service must work in collaboration and coordination with other governments, agencies, organizations, and action proponents to implement this Policy. Whenever appropriate, the Service will:

a. Coordinate activities with the appropriate Federal, State, tribal, and local agencies and other stakeholders who have responsibilities for fish and wildlife resources when developing mitigation recommendations for resources of concern to those entities;

b. consider resources and plans made available by State, local, and tribal governments and other Federal agencies;

c. seek to apply compatible approaches and avoid duplication of efforts with those same entities;

d. collaborate with Federal and State agencies, tribes, local agencies and other stakeholders in the formulation of landscape-level mitigation plans; and

e. cooperate with partners to develop, maintain, and disseminate tools and conduct training in mitigation methodologies and technologies.

The Service should engage agencies and applicants during the early planning and design stage of actions. The Service is encouraged to engage in early coordination during the NEPA Federal decisionmaking process to resolve issues in a timely manner (516 DM 8.3). Coordination during early planning, including participation as a cooperating agency or on interdisciplinary teams, can lead to better conservation outcomes. For example, the Federal Highway Administration (FHWA) is most likely to adopt alternatives that avoid or minimize impacts when the Service provides early comments under section 4(f) of the Transportation Act of 1966 relative to impacts to refuges or other Service-supported properties. When we identify potential impacts to tribal interests, the Service, in coordination with affected tribes, may recommend mitigation measures to address those impacts. Recommendations will carry more weight when the Service and tribe have overlapping authority for the resources in question and when coordinated through government-to-government consultation.

Coordination and collaboration with stakeholders allows the Service to confirm that the persons conducting mitigation activities, including contractors and other non-Federal persons, have the appropriate experience and training in mitigation best practices, and where appropriate, include measures in employee performance appraisal plans or other personnel or contract documents, as necessary. Similarly, this allows for the development of rigorous, clear, and consistent guidance, suitable for field staff to implement mitigation or to deny authorizations when impacts to resources and their values, services, and functions are not acceptable. Collaboratively working across Department of the Interior bureaus and offices allows the Service to conduct periodic reviews of the execution of mitigation activities to confirm consistent implementation of the principles of this Policy.

When collaborating with stakeholders, Service staff should utilize the principles and recommendations set forth in the Council on Environmental Quality handbook, *Collaboration in NEPA—a Handbook for NEPA Practitioners* (2007).

5.3. Assessment

Effects are changes in environmental conditions caused by an action that are relevant to the resources (fish, wildlife, plants, and their habitats) covered by this Policy. This Policy addresses mitigation for impacts to these resources. We define impacts as adverse effects relative to the affected resources. Impacts may be direct, indirect, or cumulative. Indirect effects are often major drivers in ecological systems. Because indirect impacts from an action occur later in time or farther removed in distance, they may have landscape-scale implications. Mitigation is the general label for all measures implemented to avoid, minimize, and/or compensate for its predicted impacts.

The Service should design mitigation measures to achieve the mitigation goal, when appropriate, of net gain, or a minimum of no net loss for affected resources. This design should take into account the degree of risk and uncertainty associated with both predicted project effects and predicted outcomes of the mitigation measures. The following principles shall guide the Service's assessment of anticipated effects and the expected effectiveness of mitigation measures.

1. The Service will consider action effects and mitigation outcomes within planning horizons commensurate with the expected duration of the action's impacts. In predicting whether mitigation measures will achieve the mitigation policy goal for the affected resources during the planning horizon, the Service will recognize that predictions about the more-distant future are more uncertain and adjust the mitigation recommendations accordingly.

2. Action proponents should provide reasonable predictions about environmental conditions relevant to the affected area both with and without the action over the course of the planning horizon (*i.e.,* baseline condition). If such predictions are not provided, the Service will assess the effects of a proposed action over the planning horizon considering: (a) The full spatial and temporal extent of resource-relevant direct and indirect effects caused by the action, including resource losses that will occur during the period between implementation of the action and the mitigation measures; and (b) any cumulative effects to the affected resources resulting from existing concurrent or reasonably foreseeable future activities in the landscape context. When assessing the affected area without the action, the Service will also evaluate: (a) Expected natural species succession; (b) implementation of approved restoration/improvement plans; and (c) reasonably foreseeable conditions resulting directly or indirectly from any other factors that may affect the evaluation of the project including, but not limited to, climate change.

3. The Service will use the best available effect assessment methodologies that:

a. Display assessment results in a manner that allows decisionmakers, action proponents, and the public to compare present and predicted future conditions for affected resources;

b. measure adverse and beneficial effects using equivalent metrics to determine mitigation measures necessary to achieve the mitigation policy goal for the affected resources (*e.g.,* measure both adverse and beneficial effects to a species' food resources via changes to the density or spatial extent of the food resource);

c. predict effects over time, including changes to affected resources that would occur with and without the action, changes induced by climate change, and changes resulting from reasonably foreseeable actions;

d. are practical, cost-effective, and commensurate with the scope and scale of impacts to affected resources;

e. are sufficiently sensitive to estimate the type and relative magnitude of effects across the full spectrum of anticipated beneficial and adverse effects;

f. may integrate predicted effects with data from other disciplines such as cost or socioeconomic analysis; and

g. allow for incorporation of new data or knowledge as action planning progresses.

4. Where appropriate effects assessment methods or technologies useful in valuation of mitigation are not available, Service employees will apply best professional judgment supported by best available science to assess impacts and to develop mitigation recommendations.

5.4. Evaluation Species

Section 3.2 identifies the resources to which this Policy applies. Depending on the authorities under which the Service is engaging an action for mitigation purposes, these resources may include: Particular species; fish, wildlife, and plants more generally; and their habitats, including those contributing to ecological functions that sustain species. However, one or more species of conservation interest to the Service is always necessary to initiate mitigation planning, and under this Policy, the Service will explicitly identify evaluation species for mitigation purposes. In instances where the Service is required to issue a biological opinion, permit, or regulatory determination for specific species, the Service will identify such species, at minimum, as evaluation species.

Selecting evaluation species in addition to those for which the Service must provide a regulatory determination varies according to action-specific circumstances. In practice, an initial examination of the habitats affected and review of typically associated species of conservation interest are usually the first steps in identifying evaluation species. The purpose of Service mitigation planning is to develop a set of recommendations that would improve or, at minimum, maintain the current status of the affected resources. When available, conservation planning objectives (*i.e.,* the desired status of the affected resources) will inform mitigation planning (see section 5.1). Therefore, following those species for which we must provide a regulatory determination, species for which action effects would cause the greatest increase in the gap between their current and desired status are the principal choices for selection as evaluation species.

An evaluation species must occur within the affected area for at least one stage of its life history, but as other authorities permit, the Service may consider evaluation species that are not currently present in the affected area if the species is:

a. Identified in approved State or Federal fish and wildlife conservation, restoration, or improvement plans that include the affected area; or

b. likely to occur in the affected area during the reasonably foreseeable future with or without the proposed action due to natural species succession.

Evaluation species may or may not occupy the affected area year-round or when direct effects of the action would occur.

The Service should select the smallest set of evaluation species necessary to relate the effects of an action to the full suite of affected resources and applicable authorities, including all species for which the Service is required to issue opinions, permits, or regulatory determinations. When an action affects multiple resources, evaluation species should represent other affected species or aspects of the environment so that the mitigation measures formulated for the evaluation species will mitigate impacts to other similarly affected resources to the greatest extent possible. Characteristics of evaluation species that are useful in mitigation planning may include, but are not limited to, the following:

a. Species that are addressed in conservation plans relevant to the affected area and for which habitat objectives are articulated;

b. species strongly associated with an affected habitat type;

c. species for which habitat limiting factors are well understood;

d. species that perform a key role in ecological processes (*e.g.,* nutrient cycling, pollination, seed dispersal, predator-prey relations), which may, therefore, serve as indicators of ecosystem health;

e. species that require large areas of contiguous habitat, connectivity between disjunct habitats, or a distribution of suitable habitats along migration/movement corridors, which may, therefore, serve as indicators of ecosystem functions;

f. species that belong to a group of species (a guild) that uses a common environmental resource;

g. species for which sensitivity to one or more anticipated effects of the proposed action is documented;

h. species with special status (*e.g.,* species of concern in E.O. 13186, Birds of Conservation Concern);

i. species of cultural or religious significance to tribes;

j. species that provide monetary and non-monetary benefits to people from consumptive and non-consumptive uses including, but not limited to, fishing, hunting, bird watching, and educational, aesthetic, scientific, or subsistence uses;

k. species with characteristics such as those above that are also easily monitored to evaluate the effectiveness of mitigation actions; and/or

l. species that would be subject to direct mortality as a result of an action (*e.g.,* wind turbine).

5.5. Habitat Valuation

Species conservation relies on functional ecosystems, and habitat conservation is generally the best means of achieving species population objectives. Section 5.4 provides the guidance for selecting evaluation species to represent these habitat resources. The value of specific habitats to evaluation species varies widely, such that the loss or degradation of higher value habitats has a greater impact on achieving conservation objectives than the loss or degradation of an equivalent area of lower value habitats. To maintain landscape capacity to support species, our mitigation policy goal (Section 4) applies to all affected habitats of evaluation species, regardless of their value in a conservation context. However, the Service will recognize variable habitat value in formulating appropriate means and measures to mitigate the impacts of proposed actions, as described in this section. The primary purpose of habitat valuation is to determine the relative emphasis the Service will place on avoiding, minimizing, and compensating for impacts to habitats of evaluation species.

The Service will assess the overall value of affected habitats by considering their: (a) Scarcity; (b) suitability for evaluation species; and (c) importance to the conservation of evaluation species.

- *Scarcity* is the relative spatial extent (*e.g.,* rare, common, or abundant) of the habitat type in the landscape context.
- *Suitability* is the relative ability of the affected habitat to support one or more elements of the evaluation species' life history (reproduction, rearing, feeding, dispersal, migration, hibernation, or resting protected from disturbance, etc.) compared to other similar habitats in the landscape context. A habitat's ability to support an evaluation species may vary over time.
- *Importance* is the relative significance of the affected habitat, compared to other similar habitats in the landscape context, to achieving conservation objectives for the evaluation species. Habitats of high importance are irreplaceable or difficult to replace, or are critical to evaluation species by virtue of their role in achieving conservation objectives within the landscape (*e.g.,* sustain core habitat areas, linkages, ecological functions). Areas containing habitats of high importance are generally, but not always, identified in conservation plans addressing resources under Service authorities (*e.g.,* in recovery plans) or when appropriate, under authorities of partnering entities (*e.g.,* in State wildlife action plans, Landscape Conservation Cooperative conservation ''blueprints,'' etc.).

The Service has flexibility in applying appropriate methodologies and best available science when assessing the overall value of affected habitats, but also has a responsibility to communicate the rationale applied, as described in section 5.8 (Documentation Standards). These three parameters are the considerations that will inform Service determinations of the relative value of an affected habitat that will then be used to guide application of the mitigation hierarchy under this Policy.

For all habitats, the Service will apply appropriate and practicable measures to avoid and minimize impacts over time, generally in that order, before applying compensation as mitigation for remaining impacts. For habitats we determine to be of high-value (*i.e.,* scarce and of high suitability and high importance) however, the Service will seek avoidance of all impacts. For habitats the Service determines to be of lower value, we will consider whether compensation is more effective than other components of the mitigation hierarchy to maintain the current status of evaluation species, and if so, may seek compensation for most or all such impacts.

The relative emphasis given to mitigation types within the mitigation hierarchy depends on the landscape context and action-specific circumstances that influence the efficacy and efficiency of available mitigation means and measures. For example, it is generally more effective and efficient to achieve the mitigation policy goal by maximizing avoidance and minimization of impacts to habitats that are either rare, of high suitability, or of high importance, than to rely on other measures, because these qualities are typically not easily repaired, enhanced through onsite management, or replaced through compensatory actions. Similarly, compensatory measures may receive greater emphasis when strategic application of such measures (*i.e.,* to further the objectives of relevant conservation plans) would more effectively and efficiently achieve the policy goal for mitigating impacts to habitats that are either abundant, of low suitability, or of low importance.

When more than one evaluation species uses an affected habitat, the highest valuation will govern the Service's mitigation recommendations or requirements. Regardless of the habitat valuation, Service mitigation recommendations or requirements will represent our best judgment as to the most practicable means of ensuring that a proposed action improves or, at minimum, maintains the current status of the affected resources.

5.6. Means and Measures

The means and measures that the Service recommends for achieving the goal of this Policy (see section 4) are action- and resource-specific applications of the five general types of impact mitigation: Avoid, minimize, rectify, reduce over time, and compensate. The third and fourth mitigation types, rectify and reduce over time, are combined under the minimization label (*e.g.,* in mitigation planning for permitting actions under the Clean Water Act, in the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, and in 600 DM 6.4), which we adopt for this Policy and for the structure of this section, while also providing specific examples for rectify and reduce. When carrying out its responsibilities under NEPA, the Service will apply the mitigation meanings and sequence in the NEPA regulations (40 CFR 1508.20). In particular, the Service will retain the ability to distinguish, as needed, between minimizing, rectifying, and reducing or eliminating the impact over time, as described in Appendix B: Service Mitigation Policy and NEPA.

The emphasis that the Service gives to each mitigation type depends on the evaluation species selected (section 5.4) and the value of their affected habitats (section 5.5). Habitat valuation aligns mitigation with conservation planning for the evaluation species by identifying where it is critical to avoid habitat impacts altogether and where compensation measures may more effectively advance conservation objectives. All appropriate mitigation measures have a clear connection with the anticipated effects of the action and are commensurate with the scale and nature of those effects.

Nothing in this Policy supersedes the statutes and regulations governing prohibited ''take'' of wildlife (*e.g.,* ESA-listed species, migratory birds, eagles); however, the Policy applies to mitigating the impacts to habitats and ecological functions that support populations of evaluation species, including federally protected species. Attaining the goal of improving or, at a minimum, maintaining the current status of evaluation species will often involve applying a combination of mitigation types. For each of the mitigation types, the following subsections begin with a quote of the regulatory language at 40 CFR 1508.20, then provides an expanded definition, explains its place in this Policy, and lists generalized examples of its intended use in Service mitigation recommendations. Ensuring that Service-recommended mitigation measures are implemented and effective is addressed in sections 5.8, Documentation, and 5.9, Followup.

5.6.1. Avoid—Avoid the impact altogether by not taking a certain action or parts of an action.

Avoiding impacts is the first tier of the mitigation hierarchy. Avoidance ensures that an action or a portion of the action has no direct or indirect effects during the planning horizon on fish, wildlife, plants, and their habitats. Actions may avoid direct effects to a resource (*e.g.,* by shifting the location of the construction footprint), but unless the action also avoids indirect effects caused by the action (*e.g.,* loss of habitat suitability through isolation from other habitats, accelerated invasive species colonization, degraded water quality, etc.), the Service will not consider that impacts to a resource are fully avoided. In some cases, indirect effects may cumulatively result in population and habitat losses that negate any conservation benefit from avoiding direct effects. An impact is unavoidable when an appropriate and practicable alternative to the proposed action that would not cause the impact is unavailable. The Service will recommend avoiding all impacts to high-value habitats. Generalized examples follow:

a. Design the timing, location, and/or operations of the action so that specific resource impacts would not occur.

b. Add structural features to the action, where such action is sustainable (*e.g.,* fish and wildlife passage structures, water treatment facilities, erosion control measures) that would eliminate specific losses to affected resources.

c. Adopt a non-structural alternative to the action that is sustainable and that would not cause resource losses (*e.g.,* stream channel restoration with appropriate grading and vegetation in lieu of rip-rap).

d. Adopt the no-action alternative.

5.6.2. Minimize (includes Rectify and Reduce Over Time)—Minimize the impact by limiting the degree or magnitude of the action and its implementation.

Minimizing impacts, together with rectifying and reducing over time, is the second tier of the mitigation hierarchy. Minimizing is reducing the intensity of the impact (*e.g.,* population loss, habitat loss, reduced habitat suitability, reduced habitat connectivity, etc.) to the maximum extent appropriate and practicable. Generalized examples of types of measures to minimize impacts follow:

a. Reduce the overall spatial extent and/or duration of the action.

b. Adjust the daily or seasonal timing of the action.

c. Retain key habitat features within the affected area that would continue to support life-history processes for the evaluation species.

d. Adjust the spatial configuration of the action to retain corridors for species movement between functional habitats.

e. Apply best management practices to reduce water quality degradation.

f. Adjust the magnitude, timing, frequency, duration, and/or rate-of-change of water flow diversions and flow releases to minimize the alteration of flow regime features that support life-history processes of evaluation species.

g. Install screens and other measures necessary to reduce aquatic life entrainment/impingement at water intake structures.

h. Install fences, signs, markers, and other measures necessary to protect resources from impacts (*e.g.,* fencing riparian areas to exclude livestock, marking a heavy-equipment exclusion zone around burrows, nest trees, and other sensitive areas).

Rectify — This subset of the second tier of the mitigation hierarchy involves ''repairing, rehabilitating, or restoring the affected environment.''

Rectifying impacts may possibly improve, relative to no-action conditions, a loss in habitat availability and/or suitability for evaluation species within the affected area and contribute to a net conservation gain. Rectifying impacts may also involve directly restoring a loss in populations through stocking. Generalized examples follow:

a. Repair physical alterations of the affected areas to restore pre-action conditions or improve habitat suitability for the evaluation species (*e.g.,* re-grade staging areas to appropriate contours, loosen compacted soils, restore altered stream channels to stable dimensions).

b. Plant and ensure the survival of appropriate vegetation where necessary in the affected areas to restore or improve habitat conditions (quantity and suitability) for the evaluation species and to stabilize soils and stream channels.

c. Provide for fish and wildlife passage through or around action-imposed barriers to movement.

d. Consistent with all applicable laws, regulations, policies, and conservation plans, stock species that experienced losses in affected areas when habitat conditions are able to support them in affected areas.

Reduce Over Time—This subset of the second tier of the mitigation hierarchy is to ''reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action.''

Reducing impacts over time is preserving, enhancing, and maintaining the populations, habitats, and ecological functions that remain in an affected area following the impacts of the action, including areas that are successfully restored or improved through rectifying mitigation measures. Preservation, enhancement, and maintenance operations may improve upon conditions that would occur without the action and contribute to a net conservation gain (*e.g.,* when such operations would prevent habitat degradation expected through lack of management needed for an evaluation species). Reducing impacts over time is an appropriate means to achieving the mitigation goal after applying all appropriate and practicable avoidance, minimization, and rectification measures. Generalized examples follow:

a. Control land uses and limit disturbances to portions of the affected area that may continue to support the evaluation species.

b. Control invasive species in the affected areas.

c. Manage fire-adapted habitats in the affected areas with an appropriate timing and frequency of prescribed fire, consistent with applicable laws, regulations, policies, and conservation plans.

d. Maintain or replace equipment and structures in affected areas to prevent losses of fish and wildlife resources due to equipment failure (*e.g.,* cleaning and replacing trash racks and water intake screens, maintaining fences that limit access to environmentally sensitive areas).

e. Ensure proper training of personnel in operations necessary to preserve existing or restored fish and wildlife resources in the affected area.

5.6.3. Compensate—Compensate for the impact by replacing or providing substitute resources or environments.

Compensating for impacts is the third and final tier of the mitigation hierarchy. Compensation is protecting, maintaining, enhancing, and/or restoring habitats and ecological functions for an evaluation species, generally in an area outside the action's affected area. Mitigating some percentage of unavoidable impacts through measures that minimize, rectify, and reduce losses over time is often appropriate and practicable, but the costs or difficulties of mitigation may rise rapidly thereafter to achieve the mitigation planning goal entirely within the action's affected area. In such cases, a lesser or equivalent effort applied in another area may achieve greater benefits for the evaluation species. Likewise, the effort necessary to mitigate the impacts to a habitat of low suitability and low importance of a type that is relatively abundant in the landscape context (low-value habitat) will more likely achieve sustainable benefits for an evaluation species if invested in enhancing a habitat of moderate suitability and high importance. This Policy is designed to apply the various types of mitigation where they may achieve the greatest efficiency toward accomplishing the mitigation planning goal.

Onsite restoration of an affected resource meets the definition of rectify and is not considered compensation under this Policy. Although compensation is usually accomplished outside the affected area, onsite compensation under the definitions of this Policy involves provision of a habitat resource within the affected area that was not adversely affected by the action, but that would effectively address the action's effect on the conservation of the evaluation species. For example, an action reduces food resources for an evaluation species, but in dry years, water availability is a more limiting factor to the species' status in the affected area. Increasing the reliability of water resources onsite may represent a practicable measure that will more effectively maintain or improve the species' status than some degree of rectifying the loss of food resources alone, even though the action did not affect water availability. In this example, measures to restore food resources are rectification, and measures to increase water availability are onsite compensation.

Multiple mechanisms may accomplish compensatory mitigation, including habitat credit exchanges and other emerging mechanisms. Proponent-responsible mitigation, mitigation/conservation banks, and in-lieu fee funds are the three most common mechanisms. Descriptions of their general characteristics follow:

a. *Proponent-Responsible Mitigation.* A proponent-responsible mitigation site provides ecological functions and services in accordance with Service-defined or approved standards to offset the habitat impacts of a proposed action on particular species. As its name implies, the action proponent is solely responsible for ensuring that the compensatory mitigation activities are completed and successful. Proponent-responsible mitigation may occur onsite or offsite relative to action impacts. Like all compensatory mitigation measures, proponent-responsible mitigation should: (a) Maximize the benefit to impacted resources and their values, services, and functions; (b) implement and earn credits in advance of project impacts; and (c) reduce risk to achieving effectiveness.

b. *Mitigation/Conservation Banks.* A conservation bank is a site or suite of sites that provides ecological functions and services expressed as credits that are conserved and managed in perpetuity for particular species and are used expressly to offset impacts occurring elsewhere to the same species. A mitigation bank is established to offset impacts to wetland habitats under section 404 of the Clean Water Act. Some mitigation banks may also serve the species-specific purposes of a conservation bank. Mitigation and conservation banks are typically for-profit enterprises that apply habitat restoration, creation, enhancement, and/or preservation techniques to generate credits on their banking properties. The establishment, operation, and use of a conservation bank requires a conservation bank agreement between the Service and the bank sponsor, and aquatic resource mitigation banks require a banking instrument approved by the U.S. Army Corps of Engineers. Responsibility for ensuring that compensatory mitigation activities are successfully completed is transferred from the action proponent to the bank sponsor at the time of the sale/transfer of credits. Mitigation and conservation banks generally provide mitigation in advance of impacts.

c. *In-Lieu Fee.* An in-lieu fee site provides ecological functions and services expressed as credits that are conserved and managed for particular species or habitats, and are used expressly to offset impacts occurring elsewhere to the same species or habitats. In-lieu fee programs are sponsored by governmental or nonprofit entities that collect funds used to establish in-lieu fee sites. In-lieu fee program operators apply habitat restoration, creation, enhancement, and/or preservation techniques to generate credits on in-lieu fee sites. The establishment, operation, and use of an in-lieu fee program may require an agreement between regulatory agencies of applicable authority, including the Service, and the in-lieu fee program operator. Responsibility for ensuring that compensatory mitigation activities are successfully completed is transferred from the action proponent to the in-lieu fee program operator at the time of sale/transfer of credits. Unlike mitigation or conservation banks, in-lieu fee programs generally provide compensatory mitigation after impacts have occurred. See section 5.7.1 for discussion of the Service's preference for compensatory mitigation that occurs prior to impacts.

The Service's preference is that proponents offset unavoidable resource losses in advance of their actions. Further, the Service considers the banking of habitat value for the express purpose of compensating for future unavoidable losses to be a legitimate form of mitigation, provided that withdrawals from a mitigation/conservation bank are commensurate with losses of habitat value (considering suitability and importance) for the evaluation species and not based solely upon the affected habitat acreage or the cost of land purchase and management. Resource losses compensated through purchase of conservation or mitigation bank credits may include, but are not limited to, habitat impacts to species covered by one or more Service authorities.

5.6.3.1 Equivalent Standards

The mechanisms for delivering compensatory mitigation differ according to: (1) Who is ultimately responsible for the success of the mitigation (the action proponent or a third party); (2) whether the mitigation site is within or adjacent to the impact site (onsite) or at another location that provides either equivalent or additional resource value (offsite); and (3) when resource benefits are secured (before or after resource impacts occur).

Regardless of the delivery mechanism, species conservation strategies and other landscape-level conservation plans that are based on the best scientific information available are expected to provide the basis for establishing and operating compensatory mitigation sites and programs. Such strategies and plans should also inform the assessment of species-specific impacts and benefits within a defined geography.

Service recommendations or requirements will apply equivalent ecological, procedural, and administrative standards for all compensatory mitigation mechanisms. Departmental guidance at DM 6.6 C declares a preference for compensatory mitigation measures that will maximize the benefit to affected resources, reduce risk to achieving effectiveness, and use transparent methodologies. Mitigation that the Service recommends or approves through any compensatory mitigation mechanism should incorporate, address, or identify the following that are intended to ensure successful implementation and durability:

a. Type of resource(s) and/or its value(s), service(s), and function(s), and amount(s) of such resources to be provided (usually expressed in acres or some other physical measure), the method of compensation (restoration, establishment, preservation, etc.), and the manner in which a landscape-scale approach has been considered;

b. factors considered during the site selection process;

c. site protection instruments to ensure the durability of the measure;

d. baseline information;

e. the mitigation value of such resources (usually expressed as a number of credits or other units of value), including a rationale for such a determination;

f. a mitigation work plan including the geographic boundaries of the measure, construction methods, timing, and other considerations;

g. a maintenance plan;

h. performance standards to determine whether the measure has achieved its intended outcome;

i. monitoring requirements;

j. long-term management commitments;

k. adaptive management commitments; and

l. financial assurance provisions that are sufficient to ensure, with a high degree of confidence, that the measure will achieve and maintain its intended outcome, in accordance with the measure's performance standards.

Third parties may assume the responsibilities for implementing proponent-responsible compensation. The third party accepting responsibility for the compensatory actions would assume all of the proponent's obligations for ensuring their success and durability.

5.6.3.2 Research and Education

Research and education, although important to the conservation of many resources, are not typically considered compensatory mitigation, because they do not directly offset adverse effects to species or their habitats. In rare circumstances, research or education that is directly linked to reducing threats, or that provides a quantifiable benefit to the species, may be included as part of a mitigation package. These circumstances may exist when: (a) The major threat to a resource is something other than habitat loss; (b) the Service can reasonably expect the outcome of research or education to more than offset the impacts; (c) the proponent commits to using the results/recommendations of the research to mitigate action impacts; or (d) no other reasonable options for mitigation are available.

5.7. Recommendations

Consistent with applicable authorities, the Policy's fundamental principles, and the mitigation planning principles described herein, the Service will provide recommendations to mitigate the impacts of proposed actions at the earliest practicable stage of planning to ensure maximum consideration. The Service will develop mitigation recommendations in cooperation with the action proponent and/or the applicable authorizing agency, considering the cost estimates and other information that the proponent/agency provides about the action and its effects, and relying on the best scientific information available. Service recommendations will represent our best judgment as to the most practicable means of ensuring that a proposed action improves or, at minimum maintains, the current status of the affected resources. The Service will provide mitigation recommendations under an explicit expectation that the action proponent or the applicable authorizing agency is fully responsible for implementing or enforcing the recommendations.

The Service will strive to provide mitigation recommendations, including reasonable alternatives to the proposed action, which, if fully and properly implemented, would achieve the best possible outcome for affected resources while also achieving the stated purpose of the proposed action. However, on a case-by-case basis, the Service may recommend the ''no action'' alternative. For example, when appropriate and practicable means of avoiding significant impacts to high-value habitats and associated species are not available, the Service may recommend the ''no action'' alternative.

5.7.1. Preferences for Compensatory Mitigation

Unless action-specific circumstances warrant otherwise, the Service will observe the following preferences in providing compensatory mitigation recommendations:

Advance compensatory mitigation. When compensatory mitigation is necessary, the Service prefers compensatory mitigation measures that are implemented and earn credits in advance of project impacts. Even though compensatory mitigation may be initiated in advance of project impacts, there may still be temporal losses that need to be addressed. The extent of the compensatory measures that are not completed until after action impacts occur will account for the interim loss of resources consistent with the assessment principles (section 5.3).

Compensatory mitigation in relation to landscape strategies and plans. The preferred location for Service-recommended or required compensatory mitigation measures is within the boundaries of an existing strategically planned, interconnected conservation network that serves the conservation objectives for the affected resources in the relevant landscape context. Compensatory measures should enhance habitat connectivity or contiguity, or strategically improve targeted ecological functions important to the affected resources (*e.g.,* enhance the resilience of fish and wildlife populations challenged by the widespread stressors of climate change).

Similarly, Service-recommended or required mitigation should emphasize avoiding impacts to habitats located within a planned conservation network, consistent with the Habitat Valuation guidance (section 5.5).

Where existing conservation networks or landscape conservation plans are not available for the affected resources, Service personnel should develop mitigation recommendations based on best available scientific information and professional judgment that would maximize the effectiveness of the mitigation measures for the affected resources, consistent with this Policy's guidance on Integrating Mitigation Planning with Conservation Planning (section 5.1).

5.7.2. Recommendations for Locating Compensatory Mitigation on Public or Private Lands

When appropriate as specified in this Policy, the Service may recommend establishing compensatory mitigation at locations on private, public, or tribal lands that provide the maximum conservation benefit for the affected resources. The Service will generally, but not always, recommend compensatory mitigation on lands with the same ownership classification as the lands where impacts occurred, *e.g.,* impacts to evaluation species on private lands are generally mitigated on private lands and impacts to evaluation species on public lands are generally mitigated on public lands. However, most private lands are not permanently dedicated to conservation purposes, and are generally the most vulnerable to impacts resulting from land and water resources development actions; therefore, mitigating impacts to any type of land ownership on private lands is usually acceptable as long as they are durable. Locating compensatory mitigation on public lands for impacts to evaluation species on private lands is also possible, and in some circumstances may best serve the conservation objectives for evaluation species. Such compensatory mitigation options require careful consideration and justification relative to the Service's mitigation planning goal, as described below.

The Service generally only supports locating compensatory mitigation on (public or private) lands that are already designated for the conservation of natural resources if additionality (see section 6, Definitions) is clearly demonstrated and is legally attainable. In particular, the Service usually does not support offsetting impacts to private lands by locating compensatory mitigation on public lands designated for conservation purposes because this practice risks a long-term net loss in landscape capacity to sustain species by relying increasingly on public lands to serve conservation purposes. However, the Service acknowledges that public ownership does not automatically confer long-term protection and/or management for evaluation species in all cases, which may justify locating compensatory mitigation measures on public lands, including compensation for impacts to evaluation species on public or private lands. The Service may recommend compensating for private-land impacts to evaluation species on public lands (whether designated for conservation of natural resources or not) when:

a. Compensation is an appropriate means of achieving the mitigation planning goal, as specified in this Policy;

b. the compensatory mitigation would provide additional conservation benefits above and beyond measures the public agency is foreseeably expected to implement absent the mitigation (only such additional benefits are counted towards achieving the mitigation planning goal);

c. the additional conservation benefits are durable, *i.e.,* lasting as long as the impacts that prompted the compensatory mitigation;

d. consistent with and not otherwise prohibited by all relevant statutes, regulations, and policies; and

e. the public land location would provide the best possible conservation outcome, such as when private lands suitable for compensatory mitigation are unavailable or are available but do not provide an equivalent or greater contribution towards offsetting the impacts to meet the mitigation planning goal for the evaluation species.

Ensuring the durability of compensatory mitigation on public lands may require multiple tools beyond land use plan designations, including right-of-way grants, withdrawals, disposal or lease of land for conservation, conservation easements, cooperative agreements, and agreements with third parties. Mechanisms to ensure durability of land protection for compensatory mitigation on public and private lands vary among agencies, but should preclude conflicting uses and ensure that protection and management of the mitigation land is commensurate with the magnitude and duration of impacts.

When the public lands under consideration for use as compensatory mitigation for impacts on private lands are National Wildlife Refuge System (NWRS) lands, additional considerations covered in the Service's Final Policy on the NWRS and Compensatory Mitigation Under the Section 10/404 Program (64 FR 49229–49234, September 10, 1999) may apply. Under that policy, the Regional Director will recommend the mitigation plan proposing to site compensatory mitigation on NWRS lands to the Director for approval.

5.7.3. Recommendations Related to Recreation

Mitigation for impacts to recreational uses of wildlife and habitat. The Service will generally not recommend measures intended to increase recreational value as mitigation for habitat losses. The Service may address impacts to recreational uses that are not otherwise addressed through habitat mitigation, but will do so with separate and distinct recreational use mitigation recommendations.

Recreational use of mitigation lands. Consistent with applicable statutes, the Service supports those recreational uses on mitigation lands that are compatible with the conservation goals of those mitigation lands. If certain uses are incompatible with the conservation goals for the mitigation lands, for example, off-road vehicle use in an area conserved for wildlife intolerant to disturbance, the Service will recommend against such uses.

5.8. Documentation

The Service should advise action proponents and decisionmaking agencies at timely stages of the planning process. To ensure effective consideration of Service recommendations, it is generally possible to communicate key concerns that will inform our recommendations early in the mitigation planning process, communicate additional components during and following an initial assessment of effects, and provide final written recommendations toward the end of the process, but in advance of a final decision for the action. The following outline lists the components applicable to these three planning stages. Because actions vary substantially in scope and complexity, these stages may extend over a period of years or occur almost simultaneously, which may necessitate consolidating some of the components listed below. For all actions, the level of the Service's analysis and documentation should be commensurate with the scope and severity of the potential impacts to resources. Where compensation is used to address impacts, additional information outlined in section 5.6.3 may be necessary.

A. Early Planning

1. Inform the proponent of the Service's goal to improve or, at minimum, maintain the status of affected resources, and that the Service will identify opportunities for a net conservation gain if appropriate.

2. Coordinate key data collection and planning decisions with the proponent, relevant tribes, and Federal and State resource agencies; including, but not limited to:

a. Delineate the affected area;

b. define the planning horizon;

c. identify species that may occur in the affected area that the Service is likely to consider as evaluation species for mitigation planning;

d. identify landscape-scale strategies and conservation plans and objectives that pertain to these species and the affected area;

e. define surveys, studies, and preferred methods necessary to inform effects analyses; and

f. as necessary, identify reasonable alternatives to the proposed action that may achieve the proponent's purpose and the Service's no-net-loss goal for resources.

3. As early as possible, inform the proponent of the presence of probable high-value habitats in the affected area (see section 5.5), and advise the proponent of Service policy to avoid all impacts to such habitats.

B. Effects Assessment

1. Coordinate selection of evaluation species with relevant tribes, Federal and State resource agencies, and action proponents.

2. Communicate the Service's assessment of the value of affected habitats to evaluation species.

3. If high-value habitats are affected, advise the proponent of the Service's policy to avoid all impacts to such habitats.

4. Assess action effects to evaluation species and their habitats.

5. Formulate mitigation options that would achieve the mitigation policy goal (an appropriate net conservation gain or, at minimum, no net loss) in coordination with the proponent and relevant tribes, and Federal and State resource agencies.

C. Final Recommendations

The Service's final mitigation recommendations should communicate in writing the following:

1. The authorities under which the Service is providing the mitigation recommendations consistent with this Policy.

2. A description of all mitigation measures that are reasonable and appropriate to ensure that the proposed action improves or, at minimum, maintains the current status of affected fish, wildlife, plants, and their habitats.

3. The following elements should be specified within a mitigation plan or equivalent by either the Service, action proponents, or in collaboration:

a. Measurable objectives;

b. implementation assurances, including financial, as applicable;

c. effectiveness monitoring;

d. additional adaptive management actions as may be indicated by monitoring results; and

e. reporting requirements.

4. An explanation of the basis for the Service recommendations, including, but not limited to:

a. Evaluation species used for mitigation planning;

b. the assessed value of affected habitats to evaluation species;

c. predicted adverse and beneficial effects of the proposed action;

d. predicted adverse and beneficial effects of the recommended mitigation measures; and

e. the rationale for our determination that the proposed action, if implemented with Service recommendations, would achieve the mitigation policy goal.

5. The Service's expectations of the proponent's responsibility to implement the recommendations.

5.9. Followup

The Service encourages, supports, and will initiate, whenever practicable and within our authority, post-action monitoring studies and evaluations to determine the effectiveness of recommendations in achieving the mitigation planning goal. In those instances where Service personnel determine that action proponents have not carried out those agreed-upon mitigation means and measures, the Service will request that the parties responsible for regulating the action initiate corrective measures, or will initiate access to available assurance measures. These provisions also apply when the Service is the action proponent.

6. Definitions

Definitions in this section apply to the implementation of this Policy and were developed to provide clarity and consistency within the policy itself, and to ensure broad, general applicability to all mitigation processes in which the Service engages. Some Service authorities define some of the terms in this section differently or more specifically, and the definitions herein do not substitute for statutory or regulatory definitions in the exercise of those authorities.

Action. An activity or program implemented, authorized, or funded by Federal agencies; or a non-Federal activity or program for which one or more of the Service's authorities apply to make mitigation recommendations, specify mitigation requirements, or provide technical assistance for mitigation planning.

Additionality. A compensatory mitigation measure is additional when the benefits of a compensatory mitigation measure improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure.

Affected area. The spatial extent of all effects, direct and indirect, of a proposed action to fish, wildlife, plants, and their habitats.

Affected resources. Those resources, as defined by this Policy, that are subject to the adverse effects of an action.

Baseline. Current and future environmental conditions (relevant to the resources covered by this Policy) that are expected without implementation of the proposed action under review. Predictions about future environmental conditions without the action should account for natural species succession, implementation of approved land and resource management plans, and any other reasonably foreseeable factors that influence these conditions.

Compensatory mitigation. Compensatory mitigation means to compensate for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (see 40 CFR 1508.20.) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions. Impacts are authorized pursuant to a regulatory or resource management program that issues permits, licenses, or otherwise approves activities. In this Policy, ''mitigation'' is a deliberate expression of the full mitigation hierarchy, and ''compensatory mitigation'' describes only the last phase of that sequence.

Conservation. In the context of this Policy, the noun ''conservation'' is a general label for the collective practices, plans, policies, and science that are used to protect and manage species and their habitats to achieve desired outcomes.

Conservation objective. A measurable expression of a desired outcome for a species or its habitat resources. Population objectives are expressed in terms of abundance, trend, vital rates, or other measurable indices of population status. Habitat objectives are expressed in terms of the quantity, quality, and spatial distribution of habitats required to attain population objectives, as informed by knowledge and assumptions about factors influencing the ability of the landscape to sustain species.

Conservation planning. The identification of strategies for achieving conservation objectives. Conservation plans include, but are not limited to, recovery plans, habitat conservation plans, watershed plans, green infrastructure plans, and others developed by Federal, State, tribal or local government agencies or non-governmental organizations. This Policy emphasizes the use of landscape-scale approaches to conservation planning.

Durability. A mitigation measure is durable when the effectiveness of the measure is sustained for the duration of the associated impacts of the action, including direct and indirect impacts.

Effects. Changes in environmental conditions that are relevant to the resources covered by this Policy.

Direct effects are caused by the action and occur at the same time and place.

Indirect effects are caused by the action, but occur at a later time and/or another place.

Cumulative effects are caused by other actions and processes, but may refer also to the collective effects on a resource, including direct and indirect effects of the action. The causal agents and spatial/temporal extent for considering cumulative effects varies according to the authority(ies) under which the Service is engaged in mitigation planning (*e.g.,* refer to the definitions of cumulative effects and cumulative impacts in ESA regulations and NEPA, respectively), and the Service will apply statute-specific definitions in the application of this Policy.

Evaluation species. Fish, wildlife, and plant resources in the affected area that are selected for effects analysis and mitigation planning.

Habitat. An area with spatially identifiable physical, chemical, and biological attributes that supports one or more life-history processes for evaluation species. Mitigation planning should delineate habitat types in the affected area using a classification system that is applicable to both the region(s) of the affected area and the selected evaluation species in order to facilitate determinations of habitat scarcity, suitability, and importance.

Habitat Credit Exchange. An environmental market that operates as a clearinghouse in which an exchange administrator, operating as a mitigation sponsor, manages credit transactions between compensatory mitigation providers and project permittees. This is in contrast to the direct transactions between compensatory mitigation providers and permittees that generally occur through conservation banking and in-lieu fee programs. Exchanges provide ecological functions and services expressed as credits that are permanently conserved and managed for specified species and are used to compensate for adverse impacts occurring elsewhere to the same species.

Habitat value. An assessment of an affected habitat with respect to an evaluation species based on three attributes—scarcity, suitability, and importance—which define its conservation value to the evaluation species in the context of this Policy. The three parameters are assessed independently but are sometimes correlated. For example, rare or unique habitat types of high suitability for evaluation species are also very likely of high importance in achieving conservation objectives.

Impacts. In the context of this Policy, impacts are adverse effects relative to the affected resources.

Importance. The relative significance of the affected habitat, compared to other examples of a similar habitat type in the landscape context, to achieving conservation objectives for the evaluation species. Habitats of high importance are irreplaceable or difficult to replace, or are critical to evaluation species by virtue of their role in achieving conservation objectives within the landscape (*e.g.,* sustain core habitat areas, linkages, ecological functions). Areas containing habitats of high importance are generally, but not always, identified in conservation plans addressing resources under Service authorities (*e.g.,* in recovery plans) or when appropriate, under authorities of partnering entities (*e.g.,* in State wildlife action plans, Landscape Conservation Cooperative conservation ''blueprints,'' etc.).

Landscape. An area encompassing an interacting mosaic of ecosystems and human systems that is characterized by a set of common management concerns. The most relevant concerns to the Service and this Policy are those associated with the conservation of species and their habitats. The landscape is not defined by the size of the area, but rather the interacting elements that are meaningful to the conservation objectives for the resources under consideration.

Landscape-scale approach. For the purposes of this Policy, the landscape-scale approach applies the mitigation hierarchy for impacts to resources and their values, services, and functions at the relevant scale, however narrow or broad, necessary to sustain, or otherwise achieve, established goals for those resources and their values, services, and functions. A landscape-scale approach should be used when developing and approving strategies or plans, reviewing projects, or issuing permits. The approach identifies the needs and baseline conditions of targeted resources and their values, services, and functions, reasonably foreseeable impacts, cumulative impacts of past and likely projected disturbance to those resources, and future disturbance trends. The approach then uses such information to identify priorities for avoidance, minimization, and compensatory mitigation measures across that relevant area to provide the maximum benefit to the impacted resources and their values, services, and functions, with full consideration of the conditions of additionality and durability.

Landscape-scale strategies and plans. For the purposes of this Policy, landscape-scale strategies and plans identify clear management objectives for targeted resources and their values, services, and functions at landscape-scales, as necessary, including across administrative boundaries, and employ the landscape-scale approach to identify, evaluate, and communicate how mitigation can best achieve those management objectives. Strategies serve to assist project applicants, stakeholders, and land managers in pre-planning as well as to inform NEPA analysis and decisionmaking, including decisions to develop and approve plans, review projects, and issue permits. Land use planning processes provide opportunities for identifying, evaluating, and communicating mitigation in advance of anticipated land use activities. Consistent with their statutory authorities, land management agencies may develop landscape-scale strategies through the land use planning process, or incorporate relevant aspects of applicable and existing landscape-scale strategies into land use plans through the land use planning process.

Mitigation. In the context of this Policy, the noun ''mitigation'' is a label for all types of measures (see Mitigation Types) that a proponent would implement toward achieving the Service's mitigation goal.

Mitigation hierarchy. The elements of mitigation, summarized as avoidance, minimization, and compensation, provide a sequenced approach to addressing the foreseeable impacts to resources and their values, services, and functions. First, impacts should be avoided by altering project design and/or location or declining to authorize the project; then minimized through project modifications and permit conditions; and, generally, only then compensated for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied.

Mitigation planning. The process of assessing the effects of an action and formulating mitigation measures that would achieve the mitigation planning goal.

Mitigation goal. The Service's goal for mitigation is to improve or, at minimum, maintain the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority.

Mitigation types. General classes of methods for mitigating the impacts of an action (Council on Environmental Quality, 40 CFR 1508.20(a–e)), including:

(a) Avoid the impact altogether by not taking the action or parts of the action;

(b) minimize the impact by limiting the degree or magnitude of the action and its implementation;

(c) rectify the impact by repairing, rehabilitating, or restoring the affected environment;

(d) reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action; and

(e) compensate for the impact by replacing or providing substitute resources or environments.

These five mitigation types, as enumerated by CEQ, are compatible with this Policy; however, as a practical matter, the mitigation elements are categorized into three general types that form a sequence: Avoidance, minimization, and compensation for remaining unavoidable (also known as residual) impacts. Section 5.6 (Mitigation Means and Measures) of this Policy provides expanded definitions and examples for each of the mitigation types.

Practicable. Available and capable of being done after taking into consideration existing technology, logistics, and cost in light of a mitigation measure's beneficial value and a land use activity's overall purpose, scope, and scale.

Proponent. The agency(ies) proposing an action, and if applicable, any applicant(s) for agency funding or authorization to implement a proposed action.

Resources. Fish, wildlife, plants, and their habitats for which the Service has authority to recommend or require the mitigation of impacts resulting from proposed actions.

Scarcity. The relative spatial extent (*e.g.,* rare, common, or abundant) of the habitat type in the landscape context.

Suitability. The relative ability of the affected habitat to support one or more elements of the evaluation species' life history (reproduction, rearing, feeding, dispersal, migration, hibernation, or resting protected from disturbance, etc.) compared to other similar habitats in the landscape context. A habitat's ability to support an evaluation species may vary over time.

Unavoidable. An impact is unavoidable when an appropriate and practicable alternative to the proposed action that would not cause the impact is not available.

Appendix A. Authorities and Direction for Service Mitigation Recommendations

A. Relationship of Service Mitigation Policy to Other Policies, Regulations

This section is intended to describe the interaction of existing policies and regulations with this Policy in agency processes. Descriptions regarding the application of mitigation concepts generally, and elements of this Policy specifically, for each of the listed authorities follow:

1. The Bald and Golden Eagle Protection Act (16 U.S.C. 668–668d) (Eagle Act)

The Eagle Act prohibits take of bald eagles and golden eagles except pursuant to Federal regulations. The Eagle Act regulations at title 50, part 22 of the Code of Federal Regulations (CFR), define the ''take'' of an eagle to include the following actions: ''pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb'' (§ 22.3).

Except for protecting eagle nests, the Eagle Act does not directly protect eagle habitat. However, because disturbing eagles is a violation of the Act, some activities within eagle habitat, including some habitat modification, can result in illegal take in the form of disturbance. ''Disturb'' is defined as ''to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.''

The Eagle Act allows the Secretary of the Interior to authorize certain otherwise prohibited activities through regulations. The Service is authorized to prescribe regulations permitting the taking, possession, and transportation of bald and golden eagles provided such permits are ''compatible with the preservation of the bald eagle or the golden eagle'' (16 U.S.C. 668a). Permits are issued for scientific and exhibition purposes; religious purposes of Native American tribes; falconry (golden eagles only); depredation; protection of health and safety; golden eagle nest take for resource development and recovery; nonpurposeful (incidental) take; and removal or destruction of eagle nests.

The Eagle Act provides for mitigation in the form of avoidance and minimization by restricting permitted take to circumstances where take is ''necessary.'' While not expressly addressed, compensatory mitigation can also be used as a tool for ensuring that authorized take is consistent with the preservation standard of the Eagle Act. The regulations for eagle nest take permits and eagle non-purposeful incidental take permits explicitly provide for compensatory mitigation. Although eagle habitat (beyond nest structures) is not directly protected by the Eagle Act, the statute and implementing regulations do not preclude the use of habitat restoration, enhancement, and protection as compensatory mitigation.

At the time of development of this Appendix A, the threshold for authorized take of golden eagles is set at zero throughout the United States because golden eagle populations appear to be stable and potentially declining, and may not be able to absorb additional take while still maintaining current numbers of breeding pairs over time. Accordingly, all permits for golden eagle take must incorporate compensatory mitigation. Because golden eagle populations are currently primarily constrained by a high level of unauthorized human-caused mortality, rather than habitat loss, permits for golden eagle take require mitigation to be in the form of a reduction of a source of mortality; however, habitat restoration and enhancement could potentially offset permitted take in some situations, once reliable standards and metrics are developed to support the application of habitat-based mitigation to offset permitted take.

2. Clean Water Act (33 U.S.C. 1251 *et seq.*)

Several locations within the statute under section 404 describe the responsibilities and roles of the Service. The authority at section 404(m) is most directly relevant to the Service's engagement of Clean Water Act permitting processes to recommend mitigation for impacts to aquatic resources nationwide and is routinely used by Ecological Services Field Offices. At section 404(m), the Secretary of the Army is required to notify the Secretary of the Interior, through the Service Director, that an individual permit application has been received or that the Secretary proposes to issue a general permit. The Service will submit any comments in writing to the Secretary of the Army (Corps of Engineers) within 90 days. The Service has the opportunity to engage several thousand Corps permit actions affecting aquatic habitats and wildlife annually and to assist the Corps of Engineers in developing permit terms that avoid, minimize, or compensate for permitted impacts. The Department of the Army has also entered into a Memorandum of Agreement with the Department of the Interior under section 404(q) of the Clean Water Act. The current Memorandum of Agreement, signed in 1992, provides procedures for elevating national or regional issues relating to resources, policy, procedures, or regulation interpretation.

3. Endangered Species Act of 1973, as Amended (16 U.S.C. 1531 *et seq.*)

A primary purpose of the Endangered Species Act (ESA) of 1973 as amended (16 U.S.C. 1531 *et seq.*) is to conserve the ecosystems upon which species listed as endangered and threatened depend. Conserving listed species involves the use of all methods and procedures that are necessary for their recovery, which includes mitigating the impacts of actions to listed species and their habitats. All actions must comply with the applicable prohibitions against taking endangered animal species under ESA section 9 and taking threatened animal species under regulations promulgated through ESA section 4(d). Under ESA section 7(a)(2), Federal agencies must consult with the Service(s) to ensure that any actions they fund, authorize, or carry out are not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitat. Federal agencies, and any permit or license applicants, may be exempted from the prohibitions against incidental taking for actions that are not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of designated critical habitat, if the terms and conditions of the incidental take statement are implemented.

The Service may permit incidental taking resulting from a non-Federal action under ESA section 10(a)(1)(B) after approving the proponent's habitat conservation plan (HCP) under section 10(a)(2)(A). The HCP must specify the steps the permit applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps. The basis for issuing a section 10 permit includes a finding that the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of incidental taking, and a finding that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

This Policy applies to all actions that may affect ESA-protected resources except for conservation/recovery permits under section 10(a)(1)(A). The Service will recommend mitigation for impacts to listed species, designated critical habitat, and other species for which the Service has authorized mitigation responsibilities consistent with the guidance of this Policy, which proponents may adopt as conservation measures to be added to the project descriptions of proposed actions. Such adoption may ensure that actions are not likely to jeopardize species or adversely modify designated critical habitat; however, such adoption alone does not constitute compliance with the ESA. Federal agencies must complete consultation per the requirements of section 7 to receive Service concurrence with ''may affect, not likely to adversely affect'' determinations, biological opinions for ''likely to adversely affect'' determinations, and incidental take statement terms and conditions. Proponents of actions that do not require Federal authorization or funding must complete the requirements under section 10(a)(2) to receive an incidental take permit. Mitigation planning under this Policy applies to all species and their habitats for which the Service has authorities to recommend mitigation on a particular action, including listed species and critical habitat. Although this Policy is intended, in part, to clarify the role of mitigation in endangered species conservation, nothing herein replaces, supersedes, or substitutes for the ESA implementing regulations.

All forms of mitigation are potential conservation measures of a proposed Federal action in the context of section 7 consultation and are factored into Service analyses of the effects of the action, including any voluntary mitigation measures proposed by a project proponent that are above and beyond those required by an action agency. Service regulations at 50 CFR 402.14(g)(8) affirm the need to consider ''any beneficial actions'' in formulating a biological opinion, including those ''taken prior to the initiation of consultation.'' Because jeopardy and adverse modification analyses weigh effects in the action area relative to the status of the species throughout its listed range and to the status of all designated critical habitat units, respectively, ''beneficial actions'' may also include proposed conservation measures for the affected species within its range but outside of the area of adverse effects (*e.g.,* compensation).

Mitigation measures included in proposed actions that avoid and minimize the likelihood of adverse effects and incidental take are also relevant to the Service's concurrence with ''may affect, not likely to adversely affect'' determinations through informal consultation. All mitigation measures included in proposed actions that benefit listed species and/or designated critical habitat, including compensatory measures, are relevant to jeopardy and adverse modification conclusions in Service biological opinions.

Likewise, the Service may apply all forms of mitigation, consistent with the guidance of this Policy, in formulating a reasonable and prudent alternative that would avoid jeopardy/adverse modification, provided that it is also consistent with the regulatory definition of a reasonable and prudent alternative at 50 CFR 402.02. It is preferable to avoid or minimize impacts to listed species or critical habitat before rectifying, reducing over time, or compensating for such impacts. Under some limited circumstances, however, the latter forms of mitigation may provide all or part of the means to achieving the best possible conservation outcome for listed species consistent with the purpose, authority, and feasibility requirements of a reasonable and prudent alternative.

For Federal actions that are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of habitat, the Service may provide a statement specifying those reasonable and prudent measures that are necessary or appropriate to minimize the impacts of taking incidental to such actions on the affected listed species. That incidental take statement must comply with all applicable regulations. No proposed mitigation measures relieve an action proponent of the obligation to obtain incidental take exemption through an incidental take statement (Federal actions) or authorization through an incidental take permit (non-Federal actions), as appropriate, for unavoidable incidental take that may result from a proposed action.

4. Executive Order 13186 (E.O. 13186), Responsibilities of Federal Agencies To Protect Migratory Birds

E.O. 13186 directs Federal departments and agencies to avoid or minimize adverse impacts on ''migratory bird resources,'' defined as ''migratory birds and the habitats upon which they depend.'' These acts of avian protection and conservation are implemented under the auspices of the MBTA, the Eagle Act, the Fish and Wildlife Coordination Act (16 U.S.C. 661–666c), the ESA, the National Environmental Policy Act, and ''other established environmental review process'' (section 3(e)(6)). Additionally, E.O. 13186 directs Federal agencies whose activities will likely result in measurable negative effects on migratory bird populations to collaboratively develop and implement an MOU with the Service that promotes the conservation of migratory bird populations. These MOUs can clarify how an agency can mitigate the effects of impacts and monitor implemented conservation measures. MOUs can also define how appropriate corrective measures can be implemented when needed, as well as what proactive conservation actions or partnerships can be formed to advance bird conservation, given the agency's existing mission and mandate.

The Service policy regarding its responsibility to E.O. 13186 (720 FW 2) states ''all Service employees should: A. Implement their mission-related activities and responsibilities in a way that furthers the conservation of migratory birds and minimizes and avoids the potential adverse effects of migratory bird take, with the goal of eliminating take'' (2.2 A). The policy also stipulates that the Service will support the conservation intent of the migratory bird conventions by integrating migratory bird conservation measures into our activities, including measures to avoid or minimize adverse impacts on migratory bird resources; restoring and enhancing the habitat of migratory birds; and preventing or abating the pollution or detrimental alteration of the environment for the benefit of migratory birds.

5. Executive Order 13653 (E.O. 13653), Preparing the United States for the Impacts of Climate Change

E.O. 13653 directs Federal agencies to improve the Nation's preparedness and resilience to climate change impacts. The agencies are to promote: (1) Engaged and strong partnerships and information sharing at all levels of government; (2) risk-informed decisionmaking and the tools to facilitate it; (3) adaptive learning, in which experiences serve as opportunities to inform and adjust future actions; and (4) preparedness planning.

Among the provisions under section 3, *Managing Lands and Waters for Climate Preparedness and Resilience,* is this: ''agencies shall, where possible, focus on program and policy adjustments that promote the dual goals of greater climate resilience and carbon sequestration, or other reductions to the sources of climate change . . . [a]gencies shall build on efforts already completed or underway . . . as well as recent interagency climate adaptation strategies.'' Section 5 specifies that agencies shall develop or continue to develop, implement, and update comprehensive plans that integrate consideration of climate change into agency operations and overall mission objectives.

The *Priority Agenda: Enhancing The Climate Resilience of America's Natural Resources* (October 2014), called for in E.O. 13653, includes provisions to develop and provide decision support tools for ''climate-smart natural resource management'' that will improve the ability of agencies and landowners to manage for resilience to climate change impacts.

The Service policy on climate change adaptation (056 FW 1) states that the Service will ''effectively and efficiently incorporate and implement climate change adaptation measures into the Service's mission, programs, and operations.'' This includes using the best available science to coordinate an appropriate adaptive response to impacts on fish, wildlife, plants, and their habitats. The policy also specifically calls for delivering landscape conservation actions that build resilience or support the ability of fish, wildlife, and plants to adapt to climate change.

6. Federal Power Act (16 U.S.C. 791–828c) (FPA)

The Federal Energy Regulatory Commission (FERC) authorizes non-Federal hydropower projects pursuant to the FPA. The Service's roles in hydropower project review are primarily defined by the FPA, as amended in 1986 by the Electric Consumers Protection Act, which explicitly ascribes those roles to the Service. The Service has mandatory conditioning authority for projects on National Wildlife Refuge System lands under section 4(e) and to prescribe fish passage to enhance and protect native fish runs under section 18. Under section 10(j), FERC is required to include license conditions that are based on recommendations made pursuant to the Fish and Wildlife Coordination Act by States, NOAA, and the Service for the adequate and equitable protection, mitigation, and enhancement of fish, wildlife, and their habitats.

7. Fish and Wildlife Conservation Act (16 U.S.C. 2901–2912)

Specifically, Federal Conservation of Migratory Nongame Birds (16 U.S.C. 2912) requires the Service to ''identify the effects of environmental changes and human activities on species, subspecies, and populations of all migratory nongame birds'' (section 2912(2)); ''identify conservation actions to assure that species, subspecies, and populations of migratory nongame birds . . . do not reach the point at which the measures provided pursuant to the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1543), become necessary'' (section 2912(4)); and ''identify lands and waters in the United States and other nations in the Western Hemisphere whose protection, management, or acquisition will foster the conservation of species, subspecies, and populations of migratory nongame birds. . . .'' (section 2912(5)).

8. Fish and Wildlife Coordination Act (16 U.S.C. 661–667e) (FWCA)

The FWCA requires Federal agencies developing water-related projects to consult with the Service, NOAA, and the States regarding fish and wildlife impacts. The FWCA establishes fish and wildlife conservation as a coequal objective of all federally funded, permitted, or licensed water-related development projects. Federal action agencies are to include justifiable means and measures for fish and wildlife, and the Service's mitigation and enhancement recommendations are to be given full and equal consideration with other project purposes. The Service's mitigation recommendations may include measures addressing a broad set of habitats beyond the aquatic impacts triggering the FWCA and taxa beyond those covered by other resource laws. Action agencies are not bound by the FWCA to implement Service conservation recommendations in their entirety.

9. Marine Mammal Protection Act of 1972, as Amended (16 U.S.C. 1361 *et seq.*) (MMPA)

The MMPA prohibits the take (*i.e.,* hunting, killing, capture, and/or harassment) of marine mammals and enacts a moratorium on the import, export, and sale of marine mammal parts and products. There are exemptions and exceptions to the prohibitions. For example, under section 101(b), Alaskan Natives may hunt marine mammals for subsistence purposes and may possess, transport, and sell marine mammal parts and products. However, this section focuses on incidental take authorizations for non-commercial fishing activities.

Section 101(a)(5) allows for the authorization of incidental, but not intentional, take of small numbers of marine mammals by U.S. citizens while engaged in a specified activity (other than commercial fishing) within a specified geographical region, provided certain findings are made. Specifically, the Service must make a finding that the total of such taking will have a negligible impact on the marine mammal species and will not have an unmitigable adverse impact on the availability of these species for subsistence uses. Negligible impact is defined at 50 CFR 18.27(c) as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' Unmitigable adverse impact, which is also defined at 50 CFR 18.27(c), means ''an impact resulting from the specified activity that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.''

Section 101(a)(5)(A) of the MMPA provides for the promulgation of Incidental Take Regulations (ITRs), which can be issued for a period of up to 5 years. The ITRs set forth permissible methods of taking pursuant to the activity and other means of effecting the least practicable adverse impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses. In addition, ITRs include requirements pertaining to the monitoring and reporting of such takings.

Under the ITRs, a U.S. citizen may request a Letter of Authorization (LOA) for activities proposed in accordance with the ITRs. The Service evaluates each LOA request based on the specific activity and geographic location, and determines whether the level of taking is consistent with the findings made for the total taking allowable under the applicable ITRs. If so, the Service may issue an LOA for the project and will specify the period of validity and any additional terms and conditions appropriate to the request, including mitigation measures designed to minimize interactions with, and impacts to, marine mammals. The LOA will also specify monitoring and reporting requirements to evaluate the level and impact of any taking. Depending on the nature, location, and timing of a proposed activity, the Service may require applicants to consult with potentially affected subsistence communities in Alaska and develop additional mitigation measures to address potential impacts to subsistence users. Regulations specific to LOAs are codified at 50 CFR 18.27(f).

Section 101(a)(5)(D) established an expedited process to request authorization for the incidental, but not intentional, take of small numbers of marine mammals for a period of not more than one year if the taking will be limited to harassment, *i.e.,* Incidental Harassment Authorizations (IHAs). Harassment is defined in section 3 of the MMPA (16 U.S.C. 1362). For activities other than military readiness activities or scientific research conducted by or on behalf of the Federal Government, harassment means ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild'' (the MMPA calls this Level A harassment) ''or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to migration, breathing, nursing, breeding, feeding, or sheltering'' (the MMPA calls this Level B harassment). There is a separate definition of harassment applied in the case of a military readiness activity or a scientific research activity conducted by or on behalf of the Federal Government. In addition, ''small numbers'' and ''specified geographical region'' requirements do not apply to military readiness activities.

The IHA prescribes permissible methods of taking by harassment and includes other means of effecting the least practicable impact on marine mammal species or stocks and their habitats, paying particular attention to rookeries, mating grounds, and areas of similar significance. In addition, as appropriate, the IHA will include measures that are necessary to ensure no unmitigable adverse impact on the availability of the species or stock for subsistence purposes in Alaska. IHAs also specify monitoring and reporting requirements pertaining to the taking by harassment.

ITRs and IHAs can provide considerable conservation and management benefits to covered marine mammals. The Service shall recommend mitigation for impacts to species covered by the MMPA that are under its jurisdiction consistent with the guidance of this Policy and to the extent compatible with the authorities of the MMPA. Proponents may adopt these recommendations as components of proposed actions. However, such adoption itself does not constitute compliance with the MMPA. In addition, IHAs or LOAs issued under ITRs specify the permissible methods of taking and other means of effecting the least practicable adverse impact on the species or stock and its habitat, and on the availability for subsistence purposes. Those authorizations also outline required monitoring and reporting of takes.

10. Migratory Bird Treaty Act (16 U.S.C. 703–712) (MBTA)

The MBTA does not allow the take of migratory birds without a permit or other regulatory authorization (*e.g.,* rule, depredation order). The Service has express authority to issue permits for purposeful take and currently issues several types of permits for purposeful take of individuals (*e.g.,* hunting, depredation, scientific collection). Hunting permits do not require the mitigation hierarchy be enacted; rather, the Service sets annual regulations that limit harvest to ensure levels harvested do not diminish waterfowl breeding populations. For purposeful take permits that are not covered in these annual regulations (*e.g.,* depredation, scientific collection), there is an expectation that take be avoided and minimized to the maximum extent practicable as a condition of the take authorization process. Compensation and offsets are not required under these purposeful take permits, but can be accepted.

The Service has implied authority to permit incidental take of migratory birds, though incidental take has only been authorized in limited situations (*e.g.,* Department of Defense Readiness Rule and the NOAA Fisheries Special Purpose Permit). In all situations, permitted or unpermitted, there is an expectation that take be avoided and minimized to the maximum extent practicable, and voluntary offsets can be employed to this end. However, the Service cannot legally require or accept compensatory mitigation for unpermitted, and thus illegal, take of individuals. While action proponents are expected to reduce impacts to migratory bird habitat, such impacts are not regulated under the MBTA. As a result, action proponents are allowed to use the full mitigation hierarchy to manage impacts to their habitats, regardless of whether or not a permit for take of individuals is in place. Assessments of action effects should examine direct, indirect, and cumulative impacts to migratory bird habitats, as habitat losses have been identified as a critical factor in the decline of many migratory bird species.

11. National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) (NEPA)

NEPA requires Federal agencies to integrate environmental values into decisionmaking processes by considering impacts of their proposed actions and reasonable alternatives. Agencies disclose findings through an environmental assessment or a detailed environmental impact statement and are required to identify and include all relevant and reasonable mitigation measures that could improve the action. The Council on Environmental Quality's implementing regulations under NEPA define mitigation as a sequence, where mitigation begins with avoidance of impacts; followed by minimization of the degree or magnitude of impacts; rectification of impacts through repair, restoration, or rehabilitation; reducing impacts over time during the life of the action; and lastly, compensation for impacts by providing replacement resources. Effective mitigation through this ordered approach starts at the beginning of the NEPA process, not at the end. Implementing regulations require that the Service be notified of all major Federal actions affecting fish and wildlife and our recommendations solicited. Engaging this process allows the Service to provide comments and recommendations for mitigation of fish and wildlife impacts.

12. National Wildlife Refuge Mitigation Policy (64 FR 49229–49234, September 10, 1999) (Refuge Mitigation Policy)

The Service's Final Policy on the National Wildlife Refuge System and Compensatory Mitigation under the section 10/404 Program establishes guidelines for the use of Refuge lands for siting compensatory mitigation for impacts permitted through section 404 of the Clean Water Act (CWA) and section 10 of the Rivers and Harbors Act (RHA). The Refuge Mitigation Policy clarifies that siting mitigation for off-Refuge impacts on Refuge lands is appropriate only in limited and exceptional circumstances. Mitigation banks may not be sited on Refuge lands, but the Service may add closed banks to the Refuge system if specific criteria are met. The Refuge Mitigation Policy, which explicitly addresses only compensatory mitigation under the CWA and RHA, remains in effect and is unaltered by this Policy. However, the Service will evaluate all proposals for using Refuge lands as sites for other compensatory mitigation purposes using the criteria and procedures established for aquatic resources in the Refuge Mitigation Policy (*e.g.,* to locate compensatory mitigation on Refuge property for off-Refuge impacts to endangered or threatened species).

13. Natural Resource Damage Assessment and Restoration (NRDAR)

Under the Oil Pollution Act (33 U.S.C. 2701 *et seq.*) (OPA) and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601) (CERCLA), as amended by Public Law 99–499, when a release of hazardous materials or an oil spill injures natural resources under the jurisdiction of State, tribal, and Federal agencies, these governments quantify injuries to determine appropriate restoration necessary to compensate the public for losses of those resources or their services. Nothing in this Policy supersedes the statutes and regulations governing the natural resource damage provisions of CERCLA, OPA, and the CWA.

The Service is often a participating bureau, supporting the Department of the Interior, during NRDAR. A restoration settlement, in the form of damages provided through a settlement document, is usually determined by quantifying the type and amount of restoration necessary to offset the injury caused by the spill or release. The type of restoration conducted depends on the resources injured by the release (*e.g.,* marine habitats, ground water, or biological resources (fish, birds)).

In the *Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment* (November 3, 2015), DOI is charged with developing guidance describing considerations for evaluating whether, where, and when tools and techniques used in mitigation—including restoration banking or advance restoration projects—would be appropriate as components of a restoration plan resolving natural resource damage claims. Pending promulgation of that guidance, the tools provided in section 5 maintain the flexibility to implement the appropriate restoration to restore injured resources under the jurisdiction of multiple governments, by providing support for weighing or modifying project elements to reach Service goals.

B. Additional Legislative Authorities

1. Clean Air Act; 42 U.S.C. 7401 *et seq.,* as amended (See *http://www.fws.gov/refuges/airquality/permits.html*)
2. Marine Protection, Research, and Sanctuaries Act; 16 U.S.C. 1431 *et seq.* and 33 U.S.C. 1401 *et seq.*
3. Resource Conservation and Recovery Act; 42 U.S.C. 6901 *et seq.*
4. Shore Protection Act; 33 U.S.C. 2601 *et seq.*
5. Coastal Zone Management Act; 16 U.S.C. 1451 *et seq.*
6. Coastal Barrier Resources Act; 16 U.S.C. 3501
7. Surface Mining Control and Reclamation Act; 30 U.S.C. 1201 *et seq.*
8. National Wildlife Refuge System Administration Act; 16 U.S.C. 668dd, as amended
9. National Historic Preservation Act; 16 U.S.C. 470f
10. North American Wetlands Conservation Act, 16 U.S.C. 4401 *et seq.*
11. Pittman-Roberts Wildlife Restoration Act; 16. U.S.C. 669–669k
12. Dingell-Johnson Sport Fish Restoration Act; 16 U.S.C. 777–777n, except 777e–1 and g–1
13. Federal Land and Policy Management Act, 43 U.S.C. 1701 *et seq.*

C. Implementing Regulations

1. National Environmental Policy Act (NEPA), 40 CFR part 1508, 42 U.S.C. 55
2. Marine Mammal Protection Act (MMPA), 50 CFR part 18, 16 U.S.C. 1361 *et seq.*
3. Migratory Bird Treaty Act (MBTA), 50 CFR part 21, 16 U.S.C. 703 *et seq.*
4. Bald and Golden Eagle Protection Act (Eagle Act), 50 CFR part 22, 16 U.S.C. 668 *et seq.*
5. Guidelines for Wetlands Protection, 33 CFR parts 320 and 332, 40 CFR part 230
6. Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR parts 325 and 332 (USACE) and 40 CFR part 230 (EPA), 33 U.S.C. 1344
7. National Coastal Wetlands Conservation Grants, 16 U.S.C. 3954, 50 CFR part 84
8. Natural Resource Damage Assessments (OPA), 15 CFR part 990, 33 U.S.C. 2701 *et seq.*
9. Natural Resource Damage Assessments (CERCLA), 43 CFR part 11, 42 U.S.C. 9601
10. Endangered Species Act of 1973, as amended; 50 CFR parts 13, 17 (specifically §§ 17.22, 17.32, 17.50), part 402; 16 U.S.C. 1531 *et seq.*
11. Powers of the Secretary (43 U.S.C. 1201), 43 CFR part 24

D. Executive Orders

1. Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, January 10, 2001
2. Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, January 4, 1979
3. Executive Order 11988, Floodplain Management, May 24, 1977
4. Executive Order 11990, Protection of Wetlands, May 24, 1977
5. Executive Order 12898, Federal Actions To Address Environmental Justice in Minority and Low-Income Populations, February 11, 1994
6. Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance, October 5, 2009
7. Executive Order 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects, March 22, 2012

E. Council on Environmental Quality (CEQ) Policy and Guidance

1. Guidance Regarding NEPA Regulations (48 FR 34236, July 28, 1983)
2. Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (40 CFR 1508.5, July 28, 1999)
3. Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (January 30, 2002)
4. Collaboration in NEPA, a Handbook for NEPA Practitioners (October 2007)
5. Memorandum, ''Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact'' (January 14, 2011)
6. ''Memorandum on Environmental Collaboration and Conflict Resolution'' (September 6, 2012)
7. NEPA and NHPA, a Handbook for Integrating NEPA and Section 106 (March 2013)
8. Memorandum for Heads of Federal Departments and Agencies, ''Effective Use of Programmatic NEPA Reviews'' (December 18, 2014)
9. Memorandum: ''Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews'' (August 1, 2016)

F. Department of the Interior Policy and Guidance

1. Department of the Interior National Environmental Policy Act Procedures, 516 DM 1–7
2. Secretarial Order 3330, Improving Mitigation Policies and Practices of the Department of the Interior (October 31, 2013)
3. Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997)
4. Department of the Interior Climate Change Adaptation Policy, 523 DM 1

G. U.S. Fish and Wildlife Service (USFWS) Policy and Guidance:

1. Service Responsibilities to Protect Migratory Birds, 720 FW 2
2. Final Policy on the National Wildlife Refuge System and Compensatory Mitigation under the Section 10/404 Program, 64 FR 49229–49234, September 10, 1999
3. Habitat Conservation Planning and Incidental Take Permit Processing Handbook, 61 FR 63854, 1996
4. USFWS National Environmental Policy Act Reference Handbook, 505 FW 1.7 and 550 FW 1
5. Endangered Species Act Habitat Conservation Planning Handbook (with NMFS), 1996
6. Endangered Species Act Consultation Handbook (with NMFS), 1998
7. Inter-agency Memorandum of Agreement Regarding Oil Spill Planning and Response Activities Under the Federal

Water Pollution Control Act's National Oil and Hazardous Substances Pollution Contingency Plan and the Endangered Species Act, 2002
8. Guidance for the Establishment, Use, and Operation of Conservation Banking, 2003
9. Endangered and Threatened Wildlife and Plants; Recovery Crediting Guidance, 2008
10. USFWS Tribal Consultation Handbook, 2011
11. Service Climate Change Adaptation Policy, 056 FW 1
12. USFWS Native American Policy, 510 FW 1

H. Other Agency Policy, Guidance, and Actions Relevant to Service Activities

1. Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency, The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, 1990
2. Federal Highway Administration, Consideration of Wetlands in the Planning of Federal Aid Highways, 1990
3. Clean Water Act Section 404(q) Memorandum of Agreement Between the Department of the Interior and the Department of the Army, 1992
4. Interagency Agreement between the National Park Service, Fish and Wildlife Service, Bureau of Land Management, and the Federal Aviation Administration Regarding Low-Level Flying Aircraft Over Natural Resource Areas, 1993
5. USFWS Memorandum from Acting Director to Regional Directors, Regarding ''Partners for Fish and Wildlife Program and NEPA Compliance,'' 2002
6. Agreement between the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers for Conducting Fish and Wildlife Coordination Act Activities, 2003
7. Memorandum of Agreement Between the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers, 2003
8. Partnership Agreement between the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service for Water Resources and Fish and Wildlife, 2003
9. Memoranda of understanding with nine Federal agencies, under E.O. 13186, Responsibilities of Federal Agencies to Protect Migratory Birds (*http://www.fws.gov/migratorybirds/PartnershipsAndIniatives.html*)

Appendix B. Service Mitigation Policy and NEPA

This appendix addresses Service responsibilities for applying this Policy when we are formulating our own proposed actions under the NEPA decision making process. Service personnel may also use this appendix as guidance for providing mitigation recommendations when reviewing the proposed actions of other Federal agencies under NEPA. However, comments that we provide are advisory to other Federal agencies in the NEPA context as an agency with special expertise regarding mitigating impacts to fish and wildlife resources. Consistent with their authorities, action agencies choose whether to adopt, in whole or in part, mitigation recommendations received from other agencies and the public, including the Service. Any requirements of other Federal agencies to mitigate impacts to fish and wildlife resources are governed by applicable statutes and regulations.

A. Mitigation in Environmental Review Processes

NEPA was enacted to promote efforts to prevent or eliminate damage to the environment and biosphere (42 U.S.C. 4321). The NEPA process is intended to help officials make decisions based on an understanding of environmental consequences and take actions that protect, restore, and enhance the environment (40 CFR part 1501). At the earliest stage possible in the planning process, and prior to making any detailed environmental review, the Service will ''consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.'' (42 U.S.C. 4332(C)) Early coordination avoids delays, reduces potential conflicts, and helps ensure compliance with other statutes and regulations. When scoping the issues for the review, the Service will ''invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds).'' (40 CFR 1501.7(a)(1))

NEPA requires consideration of the impacts from connected, cumulative, and similar actions, and their relationship to the maintenance and enhancement of long-term productivity (42 U.S.C. 4332). Mitigation measures should be developed that effectively and efficiently address the predicted and actual impacts, relative to the ability to maintain and enhance long-term productivity. The consideration of mitigation (type, timing, degree, etc.) should be consistent with and based upon the evaluation of direct, indirect, and cumulative impacts. The Service should also consider and encourage public involvement in development of mitigation planning, including components such as compliance and effectiveness monitoring, and adaptive management processes.

Consistent with the January 14, 2011, CEQ Memorandum: Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impacts, Service-proposed actions should incorporate measures to avoid, minimize, rectify, reduce, and compensate for impacts into initial proposal designs and described as part of the action. Measures to achieve net gain or no-net-loss outcomes have the greatest potential to achieve environmentally preferred outcomes that are encouraged by the memorandum, and measures to achieve net gain outcomes have the greatest potential to enhance long-term productivity. We should analyze mitigation measures considered, but not incorporated into the proposed action, as one or more alternatives. For illustrative purposes, our NEPA documents may address mitigation alternatives or consider mitigation measures that the Service does not have legal authority to implement. However, the Service should not commit to mitigation alternatives or measures considered or analyzed without sufficient legal authorities or sufficient resources to perform or ensure the effectiveness of the mitigation (CEQ 2011). The Service should monitor the compliance and effectiveness of our mitigation commitments. For applicant-driven actions, some or most of the responsibility for mitigation monitoring may lie with the applicant; however, the Service retains the ultimate responsibility to ensure that monitoring is occurring when needed and that the results of monitoring are properly considered in an adaptive management framework.

When carrying out its responsibilities under NEPA, the Service will apply the mitigation meanings and sequence in the NEPA regulations (40 CFR 1508.20). In particular, the Service will retain the ability to distinguish between:

- Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- rectifying the impact by repairing, rehabilitating, or restoring the affected environment; and
- reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

Minimizing impacts under NEPA is commonly applied at the planning design stage, prior to the action (and impacts) occurring. Rectification and reduction over time are measures applied after the action is implemented (even though they may be included in the plan). Therefore, under NEPA, there are often very different temporal scopes between minimization measures and those for rectification and reduction over time. These temporal differences can be important for developing and evaluating alternatives, analyzing indirect and cumulative impacts, and for designing and implementing effectiveness and compliance monitoring. Therefore, the Service will retain the ability to distinguish between these three mitigation types when doing so will improve the ability to take the requisite NEPA ''hard look'' at potential environmental impacts and reasonable alternatives to proposed actions.

Other statutes besides NEPA that compel the Service to address the possible environmental impacts of mitigation activities for fish and wildlife resources commonly include the National Historic Preservation Act of 1996 (NHPA) (16 U.S.C 470 *et seq.*), as amended in 1992, the Federal Water Pollution Control Act (Clean Water Act) (33 U.S.C. 1251–1376), Fish and Wildlife Coordination Act (16 U.S.C 661–667(e)), as amended (FWCA), and the Clean Air Act (42 U.S.C. 7401–7661). Service mitigation decisions should also comply with all applicable Executive Orders, including E.O. 13514, Federal Leadership in Environmental, Energy, and Economic Performance (October 5, 2009); E.O. 13653, Preparing the United States for the Impacts of Climate Change (November 1, 2013); and E.O. 12898, Federal Actions To Address Environmental Justice in Minority

Populations and Low-Income Populations. DOI Environmental Compliance Memorandum (ECM) 95–3 provides additional direction regarding responsibilities for addressing environmental justice under NEPA, including the equity of benefits and risks distribution.

B. Efficient Mitigation Planning

The CEQ Regulations Implementing NEPA include provisions to reduce paperwork (§ 1500.4), delay (§ 1505.5), and duplication with State and local procedures (§ 1506.2) and combine documents in compliance with NEPA. A key component of the provisions to reduce paperwork directs Federal agencies to use environmental impact statements for programs, policies, or plans, and to tier from statements of broad scope to those of narrower scope, in order to eliminate repetitive discussions of the same issues (§§ 1501.1(i), 1502.4, and 1502.20). To the fullest extent possible, the Service should coordinate with State, tribal, local, and other Federal entities to conduct joint mitigation planning, research, and environmental review processes. Mitigation planning can also provide efficiencies when it is used to reduce the impacts of a proposed project to the degree it eliminates significant impacts and avoids the need for an environmental impact statement. When using this approach, employing a mitigated Finding of No Significant Impact (FONSI), the Service should ensure consistency with the aforementioned January 14, 2011, CEQ memorandum.

Use of this Policy will help focus our NEPA discussion on issues for fish, wildlife, plants, and their habitats, and will avoid unnecessarily lengthy background information. When appropriate, the Service should use the process for establishing evaluation species and resource categories to concentrate our environmental analyses on relevant and significant issues.

Programmatic NEPA reviews can establish standards for consideration and implementation of mitigation, and can more effectively address cumulative impacts. The programmatic NEPA reviews can facilitate decisions on agency actions that precede site- or project-specific decisions and actions, such as mitigation alternatives or commitments for subsequent actions, or narrowing of future alternatives. To ensure that landscape-scale mitigation planning is effectively implemented and meets conservation goals, as appropriate, the Service should seek and consider collaborative opportunities to conduct programmatic NEPA decisionmaking processes on Service actions that are similar in timing, impacts, alternatives, resources, and mitigation. The Service should consider developing standard mitigation protocols or objectives in a programmatic NEPA review in order to provide a framework and scope for the subsequent tiered analysis of environmental impacts. Existing landscape-scale conservation and mitigation plans that have already undergone a NEPA process will provide efficiencies for Federal actions taken on a project-specific basis and will also better address potential cumulative impacts. However, the Service may incorporate plans or components of plans by reference (40 CFR 1502.21), while addressing impacts from plans or components within the NEPA process on the Service action. When considering programmatic NEPA reviews, the Service should adopt approaches consistent with the December 18, 2014, CEQ Memorandum: Effective Use of Programmatic NEPA Reviews.

Appropriate treatment of climate change in NEPA reviews is essential to development of meaningful mitigation. The Service approach should be consistent with the August 1, 2016, CEQ Memorandum: Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, which guides the consideration of reasonable alternatives and recommends agencies consider the short- and long-term effects and benefits in the alternatives and mitigation analysis.

C. Collaboration

Collaboration is an important component of mitigation planning, especially at the landscape or programmatic level. A collaborative NEPA process can offer the Service many benefits regarding development and implementation of mitigation, including, but not limited to: Better information regarding mitigation options by accessing relevant scientific and technical expertise and knowledge relating to local resources; a fairer process by involving most or all interests involved in determining mitigation; conflict prevention by dealing with issues related to mitigation as they arise; and easier implementation because all the stakeholders feel vested in the implementation of mitigation. Therefore, when considering and engaging in collaboration, the Service should, to the extent applicable, utilize the principles and recommendations set forth in the Office of Management and Budget and CEQ Memorandum on Environmental Collaboration and Conflict Resolution (2012) and the CEQ handbook, *Collaboration in NEPA–a Handbook for NEPA Practitioners* (2007).

D. NEPA and Tribal Trust Responsibilities

NEPA also provides a process through which all Tribal Trust responsibilities can be addressed simultaneous to consultation, but care should be taken to ensure that culturally sensitive information is not disclosed. Resources that may be impacted by Service actions or mitigation measures include culturally significant or sacred landscapes, species associated with those landscapes, or species that are separately considered culturally significant or sacred. The Service should coordinate or consult with affected tribes to develop methods for evaluating impacts, significance criteria, and meaningful mitigation to sacred or culturally significant species and their locales. Because climate change has been identified as an Environmental Justice (EJ) issue for tribes, adverse climate change-related effects to culturally significant or sacred landscapes or species may be cumulatively greater, and may indicate the need for a separate EJ analysis. Affected tribes can be those for which the locale of the action or landscape mitigation planning lies within traditional homelands and can include traditional migration areas. The final determination of whether a tribe is affected is made by the tribe, and should be ascertained during consultation or a coordination process. When government-to-government consultation takes place, the consultation process will be guided by the Service Tribal Consultation Handbook.

The Service has overarching Tribal Trust Doctrine responsibilities under the Eagle Act, the National Historic Preservation Act (NHPA), the American Indian Religious Freedom Act (AIRFA) (42 U.S.C. 1996), Religious Freedom Restoration Act of 1993 (RFRA) (42 U.S.C. 2000bb *et seq.*), Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, the Endangered Species Act (June 5, 1997), Executive Order 13007, Indian Sacred Sites (61 FR 26771, May 29, 1996), and the USFWS Native American Policy. Government-wide statutes with requirements to consult with tribes include the Archeological Resources Protection Act of 1979 (ARPA) (16 U.S.C. 470aa–mm), the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001 *et. seq.*), and AIRFA. Regulations with requirements to consult include NAGPRA, NHPA, and NEPA. As required, the Service will initiate Section 106 consultation with Indian tribes during early planning for FWS proposed actions, to ensure their rights and concerns are incorporated into project design. Consultation will continue throughout all stages of the process, including during consideration of mitigation.

E. Integrating the Mitigation Policy Into the NEPA Process

When the Service is the lead or co-lead Federal agency for NEPA compliance, this Policy may inform several components of the NEPA process and make it more effective and more efficient in conserving the affected Federal trust resources. This section discusses the role of this Policy in Service decisionmaking under NEPA.

Scoping

The Service should use internal and external scoping to help identify appropriate evaluation species, obtain information about the relative scarcity, suitability, and importance of affected habitats for resource category assignments, identify issues associated with these species and habitats, and identify issues associated with other affected resources. Climate change vulnerability assessments can be a valuable tool for identifying or screening new evaluation species. The Service should coordinate external scoping with agencies having special expertise or jurisdiction by law for the affected resources.

Purpose and Need

The purpose and need statement of the NEPA document should incorporate relevant conservation objectives for evaluation species and their habitats, and the need to ensure either a net gain or no-net-loss. Because the statement of purpose and need frames the development of the proposed action and alternatives, including conservation objectives from the beginning, it steers action proposals away from impacts that may otherwise necessitate mitigation. Addressing conservation objectives in the purpose statement initiates a planning process in which the proposed action and all reasonable alternatives evaluated necessarily include appropriate conservation measures, differing in type or degree, and avoids presenting decisionmakers with a choice between a ''conservation alternative'' and a ''no conservation alternative.''

Alternatives

The alternatives should include, as appropriate, an alternative that includes design components or mitigation measures to achieve a net benefit for affected resources and an alternative that includes design components or mitigation measures to achieve no-net-loss of affected resources. Alternatives that include provisions for mitigation based upon different climate change projections will help guide the development of appropriate responses, and will facilitate the ability to change mitigation responses more quickly to ones already analyzed but not previously adopted.

Affected Environment

The affected environment discussion should focus on significant environmental issues associated with evaluation species and their habitats and highlight resource vulnerabilities that may require mitigation features in the project design. This section should document the relative scarcity, suitability, and importance of affected habitats, along with the sensitivity and status of the species and habitats. It should identify relevant temporal and spatial scales for each resource and the appropriate indicators of effects and units of measurement for evaluating mitigation features. This section should also identify habitats for evaluation species that are currently degraded but have a moderate to high potential for restoration or improvement.

Significance Criteria

Explicit significance criteria provide the benchmarks or standards for evaluating effects under NEPA. Potentially significant impacts to resources require decisionmaking supported by an environmental impact statement. Determining significance considers both the context and intensity of effects. For resources covered by this Policy, the sensitivity and status of affected species, and the relative scarcity, suitability, and importance of affected habitats, provide the context component of significance criteria. Measures of the severity of effects (degree, duration, spatial extent, etc.) provide the intensity component of significance criteria. Significance criteria may help identify appropriate levels and types of mitigation; however, the Service should consider mitigation for impacts that do not exceed thresholds for significance as well as those that do.

Analysis of Environmental Consequences

The analysis of environmental consequences should address the relationship of effects to the maintenance and enhancement of long-term productivity (40 CFR 1502.16), and include the timing and duration of direct, indirect, and cumulative effects to resources, short-term versus long-term effects (adverse and beneficial), and how the timing and duration of mitigation would influence net effects over time. The Service's net gain goal for fish and wildlife resources under this Policy applies to the full planning horizon of a proposed action. Guidance under section V.B.3 (Assessment Principles) of this Policy supplements existing Service, Department, and government-wide guidance for the Service's environmental consequences analyses for affected fish and wildlife resources under NEPA.

Cumulative Effects Analyses

The long-term benefits of mitigation measures, whether onsite or offsite relative to the proposed action, often depend on their placement in the landscape relative to other environmental resources and stressors. Therefore, cumulative effects analyses, including the effects of climate change, are especially important to consider in designing mitigation measures for fish and wildlife resources. Cumulative effects analyses should include consideration of direct and indirect effects of climate change and should incorporate mitigation measures to address altered conditions. Cumulative effects are doubly important in actions affecting species in decline, such as ESA-listed or candidate species, marine mammals, and Birds of Conservation Concern, for which the Service should design mitigation that will improve upon existing conditions and offset as much as practicable reasonably foreseeable adverse cumulative effects. Also, to the extent practicable, cumulative effects analyses should address the synergistic effects of multiple foreseeable resource stressors. For example, in parts of some western States, the combination of climate change, invasive grasses, and nitrogen deposition may substantially increase fire frequency and intensity, adversely affecting some resources to a greater degree than the sum of these stressors considered independently.

Analysis of Climate Change

The analyses of climate change effects should address effects to and changes for the evaluation species, resource categories, mitigation measures, and the potential for changes in the effects of mitigation measures. Anticipated changes may result in the need to choose different or additional evaluation species and habitat, at different points in time.

Decision Documents

Mitigation measures should be included as commitments within a Record of Decision (ROD) for an EIS, and within a mitigated FONSI. The decision documents should clearly identify: (a) Measures to achieve outcomes of no net loss or net gain; (b) the types of mitigation measures adopted for each evaluation species or suite of species; (c) the spatial and temporal application and duration of the measures; (d) compliance and effectiveness monitoring; (e) criteria for remedial action; and (f) unmitigable residual effects.

Appendix C. Compensatory Mitigation in Financial Assistance Awards Approved or Administered by the U.S. Fish and Wildlife Service

The basic authority for Federal financial assistance is in the Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C. 6301 *et seq.*). It distinguishes financial assistance from procurement, and explains when to use a grant or a cooperative agreement as an instrument of financial assistance. Regulations at 2 CFR part 200 provide Government-wide rules for managing financial assistance awards. Each of the Service's financial assistance programs has at least one statutory authority, which are listed in the Catalog of Federal Domestic Assistance at *http://www.cfda.gov/.* These statutory authorities and their program-specific regulations may supplement or create exceptions to the Government-wide regulations. The authorities and regulations for the vast majority of financial assistance programs do not address mitigation, but there are at least two exceptions. The statutory authority for the North American Wetlands Conservation Fund program (16 U.S.C. 4401 *et seq.*) prohibits the use of program funds for specific types of mitigation. Regulations implementing the National Coastal Wetlands Conservation Grant program (50 CFR part 84) include among the activities ineligible for funding the acquisition, restoration, enhancement, or management of lands to mitigate recent or pending habitat losses. Consistent with this Policy, the regulations at 50 CFR part 84 authorize the use of Natural Resource Damage Assessment funds as match in the National Coastal Wetlands Conservation Program. To foster consistent application of financial assistance programs with respect to mitigation processes, the following provisions describe appropriate circumstances as well as prohibitions for use of financial assistance in developing compensatory mitigation.

A. What is Federal financial assistance?

Federal financial assistance is the transfer of cash or anything of value from a Federal agency to a non-Federal entity to carry out a public purpose authorized by a U.S. law. If the Federal Government will be substantially involved in carrying out the project, the instrument for transfer must be a cooperative agreement. Otherwise, it must be a grant agreement. We use the term *award* interchangeably for a grant or cooperative agreement. This Policy applies only to awards approved or administered by the Service in one of its financial assistance programs. If the Service shares responsibility for approving or administering an award with another entity, this Policy applies only to those decisions that the Service has the authority to make under the terms of the shared responsibility.

B. Where do most mitigation issues occur in financial assistance?

Most mitigation issues in financial assistance relate to: (a) The proposed use of mitigation funds on land acquired with Federal financial assistance, and (b) using either mitigation funds or in-kind contributions derived from mitigation, as match. Match is the share of project costs not paid by Federal funds, unless otherwise authorized by Federal statute. Most Service-approved or -administered financial assistance programs require or encourage applicants to provide match to leverage the Federal funds.

C. Can the Federal or matching share in a financially assisted project be used to generate mitigation credits for activities authorized by Department of the Army (DA) permits?

1. Neither the Federal nor matching share in financially assisted aquatic-resource-restoration projects or aquatic resource conservation projects can be used to generate mitigation credits for DA-authorized activities except as authorized by 33 CFR 332.3(j)(2) and 40 CFR 230.93(j)(2). These exceptional situations are any of the following:

a. The mitigation credits are solely the result of any match over and above the required minimum. This surplus match must supplement what will be accomplished by the Federal funds and the required-minimum match to maximize the overall ecological benefits of the restoration or conservation project.

b. The Federal funding for the award is statutorily authorized and/or appropriated for the purpose of mitigation.

c. The work funded by the financial assistance award is subject to a DA permit that requires mitigation as a condition of the permit. An example is an award that funds a boat ramp that will adversely affect adjacent wetlands and the impact must be mitigated. The recipient may pay the cost of the mitigation with either the Federal funds or the non-Federal match.

2. Match cannot be used to generate mitigation credits under the exceptional situations described in section C(1)(a–c) if the financial assistance program's statutory authority or program-specific regulations prohibit the use of match or program funds for compensatory mitigation.

D. Can the Service approve a proposal to use the proceeds from the purchase of credits in an in-lieu-fee program or a mitigation bank as match?

1. In-lieu-fee programs and mitigation banks are mechanisms authorized in 33 CFR part 332 and 40 CFR part 230 to provide mitigation for activities authorized by a DA permit. The Service must not approve a proposal to use proceeds from the purchase of credits in an in-lieu-fee program or mitigation bank as match unless both of the following apply:

a. The proceeds are over and above the required minimum match. This surplus match must supplement what will be accomplished by the Federal funds and the required-minimum match to maximize the overall ecological benefits of the project.

b. The statutory authority for the financial assistance program and program-specific regulations (if any) do not prohibit the use of match or program funds for mitigation.

2. The reasons that the Service cannot approve a proposal to use proceeds from the purchase of credits in an in-lieu-fee program or mitigation bank as match except as described in section D(1)(a–b) are:

a. Proceeds from the purchase of credits are legally required compensation for resources or resource functions impacted elsewhere. The sponsor of the in-lieu-fee program or mitigation bank uses these proceeds for the restoration, establishment, enhancement, and/or preservation of the resources impacted. The purchase price of the credits is based on the full cost of providing the compensatory mitigation.

b. When credits are purchased from an in-lieu-fee program sponsor or a mitigation bank to compensate for impacts authorized by a DA permit, the responsibility for providing the compensatory mitigation transfers to the sponsor of the in-lieu-fee program or mitigation bank. The process is not complete until the sponsor provides the compensatory mitigation according to the terms of the in-lieu-fee program instrument or mitigation-banking instrument approved by the District Engineer of the U.S. Army Corps of Engineers.

E. Can the Federal share or matching share in a financially assisted project be used to satisfy a mitigation requirement of a permit or legal authority other than a DA permit?

The limitations on the use of mitigation in a Federal financially assisted project are generally the same regardless of the source of the mitigation requirement, but only the limitations regarding mitigation required by a DA permit are currently established in regulation. Limitations for a permit or authority other than a DA permit are established in this Policy. They are:

1. Neither the Federal nor matching share in a financially assisted project can be used to satisfy Federal mitigation requirements except in any of the following situations:

a. The mitigation credits are solely the result of any match over and above the required minimum. This surplus match must supplement what will be accomplished by the Federal funds and the required minimum match to maximize the overall ecological benefits of the project.

b. The Federal funding for the award is statutorily authorized and/or appropriated for use as compensatory mitigation for specific projects or categories of projects.

c. The project funded by the Federal financial assistance award is subject to a permit or authority that requires mitigation as a condition of the permit. An example is an award that funds a boat ramp that will adversely affect adjacent wetlands and the impact must be mitigated. The recipient may pay the cost of the mitigation with either the Federal funds or the non-Federal match.

2. Match cannot be used to satisfy Federal mitigation requirements under the exceptional situations described in section E(1)(a–c) if the financial assistance program's statutory authority or program-specific regulations prohibit the use of match or program funds for mitigation.

3. If any regulations govern the specific type of mitigation, and if these regulations address the role of mitigation in a Federal financially assisted project, the regulations will prevail in any conflict between those regulations and section E of Appendix C.

F. Can the Service approve a proposal to use revenue from a Natural Resource Damage Assessment and Restoration (NRDAR) Fund settlement as match in a financial assistance award?

1. The Service can approve such a proposal as long as the financial assistance program does not prohibit the use of match or program funds for compensatory mitigation. In certain cases, this revenue qualifies as match because:

a. Federal and non-Federal entities jointly recover the fees, fines, and/or penalties and deposit the fees, fines, and/or penalties as joint and indivisible recoveries into a fiduciary fund for this purpose.

b. The governing body of the NRDAR Fund may include Federal and non-Federal trustees, who must unanimously approve the transfer to a non-Federal trustee for use as non-Federal match.

c. The project is consistent with a negotiated settlement agreement and will carry out the provisions of the Comprehensive Environmental Response Compensation and Liability Act, as amended, Federal Water Pollution Control Act of 1972, and the Oil Pollution Act of 1990 for damage assessment activities.

d. The use of the funds by the non-Federal trustee is subject to binding controls.

G. Can the Service approve financial assistance to satisfy mitigation requirements of State, tribal, or local governments?

1. The Service may approve an award that satisfies a compensatory mitigation requirement of a State, tribal, or local government, if satisfying the mitigation requirement is incidental to a project purpose consistent with the purposes(s) of the program. It is solely the responsibility of the State, tribal, or local government to determine that its mitigation requirement has been satisfied and to submit any required certifications to that effect.

2. Satisfying a State, tribal, or local government mitigation requirement with Federal financial assistance or contributing match originating from such a requirement to a Federal award must not be contrary to any law, regulation, or policy of the State, tribal, or local government, as applicable.

H. Can a project on land already designated for the conservation of natural resources generate credits for compensatory mitigation?

1. A project on public, private, or federally recognized tribal lands already designated for conservation of natural resources can generate credits for compensatory mitigation if it meets the requirements of section 5.7.2. One of these requirements is that the benefits of the mitigation measures must be additional. If the authority for the compensatory mitigation is the Clean Water Act and if public land is proposed as the site of the project, it must also comply with 33 CFR 332.3(a)(3) and 40 CFR 230.93(a)(3), both of which read:

> . . . Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place. . . .

Public land includes only those real property interests owned or held by Federal, State, and local governments, and instrumentalities of any of these governments.

To be either ''additional'' or ''over and above,'' the benefits must improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure. Baseline conditions are: (a) Those that exist, and (b) those that a public land-management agency is foreseeably expected to implement absent the mitigation.

2. Examples of baseline conditions that a land-management agency or organization is foreseeably expected to implement are:

a. Management outcomes or environmental benefits required for a land-management unit by a statute, regulation, covenant in a deed, facility-management plan, or an integrated natural resources management plan, *e.g.,* (a) huntable populations of big game, (b) Class A wild trout populations at Class A densities, and (c) habitat diversity. When evaluating existing plans under sections H.2.a or b, the Service must defer to State and tribal plans to determine which additional benefits to count toward achieving the mitigation planning goal as long as the plans are consistent with Federal law and regulation and this Policy.

b. Management responsibilities assigned to an agency by statute, regulation, facility management plan, or integrated natural resources management plan, *e.g.,* (a) resource protection, (b) habitat management, and (c) fire management.

c. Commitments made under a financial-assistance award by the recipient, a subrecipient, or a partner to achieve certain management outcomes or environmental benefits for a land-management unit. The source of the funding to carry out these commitments may be the awarding agency, a match provider, and/or other contributors.

3. Projects that are not part of annual operations and maintenance are not baseline conditions if they are unfunded and have little prospect of funding, even if these projects are authorized in a statute or called for in a plan. Examples of projects that may be authorized in a statute or called for in a plan, but may have little prospect for funding are: (a) Construction of a high-volume pump station, (b) demolition of a dam, (c) reforestation of 1,000 acres of former agricultural land, and (d) acquisition of real property.

4. If it is unclear whether the proposed mitigation would provide additional conservation benefits after considering the above guidance, financial assistance managers must use judgment in making a decision. The overarching principles in making this decision should be: (a) Consistency with regulations, and (b) avoidance of an unauthorized subsidy to anyone who has a legal obligation to compensate for the environmental impacts of a project.

5. Service staff must be involved in the decision to locate mitigation on real property acquired under a Service-approved or administered financial assistance award for one or both of the following reasons:

a. The Service has a responsibility to ensure that real property acquired under one of its financial assistance awards is used for its authorized purpose as long as it is needed for that purpose.

b. If the proposed legal arrangements or the site-protection instrument to use the land for mitigation would encumber the title, the recipient of the award that funded the acquisition of the real property must obtain the Service's approval. If the proposed legal arrangements would dispose of any real-property rights, the recipient must request disposition instructions from the Service.

I. Does the Service's Mitigation Policy affect financial assistance programs and awards managed by other Federal entities?

1. This Policy affects only those Federal financial assistance programs and awards in which the Service has the authority to approve or disapprove applications for financial assistance or changes in the terms and conditions of an award. It also affects real property or equipment acquired or improved with a Service-administered financial assistance award where the recipient must continue to manage the real property or equipment for its originally authorized purpose as long as it is needed for those purposes.

2. The Policy has no effect on other Federal agencies' policies on match or cost share as long as those policies do not affect:

a. Restrictions in the Policy on the use of Service-approved or administered financial assistance awards for generating compensatory mitigation credits, and

b. the Service's responsibilities as identified in Federal statutes or their implementing regulations.

3. This Policy does not take precedence over the requirements of any Federal statute or regulation whether that statute or regulation applies to a Service program or a program of another Federal agency.

Dated: November 9, 2016.

Daniel M. Ashe,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–27751 Filed 11–18–16; 8:45 am]

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Part IV

Securities and Exchange Commission

17 CFR Parts 200, 230, 239, et al.

Exemptions To Facilitate Intrastate and Regional Securities Offerings; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 230, 239, 240, 249, 270 and 275

[Release Nos. 33–10238; 34–79161; File No. S7–22–15]

RIN 3235–AL80

Exemptions To Facilitate Intrastate and Regional Securities Offerings

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: We are adopting amendments to modernize Rule 147 under the Securities Act of 1933, which provides a safe harbor for compliance with the Section 3(a)(11) exemption from registration for intrastate securities offerings. We are also establishing a new intrastate offering exemption under the Securities Act, designated Rule 147A, which will be similar to amended Rule 147, but will have no restriction on offers and will allow issuers to be incorporated or organized outside of the state in which the intrastate offering is conducted provided certain conditions are met. The amendments to Rule 147 and new Rule 147A are designed to facilitate capital formation, including through offerings relying upon intrastate crowdfunding provisions under state securities laws, while maintaining appropriate investor protections and providing state securities regulators with the flexibility to add additional investor protections they deem appropriate for offerings within their state.

We also are adopting amendments to Rule 504 of Regulation D under the Securities Act to facilitate issuers' capital raising efforts and provide additional investor protections. The amendments to Rule 504 will increase the aggregate amount of securities that may be offered and sold in any twelve-month period from $1 million to $5 million and disqualify certain bad actors from participation in Rule 504 offerings. In light of these amendments to Rule 504, we are also repealing Rule 505.

DATES: *Effective date:* Revised 17 CFR 230.147 (Rule 147) and new 17 CFR 230.147A (Rule 147A) will be effective on April 20, 2017. The amendments to 17 CFR 230.504 (Rule 504) and 17 CFR 200.30–1 (Rule 30–1) will be effective on January 20, 2017. The removal of 17 CFR 230.505 (Rule 505) will be effective on May 22, 2017. All other amendments in this rule will be effective on May 22, 2017.

Comment date: Comments regarding the collection of information requirements within the meaning of the Paperwork Reduction Act of 1995 should be received on or before January 20, 2017.

ADDRESSES: Persons submitting comments on the collection of information requirements should direct the comments to the Commission by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/final.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number S7–22–15 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

FOR FURTHER INFORMATION CONTACT: With regard to the final rules, Anthony G. Barone, Special Counsel, Jenny Riegel, Special Counsel, or Ivan Griswold, Attorney-Advisor, Division of Corporation Finance, at (202) 551–3460, and with regard to guidance on broker-dealer registration, Timothy J. White, Senior Special Counsel, Division of Trading and Markets, at (202) 551–5550, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION: We are adopting new Rule 147A and are adopting amendments to Rule 147 [1] and Rule 504 [2] of Regulation D [3] under the Securities Act of 1933 (the ''Securities Act'').[4] We are repealing Rule 505 [5] of Regulation D.

Table of Contents

I. Introduction and Background

On October 30, 2015, we proposed amendments to Rule 147 and Rule 504 under the Securities Act to assist smaller companies with capital formation consistent with other public policy goals, including investor protection.[6] In developing final rules, we considered recommendations by the Advisory Committee on Small and Emerging Companies (''ACSEC'') [7] and the most recent SEC Government-Business Forum on Small Business

[1] 17 CFR 230.147.

[2] 17 CFR 230.504.

[3] 17 CFR 230.500 through 230.508.

[4] 15 U.S.C. 77a *et seq.*

[5] 17 CFR 230.505.

[6] *See* SEC Rel. No. 33–9973 [80 FR 69786] (Nov. 10, 2015) (''Proposing Release'').

[7] *See* Recommendation to the Commission by the Advisory Committee on Small and Emerging Companies to Modernize Rule 147 under the Securities Act of 1933 (Sept. 23, 2015) (''2015 ACSEC Recommendation''), *available at http://www.sec.gov/info/smallbus/acsec/acsec-recommendation-modernize-rule-147.pdf.* The Commission established the ACSEC in 2011 with the objective of providing the Commission with advice on its rules, regulations and policies with regard to its mission of protecting investors, maintaining fair, orderly and efficient markets and facilitating capital formation, as they relate to: (1) Capital raising by emerging privately-held small businesses (emerging companies) and publicly traded companies with less than $250 million in public market capitalization (smaller public companies) through securities offerings, including private and limited offerings and initial and other public offerings; (2) trading in the securities of emerging companies and smaller public companies; and (3) public reporting and corporate governance requirements of emerging companies and smaller public companies. Advisory Committee on Small and Emerging Companies, SEC Rel. No. 33–9258 (Sept. 12, 2011) [76 FR 57769 (Sept. 16, 2011)].

Capital Formation (''Small Business Forum'') [8] and comment letters received on the Proposing Release.[9] Today we are amending Rule 147 and establishing a new Securities Act exemption, designated Rule 147A. We are also amending Rule 504 of Regulation D. We believe the final rules will facilitate capital formation by smaller companies by increasing the utility of the current Securities Act exemptive framework for smaller offerings while maintaining appropriate protections for investors. The final rules complement recent efforts by the U.S. Congress,[10] state legislatures,[11] and state securities regulators [12] to modernize existing federal and state securities laws and regulations to assist smaller companies with capital formation. We believe our amendment to Rule 504 to increase its aggregate offering ceiling from $1 million to $5 million will significantly diminish the utility of Rule 505 and we are therefore repealing that rule.

Consistent with commenters' suggestions [13] and the recommendations of the 2015 Small Business Forum,[14] we are retaining and modernizing Rule 147 under the Securities Act as a safe harbor for intrastate offerings exempt from registration pursuant to Securities Act Section 3(a)(11). These amendments will modernize the safe harbor, while keeping within the statutory parameters of Section 3(a)(11), so that issuers may continue to rely upon the rule for offerings pursuant to state law exemptions, including crowdfunding provisions, that are conditioned upon compliance with Section 3(a)(11) and Rule 147.

Securities Act Section 3(a)(11) provides an exemption from registration under the Securities Act for ''[a]ny security which is part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory.'' [15] In 1974, the Commission adopted Rule 147 under the Securities Act to provide objective standards for local businesses seeking to rely on Section 3(a)(11).[16] The Rule 147 safe harbor was intended to provide assurances that the intrastate offering exemption would be used for the purpose Congress intended in enacting Section 3(a)(11), namely the local financing of companies by investors within the company's state or territory.[17] Rule 147 reflects this Congressional intent and generally relies upon state regulation to effectively protect investors.

Notwithstanding the importance of these limitations, due to developments in modern business practices and communications technology in the years since Rule 147 was adopted, we have determined that it is necessary to update the requirements of Rule 147 to ensure its continued utility.[18] We are also establishing a new intrastate offering exemption under the Securities Act, designated Rule 147A, that will further accommodate modern business practices and communications technology and provide an alternative means for smaller companies to raise capital locally.

We are adopting new Rule 147A pursuant to our general exemptive authority under Section 28 of the Securities Act,[19] and therefore, new

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[8] *See* Final Report of the 2015 SEC Government Business Forum on Small Business Capital Formation (April 2016) (''2015 Small Business Forum Recommendations''), *available at http://www.sec.gov/info/smallbus/gbfor34.pdf.* The Small Business Investment Incentive Act of 1980 directed the Commission to conduct an annual government-business forum to undertake an ongoing review of the financing problems of small businesses. 15 U.S.C. 80c–1. The Small Business Forum has met annually since 1982 to provide a platform to highlight perceived unnecessary impediments to small business capital formation and address whether they can be eliminated or reduced. Each forum seeks to develop recommendations for government and private action to improve the environment for small business capital formation, consistent with other public policy goals, including investor protection. Information about the Small Business Forum is *available at http://www.sec.gov/info/smallbus/sbforum.shtml*.

[9] The comment letters received in response to the Proposing Release are *available at http://www.sec.gov/comments/s7-22-15/s72215.shtml.*

[10] Congress enacted the Jumpstart Our Business Startups Act of 2012 (''JOBS Act''), which was signed into law by President Obama on April 5, 2012. Public Law 112–106, 126 Stat. 306. Pursuant to Title II of the JOBS Act, the Commission adopted new paragraph (c) of Rule 506 of Regulation D, removing the prohibition on general solicitation or general advertising for securities offerings relying on Rule 506. *See* SEC Rel. No. 33–9415 (July 10, 2013). Pursuant to Title IV of the JOBS Act, the Commission amended Regulation A in order to permit issuers to raise up to $50 million annually. *See* SEC Rel. No. 33–9741 (Mar. 25, 2015) (''2015 Regulation A Release''). Pursuant to Title III of the JOBS Act, the Commission adopted rules permitting companies to use the Internet to offer and sell securities through crowdfunding (''Regulation Crowdfunding''). *See* SEC Rel. No. 33–9974 (Oct. 30, 2015) (''Regulation Crowdfunding Adopting Release''). Congress also enacted the Fixing America's Surface Transportation Act of 2015 (''FAST Act''), which was signed into law by President Obama on December 4, 2015. Public Law 114–94, Sec 129 Stat. 1312 (2015). The FAST Act includes several amendments to the federal securities laws, including a new exemption to Section 4 of the Securities Act for secondary sales of securities that are purchased by an accredited investor, among other requirements (Section 76001), and changes to facilitate initial public offerings by emerging growth companies (Sections 71001 through 71003).

[11] *See, e.g.,* Ala. Code § 8–6–11 (2014); Ariz. Rev. Stat. Ann. § 44–1844 (2015); Colo. Rev. Stat. § 11–51–304(6) (2014); Fla. Stat. § 571.021, 517.061, 517.0611, 517.12, 517.121, 517.161, 626.9911; Ind. Code § 6–3.1–24–14 (2014); Ky. Rev. Stat. Ann. § 292.410–292.415 (2015); Me. Rev. Stat. Ann. tit. 32, § 16304, sub–§ 6–a (2014).

[12] *See, e.g.,* D.C. Mun Regs. tit. 26–B, § 250 (2014); Ga. Comp. R. & Regs. 590–4–08 (2011); Idaho Code Ann. § 30–14–203 (providing an exemption by order on a case-by-case basis); Kan. Admin. Regs. § 81–5–21 (2011).

[13] Letter from David M. Lynn, Chair, Federal Regulation of Securities Committee, Business Law Section, American Bar Association, April 8, 2016 (''ABA Letter''); Letter from Christopher D. Miller, Economic and Downtown Development Director, City of Adrian, Michigan, January 8, 2016 (''City of Adrian Letter''); Letter from Keith Paul Bishop, Former California Commissioner of Corporations, December 30, 2015 (''Bishop Letter''); Letter from Deborah L. Gunny and Cathryn S. Gawne, Co-Chairs, Corporations Committee, Business Law Section, State Bar of California, January 8, 2016 (''California Bar Letter''); Letter from Kim Wales, CEO, Wales Capital, and Executive Board Member, CrowdFund Intermediary Regulatory Advocates, January 11, 2016 (''CFIRA Letter''); Letter from Reps. Tom Emmer, Gwen Moore, Patrick McHenry, John Carney, Scott Garrett, Denny Heck, Randy Neugebauer, Terri Sewell, Luke Messer, Keith Ellison, Peter T. King, Robert Hurt, Robert Pittenger, Roger Williams and Stephen Fincher, U.S. House of Representatives, October 7, 2016 (''Congressional Letter''); Letter from Sara Hanks, CEO, CrowdCheck, Inc., January 2, 2016 (''CrowdCheck Letter''); Letter from Samuel S. Guzik, Securities Attorney, Guzik Associates, January 18, 2016 (''Guzik Letter''); Letter from Brian Knight, Associate Director, Financial Policy, and Staci Warden, Executive Director; Center for Financial Markets, Milken Institute, January 11, 2016 (''Milken Letter''); Letter from Judith M. Shaw, President, North American Securities Administrators Association, Inc. (''NASAA'') and Maine Securities Administrator, January 11, 2016 (''NASAA Letter''); Letter from Youngro Lee, Esq., Co-founder/CEO, NextSeed TX LLC, January 7, 2016 (''NextSeed Letter''); Letter from Amy E. Pearl, Founder and Executive Director, Hatch Innovation Inc., January 10, 2016 (''Pearl Letter''); Letter from Joe M. Wallin, Attorney, January 11, 2016 (''Wallin Letter''); Letter from Kristin Wolff, January 11, 2016 (''Wolff Letter''); Letter from Howard Orloff, CMO, ZacksInvest, November 19, 2015 (''Orloff Letter''); Letter from Anthony J. Zeoli, Partner, Freeborn & Peters LLP, November 5, 2016 (''Zeoli Letter''). No commenters supported the proposed elimination of Rule 147 as a safe harbor under Section 3(a)(11).

[14] *See* 2015 Small Business Forum Recommendations.

[15] 15 U.S.C. 77c(a)(11).

[16] *See* SEC Rel. No. 33–5450 (Jan. 7, 1974) [39 FR 2353 (Jan. 21, 1974)] (''Rule 147 Adopting Release''). *See also* SEC Rel. No. 33–5349 (Jan. 8, 1973) [38 FR 2468 (Jan. 26, 1973)] (''Rule 147 Proposing Release'').

[17] *See* Rule 147 Adopting Release. *See also* H.R. Rep. No. 73–85, at 6–7 (1933), H.R. Rep. No. 73–1838, at 40–41 (1934) (Conf. Rep.) and SEC Rel. No. 33–4434, at 4 (Dec. 6, 1961) [26 FR 11896 (Dec. 13, 1961)] (''1961 Release'').

[18] The Commission has not amended Rule 147 since its adoption, other than in 2013 when the Commission adopted technical amendments to Rules 145, 147, 152 and 155 to update references to Section 4(2) of the Securities Act, which was renumbered as Section 4(a)(2) by Section 201(c) of the JOBS Act, Public Law 112–106, sec. 201(c), 126 Stat. 306, 314 (Apr. 5, 2012). See SEC Rel. No. 33–9414 [78 FR 44730] (July 10, 2013). *See also* ABA Letter; Milken Letter.

[19] 15 U.S.C. 77z–3. For the reasons discussed throughout this release, we find that the Rule 147A

Continued

Rule 147A will not be subject to the statutory limitations of Section 3(a)(11). Accordingly, Rule 147A will have no restriction on offers, but will require that all sales be made only to residents of the issuer's state or territory to ensure the intrastate nature of the exemption. Rule 147A also will not require issuers to be incorporated or organized in the same state or territory where the offering occurs so long as issuers can demonstrate the in-state nature of their business, which we believe will expand the number of businesses that will be able to seek intrastate financing under Rule 147A, as compared to amended Rule 147. Certain provisions of existing Rule 147 concerning legends and mandatory disclosures to purchasers and prospective purchasers will apply to offerings conducted pursuant to amended Rule 147 and Rule 147A.[20]

As in current Rule 147, nothing in either amended Rule 147 or new Rule 147A will obviate the need for compliance with any applicable state law relating to the offer and sale of securities. Thus, states will retain the flexibility to adopt requirements that are consistent with their respective interests in facilitating capital formation and protecting their resident investors in intrastate securities offerings, including the authority to impose additional disclosure requirements regarding offers and sales made to persons within their state or territory, or the authority to limit the ability of certain bad actors from relying on applicable state exemptions. In addition, both federal and state antifraud provisions will continue to apply to offers and sales made pursuant to amended Rule 147 and new Rule 147A.

The staff will seek to collaborate with state regulators in gathering information about intrastate crowdfunding offerings and, based on the sharing of this information and other relevant inputs, the staff will undertake to study and submit a report to the Commission, no later than three years following the effective date of amended Rule 147 and new Rule 147A, on capital formation and investor protection in offerings under these rules. The report will include, but not be limited to, a review of information about:

(1) The use of amended Rule 147 and new Rule 147A;

(2) repeat use by the same issuers of amended Rule 147 or new Rule 147A;

(3) the use by issuers of alternative federal offering exemptions concurrently or close in time to an offer or sale under amended Rule 147 or new Rule 147A;

(4) fraud associated with, or issuer non-compliance with provisions of, amended Rule 147 or new Rule 147A;

(5) the role of intrastate broker-dealers and other intermediaries in offerings conducted pursuant to amended Rule 147 or new Rule 147A; and

(6) the application of state bad actor disqualification provisions in offerings conducted pursuant to amended Rule 147 or new Rule 147A to inform whether the Commission should consider including bad actor disqualification provisions in amended Rule 147 and new Rule 147A.

We also are amending Rule 504 of Regulation D under the Securities Act to increase the aggregate amount of securities that may be offered and sold pursuant to Rule 504 in any twelve-month period from $1 million to $5 million and to disqualify certain bad actors from participation in Rule 504 offerings. The higher offering ceiling amount will promote capital formation by increasing the flexibility of state securities regulators to implement coordinated review programs to facilitate regional offerings.[21] The bad actor disqualification provisions will provide for greater consistency across Regulation D. We believe these amendments to Rule 504 will significantly diminish the utility of Rule 505, which historically has been little utilized in comparison to Rule 506 of Regulation D.[22] We, therefore, are repealing Rule 505.

II. Amendments to Rule 147 and New Rule 147A

A. Explanation of Amendments to Rule 147 and New Rule 147A

Numerous commenters [23] and the 2015 Small Business Forum [24] recommended retaining Rule 147 as a safe harbor under Section 3(a)(11). Many of these commenters also recommended adopting a substantially similar new exemption pursuant to the Commission's general exemptive authority under Section 28 as an alternative to the Section 3(a)(11) exemption and safe harbor for companies that wish to conduct intrastate offerings under slightly broader conditions than contemplated by Section 3(a)(11). After considering the comments, we are amending Rule 147 to modernize the rule to incorporate most of our proposed amendments, except for the two proposed amendments that do not fit within the statutory limits of Section 3(a)(11)—allowing issuers to make offers accessible to out-of-state residents and to be incorporated out-of-state. These two provisions are the distinguishing features of the new Rule 147A exemption that we are establishing pursuant to our general exemptive authority under Section 28. Aside from these two provisions, the remaining provisions of new Rule 147A are substantively the same as the provisions of amended Rule 147.

1. Manner of Offering

a. Proposed Amendments

Rule 147, as proposed, would have required issuers to limit sales to in-state residents, but would no longer have limited offers by the issuer to in-state residents.[25] Accordingly, under our proposal, amended Rule 147 would have permitted issuers to engage in general solicitation and general advertising that could reach out-of-state residents in order to locate potential in-state investors using any form of mass media, including unrestricted, publicly-available Internet Web sites, to advertise their offerings, so long as all sales of

exemption being adopted today is necessary and appropriate in the public interest and consistent with the protection of investors.

[20] *See* Rules 147(f) and 147A(f).

[21] The state registration of securities offerings under coordinated review programs is an example of the efforts being undertaken by states to streamline the state registration process for issuers seeking to undertake multi-state registrations. These programs establish uniform review standards and are designed to expedite the registration process, thereby potentially saving issuers time and money. Participation in such programs is voluntary. The states have created coordinated review protocols for equity, small company and franchise offerings; direct participation program securities; and for certain offerings of securities pursuant to Regulation A. More information on coordinated review programs is available at *http://www.nasaa.org/industry-resources/corporation-finance/coordinated-review/*.

[22] For the period 2009 through 2015, 132,091 Forms D were filed. Of these Forms D, 3,758 reported an offering made in reliance upon Rule 505 of Regulation D, representing approximately 3% of all offerings made in reliance upon Regulation D and 5% of all Regulation D offerings raising less than $5 million. During this time period, 1,548 Forms D reported reliance only on Rule 505, and 2,210 Forms D reported reliance on Rule 505 and another Regulation D exemption. By contrast, for the period 2009 through 2015, 5,532 filings reported an offering made in reliance upon Rule 504, representing approximately 4% of all offerings made in reliance upon Regulation D and 13% of all Regulation D offerings raising less than $1 million. During this time period, 4,308 Forms D reported reliance only on Rule 504, and 1,224 Forms D reported reliance on Rule 504 and another Regulation D exemption. All other Form D filings during this period reported an offering made in reliance on Rule 506.

[23] ABA Letter; City of Adrian Letter; Bishop Letter; California Bar Letter; CFIRA Letter; Congressional Letter; CrowdCheck Letter; Guzik Letter; Milken Letter; NASAA Letter; NextSeed Letter; Pearl Letter; Wallin Letter; Wolff Letter; Orloff Letter; Zeoli Letter. No commenters supported the proposed elimination of Rule 147 as a safe harbor under Section 3(a)(11).

[24] 2015 Small Business Forum Recommendations.

[25] *See* proposed Rule 147(d).

securities so offered were made to residents of the state or territory in which the issuer has its principal place of business. In the Proposing Release, the Commission noted that market participants and commenters have indicated that the combined effect of the statutory limitation on offers in Section 3(a)(11) and the prescriptive threshold requirements of Rule 147 unduly limits the availability of the exemption for local companies that would otherwise conduct intrastate offerings.[26]

Given that proposed Rule 147 would have allowed offers to be made to or be accessible by out-of-state residents, including advertising offers on publicly-available Internet Web sites, the proposal would have required an issuer to include a prominent disclosure on all offering materials used in connection with a Rule 147 offering stating that sales will be made only to residents of the same state or territory as the issuer.[27] This proposed disclosure requirement was intended to advise investors who are not residents of the state in which sales are being made that the intrastate offering would be unavailable to them.

As proposed, Rule 147 would no longer have remained a safe harbor for conducting a valid intrastate exempt offering under Section 3(a)(11). An issuer that attempted to comply with Rule 147, as proposed to be amended, but failed to do so, could rely on any other available exemption. Failure to satisfy the requirements of Rule 147, as proposed to be amended, however, would also have likely resulted in a failure to satisfy the statutory requirements for the intrastate offering exemption under Section 3(a)(11), since the requirements of Section 3(a)(11) would be more restrictive than under Rule 147, as proposed to be amended.

b. Comments on Proposed Amendments

All commenters that addressed the issue expressed support for eliminating the limitation on offers to in-state residents while continuing to require that all sales be made to in-state residents.[28] Many of these commenters also expressed support for retaining existing Rule 147 as a safe harbor under Section 3(a)(11), in order to allow issuers to take advantage of existing state crowdfunding provisions.[29] As explained by one commenter, if the Commission eliminated the Rule 147 safe harbor, state legislative and/or rulemaking action would be required, since almost all of the state crowdfunding exemptions are premised on the offering qualifying under Section 3(a)(11) and its Rule 147 safe harbor.[30] The commenter noted that eliminating the Rule 147 safe harbor would leave these state crowdfunding exemptions unavailable until states modified their exemptions to accommodate the removal of Rule 147 as a safe harbor to Section 3(a)(11).[31] In order to avoid this problem, some commenters recommended that the Commission interpret Section 3(a)(11) and Rule 147 to allow for offers to be viewed by out-of-state residents.[32] A few of these commenters stated that Section 3(a)(11) should be interpreted to allow for offers to be viewed by out-of-state residents, so long as such offers indicate that they are being made to residents of a single state.[33]

One commenter also noted that issuers currently rely on Section 3(a)(11) and Rule 147 to conduct forms of intrastate offerings other than pursuant to state crowdfunding provisions.[34] In the view of this commenter, removal of Rule 147 as a safe harbor under Section 3(a)(11) would also present problems for these exempt offerings, thereby severely restricting other local capital raising options.[35]

Although commenters overwhelmingly supported retaining existing Rule 147 as a safe harbor to Section 3(a)(11), many commenters also supported adopting a substantially similar new exemption under the Commission's general exemptive authority under Section 28 for companies that conduct an intrastate offering but may not qualify for the Section 3(a)(11) exemption.[36] Similarly, the 2015 Small Business Forum recommended that the Commission take a ''side-by-side'' approach in introducing a new Rule 147—as it did with Rule 506 and Regulation A [37]—keeping old Rule 147 in place as a safe harbor under Section 3(a)(11) (but amending it to the extent permissible given the statutory limitations of Section 3(a)(11)) while also adopting a new exemption.[38] Several commenters stated that establishing a new exemption under Section 28, in addition to retaining existing Rule 147, would afford the states time to amend their existing state crowdfunding provisions, as well as to adopt new state crowdfunding provisions.[39] One commenter supported leaving the existing Rule 147 as a safe harbor to Section 3(a)(11) while adopting the proposed new exemption as new Rule 505.[40]

Several commenters supported our proposal to require prominent disclosure on all offering materials used in connection with a Rule 147 offering stating that sales will be made only to residents of the same state or territory as

[26] *See* Proposing Release at text accompanying note 18.

[27] *See* proposed Rule 147(f)(3).

[28] ABA Letter; NASAA Letter; Letter from Kurt N. Schacht, CFA, Managing Director, Standards and Advocacy, and Linda L. Rittenhouse, Director, Capital Markets Policy, CFA Institute, January 11, 2016 (''CFA Letter''); CrowdCheck Letter; CFIRA Letter; Guzik Letter; NextSeed Letter; Milken Letter; Zeoli Letter; Bishop Letter; Wolff Letter; City of Adrian Letter; Pearl Letter; Finn Terdal, Technology Coordinator, Hatch Innovation, January 11, 2016 (''Terdal Letter''); Letter from Simon R. Love, Managing Director, Hatch Lab, January 11, 2016 (''Love Letter''); Letter from John MacDougall, Founder & CEO, MacDougall & Sons Bat Co. Inc., January 10, 2016 (''MacDougall Letter''); Letter from Erin Ely, January 10, 2016 (''Ely Letter''); Letter from Jim Newcomer, Ph.D., 4mation Advisers, January 10, 2016 (''Newcomer Letter''); Brandon P. Romano, Content Director, Brelion, LLC, January 6, 2016 (''Brelion Letter''); Letter from Sean Shepherd, CrwdCorp LLC, December 30, 2015 (''CrwdCorp Letter''). *See also* Congressional Letter (expressing general support for the proposed amendments to Rule 147).

[29] *See* ABA Letter; CFIRA Letter; Congressional Letter; CrowdCheck Letter; NASAA Letter; California Bar Letter; Guzik Letter; Milken Letter; NextSeed Letter; Zeoli Letter; Bishop Letter; Wolff Letter; Pearl Letter; City of Adrian Letter; Orloff Letter; Wallin Letter.

[30] NASAA Letter. According to the NASAA Letter, as of January 2016, of the 29 states plus the District of Columbia that adopted or were finalizing rulemaking implementing crowdfunding exemptions, 29 were premised on the offering qualifying under Section 3(a)(11) and its Rule 147 safe harbor: Alabama, Arizona, Colorado, District of Columbia, Georgia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Jersey, New Mexico, Oregon, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, and Wisconsin. As of January 2016, the exemptions were effective in 27 of the 30 jurisdictions: Minnesota and New Jersey were finalizing rulemaking, and New Mexico was working on draft regulations. Of the states with state crowdfunding exemptions, only Iowa and Vermont do not explicitly reference Rule 147, and Maine relies on Rule 504 rather than Section 3(a)(11).

[31] *Id.*

[32] ABA Letter; Guzik Letter; Zeoli Letter; Milken Letter; Pearl Letter.

[33] ABA Letter; Guzik Letter; Zeoli Letter.

[34] NASAA Letter. For example, issuers may rely upon Section 3(a)(11) and Rule 147 for offerings registered under state securities laws, or pursuant to exemptions from state registration other than state crowdfunding provisions.

[35] *Id.*

[36] ABA Letter; City of Adrian Letter; Bishop Letter; California Bar Letter; CFIRA Letter; Congressional Letter; CrowdCheck Letter; Guzik Letter; Milken Letter; NASAA Letter; NextSeed Letter; Pearl Letter; Wallin Letter; Orloff Letter; Zeoli Letter.

[37] For example, pursuant to Title II of the JOBS Act, the Commission adopted the Rule 506(c) exemption that permits an issuer to engage in general solicitation under certain circumstances while retaining Rule 506(b) as a safe harbor, which prohibits general solicitation. Pursuant to Title IV of the JOBS Act, the Commission also adopted Tier 1 and Tier 2 categories under Regulation A.

[38] 2015 Small Business Forum Recommendations.

[39] *See, e.g.,* Pearl Letter; Orloff Letter.

[40] Orloff Letter.

the issuer.[41] One commenter supported the proposed prominent disclosure requirement, but only to the extent it is required on all general solicitation and advertising materials.[42] Two other commenters noted that appropriate accommodations should be made to permit use of space-constrained social media communications such as Twitter.[43] Two commenters noted that the Commission's efforts to modernize these requirements should preserve state authority over intrastate offerings, including the authority to impose additional disclosure requirements.[44]

c. Final Rules

After considering these comments and the recommendations of the 2015 Small Business Forum, we are adopting new Rule 147A to allow issuers to make offers accessible to out-of-state residents, so long as sales are limited to in-state residents. We are also retaining amended Rule 147 as a safe harbor under Section 3(a)(11) to preserve the continued availability of existing state exemptive provisions that are specifically conditioned upon issuer reliance on Section 3(a)(11) and Rule 147. Issuers relying on amended Rule 147 as a safe harbor under Section 3(a)(11) must continue to limit all offers and sales to in-state residents.[45]

We believe offers made over the Internet that can be viewed by a significant number of out-of-state residents are not consistent with Section 3(a)(11) and Rule 147, even if such offers include prominent disclosure stating that sales will be made only to residents of the same state or territory as the issuer.[46] When Section 3(a)(11) was enacted in 1934, Congress noted, among other things, that ''a person who comes within the purpose of the exemption, but happens to use a newspaper for the circulation of his advertising literature, which newspaper is transmitted in interstate commerce, does not thereby lose the benefits of the exemption.'' [47] Further, in 1937 the Commission released guidance on the nature of the Section 3(a)(11) exemption in the form of a letter from the Commission's General Counsel.[48] The letter stated that securities exempt from registration pursuant to Section 3(a)(11) ''may be made the subject of general newspaper advertisement (provided the advertisement is appropriately limited to indicate that offers to purchase are solicited only from, and sales will be made only to, residents of the particular state involved).'' [49] In its 1961 Release, the Commission explained that in order ''[t]o give effect to the fundamental purpose of the exemption, it is necessary that the entire issue of securities shall be offered and sold to, and come to rest only in the hands of residents within the state. If any part of the issue is offered or sold to a non-resident, the exemption is unavailable not only for the securities so sold, but for all securities forming a part of the issue, including those sold to residents.'' [50] We do not read the legislative history for Section 3(a)(11) and the prior Commission statements as envisioning widespread out-of-state offers, but rather as recognition that some media of communication, such as a local newspaper or periodical, could only be imperfectly targeted to residents of a particular state. The Internet, however, is not similarly targeted to residents of a particular state, making it difficult for issuers to keep the distribution of such offers local in nature.

Given the foregoing, we believe that the most appropriate means to permit the offer and sale of securities on Internet Web sites, or using any other form of mass media likely to reach significant numbers of out-of-state residents, is to adopt a new intrastate offering exemption pursuant to the Commission's general exemptive authority under Section 28. Accordingly, new Rule 147A will require issuers to limit sales to in-state residents, but will not limit offers by the issuer to in-state residents. New Rule 147A thereby will permit issuers to engage in general solicitation and general advertising of their offerings, using any form of mass media, including unrestricted, publicly-available Internet Web sites, so long as sales of securities so offered are made only to residents of the state or territory in which the issuer is resident.

Consistent with the proposal, both Rule 147A and amended Rule 147 will require issuers to include prominent disclosure with all offering materials stating that sales will be made only to residents of the same state or territory as the issuer.[51] We believe this disclosure will help alert potential investors that only residents of the state in which the issuer is located are eligible to participate in the offering. Nothing in this disclosure requirement, however, will prevent state authorities from imposing additional disclosure requirements or other requirements on offers or sales made to persons within their states.

Two commenters noted that appropriate accommodations should be made to permit use of space-constrained social media communications such as Twitter.[52] To accommodate space-constrained social media communication, when offering materials are distributed through a communications medium that has technological limitations on the number of characters or amount of text that may be included in the communication and including the required statements in their entirety, together with the other information, would cause the communication to exceed the limit on the number of characters or amount of text, an issuer could satisfy the disclosure requirement by including an active hyperlink to the required disclosure that otherwise would be required by the rules.The communication should prominently convey, through introductory language, that required information is provided through the hyperlink. We believe this guidance will accommodate advancements in social media, while still providing potential investors with the disclosure required by the rules. Where an electronic communication is capable of including the entirety of the required disclosure, along with the other information, without exceeding the applicable limit on the number of characters or amount of text, the use of a hyperlink to the required statements should not be used.

2. Elimination of Residence Requirement for Issuers

a. Proposed Amendments

For corporations, limited partnerships, trusts, or other forms of business organizations, we proposed to eliminate the current requirement in Rule 147 that limits the availability of the rule to issuers incorporated or

[41] CFA Letter; CFIRA Letter; CrowdCheck Letter; NASAA Letter.

[42] NASAA Letter.

[43] CFIRA Letter; CrowdCheck Letter.

[44] Congressional Letter; NASAA Letter.

[45] *See* Rule 147(b).

[46] *Cf.* ABA Letter; Guzik Letter; Zeoli Letter; Milken Letter; Pearl Letter.

[47] *See* H.R. Rep. No. 73–1838, at 40–41 (1934) (Conf. Rep.). Section 3(a)(11) initially was enacted as Securities Act Section 5(c). When Congress enacted the Securities Exchange Act of 1934, it also amended the Securities Act, including revising and redesignating Section 5(c) as Section 3(a)(11).

[48] *See* SEC Rel. No. 33–1459 (May 29, 1937) [11 FR 10958 (Sept. 27, 1946)] (''1937 Letter of General Counsel'').

[49] *Id.*

[50] 1961 Release; *see also* 1937 Letter of General Counsel (stating that Section 3(a)(11) is ''limited to cases in which the entire issue of securities is offered and sold exclusively to residents of the state in question'').

[51] *See* Rules 147(f)(3) and 147A(f)(3).

[52] CFIRA Letter; CrowdCheck Letter.

organized in the state in which an offering takes place. Our proposed amendments would have expanded the universe of eligible issuers by eliminating the current ''residence'' requirement, while continuing to require that an issuer have a sufficient in-state presence determined by the location of the issuer's principal place of business.[53]

The proposed amendments also would have replaced the current rule's ''principal office'' [54] requirements for an issuer with a ''principal place of business'' requirement.[55] The proposed rule defined the term ''principal place of business'' to mean the location from which the officers, partners, or managers of the issuer primarily direct, control and coordinate the activities of the issuer.[56] As noted in the Proposing Release, an issuer would have been able to have a ''principal place of business'' within only one state or territory and would have therefore been able to conduct an offering pursuant to amended Rule 147 only within that particular state or territory. We also proposed to restrict the ability of an issuer that has changed its principal place of business from conducting an intrastate offering in a different state for a period of nine months from the date of the last sale in the prior state,[57] which was consistent with the duration of the resale limitation period specified in proposed Rule 147(e).[58]

b. Comments on Proposed Amendments

Commenters were divided on the proposal to eliminate the requirement in Rule 147 that entities be incorporated or organized under the laws of the state or territory in which the offering takes place. Several commenters supported eliminating this requirement and stated that the jurisdiction of entity formation should not affect the ability of an issuer to be considered resident for purposes of an intrastate offering and that there are valid business reasons for incorporating or organizing in states, such as Delaware, which do not detract from an issuer's connection to the state in which its principal place of business is located.[59] Other commenters opposed eliminating the requirement that entities be incorporated or organized under the laws of the state in which the offering takes place,[60] and some of these commenters stated that the intrastate exemption should promote state and local economic development goals in addition to capital formation—goals that, in their view, would be curtailed in the absence of an in-state organization requirement.[61]

Commenters also were divided on replacing the current in-state organization requirement in Rule 147(c)(1) with a principal place of business requirement. While two commenters viewed the principal place of business standard along with a ''doing business'' test as sufficiently demonstrating the in-state nature of an issuer's business,[62] two other commenters opposed the proposed principal place of business requirement.[63] One commenter noted that the jurisdictional reach of state securities laws is independent of whether an issuer is conducting any business within the state and indicated that a state's jurisdiction is established by the offer or sale of a security within the state.[64] Another commenter stated that the principal place of business requirement is ''anti-competitive in nature and disruptive in spurring economic growth for small businesses.'' [65]

Several commenters supported the proposed nine-month waiting period until the offering comes to rest, consistent with the requirements of proposed Rule 147(e), before an issuer may change its principal place of business to another state or territory and make a subsequent offering of securities in that new state or territory in reliance on proposed Rule 147.[66] No commenters opposed the proposed waiting period.

c. Final Rules

We are adopting changes to the residency requirements for issuers conducting exempt intrastate offerings largely as proposed, but with certain modifications to reflect our decision to retain existing Rule 147 as a safe harbor to the Section 3(a)(11) exemption. Since we are retaining Rule 147 as a safe harbor and since Section 3(a)(11) expressly requires that if the issuer is a corporation that it be ''incorporated by and doing business within, such state or territory,'' we are not eliminating the ''residence'' requirement in current paragraph (c)(1) of Rule 147, as proposed. Instead, we are retaining the requirement that an issuer shall be deemed a resident of a state or territory in which it is incorporated or organized for issuers that are incorporated or organized under state or territorial law, such as corporations, limited partnerships and trusts.

In addition, for consistency between the provisions of Rule 147 and new Rule 147A,[67] throughout amended Rule 147, we are replacing the ''principal office'' requirement with the proposed ''principal place of business'' requirement.[68] Instead of ''principal

[53] *See* proposed Rule 147(c)(1). *See also* discussion on principal place of business in Section II.B.1 below, and the related discussion of the proposed requirement that an issuer satisfy at least one of four threshold requirements in order to help ensure the in-state nature of its business.

[54] *See* 17 CFR 230.147(c)(1)(ii) and 17 CFR 230.147(c)(2)(iv).

[55] *See* proposed Rule 147(c)(1).

[56] *See* proposed Rule 147(c)(1).

[57] *See* Note 1 to proposed Rule 147(c)(1).

[58] *See* proposed Rule 147(e) (proposing to limit resales of a given security purchased in an offering pursuant to Rule 147 to out-of-state residents for a nine-month period from the date such security is sold by the issuer).

[59] *See* Bishop Letter (''The application of state securities laws is not dependent upon the state of incorporation or organization of the issuer. Rather, the application of these laws depends upon whether an offer or sale is being made within the state.''); CFIRA Letter; CFA Letter (the proposed approach ''continues the issuer-state connection through the actual business activities and employment aspects that accompany a principal place of business and recognizes the lack of connection between state of incorporation and actual business activities.''); CrowdCheck Letter; NASAA Letter; NextSeed Letter.

[60] Love Letter; MacDougall Letter; Newcomer Letter; Pearl Letter; Wolff Letter.

[61] Love Letter (''If the company is incorporated in the state where sales occur, it is another way to encourage local funds to be retained locally''); MacDougall Letter (stating that incorporating out of state to avoid state taxes ''goes against the 'spirit' of the law and sends the wrong message''); Pearl Letter (''intrastate laws are focused on state economic development *in addition to* capital formation for entrepreneurs and financial return for investors, and therefore the retention of capital within the state is a necessary component of the successful spread of benefits''); Wolff Letter (stating that local investing confers benefits that extend beyond financial return and seeks to encourage the spread of such social, economic, and other benefits while lifting the restriction on state incorporation entirely changes the nature of the intrastate crowdfunding).

[62] NASAA Letter; NextSeed Letter.

[63] Bishop Letter; Letter from David L. Sjursen, CEO & Founder, Exante Regulatory Compliance Consultants Inc., December 2, 2015 (''Exante Letter'').

[64] Bishop Letter (''[T]he Commission's proposed 'presence' requirements would not augment California's ability to enforce its securities laws for the protection of resident investors as assumed by the Commission. If a state believes that its existing qualification or exemption requirements inadequately protect offerees and purchasers, it can amend those requirements. . . . [I]t is far more logical to require only that the issuer be organized in the state or territory or qualified to transact intrastate business in the state or territory'').

[65] Exante Letter.

[66] CFIRA Letter; CrowdCheck Letter; NASAA Letter.

[67] *See* Rules 147(c)(1), 147(d)(1), 147A(c)(1) and 147A(d)(1). The principal place of business definition is consistent with the use of that term in Exchange Act Rule 3a71–3, 17 CFR 240.3a71–3, for cross-border security based swap dealing activity, and the use of the term ''principal office and place of business'' in Investment Advisers Act Rule 203A–3(c), 17 CFR 275.203A–3(c).

[68] For example, as proposed, we are amending paragraph (d)(1) of Rule 147 to replace the ''principal office'' requirement with ''principal place of business.'' *See also* Section II.B.3 below

Continued

office,'' amended Rule 147 and new Rule 147A will refer to the term ''principal place of business'' to mean the location from which the officers, partners, or managers of the issuer primarily direct, control and coordinate the activities of the issuer.[69] We do not expect this change will significantly alter the scope of existing Rule 147 as we believe ''principal place of business'' is conceptually similar to principal office location.

Under amended Rule 147, issuers that are incorporated or organized under state or territorial law will be deemed a ''resident'' of a particular state or territory in which they are both incorporated or organized and have their ''principal place of business.'' [70] Specifically, the ''principal office'' requirement contained in current Rule 147(c)(2)(iv) [71] will be updated and replaced with the ''principal place of business'' requirement in amended Rule 147(c)(1)(i). Similarly, issuers that are general partnerships, or in the form of another business organization not organized under any state or territorial law, shall be deemed to be a ''resident'' of the state or territory in which they have their ''principal place of business.'' [72]

Consistent with the proposal, new Rule 147A(c)(1) will rely solely on the principal place of business requirement to determine the state or territory in which the issuer shall be deemed a ''resident,'' not only for corporate issuers, but for all issuers, including issuers that are not organized under any state or territorial law, such as general partnerships.[73] Although commenters were divided on whether to retain the requirement that entities be incorporated or organized under the laws of the state in which the offering takes place, we continue to believe that using a principal place of business requirement in lieu of an in-state formation requirement to establish the issuer's residency is more consistent with modern business practices in which issuers are permitted to incorporate or organize in states other than the state or territory of their principal place of business, for example, to take advantage of well-established bodies of corporate or partnership law.[74] We continue to believe that, outside the statutory requirements of Section 3(a)(11), the jurisdiction of entity formation should not affect the ability of an issuer to be considered ''resident'' for purposes of an intrastate offering exemption at the federal level. While we recognize that some commenters supported retaining an in-state formation requirement as a means of ensuring that the economic and social benefits of the offering remain within the state, the objectives of our rulemaking in this area are more broadly focused on facilitating capital formation by small businesses.[75] We believe that retaining an in-state formation requirement in new Rule 147A would be unnecessarily restrictive and limit the usefulness of the exemption, potentially to the detriment of local economic development.

We are, however, retaining the proposed principal place of business requirement, despite the views of several commenters that such a requirement is unnecessary or inappropriate.[76] Although, as noted by one commenter, the jurisdictional reach of state securities laws is independent of whether an issuer is conducting any business within the state since a state's jurisdiction is established by the offer or sale of a security within the state,[77] we believe that states will have a particular interest in regulating intrastate offerings for the protection of investors where there is a meaningful nexus between the state, issuers and investors.

To ensure an appropriate connection between the state, issuers and investors, amended Rule 147(d) and Rule 147A(d) will require an issuer to be a resident of the same state where purchasers are resident or where the issuer reasonably believes they are resident.[78] Viewed together, paragraphs (c) and (d) of each of Rules 147 and 147A help to ensure the local intrastate character of the offering by requiring that both issuers and purchasers reside and have their principal place of business (for purchasers, the principal place of business requirement only applies to purchasers who are legal entities) [79] in the same state or territory where the offering takes place.

For situations where an issuer changes its principal place of business to another state after conducting an intrastate offering in reliance on Rule 147 or Rule 147A, we are adopting provisions in both rules that limit the ability of an issuer to conduct a subsequent intrastate offering pursuant to Rule 147 or Rule 147A until such time as securities sold in reliance on the exemption in the prior state have come to rest in that state.[80] This is consistent with the view that securities sold in an intrastate offering in one state should have to come to rest within such state before purchasers may resell their securities to out-of-state residents.[81] Accordingly, both rules provide that issuers who have previously conducted an intrastate offering pursuant to Rule 147 or Rule 147A will not be able to conduct another subsequent intrastate offering pursuant to either rule in a different state for a period of six months from the date of the last sale in the prior state, which is consistent with the duration of the resale limitation period specified in our amendments to Rule 147(e) and new Rule 147A(e).[82] The use of a six-month period is a change from the proposed nine-month period, and aligns these provisions with changes being made to amended Rule 147(e) and new Rule 147A(e), consistent with commenters' suggestions to reduce the nine-month resale limitation period to six months.[83]

B. Common Requirements of the Amendments to Rule 147 and New Rule 147A

Our amendments to Rule 147 and the provisions of new Rule 147A are substantially identical, except that, as discussed above, new Rule 147A allows an issuer to make offers accessible to out-of-state residents and to be incorporated or organized out-of-state.[84] Under the rules we adopt today, both amended Rule 147 and new Rule 147A will include the following provisions:

• A requirement that the issuer satisfy at least one ''doing business'' requirement that will demonstrate the in-state nature of the issuer's business.

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discussing the use of the ''principal place of business'' standard for the residence of entity purchasers.

[69] *See* Rules 147(c)(1), 147(d)(1), 147A(c)(1) and 147A(d)(1).

[70] *See* 17 CFR 230.147(c)(1)(i).

[71] *See* 17 CFR 230.147(c)(1)(iv).

[72] *See* 17 CFR 230.147(c)(1)(ii).

[73] *See* note 56 above.

[74] For example, data provided by issuers in Form D filings with the Commission indicates that approximately 37% of Rule 504 offerings and 39% of Rule 505 offerings indicated in their Form D filings that they had different states of incorporation and principal places of business. Form D data also indicates that approximately 65% of all Rule 506 offerings initiated during 2009–2015 reported different states of incorporation and operations. *See* discussion in Section V.B.2.b.ii below.

[75] *See e.g.,* Rule 147 Adopting Release at text accompanying note 2.

[76] Bishop Letter; Exante Letter.

[77] Bishop Letter.

[78] *See* Rule 147A(c)(1).

[79] Under both amended Rule 147(d)(2) and Rule 147A(d)(2), the residence of an individual (natural person) is determined by the state or territory in which his or her principal residence is located at the time of the offer and sale to the individual.

[80] *See* Rules 147(e) and 147A(e).

[81] *See* 1961 Release at 4.

[82] *See* Instruction to paragraph (c)(1) of Rule 147 and Instruction to paragraph (c)(1) of Rule 147A.

[83] *See* Section II.B.4.c below.

[84] *See* Sections II.A.1and II.A.2 above.

• A new ''reasonable belief'' standard for issuers to rely upon in determining the residence of the purchaser at the time of the sale of securities.

• A requirement that issuers obtain a written representation from each purchaser as to his or her residency.

• The residence of a purchaser that is a non-natural person, such as a corporation, partnership, trust or other form of business organization, will be defined as the location where, at the time of the sale, the entity has its ''principal place of business.''

• A limit on resales to persons resident within the state or territory of the offering for a period of six months from the date of the sale by the issuer to the purchaser of a security sold pursuant to the exemption.

• An integration safe harbor that will include any prior offers or sales of securities by the issuer, as well as certain subsequent offers or sales of securities by the issuer occurring after the completion of the offering.

• Disclosure requirements, including legend requirements, to offerees and purchasers about the limits on resales.

1. Requirements for Issuers ''Doing Business'' In-State

a. Proposed Amendments

Under the proposed rules, an issuer would be required to meet at least one of the following requirements in order to be considered ''doing business'' in-state:

• The issuer derived at least 80% of its consolidated gross revenues from the operation of a business or of real property located in or from the rendering of services within such state or territory; [85]

• The issuer had at the end of its most recent semi-annual fiscal period prior to the first offer of securities pursuant to the exemption, at least 80% of its consolidated assets located within such state or territory; [86]

• The issuer intends to use and uses at least 80% of the net proceeds to the issuer from sales made pursuant to the exemption in connection with the operation of a business or of real property, the purchase of real property located in, or the rendering of services within such state or territory; [87] or

• A majority of the issuer's employees are based in such state or territory.[88]

b. Comments on the Proposed Amendments

Several commenters supported our proposed amendments to the current ''doing business'' requirements in Rule 147(c)(2).[89] One commenter specifically favored the proposed disjunctive approach, requiring an issuer to satisfy one of four threshold tests, thereby enabling different types of issuers (*e.g.,* a brick-and-mortar business versus an online business) to confirm local residency and demonstrate the in-state nature of their business.[90] Another commenter, although noting that the proposed requirements and thresholds appropriately reflect characteristics that are in keeping with establishing a local presence, was concerned that having to meet only one requirement may not establish the local connection of the issuer to the state to the degree anticipated by Section 3(a)(11) and encouraged a close review of this issue in a Commission study.[91]

Two commenters supported our proposed amendment to the ''doing business'' test to add an alternative threshold requirement based on the location of a majority of an issuer's employees.[92] Several commenters supported using this additional criterion, but with different percentage thresholds.[93] Some of these commenters recommended requiring that at least 80% of the issuer's employees be based in the state,[94] while another commenter supported requiring that at least 75% of the issuer's employees be based in the state.[95]

Several commenters opposed our proposed ''doing business'' requirements in favor of alternative standards.[96] For example, some of these commenters supported the use of five alternative criteria in order for an issuer to be deemed a ''state business,'' specifically: the issuer's main office be located in-state, and at least 80% of the funds raised be used in-state, work is done in-state, employees live in-state and owners reside in-state.[97] Another commenter supported generally these same criteria, but using 75% thresholds as opposed to 80% thresholds.[98] Other commenters recommended a more flexible standard that would move away from the strict 80% thresholds in favor of majority requirements that would harmonize the current ''doing business'' tests with the proposed test for number of employees.[99] Finally, another commenter suggested a periodic review by the Commission to evaluate the 80% thresholds to determine whether the exemption succeeds in facilitating the goal of small business capital formation while protecting investors.[100]

c. Final Rules

After considering the comments, we are adopting, as proposed, updated and modernized ''doing business'' requirements in Rule 147 and new Rule 147A to comport with contemporary small business practices.[101] We believe these updated requirements will expand the universe of issuers that may rely on Section 3(a)(11) and the amended Rule 147 safe harbor, as well as new Rule 147A, to conduct exempt intrastate offerings, while continuing to require issuers to have an in-state presence sufficient to justify reliance on these provisions. Given the increasing ''interstate'' nature of small business activities, we believe it has become increasingly difficult for companies, even smaller companies that are physically located within a single state or territory, to satisfy the issuer ''doing business'' requirements of current Rule 147(c)(2).[102] Accordingly, we believe these issuer ''doing business'' requirements, identical for both amended Rule 147 and new Rule 147A, will provide issuers with greater flexibility in conducting intrastate offerings and expand the availability of

[85] *See* proposed Rule 147(c)(2)(i) and related notes to the rule indicating how and when an issuer would calculate its revenue for purposes of compliance with the proposed rule, based on when the first offer of securities is made pursuant to the exemption.

[86] *See* proposed Rule 147(c)(2)(ii).

[87] *See* proposed Rule 147(c)(2)(iii).

[88] *See* proposed Rule 147(c)(2)(iv).

[89] CFA Letter; CFIRA Letter; CrowdCheck Letter; NASAA Letter.

[90] NASAA Letter.

[91] CFA Letter (''If the Commission determines to adopt the proposed approach, however, we encourage a close review in the study the Commission intends to undertake within three years of the adoption of the amendments.''). *See* note 106.

[92] Milken Letter; NASAA Letter.

[93] Ely Letter; MacDougall Letter; Pearl Letter; Terdal Letter; Wolff Letter.

[94] Ely Letter; MacDougall Letter; Pearl Letter; Terdal Letter.

[95] Wolff Letter.

[96] Ely Letter; MacDougall Letter; Pearl Letter; Terdal Letter.

[97] Ely Letter; MacDougall Letter; Pearl Letter (recommending that an issuer be required to satisfy ''at least three'' of these five criteria or from an alternative ''reasonable list''). *Cf.* Terdal Letter (''A more appropriate test of a ''local company'' would be one that has at least 80% of the employees' wages paid in state, or perhaps 80% of the work (*i.e.* manufacturing, producing, brewing, etc.) be done in state.'').

[98] Wolff Letter (recommending 75% thresholds for use of funds, work done in-state, and number of employees residing in-state but that the rules require only a majority of the owners' primary residences be located in-state).

[99] Milken Letter (stating that the requirement for a precise 80% threshold ''can be confusing and difficult for issuers to assess. Additionally, the high and precise threshold can exclude issuers that rationally should qualify.''); Pearl Letter.

[100] NASAA Letter.

[101] *See* Rules 147(c)(2) and 147A(c)(2).

[102] *See* discussion in Section II.A.2 above.

these two intrastate offering provisions.[103]

As proposed, we are adopting amendments to Rule 147(c)(2) and including provisions in new Rule 147A(c)(2) that will provide issuers with greater flexibility to satisfy the current ''doing business'' requirements by adding an alternative test based on the location of a majority of the issuer's employees while retaining the three 80% threshold tests in current Rule 147(c)(2).[104] Furthermore, while the substance of the three 80% threshold requirements of current Rule 147(c)(2) is being retained in the final rules, compliance with any one of the 80% threshold requirements (or the additional test based on the majority of employees) will be sufficient to demonstrate the in-state nature of the issuer's business, as proposed. This is a change from current Rule 147(c)(2), which requires issuers to satisfy all three 80% threshold requirements.

We recognize that commenters had various alternative views on these requirements. While some commenters sought to require issuers to meet additional criteria, other commenters sought to lower the percentage thresholds in the criteria to ease the issuer requirements. We believe that the approach we are adopting in the final rules will provide issuers with additional flexibility to satisfy the requirements, while continuing to function as meaningful indicia of the in-state nature of the issuer's business. In light of the fact that issuers will need to meet only one of the threshold tests, we are not changing the current 80% threshold tests to a majority requirement as one commenter suggested.[105] We believe it is appropriate to first observe how the updated doing business in-state requirements are used by issuers in practice before making any further changes.[106] Except as discussed below, we also are not adopting alternative criteria for the doing business in-state requirements, as suggested by several commenters.[107] We believe the existing criteria have generally served states, issuers and investors well by being easy to understand and apply, and when updated as discussed above, will appropriately reflect characteristics in keeping with a local business presence.[108]

We are also making certain technical revisions to the three current 80% thresholds, as proposed, that we believe will simplify the structure and application of the rules.[109] In light of our amendments to require issuers to satisfy only one of the threshold tests, we are eliminating the current provision in Rule 147(c)(2)(i)(B), which does not apply the revenue test to issuers with less than $5,000 in revenue during the prior fiscal year.[110] While this accommodation may be reasonable in the context of the current conjunctive 80% threshold requirements of Rule 147(c)(2), we do not believe it is necessary under the new disjunctive approach that we are adopting in these rules.

Consistent with the proposal, and as supported by commenters, we are adding an alternative requirement to the three modified 80% threshold requirements. This requirement, which relates to the location of a majority of the issuer's employees, will provide an additional method by which an issuer may demonstrate that it conducts in-state business sufficient to justify reliance on either Rule 147 or new Rule 147A. For these purposes, we are permitting an issuer to satisfy the ''doing business'' requirements by having a majority of its employees based in such state or territory.[111] An employee would be based in the same state or territory of the issuer for purposes of this test if such employee is based out of offices located within such state or territory.[112] For example, if an employee provides services in the Maryland, Virginia and Washington, DC metro area out of the offices of a company in Maryland, the employee would be based in Maryland for purposes of this test. While some commenters suggested different thresholds for the employee test (ranging from 75% to 80%), we believe that using a majority of the employees test provides a standard that more accurately captures the increasingly flexible ways that companies structure and conduct their business operations, while still requiring that more employees be located in-state than elsewhere. Current workforce trends, such as telecommuting, whereby employees often work in a different geographical location from their employer, suggest that flexibility is particularly needed in this area. We believe adding this criterion to expand upon the current doing business requirements in Rule 147(c)(2) will provide additional flexibility to issuers by making these requirements more consistent with modern business practices, especially in light of the different roles employees play within smaller companies and the different locations in which employees carry out such roles, while still providing important indicia of the in-state nature of an issuer's business.

2. Reasonable Belief as to Purchaser Residency Status

a. Proposed Amendments

Consistent with the requirements in Regulation D,[113] we proposed to add a reasonable belief standard to the issuer's determination as to the residence of the purchaser at the time of the sale of the securities.[114] As proposed, an issuer would satisfy the requirement that the purchaser in the offering be a resident of the same state or territory as the issuer's principal place of business by either the existence of the fact that the purchaser is a resident of the applicable state or territory, or by establishing that the issuer had a reasonable belief that the purchaser of the securities in the offering was a resident of such state or territory.[115] We also proposed to eliminate the requirement in current Rule 147 that issuers obtain a written representation from each purchaser as to his or her residence, as we believed this requirement may be unnecessary in light of the proposed reasonable belief standard.[116]

b. Comments on the Proposed Amendments

Several commenters supported the proposal to include a reasonable belief standard.[117] One of these commenters

[103] *See, e.g.,* Transcript of Record 82–91, SEC Advisory Committee on Small and Emerging Companies (June 3, 2015).

[104] *See* Rules 147(c)(2) and 147A(c)(2).

[105] *See* Milken Letter.

[106] As we indicated in the Proposing Release, we expect the staff to undertake to study and submit a report to the Commission no later than three years following the effective date of the final rules on whether this new framework appropriately provides assurances that an issuer is doing business in the state in which the offering takes place.

[107] *See* Ely Letter; MacDougall Letter; Pearl Letter; Terdal Letter.

[108] *See* CFA Letter.

[109] For example, in order to streamline the presentation of Rule 147(c)(2), we are re-designating current Rule 147(c)(2)(i)(A)–(B), 17 CFR 230.147(c)(2)(i)(A)–(B), which includes instructions on how to calculate revenue under Rule 147(c)(2)(i), as Instruction to paragraph (c)(2)(i) of Rule 147. Similarly, Rule 147A will also include an instruction on how to calculate revenue under Rule 147A(c)(2)(i).

[110] 17 CFR 230.147(c)(2)(i)(B).

[111] *See* Rules 147(c)(2)(iv) and 147A(c)(2)(iv).

[112] The state or territory in which an employee is based may, or may not, be the same state or territory in which the employee resides.

[113] Rule 501(a) of Regulation D includes in the definition of ''accredited investor,'' persons who come within the enumerated categories of the rule, or who the issuer reasonably believes come within any of such categories, at the time of sale to such person. 17 CFR 230.501(a).

[114] *See* proposed Rule 147(d).

[115] *Id.*

[116] 17 CFR 230.147(f)(1)(iii).

[117] ABA Letter; City of Adrian Letter; CFA Letter; NASAA Letter.

stated that a reasonable belief standard will provide more certainty for issuers about the availability of the exemption and increase its utility without sacrificing investor protection.[118]

Commenters were divided on whether to eliminate the requirement to obtain a written representation from the purchaser as to his or her residence, with two commenters supporting the proposed elimination of the requirement[119] and two commenters opposing it.[120] Commenters opposing elimination of the requirement stated that the written representation should not be the sole indication of residency under a facts and circumstances exercise, but asserted that it is a useful indication of residency.[121]

Several commenters requested that the Commission provide a safe harbor for determining an individual purchaser's residence, based upon certain objective criteria.[122] Two of those commenters supported the creation of a non-exclusive safe harbor setting out the means by which a reasonable belief may be established, including the circumstances in which an issuer may rely on the steps taken by a third-party, such as a service provider or intermediary.[123] Another of those commenters stated that Commission staff should work with the states to standardize requirements for determining state of residency for purposes of investor participation in an offering to help ensure compliance with the residency requirement.[124] In addition, the 2015 Small Business Forum recommended that the Commission create a safe harbor for determining the ''place of business'' of a non-natural person investor in Rule 147 offerings, which could be as simple as a self-certification as to its place of business.[125]

c. Final Rules

Consistent with the proposal, and with the determination of accredited investor status under Regulation D,[126] we are adopting amendments to Rule 147 and a provision in new Rule 147A that will include a reasonable belief standard for the issuer's determination as to the residence of the purchaser at the time of the sale of the securities.[127] Under the final rules, an issuer will satisfy the requirement that the purchaser in the offering be a resident of the same state or territory in which the issuer is resident by either the existence of the fact that the purchaser is a resident of the applicable state or territory, or by establishing that the issuer had a reasonable belief that the purchaser of the securities in the offering was a resident of such state or territory.[128] Under current Rule 147(d), regardless of the efforts an issuer takes to determine that potential investors are residents of the state in which the issuer is resident, the exemption is lost for the entire offering if securities are offered or sold to just one investor that was not in fact a resident of such state. We continue to believe that permitting issuers to sell on the basis of a reasonable belief of a purchaser's in-state residency status will increase the utility of amended Rule 147 and new Rule 147A by providing issuers with additional certainty about the availability of the exemption under Section 3(a)(11) or new Rule 147A while still providing appropriate investor protections.[129]

In a change from the proposal, both amended Rule 147 and new Rule 147A will include a requirement that issuers obtain a written representation from each purchaser as to his or her residence.[130] We are persuaded by those commenters who stated that this requirement should be retained and considered as evidence of, but not be dispositive of, the purchaser's residency. In the context of Section 3(a)(11), the Commission has previously indicated that ''[t]he mere obtaining of formal representations of residence . . . should not be relied upon without more as establishing the availability of the exemption.''[131] Whether an issuer has formed a reasonable belief that the prospective purchaser is an in-state resident will be determined on the basis of all facts and circumstances. Obtaining a written representation from purchasers of in-state residency status will not, without more, be sufficient to establish a reasonable belief that such purchasers are in-state residents.[132]

In addition to the written representation, other facts and circumstances could include, but will not be limited to, for example, a pre-existing relationship between the issuer and the prospective purchaser that provides the issuer with sufficient knowledge about the prospective purchaser's principal residence or principal place of business so as to enable the issuer to have a reasonable basis to believe that the prospective purchaser is an in-state resident. An issuer may also consider other facts and circumstances when establishing the residency of a prospective purchaser, such as evidence of the home address of the prospective purchaser, as documented by a recently dated utility bill, pay-stub, information contained in state or federal tax returns, any documentation issued by a federal, state, or local government authority, such as a driver's license or identification card, or a public or private database that the issuer has determined is reasonably reliable, including credit bureau databases, directory listings, and public records.

While a few commenters[133] and the 2015 Small Business Forum recommended that the Commission provide a safe harbor for determining a purchaser's residence, including the circumstances in which a reasonable belief may be established, we are not doing so in the final rules. Our rules do not provide a safe harbor for the reasonable belief determination made under Rule 501(a) of Regulation D for exempt offerings, and we do not believe that the determinations required for amended Rule 147 and new Rule 147A present a more compelling case for having such a provision. In addition, we are concerned that a safe harbor could be viewed as an exclusive or minimum standard. We believe that requiring issuers to consider the facts and circumstances in order to establish a reasonable basis to believe that the purchaser is a resident of the same state or territory in which the issuer is resident is appropriate and will provide sufficient certainty for issuers seeking to satisfy the requirements of the exemption. Commission staff will consider available information on issuer compliance with the ''reasonable belief'' standards in connection with the study

[118] NASAA Letter.

[119] CFIRA Letter; CrowdCheck Letter.

[120] CFA Letter; NASAA Letter.

[121] NASAA Letter (''this requirement should remain in place but may be construed as evidence of, but not be dispositive of, a reasonable belief of purchaser residency.'').

[122] CFIRA Letter; CrowdCheck Letter; Letter from Brandon Smith, Managing Principal, Localstake Marketplace LLC, November 17, 2015 (''Localstake Letter''); Letter from Rose Oswald-Poels, President/CEO, Wisconsin Bankers Association, January 8, 2016 (''WBA Letter'').

[123] CFIRA Letter; CrowdCheck Letter.

[124] Localstake Letter.

[125] *See* 2015 Small Business Forum Recommendations.

[126] *See* note 113 above.

[127] *See* Rules 147(d) and 147A(d).

[128] *Id.*

[129] The burden will continue to be on the issuer to establish that the purchaser is an in-state resident or that the issuer had a reasonable belief as to residency. Otherwise, the sale to a non-resident purchaser would preclude reliance on amended Rule 147 or new Rule 147A.

[130] *See* Rules 147(f)(1)(iii) and 147A(f)(1)(iii).

[131] *See* 1961 Release at 3.

[132] *See* Instruction to paragraph (d) of Rule 147 and Instruction to paragraph (d) of Rule 147A.

[133] CFIRA Letter; CrowdCheck Letter; Localstake Letter; WBA Letter.

of amended Rule 147 and new Rule 147A.[134]

3. Residence of Entity Purchasers

a. Proposed Amendments

We proposed to define the residence of a purchaser that is a legal entity, such as a corporation, partnership, trust or other form of business organization, as the location where, at the time of the sale, the entity has its principal place of business.[135] For these purposes, we also proposed to define a purchaser's ''principal place of business,'' consistent with the proposed definition for issuer eligibility purposes, as the location in which the officers, partners, or managers of the entity primarily direct, control and coordinate its activities.[136]

b. Comments on the Proposed Amendments

Two commenters supported the proposed amendments to replace the ''principal office'' requirement for entity purchasers with the ''principal place of business'' standard, consistent with the standard for issuers.[137] One commenter suggested that the Commission clarify how the residency of non-business trusts should be determined.[138]

c. Final Rules

Consistent with the proposal, we are adopting amendments to Rule 147 and a provision in new Rule 147A that will define the residence of a purchaser that is a legal entity, such as a corporation, partnership, trust or other form of business organization, as the location where, at the time of the sale, the entity has its principal place of business.[139] The final rules define a purchaser's ''principal place of business,'' consistent with the definition for determining issuer residency contained in paragraph (c)(1) of Rules 147 and 147A, as the location in which the officers, partners, or managers of the entity primarily direct, control and coordinate its activities.[140] In addition, as suggested by one commenter, [141] we are adding an instruction to the requirement as to the residency of the purchaser stating that a trust that is not deemed by the law of the state or territory of its creation to be a separate legal entity should be deemed to be a resident of each state or territory in which its trustee is, or trustees are, resident.[142]

4. Limitation on Resales

a. Proposed Amendments

We proposed to amend the limitation on resales in Rule 147(e) to provide that for a period of nine months from the date of the sale by the issuer of a security sold pursuant to this rule, any resale by a purchaser would need to be made only to residents within the purchaser's state or territory of residence.[143] In contrast, Rule 147(e) currently requires that during the period in which securities are offered and sold in reliance on the intrastate offering exemption, and for a period of nine months from the date of the last sale by the issuer of such securities, all resales of any securities sold in the offering shall only be made to persons resident within the state or territory of which the issuer is a resident. In the Proposing Release, we explained that the determination as to when a given purchase of securities in an intrastate offering has come to rest in-state depends less on a defined period of time after the final sale by the issuer in such offering than it does on whether a resident purchaser has taken the securities ''without a view to further distribution or resale to non-residents.'' [144] In this regard, we believed that a time-based limitation on potential resales to non-residents that relates back to the date of the purchase by a resident investor from the issuer would more precisely address the concern regarding out-of-state resales.

We also proposed to amend Rule 147(b) so that an issuer's ability to rely on Rule 147 would no longer be conditioned on a purchaser's compliance with Rule 147(e).[145] We believed that this proposed amendment to the application of Rule 147(e), as it relates to Rule 147(b), would increase the utility of the exemption by eliminating the uncertainty created in the offering process for issuers under the current rules. As proposed, issuers would remain subject to requirements relating to, for example, in-state sales limitations, legends, stop transfer instructions for transfer agents, and offeree and purchaser disclosures in order to satisfy the exemption at the federal level. In addition, issuers would continue to be subject to the antifraud and civil liability provisions of the federal securities laws, as well as state securities law requirements. Lastly, although we did not propose to amend our rules to provide that securities issued under amended Rule 147 be considered ''restricted securities'' under Rule 144(a)(3), [146] we requested comments on this question.

b. Comments on the Proposed Amendments

Several commenters supported the proposed change to the limitation on resales by resident purchasers to non-residents based on the date of sale by the issuer to the relevant purchaser rather than based on the date when the offering terminates.[147] Commenters, however, had differing views on the length of the holding period from the date of sale. Two commenters supported a nine-month holding period from the date of sale.[148] One of these commenters reasoned that this period sufficiently demonstrates the purchase was for investment without an intent to distribute out-of-state or avoid registration.[149] Two other commenters stated that a period of six months is adequate to establish that securities have ''come to rest'' in a state.[150] Those commenters noted that a nine-month period does not exist in any other securities law requirements, so the potential exists for confusion. One commenter recommended that the Commission clarify that bona fide gifts are not subject to the limitation on resales out-of-state, and that a donee is deemed to have acquired the securities when they were acquired by the donor.[151]

Commenters were divided on whether securities issued under amended Rule 147 should be considered ''restricted securities'' under Rule 144(a)(3). One commenter stated that securities issued under amended Rule 147 should be considered ''restricted securities'' under Rule 144(a)(3).[152] Two other

[134] *See* Section I above.

[135] *See* proposed Rule 147(d). Under the current rule, an entity is a resident of the state or territory where the entity has its ''principal office.'' Current Rule 147 does not define ''principal office.'' 17 CFR 230.147(c)(2)(iv).

[136] *See* proposed Rule 147(c)(1).

[137] NASAA Letter; NextSeed Letter.

[138] Bishop Letter (recommending that Rule 147(d)(1) be amended to add: ''A trust that is not deemed by the law of the state or territory of its creation to be a separate legal entity is deemed to be a resident of each state or territory in which its trustee is, or trustees are, resident.'').

[139] *See* Rules 147(d) and 147A(d).

[140] *See* Rules 147(c)(1), 147(d)(1), 147A(c)(1) and 147A(d)(1).

[141] Bishop Letter.

[142] *See* Instruction 1 to paragraph (d)(1) of Rule 147 and Instruction 1 to paragraph (d)(1) of Rule 147A.

[143] Proposed Rule 147(e).

[144] *See* Proposing Release, at text accompanying note 87.

[145] *See* proposed Rule 147(b). As proposed, current Rule 147(a) would be re-designated as Rule 147(b).

[146] 17 CFR 230.144(a)(3).

[147] CFA Letter; CFIRA Letter; CrowdCheck Letter; NASAA Letter.

[148] CFA Letter; NASAA Letter.

[149] NASAA Letter.

[150] CrowdCheck Letter; CFIRA Letter. These commenters stated that allowing a six-month period, by analogy to parts of Rule 144, is more appropriate.

[151] Bishop Letter.

[152] NASAA Letter.

commenters stated that the securities should not be treated as ''restricted securities'' under Rule 144(a)(3), noting that the ''coming to rest'' in-state purpose of the nine-month restriction is sufficiently distinct from the policy considerations underlying Rule 144.[153]

In addition, several commenters supported no longer conditioning the availability of the exemption on purchaser compliance with Rule 147(e).[154] One of those commenters reasoned that if an issuer takes reasonable steps to comply with the limitations on resale, the issuer should not lose the original exemption if a purchaser does not comply with the resale restrictions at a later date.[155]

c. Final Rules

After considering the comments, we are adopting a requirement in amended Rule 147 and new Rule 147A providing that for a period of six months from the date of the sale of the security by the issuer any resale of the security shall be made only to persons resident within the state or territory in which the issuer was resident at the time of the sale of the security by the issuer.[156] We are persuaded by those commenters that indicated that a period of six months is adequate to establish that securities sold in an intrastate offering have ''come to rest'' in a state by analogizing to provisions of Rule 144, in which a six-month holding period is deemed sufficient to establish a requisite investment intent.[157] In this regard, given the use of a six-month resale restriction in the Rule 144 context, we believe that a similar resale restriction in the intrastate offering context should provide adequate assurance that the securities will come to rest in-state.[158]

We note that bona fide gifts are not subject to the limitation on resales in amended Rule 147 or new Rule 147A.[159] Since bona fide gifts are not transactions for value, they require no investment decision by the donee and thus do not involve the sale of a security subject to regulation under the Securities Act.[160] However, we note that subsequent resales of donated securities are subject to the resale restrictions regardless of the state in which the holder of the donated securities resides. To address bona fide gifts of securities to out-of-state donees, as well as the resales of securities that were wrongfully sold to out-of-state purchasers, within the six month re-sale limitation period, we are revising our proposed resale limitation to focus on the state or territory in which the issuer was resident, as opposed to where the last purchaser of the securities may have resided. Accordingly, the resale limitation in the final rules limits resales to ''persons resident within the state or territory in which the issuer was resident . . . at the time of the sale of the security by the issuer'' as opposed to limiting resales to ''persons resident within the purchaser's state or territory of residence,'' as proposed. We believe this revision will address situations in which purchasers in the offering subsequently gift or wrongfully sell their securities to out-of-state residents who then wish to resell their securities within the six month limitation of paragraph (e). This change to the rules makes clear that the six-month limitation on resales applies to all holders of the securities, including holders subsequent to the original purchaser, whether they received the shares as a gift, donation, or by purchase.[161]

As proposed, the resale limitation period for both amended Rule 147(e) and new Rule 147A(e) will relate back to the date of purchase by a resident investor from the issuer, in contrast to current Rule 147(e) that does not start the resale limitation period until the offering has terminated (*i.e.,* until all offers and sales have ceased).[162] We continue to believe that a time-based limitation on potential resales to non-residents of securities purchased in an intrastate offering that relates back to the date of purchase by a resident investor from the issuer would more precisely address the concern regarding out-of-state resales.

In light of our revision to the resale limitation to focus on the state where the issuer is a resident, we are including additional language in amended Rule 147(e) and new Rule 147A(e) to specify that all re-sales during this six month resale limitation period will be restricted to the state or territory in which the issuer was a resident at the time of the sale of the security by the issuer to a purchaser. Accordingly, if an issuer were to change its state or territory of residence during the six month resale limitation period, all resales would, nevertheless, continue to be limited to the state or territory in which the issuer resided at the time of the original sale of securities in reliance upon either Rule 147 or Rule 147A. We believe this additional language will preserve the intent of the proposed resale restriction—to help ensure that the securities offered pursuant to an intrastate offering exemption have come to rest within the state of the offering before being resold.

As proposed, an issuer's ability to rely on the respective rules will not be conditioned on a purchaser's compliance with Rule 147(e) and Rule 147A(e).[163] As discussed in the Proposing Release, the application of current Rule 147(e) in the overall scheme of the safe harbor can cause uncertainty for issuers. We continue to believe that removing the condition on purchaser compliance with Rule 147(e) will increase the utility of the exemption by eliminating the uncertainty created in the offering process for issuers under the current rules. As one commenter noted, if an issuer takes reasonable steps to comply with the limitations on resale, it should not lose the availability of the exemption due to a purchaser not complying with the resale limitations.[164] We continue to believe that eliminating this uncertainty should not result in an increased risk of issuer non-compliance with the rules, because issuers will remain subject to requirements relating to, for example, in-state sales limitations, legends, stop transfer instructions for transfer agents, and offeree and purchaser disclosures, in order to satisfy the exemption at the federal level.[165] In addition, issuers will

[153] CFIRA Letter; CrowdCheck Letter.

[154] CFIRA Letter; CrowdCheck Letter; NASAA Letter.

[155] NASAA Letter.

[156] Rules 147(e) and 147A(e).

[157] *See* CFIRA Letter and CrowdCheck Letter. Rule 144 provides a safe-harbor from being deemed a ''statutory underwriter'' under Section 2(a)(11) of the Securities Act. Specifically, Rule 144(d)(1)(i) requires a six-month holding period for restricted securities sold by issuers reporting under the Exchange Act in order for a purchaser to resell such securities and not be deemed an underwriter.

[158] In such circumstances, resales of securities that were initially purchased in an intrastate offering must themselves be registered or exempt from registration pursuant to any state securities laws where such resale takes place.

[159] *See* Bishop Letter.

[160] Section 2(a)(3) of the Securities Act defines ''sale'' or ''sell'' to ''include every contract of sale or disposition of a security or interest in a security, for value.'' A lack of monetary consideration, however, does not always mean that there was not a sale or offer for sale for purposes of Section 5. *See, e.g.,* Capital General Corporation, 54 SEC Docket 1714, 1728–29 (July 23, 1993) (Capital General's ''gifting'' of securities constituted a sale because it was a disposition for value, the ''value'' arising ''by virtue of the creation of a public market for the issuer's securities.''). *See also* SEC v. Harwyn Industries Corp., 326 F. Supp. 943 (S.D.N.Y. 1971).

[161] *See* Rules 147(e) and 147A(e).

[162] The resale limitation period may end on different dates for different purchasers if the issuer sold shares on multiple dates.

[163] *See* Rules 147(b) and 147A(b). Current Rule 147(a) would be re-designated as Rule 147(b).

[164] NASAA Letter.

[165] Commission staff will seek to review information gathered by state regulators on issuer compliance with the legend requirements in amended Rule 147(f) and new Rule 147A(f) as part

Continued

continue to be subject to the antifraud and civil liability provisions of the federal securities laws, as well as state securities law requirements.

Lastly, while one commenter believed that securities issued under amended Rule 147 should be considered ''restricted securities'' under Rule 144(a)(3), [166] we believe that limiting the resale of these securities only to persons resident within the same state or territory in which the issuer is a resident for a period of six months from the date of the sale of the security by the issuer to the purchaser is sufficient to assure that the offering has come to rest in the state or territory in which the issuer resides and thereby preserve the local character of the offering. We note that states are free to impose any additional requirements they believe are necessary to protect the residents of their states, including imposing further transfer restrictions on securities issued under amended Rule 147 or new Rule 147A similar to that required under Rule 144(a)(3). In addition, persons reselling securities will need to consider whether they could be an ''underwriter'' if they acquired the securities with a view to ''distribution'' or if they are participating in a ''distribution.'' [167] A seller that complies with the conditions of the Rule 144 safe harbor will not be deemed to be an underwriter.[168]

5. Integration

a. Proposed Amendments

The proposed Rule 147 integration safe harbor would include any prior offers or sales of securities by the issuer, as well as certain subsequent offers or sales of securities by the issuer occurring within six months after the completion of an offering exempted by Rule 147. As proposed, offers and sales made pursuant to Rule 147 would not be integrated with:

• Prior offers or sales of securities; or

• Subsequent offers or sales of securities that are:

• Registered under the Act, except as provided in proposed paragraph (h) of Rule 147;

• Exempt from registration under Regulation A (17 CFR 230.251 *et seq.*);

• Exempt from registration under Rule 701 (17 CFR 230.701);

• Made pursuant to an employee benefit plan;

• Exempt from registration under Regulation S (17 CFR 230.901 through 230.905);

• Exempt from registration under Section 4(a)(6) of the Act (15 U.S.C. 77d(a)(6)); or

• Made more than six months after the completion of an offering conducted pursuant to this rule.[169]

b. Comments on the Proposed Amendments

One commenter supported including registered offers and sales and certain other exempt offerings occurring within six months after completion of the offering in the integration safe harbor, as proposed.[170] The same commenter did not support providing a safe harbor for any and all prior offers or sales of securities by the issuer, as proposed in paragraph (g)(1) of the amended rule, and instead recommended restricting the safe harbor to cover only offers and sales of securities that take place before the six-month period immediately preceding the Rule 147 offering.[171] While acknowledging that the proposed integration safe harbor is consistent with the integration safe harbor in Rule 251(c) of Regulation A, the commenter distinguished Regulation A from Rule 147 by noting that ''Regulation A is a quasi-registration subject to regulatory oversight by the Commission and the states while a Rule 147 offering may be exempt at both the federal and state level.'' In determining an integration safe harbor model to follow, the commenter indicated it would be better to look to Rule 502(a) of Regulation D, which limits the safe harbor for private offerings to offers and sales occurring either six months before, or six months after, a Regulation D offering.[172]

On the other hand, two commenters believed that Rule 147 offerings should not be integrated with any other exempt offerings.[173] One of these commenters recommended that Rule 147 contain language expressly stating that an offering made in reliance on Rule 147 will not be integrated with another exempt offering made concurrently, provided that each offering meets the requirements of the claimed exemption.[174]

c. Final Rules

After considering the comments, we are adopting amendments to the integration safe harbor under Rule 147 and providing an identical integration safe harbor provision in new Rule 147A, substantially as proposed. The integration safe harbor will cover any prior offers or sales of securities by the issuer, as well as certain subsequent offers or sales of securities by the issuer occurring after the completion of an offering pursuant to Rule 147 or Rule 147A, as applicable. Accordingly, offers and sales made pursuant to Rules 147 and 147A will not be integrated with:

• Offers or sales of securities made prior to the commencement of offers and sales of securities pursuant to Rules 147 or 147A; or

• Offers or sales of securities made after completion of offers and sales pursuant to Rules 147 or 147A that are:

• Registered under the Securities Act, except as provided in Rule 147(h) or Rule 147A(h);

• Exempt from registration under Regulation A (17 CFR 230.251 *et seq.*);

• Exempt from registration under Rule 701 (17 CFR 230.701);

• Made pursuant to an employee benefit plan;

• Exempt from registration under Regulation S (17 CFR 230.901 through 230.905);

• Exempt from registration under Section 4(a)(6) of the Act (15 U.S.C. 77d(a)(6)); or

• Made more than six months after the completion of an offering conducted pursuant to Rules 147 or 147A.[175]

As discussed in the Proposing Release, integration safe harbors provide issuers, particularly smaller issuers whose capital needs often change, with greater certainty about their eligibility to comply with an exemption from Securities Act registration.[176] Consistent with the proposal and the approach taken in Rule 251(c) of Regulation A, the safe harbor from integration provided by Rule 147(g) and Rule 147A(g) will expressly provide that any offer or sale made in reliance on the respective rules will not be integrated with any other offer or sale made either before the commencement of, or more than six

of the study of amended Rule 147 and new Rule 147A. *See* Section I.

[166] *Id.*

[167] *See* Section 4(a)(1) of the Securities Act (exempting from registration ''transactions by any person other than an issuer, underwriter, or dealer'') and Section 2(a)(11) of the Securities Act (defining the term ''underwriter''). 15 U.S.C. 77d(a)(1) and 15 U.S.C. 77b(a)(11).

[168] 17 CFR 230.144.

[169] *See* proposed Rule 147(g).

[170] NASAA Letter.

[171] *Id.*

[172] *Id.* Rule 502(a) provides that ''Offers and sales that are made more than six months before the start of a Regulation D offering or are made more than six months after completion of a Regulation D offering will not be considered part of that Regulation D offering, so long as during those six month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D, other than those offers or sales of securities under an employee benefit plan as defined in Rule 405 under the Act.'' 17 CFR 230.502(a).

[173] NextSeed Letter; Localstake Letter.

[174] NextSeed Letter.

[175] *See* Rules 147(g) and 147A(g).

[176] *See* Proposing Release at Section II.B.4.d. (Integration); *see also* 2015 Regulation A Release at Section II.B.5. (Integration).

months after the completion of, the respective intrastate offerings under either Rule 147 or Rule 147A. For transactions that fall within the scope of the safe harbor, issuers will not have to conduct an integration analysis of the terms of any offering being conducted under the other specified provisions in order to determine whether the two offerings would be treated as one for purposes of qualifying for either exemption.[177] While one commenter recommended that the Commission adopt a safe harbor more closely aligned with the provisions of Rule 502(a) of Regulation D,[178] we believe the integration safe harbor in Rule 251(c) of Regulation A is more consistent with the Commission's post-JOBS Act approach to integration that has evolved since the adoption of Regulation D in 1982 to better articulate the principles underlying the integration doctrine in light of current offering practices and developments in information and communication technology.[179] As we explained in the Proposing Release, we believe that our approach to integration will provide issuers with greater certainty as to the availability of an exemption for a given offering and increase consistency in the application of the integration doctrine among the exemptive rules available to smaller issuers, while preserving important investor protections provided in each exemption.[180]

The bright-line integration safe harbor we are adopting in amended Rule 147(g) and new Rule 147A(g) will assist issuers, particularly smaller issuers, in analyzing certain transactions, but will not address the issue of potential offers or sales that occur concurrently with, or close in time after, a Rule 147 or 147A offering. There is no presumption that offerings outside the integration safe harbors should be integrated. Rather, whether concurrent or subsequent offers and sales of securities will be integrated with any securities offered or sold pursuant to amended Rule 147 or new Rule 147A will depend on the particular facts and circumstances, including whether each offering complies with the requirements of the exemption that is being relied upon for the particular offering.[181] For example, an issuer conducting a concurrent exempt offering for which general solicitation is not permitted will need to be satisfied that purchasers in that offering were not solicited by means of the offering made in reliance on Rule 147 or new Rule 147A.[182] If an offer fails to comply with the requirements of the exemption, and the offer is not registered and no other exemption is available, that offer would be in violation of Section 5 of the Securities Act.

Amended Rule 147, as a safe harbor under Section 3(a)(11), will continue to prohibit out-of-state offers to any person not residing in the same state or territory in which the issuer is resident. Accordingly, an issuer conducting a concurrent exempt offering for which general solicitation is permitted across state lines would be unlikely to comply with the in-state offer restriction in Rule 147(b).[183] For example, issuers relying on amended Rule 147 will not be able to conduct a concurrent Regulation Crowdfunding offering, since by its nature a Regulation Crowdfunding offering would involve a multistate offer due to the offering terms being made publicly available from an intermediary's online platform.[184]

An issuer relying on the new Rule 147A exemption, which permits multi-state offers, may conduct a concurrent exempt offering for which general solicitation is permitted, so long as the issuer complies with the legend and disclosure requirements of Rule 147A(f), as well as any additional restrictions on the general solicitation required by the other exemption concurrently being relied upon by the issuer. For example, the limitations imposed on advertising the terms of the offering pursuant to Rule 204 of Regulation Crowdfunding would limit the issuer's general solicitation in a concurrent offering made pursuant to Rule 147A. Similarly, an issuer conducting a concurrent Rule 506(c) offering could not include in its Rule 506(c) general solicitation materials an advertisement of a concurrent Rule 147A offering, unless that advertisement also included the disclosure required by, and otherwise complied with, paragraph (f) of Rule 147A.[185]

As discussed in the Proposing Release, we are mindful of the risk that offers made pursuant to an exemption shortly before a registration statement is filed could be viewed as conditioning the market for that registered offering. Accordingly, final Rules 147 and 147A will exclude from the safe harbor any such offer made to persons other than qualified institutional buyers and institutional accredited investors within the 30-day period before a registration statement is filed with the Commission.[186] Commission staff expects to review issuer compliance with the expanded integration safe harbor as part of the study of amended Rule 147 and new Rule 147A.[187]

6. Disclosures to Investors

a. Proposed Amendments

We proposed to retain the substance of the disclosure requirements of

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[177] The issuer will, however, need to comply with the requirements of each exemption that it is relying upon. For example, an offering made pursuant to Rule 506(b) will not be integrated with a subsequent offering pursuant to Rule 147A, but the issuer will need to comply with the requirements of each rule, including the limitation on general solicitation for offers made pursuant to Rule 506(b).

[178] NASAA Letter.

[179] *See also,* Regulation Crowdfunding Adopting Release.

[180] *See* Proposing Release at text accompanying note 103. *See also* Rule 251(c) of Regulation A [17 CFR 230.251(c)]; Rule 701 [17 CFR 230.701]. Each exemption is designed based on a particular type of offer and investor, with corresponding requirements that must be satisfied.

[181] The integration concept was first articulated by the Commission in 1933 and was further developed in two interpretive releases issued in the 1960s. *See* SEC Rel. No. 33–97 (Dec. 28, 1933); SEC Rel. No. 33–4434 (Dec. 6, 1961); SEC Rel. No. 33–4552 (Nov. 6, 1962). The interpretive releases stated that determining whether a particular securities offering should be integrated with another offering requires an analysis of the specific facts and circumstances of the offerings. The Commission identified five factors to consider in making the determination of whether the offerings should be integrated. *See* SEC Rel. No. 33–4552 (Nov. 6, 1962). *See also* Rule 502(a) of Regulation D. More recently, the Commission has provided additional guidance to help issuers evaluate whether two offerings should be integrated. In 2007, the Commission provided a framework for analyzing how an issuer can conduct simultaneous registered and private offerings. *See* SEC Release No. 33–8828 (Aug. 3, 2007) [72 FR 45116 (Aug. 10, 2007)]. In 2015, when implementing provisions of the JOBS Act, the Commission applied this framework to concurrent exempt offerings, including situations where one offering permits general solicitation and the other does not. *See* 2015 Regulation A Release at Section II.B.5 and Regulation Crowdfunding Adopting Release at Section II.A.1.c. In those releases, the Commission noted that an offering made pursuant to Regulation A or Regulation Crowdfunding should not be integrated with another exempt offering made by the issuer, provided that each offering complies with the requirements of the exemption that is being relied upon for the particular offering. *Id.*

[182] For a concurrent offering under Rule 506(b), purchasers in the Rule 506(b) offering could not be solicited by means of a general solicitation under Rule 147 or new Rule 147A. The issuer would need an alternative means of establishing how purchasers in the Rule 506(b) offering were solicited. For example, the issuer may have had a preexisting substantive relationship with such purchasers. Otherwise, the solicitation conducted in connection with the Rule 147 or Rule 147A offering would very likely preclude reliance on Rule 506(b). *See also* SEC Rel. No. 33–8828 (Aug. 3, 2007) [72 FR 45116 (Aug. 10, 2007)].

[183] *See* Rule 147(b).

[184] For the same reasons, issuers will not be able to rely on amended Rule 147 and conduct concurrent Regulation A offerings or registered public offerings.

[185] *See* Rule 147A(f); *see also* discussion in Section II.A.1.

[186] *See* Rules 147(h) and 147A(h). In such circumstances, whether an offer made within the thirty-day period before the filing of a registration statement constitutes an impermissible offer for purpose of Securities Act Section 5(c) will be based on the facts and circumstances of such offer.

[187] *See* Section I above.

current Rule 147(f)(3), in modified form. As proposed, Rule 147(f)(3) would require issuers to make specified disclosures to offerees and purchasers about the limitations on resale contained in proposed Rule 147(e) and to include the legend set forth in proposed Rule 147(f)(1)(i) on the certificate or other document evidencing the offered security. Although the disclosure should be prominently disclosed to each offeree and purchaser at the time any offer or sale is made by the issuer to such person, the proposed amendments would no longer require that such disclosure be made in writing in all instances. Instead, the proposed amendments would require issuers to provide the required disclosure to offerees in the same manner in which an offer is communicated, while continuing to require written disclosure to all purchasers. In addition, the proposed amendments would no longer require issuers to disclose to offerees and purchasers the stop transfer instructions provided by an issuer to its transfer agent[188] or the provisions of Rule 147(f)(2) regarding the issuance of new certificates during the Rule 147(e) resale period.[189]

b. Comments on the Proposed Amendments

Two commenters supported the proposal to include in the text of the amended rule the specific language of the required disclosure.[190] These commenters also stated that all offerees and purchasers should continue to receive written disclosures, rather than, as proposed, permitting offerees to receive oral disclosures if the offer is communicated orally.[191]

c. Final Rules

After considering the comments, we are adopting amendments to Rule 147 and a provision in new Rule 147A that will require issuers to make specified disclosures to offerees and purchasers about the limitations on resale contained in Rules 147(e) and 147A(e), respectively. Issuers will also be required to meet the legend requirement of Rules 147(f)(1)(i) and 147A(f)(1)(i), respectively. Although the disclosure should be prominently disclosed to each offeree and purchaser at the time any offer or sale is made by the issuer to such person, consistent with the proposal, the amendment and new rule will not require that such disclosure be made in writing in all instances.

While two commenters recommended that we require issuers to provide all offerees written disclosures, rather than permitting offerees to receive oral disclosures if the offer is communicated orally,[192] we are not adopting that requirement in our rules. We believe the approach we are adopting—requiring issuers to provide the disclosure to offerees in the same manner in which an offer is communicated—will provide appropriate flexibility to issuers in the conduct of their offerings and avoid potential confusion as to when, for example, an oral offer must be followed up with a written disclosure.[193] Requiring the disclosure to be made orally if the offer is made orally also will help ensure that the investor receives the required disclosure when most relevant (*i.e.,* immediately upon learning about the offer). Furthermore, we believe our amendments to Rule 147(f)(3) and the provision in new Rule 147A(f)(3) will maintain appropriate investor protections, especially in light of the new provision requiring issuers to provide written disclosure to all purchasers within a reasonable period of time before the date of sale. We note that this requirement to provide written disclosure a reasonable period of time before the date of sale is consistent with the disclosure delivery requirements of Regulation D and Rule 701.[194] Finally, while we are not adopting commenters' suggestions to require that written disclosure be provided to all offerees, nothing in our rules prevents state regulators, that deem it necessary and appropriate, from requiring such written disclosures for offers to residents within their states. State regulators are in a position to tailor any such rules to their local capital markets in a manner that addresses capital market practices and investor protection measures they deem appropriate for offers and sales to residents of their state.

Consistent with the proposal, issuers will also be required to satisfy the legend requirement in Rules 147(f)(1)(i) and 147A(f)(1)(i), respectively. However, issuers will not be required to disclose to offerees and purchasers the stop transfer instructions provided by an issuer to its transfer agent[195] or the provisions of Rules 147(f)(2) and 147A(f)(2), respectively, regarding the issuance of new certificates during the resale period.[196] Although issuers will have to comply with these transfer agent instruction requirements,[197] we continue to believe that requiring issuers to disclose information regarding such requirements to offerees and purchasers at the time of the offer and/or sale will not enhance the disclosure requirements under Rules 147(e), 147A(e), 147(f)(1) or 147A(f)(1), and we therefore are eliminating the disclosure requirements related to stop transfer instructions and the issuance of new certificates from Rule 147 and not including them in new Rule 147A.[198]

Finally, in order for the required disclosure to offerees and purchasers under amended Rule 147(f) and new Rule 147A(f) to be as clear as possible, and consistent with our revisions to make the issuer's state of residency the focus of the relevant resale restrictions, we are adding a requirement that the issuer identify in this disclosure the particular state or territory in which the issuer was resident at the time of the original sale of the security. Since a small business may change the location of its residence and principal activities within the six-month resale limitation period provided for in amended Rule 147(e) and new Rule 147A(e), we believe this information, which should be readily available to the issuer, will assist purchasers in understanding the implications of the applicable resale restrictions.

7. State Law Requirements

a. Proposed Amendments

We proposed to limit the availability of Rule 147 to issuers that have registered an offering in the state in which all of the purchasers are resident or that conduct the offering pursuant to an exemption from state law registration in such state that limits the amount of securities an issuer may sell pursuant to such exemption to no more than $5 million in a twelvemonth period and that limits the amount of securities an investor can purchase in any such offering.[199] In the Proposing Release, we expressed our preliminary view that, in light of the other proposed changes to

[188] *See* 17 CFR 230.147(f)(1)(ii).

[189] *See* 17 CFR 230.147(f)(2).

[190] CFA Letter; NASAA Letter.

[191] *Id.*

[192] *Id.*

[193] In addition, it may not be possible for an issuer to provide written disclosures to all offerees. For example, an issuer conducting an offer over the radio would not be able to provide the written disclosures to everyone listening to the offer on the radio as it would not know the identity of each of the offerees.

[194] *See e.g.,* Rules 501(i)(4) and 502(b)(1) of Regulation D and Rule 701(e).

[195] *See* 17 CFR 230.147(f)(1)(ii).

[196] *See* 17 CFR 230.147(f)(2). Additionally, as discussed in Section II.B.1 above, we are requiring issuers in offerings conducted pursuant to Rule 147 or Rule 147A to disclose to each offeree in the manner in which any offer is communicated and to each purchaser of a security in writing that sales will be made only to residents of the same state or territory as the issuer. *See* Rules 147(f)(3) and 147A(f)(3).

[197] *See* Rules 147(f)(1)(ii), 147(f)(2), 147A(f)(1)(ii) and 147A(f)(2).

[198] *See* Rules 147(f)(3) and 147A(f)(3).

[199] *See* proposed Rule 147(a).

Rule 147, including a maximum offering amount limitation and investment limitations in the rule would provide investors with additional protection and would be consistent with existing state law crowdfunding provisions.[200]

b. Comments on the Proposed Amendments

All commenters that addressed the issue opposed any limits at the federal level on offering size or investment size.[201] In general, these commenters preferred that any limits be imposed through the state legislative and/or rulemaking process, which they stated may be better situated to making a determination about specific limits.[202] Commenters also stated that the requirements are unnecessary at the federal level since these are local offerings where only the individual state's residents are involved.[203] One of these commenters noted the potential disparate impact on larger versus smaller states with different resident populations and gross domestic products.[204] Another of these commenters noted that, in addition to the regulation of these offerings at the state level, to the extent federal regulatory oversight is deemed necessary, these offerings are also subject to the Commission's powers to enforce the antifraud provisions of Section 10(b) of the Exchange Act and Rule 10b–5 thereunder.[205] Another of these commenters stated that the baseline cost of the proposed federal requirements may prevent state policy makers from adding investor protection provisions that the states consider to be more effective due to the cumulative compliance burden.[206] In addition, the 2015 Small Business Forum recommended that the Commission remove the $5 million limit in the proposal, permitting the states to set their own limits as appropriate.[207]

A few commenters stated that, if the proposed limits were retained, any limit on the amount a company can raise under Rule 147 should be indexed for inflation,[208] with one of these commenters suggesting an automatic, periodic review of any such limits.[209] One commenter strongly encouraged the Commission to raise the offering limit significantly.[210] Two commenters believed that, if the proposed limits were retained, Rule 147 should be amended to require that the offering, not the state exemption, be limited to no more than $5 million in order to allow issuers to rely upon existing state law exemptions.[211] One of these commenters also suggested that, if the proposed investment limits were retained, the Commission should establish them as direct requirements of amended Rule 147 and should only apply them to non-accredited investors.[212]

c. Final Rules

Given the comments received, the recommendations of the 2015 Small Business Forum and the intrastate nature of the offerings, we are not limiting amended Rule 147 and new Rule 147A to offerings that either are registered in the state where all of the purchasers are resident or that are conducted pursuant to an exemption from state law registration in a state that limits the amount of securities an issuer may sell pursuant to such exemption to no more than $5 million in a twelve-month period and that limits the amount of securities an investor can purchase in any such offering. Consistent with the policy underlying Section 3(a)(11), we believe it appropriate that the resident investor protections in intrastate offerings primarily flow from the requirements of state securities law. For example, as with the federal securities laws, states generally require an issuer to register an offering with appropriate state authorities when offers or sales of securities are made to their residents, unless the state has adopted, by rule or statute, an exemption from registration. As noted in the Proposing Release, of the states that have adopted and/or enacted crowdfunding provisions that require an issuer to comply with Rule 147, either alone or in conjunction with Section 3(a)(11), no state has adopted and/or enacted a crowdfunding provision with an aggregate offering amount that exceeds $5 million.[213] Additionally, almost all of these states have adopted provisions that impose investment limitations on investors.

In light of these existing limitations in state exemptions and the fact that all commenters opposed our proposed limits at the federal level on offering size and investment size, we are not adopting the proposed federal limits on state exemptions. As commenters noted, states can decide whether to adopt requirements not specifically contemplated by the federal requirements that are consistent with their respective interests in facilitating capital formation and protecting their resident investors in intrastate securities offerings within their jurisdiction.[214] If any states determine to amend their statutes and/or rules to require compliance with new Rule 147A, those states can consider whether any additional requirements should be adopted at the state level given their interest in regulating local offerings within their jurisdiction. Moreover, in addition to state securities law requirements, issuers will continue to be subject to the antifraud and civil liability provisions of the federal securities laws.

C. Additional Considerations

In addition to soliciting specific comments on the proposals, we also solicited general comments, including additional or different revisions to the rules and other matters that may impact the proposals.

1. Notice Filings

Commenters were divided on whether to require issuers utilizing the exemption to make a notice filing with the Commission. While one commenter specifically stated that additional federal administrative obligations, such as new minimum disclosure or delivery requirements, registration and/or additional filings with the Commission, should not be imposed on issuers for

[200] *See* Proposing Release.

[201] *See* ABA Letter; Letter from Rutheford B. Campbell, Jr., Spears-Gilbert Professor of Law, University of Kentucky College of Law, March 30, 2016 (''Campbell Letter''); CFIRA Letter; Congressional Letter (''the states are better positioned to determine offering and investment caps that best meet their local population and business needs''); CrowdCheck Letter; Guzik Letter; Milken Letter; NASAA Letter; NextSeed Letter; WBA Letter.

[202] *See, e.g.,* ABA Letter; Campbell Letter; CFIRA Letter; Congressional Letter; CrowdCheck Letter; Guzik Letter; NASAA Letter; WBA Letter.

[203] ABA Letter; Campbell Letter; CFIRA Letter; CrowdCheck Letter; Guzik Letter; Milken Letter; NASAA Letter; NextSeed Letter; WBA Letter.

[204] NASAA Letter.

[205] Guzik Letter.

[206] Milken Letter.

[207] *See* 2015 Small Business Forum Recommendations.

[208] ABA Letter; NASAA Letter; Milken Letter.

[209] NASAA Letter.

[210] WBA Letter.

[211] Bishop Letter; WBA Letter.

[212] WBA Letter.

[213] *See http://www.nasaa.org/industry-resources/corporation-finance/instrastate-crowdfunding-resource-center/intrastate-crowdfunding-directory/.* Illinois is the only state with a crowdfunding provision allowing for a maximum aggregate offering amount up to $5 million in a twelve-month period. All other states that have adopted some form of a state-based crowdfunding provision limit the aggregate offering amount to between $1 million and $2.5 million. *See* Illinois House Bill 3429, § 4.T. (2015), *available at https://legiscan.com/IL/text/HB3429/id/1257029.*

[214] States currently employ this approach to varying degrees in their respective state crowdfunding statutes. *See, e.g.,* D.C. Mun. Regs. tit. 26–B, § 250 (2014) (escrow required until minimum offering amount satisfied), Ind. Code § 6–3.1–24–14 (2014) (funding portal required).

conducting intrastate crowdfunding,[215] another commenter recommended that the Commission require issuers utilizing Rule 147 to file a notice with the Commission, but (similar to Regulation D) the exemption should not be conditioned on the filing.[216] Given the local intrastate nature of the exemptions, we continue to believe that the limited benefits of a notice filing with the Commission would not justify the costs and burdens on issuers to add such a requirement. We note, however, that states could make a notice filing (at the state level) a condition to any state law exemption.[217] In this regard, we note that a vast majority of intrastate crowdfunding provisions require a notice filing with a state regulator.[218] Commission staff will seek to collaborate with state regulators to consider filing data in connection with the study of amended Rule 147 and new Rule 147A.[219]

2. Intrastate Broker Dealer Exemption

Exchange Act Section 15(a)(1) exempts from broker-dealer registration requirements under Section 15(b) a broker-dealer whose business is exclusively intrastate and who does not use any facility of a national securities exchange (''intrastate broker-dealer exemption'').[220] Several commenters supported interpreting the intrastate broker-dealer exemption under the Exchange Act to include intermediaries whose activities are limited to facilitating intrastate offerings using the Internet.[221] One commenter was concerned that intrastate intermediaries operating exclusively online may not qualify for the intrastate exemption from registration if they post information on the Internet and it is accessed by out-of-state residents.[222] The commenter, therefore, suggested that the Commission clarify that an entity will not relinquish its ability to rely on the intrastate broker-dealer exemption solely because it has a web presence, as long as it continues to operate and conduct sales intrastate.[223] Two commenters similarly suggested that intrastate intermediaries should be able to rely on the intrastate broker-dealer exemption from broker-dealer registration if they use the Internet to facilitate offerings being conducted in reliance on Rule 147.[224]

We agree with the commenters that it would be helpful to provide guidance regarding the use of the Internet by a person that seeks to rely on the intrastate broker-dealer exemption.[225] In providing this guidance, we are seeking to take into account the contemporary business practices of broker-dealers, which have evolved over the years to include as a routine matter the use of the Internet as an essential tool in conducting business. As noted elsewhere, the actions we are taking today are intended to facilitate capital formation, while maintaining appropriate investor protections. We believe that a broker-dealer whose business otherwise meets the requirements of the intrastate broker-dealer exemption should not cease to qualify for the intrastate broker-dealer exemption solely because it has a Web site that may be viewed by out-of-state persons, so long as the broker-dealer takes measures reasonably designed to ensure that its business remains exclusively intrastate.[226] The use of disclaimers clearly indicating that the broker-dealer's business is exclusively intrastate and that the broker-dealer can only act for or with, and provide broker-dealer services to, a person in its state could be one means reasonably designed to ensure that the broker-dealer's business remains exclusively intrastate so long as the broker-dealer does not provide brokerage services to a person that indicates that it is, or that the broker-dealer has reason to believe is, not within the broker-dealer's state of residence.[227] These measures are not

[215] NextSeed Letter.

[216] Campbell Letter.

[217] *See* NASAA Letter.

[218] *E.g.,* Alabama, Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, Wyoming and the District of Columbia. Other states have pending legislation that would require notice filings for intrastate crowdfunded offerings, *e.g.,* California, Hawaii, Missouri, Nevada, and New Hampshire.

[219] *See* Section I above.

[220] Under Section 15(a)(1) of the Exchange Act, it is generally unlawful for any broker or dealer to use any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempt security) unless the broker or dealer is registered with the Commission. Section 15(a)(1) provides an exemption from registration for ''a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange.''

[221] *See* NASAA Letter; NextSeed Letter; WBA Letter. The commenters were focused, in particular, on intermediaries that facilitate intrastate crowdfunding offerings using the Internet.

[222] NASAA Letter. This commenter noted that an SEC staff Guide to Broker-Dealer Registration indicates that information posted on the Internet that is accessible by persons in another state would be considered an interstate offer of securities and would require federal broker-dealer registration. *See id. See also* Guide to Broker-Dealer Registration, Division of Trading and Markets, U.S. Securities and Exchange Commission (Apr. 2008), *available at https://www.sec.gov/divisions/marketreg/bdguide.htm.* The Commission has not previously spoken to this issue, and the guidance in this release is intended to take into account modern business practices of broker-dealers and clarify the permissibility of the use of the Internet by broker-dealers relying on the intrastate broker-dealer exemption. To the extent the staff guidance is inconsistent, it is superseded.

[223] *See* NASAA Letter. The commenter also suggested that intrastate broker-dealers be permitted to advertise and use the Internet without having to register with the Commission so long as they used certain disclaimers. *Id.*

[224] NextSeed Letter (''[S]tate crowdfunding intermediaries should be permitted to use the internet to facilitate intrastate crowdfunding offerings pursuant to Rule 147 and still be able to rely on the intrastate broker-dealer exemption.''); WBA Letter (''If crowdfunding offerings conducted in accordance with amended Rule 147 are intrastate in nature, then state crowdfunding portals which exclusively host such offerings should be deemed to conduct 'exclusively intrastate' business under [Section] 15(a)(1).'').

[225] Although commenters focused on broker-dealers who facilitate intrastate crowdfunding offerings, we are providing more general guidance not limited to offerings relying upon intrastate crowdfunding provisions under state law.

[226] As noted, Section 15(a)(1) of the Exchange Act provides an exemption from registration for ''a broker or dealer whose business is exclusively intrastate.'' Our guidance today is intended to provide clarity regarding when a broker-dealer's business will be ''exclusively intrastate'' in connection with its use of the Internet. As discussed in this section of this release, a broker-dealer with a Web site that may be viewed by an out-of-state person may still be able to rely on the intrastate exemption if the broker-dealer implements measures reasonably designed to ensure that its business remains exclusively intrastate. This guidance is separate and apart from the question of whether a security may be offered and sold on the broker-dealer's Web site in reliance on an exemption from registration under Section 5 of the Securities Act. In this regard, we note that an offer in the context of the Securities Act has generally been defined broadly, and the considerations involved in determining whether an offer includes an impermissible general solicitation are necessarily distinct from the considerations as to whether a broker-dealer's activities occur exclusively within a single state. Therefore, a broker-dealer facilitating an offering pursuant to an exemption from registration under the Securities Act should be careful not to engage in activity that would compromise the issuer's ability to rely on the applicable exemption to Securities Act Section 5. *See, e.g.,* Rules 147 and 147A, including paragraphs (d) and (f) and the Instruction to paragraph (d).

[227] This guidance is consistent with the concepts articulated in prior Commission guidance for foreign broker-dealers. *See* Interpretation: Re: Use of Internet Web sites to Offer Securities, Solicit Securities Transactions, or Advertise Investment Services Offshore, SEC Rel. No. 33–7516 (Mar. 23, 1998) (''Offshore Interpretation''). In the Offshore Interpretation, the Commission stated that it would not consider a foreign broker-dealer's advertising on an Internet Web site to constitute an attempt to induce a securities transaction with U.S. persons if the foreign broker-dealer takes measures reasonably designed to ensure that it does not effect securities transactions with U.S. persons as a result of its Internet activities. The Commission further stated that, as applied in the broker-dealer context, a foreign broker-dealer generally would be considered to have taken measures reasonably designed to ensure it does not effect securities transactions with U.S. persons as a result of its Internet activities if it: (i) Posts a prominent disclaimer on the Web site either affirmatively delineating the countries in which the broker-dealer's services are available, or

intended to be exclusive. A broker-dealer could adopt other measures reasonably designed to ensure that it does not provide brokerage services to persons that are not within the same state as the broker-dealer. We do not believe, however, that an intermediary's business would be ''exclusively intrastate'' if it sold securities or provided any other brokerage services to a person that indicates that it is, or that the broker-dealer has reason to believe is, not within the broker-dealer's state of residence.[228] We believe that this guidance will facilitate capital formation by smaller companies while maintaining appropriate protections for investors.[229] This guidance also is consistent with, and will further, the goal of modernizing our rules to comport with contemporary business practices.

3. Section 12(g) Registration

Several commenters recommended exempting securities issued in reliance upon Rule 147 from the reporting requirements of Section 12(g) of the Exchange Act.[230] Most of these commenters asserted that the Rule 147 exemption would be of limited utility if the securities were not exempted from Section 12(g).[231] In addition, the 2015 Small Business Forum recommended that the Commission provide a permanent exemption from Section 12(g) registration under the Exchange Act for securities sold in a Rule 147 offering.[232] As amended by the JOBS Act, Section 12(g) requires, among other things, that an issuer with total assets exceeding $10,000,000 and a class of securities held of record by either 2,000 persons or 500 persons who are not accredited investors to register such class of securities with the Commission.[233]

Section 12(g) was originally enacted by Congress as a way to ensure that purchasers of over-the-counter securities about which there was little or no information, but which had a significant shareholder base, were provided with ongoing information about their investment.[234] Unlike Tier 2 offerings under Regulation A [235] or Regulation Crowdfunding,[236] where the Commission provided conditional exemptions from registration under Section 12(g), issuers that utilize the exemptions under amended Rule 147 or new Rule 147A will not be required to comply with ongoing reporting requirements. Given the lack of ongoing reporting requirements, we believe that the Section 12(g) record holder and asset thresholds continue to provide an important baseline above which issuers should generally be subject to the disclosure obligations of the Exchange Act. As the shareholder base of these issuers and their total assets grow, we believe that the additional protections that will be provided by registration under Section 12(g) are necessary and appropriate.

4. Exclusion of Investment Companies

In the proposing release, we asked whether we should leave existing Rule 147 in place and unchanged as a safe harbor under Section 3(a)(11) while adopting the proposed revisions to Rule 147 as a new rule, and if so, whether we should make any additional changes to the proposed rule. One commenter that recommended retaining the existing Rule 147 safe harbor and adopting a new exemption also recommended that the new exemption exclude investment companies subject to the Investment Company Act of 1940 (the ''Investment Company Act''),[237] including private equity funds, from relying upon Rule 147.[238] Under Section 24(d) of the Investment Company Act,[239] the Section 3(a)(11) exemption is not available for an investment company registered or required to be registered under the Investment Company Act.[240] Since we are retaining Rule 147 as a safe harbor under Section 3(a)(11), Rule 147 will continue to be unavailable for an investment company registered or required to be registered under the Investment Company Act. To provide a consistent treatment between Rule 147 and new Rule 147A, we are specifically excluding an issuer that is an investment company registered or required to be registered under the Investment Company Act from relying on Rule 147A.[241] As described above, the final rules maintain a consistent approach across the two intrastate offering exemptions, where possible, including with respect to issuer eligibility. In addition, this same commenter also recommended excluding other types of issuers from Rule 147.[242] Since these other types of issuers are not excluded from existing Rule 147 and because we believe that, absent specific Congressional direction or evidence of abuse, the states should have the discretion to determine whether any additional restrictions are appropriate for offerings conducted exclusively within their jurisdiction, we

stating that the services are not available to U.S. persons; and (ii) refuses to provide brokerage services to any potential customer that the broker-dealer has reason to believe is, or that indicates that it is, a U.S. person, based on residence, mailing address, payment method, or other grounds.

[228] *See, e.g., In the Matter of Professional Investors, Inc.,* 37 SE.C. 173, 175–176 (1956) (indicating that a broker-dealer that effected transactions on national securities exchanges for its customers and its own account and, as an underwriter, sold stock on behalf of an out-of-state issuer no longer had an exclusively intrastate business and the intrastate exemption from registration as a broker-dealer was therefore not available); *Peoples Securities Company,* 39 SE.C. 641, 652–653 (1960) (stating that a broker-dealer's business was not exclusively intrastate based on its interstate activities, which included sales of securities to out-of-state residents), aff'd sub nom. *Peoples Securities Co.* v. *SE.C.,* 289 F.2d 268 (C.A. 5, 1961).

[229] Commission staff expects to consider the role of intrastate broker-dealers and other intermediaries in offerings under amended Rule 147 or new Rule 147A in connection with its study. *See* Section I above.

[230] CFIRA Letter; CrowdCheck Letter; Guzik Letter; Milken Letter; City of Adrian Letter.

[231] CFIRA Letter; CrowdCheck Letter; Guzik Letter; City of Adrian Letter.

[232] *See* 2015 Small Business Forum Recommendations.

[233] *See* Section 501 of the JOBS Act. *See also* 17 CFR 240.12g–1. In the case of an issuer that is a bank, a savings and loan holding company or a bank holding company, Exchange Act Section 12(g)(1)(B) (15 U.S.C. 78*l*(g)(1)(B)) requires, among other things, that the issuer, if it has total assets exceeding $10,000,000 and a class of securities held of record by 2,000 persons, register such class of securities with the Commission. *See* Section 601 of the JOBS Act and Section 85001 of the FAST Act. *See also* 17 CFR 240.12g–1.

[234] *See generally Report of the Special Study of Securities Markets of the Securities and Exchange Commission,* House Document No. 95, House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. (1963), at 60–62.

[235] *See* 2015 Regulation A Release at Section II.B.6.

[236] *See* Regulation Crowdfunding Adopting Release at Section II.E.4.

[237] 15 U.S.C. 80a–1 *et seq.*

[238] NASAA Letter.

[239] 15 U.S.C. 80a–24(d).

[240] *See* 1961 Release at note 1.

[241] *See* Rule 147A(a). Investment companies are companies that are registered or required to be registered under the Investment Company Act. 15 U.S.C. 80a–1 *et seq.* Private funds (including private equity funds and other pooled investment vehicles) generally rely on the exclusions from the definition of ''investment company'' in Sections 3(c)(1) or 3(c)(7) of the Investment Company Act. *See* 15 U.S.C. 80a–3(c). Private funds are precluded from relying on either of these exclusions if they make a public offering of their securities. *Id.* Accordingly, if such a private fund engaged in a public offering of its securities, that private fund would no longer be able to rely on the applicable exclusion under Section 3(c)(1) or (7) and thus would be required to be registered under the Investment Company Act, unless another exclusion or exemption is available. As a result, the private fund would be an ''investment company'' for purposes of Section 24(d) and would be excluded from the Section 3(a)(11) exemption and safe harbor of existing Rule 147.

[242] Specifically, NASAA also recommended excluding the following types of issuers from the exemption: holding companies (*i.e.,* companies whose principal purpose is owning stock in, or supervising the management of, other companies); blind pools; commodity pools; public companies reporting under the Exchange Act; and blank check companies (*i.e.,* development stage companies that either have no specific business plan or purpose or have indicated that their business plan is to engage in a merger or acquisition with an unidentified company or companies or other entity or person).

are not amending Rule 147 or including a provision in Rule 147A to exclude other types of issuers from these provisions.

5. Trust Indenture Act

Two commenters supported exempting securities issued in reliance upon Rule 147, as proposed to be amended, from the Trust Indenture Act of 1939.[243] Rule 147 offerings are exempt from the Trust Indenture Act pursuant to Section 304(a)(4) which exempts any security issued in reliance on Section 3(a)(11) of the Securities Act.[244] Since the Trust Indenture Act applies to any debt security sold through the use of the mails or interstate commerce, including debt securities sold in transactions that are exempt from Securities Act registration, the issuance of a debt security under new Rule 147A, as a new exemption not under Section 3(a)(11), raises questions about the applicability of the Trust Indenture Act. We note, however, that Trust Indenture Act Section 304(a)(8) [245] and Rule 4a–1 [246] provide an exemption for the issuance of up to $50 million of debt securities without an indenture in any 12-month period. Given the existing exemption for up to $50 million of debt securities, we do not believe that a specific exemption from the requirements of the Trust Indenture Act for offerings of debt securities under Rule 147A is necessary at this time.

6. Other Requirements

Two commenters recommended that the Commission work with the states to encourage, or amend Rule 147 in a way that encourages, issuers to use any U.S. escrow agent, as opposed to using only escrow agents registered in the state of the offering, which is often a requirement of state law.[247] Another commenter recommended amending Rule 147 to include bad actor disqualification provisions similar to those set forth under Rule 506(d).[248]

As noted elsewhere, the amendments we are adopting today are intended to facilitate capital formation, while maintaining appropriate investor protections and providing state securities regulators with the flexibility to add additional investor protections they deem appropriate for offerings within their state. Moreover, a broad consensus of commenters opposed additional requirements for exempt intrastate offerings beyond those currently contemplated by our rules.[249] State legislatures and/or securities regulators have a significant interest in intrastate offerings made to their residents and therefore may wish to impose, and are uniquely positioned to determine, additional requirements they deem necessary or appropriate for the protection of their residents. Consistent with our approach to other aspects of the final rules, we believe it is appropriate in these circumstances to defer to the states regarding which, if any, of the additional provisions recommended by commenters should supplement the federal rules. In this regard, we note that bad actor disqualification provisions are a feature of most state crowdfunding exemptions.[250] In addition, a majority of states have adopted the Uniform Limited Offering Exemption (''ULOE''), or a variant of that uniform exemption.[251] The ULOE includes a bad actor disqualification provision.[252] Other state exemptions include bad actor disqualification provisions,[253] and the small corporate offering registration (''SCOR'') program [254] also contemplates disqualification of an issuer or any of its officers, directors, principal stockholders or promoters because of prior violations of the securities laws. We believe that state and federal regulators share an interest in collaborative efforts that facilitate capital formation and investor protection. Accordingly, Commission staff will seek to collaborate with state regulators to review data on the application of state bad actor disqualification provisions in offerings conducted pursuant to amended Rule 147 or new Rule 147A to inform whether the Commission should consider including bad actor disqualification provisions in Rules 147 and 147A.[255]

III. Amendments to Rules 504 and 505 of Regulation D

A. Overview of Rules 504 and 505

Rule 504 [256] of Regulation D provides issuers with an exemption from registration for offers and sales of up to $1 million of securities in a twelve-month period, provided that the issuer is not:

- Subject to reporting pursuant to Section 13 or 15(d) of the Exchange Act; [257]
- an investment company; [258] or
- a development stage company that either has no specific business plan or purpose or that has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies (''blank check company'').[259]

Additionally, Rule 504 imposes certain conditions, including limitations on the use of general solicitation or general advertising in the offering and the restricted status of securities issued pursuant to the exemption, with limited exceptions for offers and sales made:

- Exclusively in one or more states that provide for the registration of the securities, and require the public filing and delivery to investors of a substantive disclosure document before sale, and are made in accordance with state law requirements;
- in one or more states that have no provision for the registration of the securities or the public filing or delivery

[243] NextSeed Letter; WBA Letter.

[244] 15 U.S.C. 77ddd(a)(4).

[245] 15 U.S.C. 77ddd(a)(8).

[246] 17 CFR 260.4a–1.

[247] City of Adrian Letter; Localstake Letter.

[248] NASAA Letter.

[249] *See* Section II.B.7 above.

[250] *See* NASAA Letter. *See, e.g.,* Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Iowa, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Texas, Vermont, Washington, Wisconsin and the District of Columbia.

[251] *See, e.g.,* Alabama, Arizona, Colorado, Georgia, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Maryland, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming and the District of Columbia. The Uniform Limited Offering Exemption was adopted by NASAA in 1983 and again in 1989 (available from the NASAA Web site at *http://www.nasaa.org/wp-content/uploads/2011/07/UNIFORM–LIMITED–OFFERING–EXEMPTION.pdf*).

[252] *See* Section 1.B of the ULOE.

[253] *See, e.g.,* the Model Accredited Investor Exemption (available from the NASAA Web site at *http://www.nasaa.org/wp-content/uploads/2011/07/24-Model_Accredited_Investor_Exemption.pdf*), as well as other state exemptions such as the Small Issuer Exemption in Pennsylvania, 10 Pa. Code § 203.187, and the Small Offering Exemption in Washington, WAC 460–44A–504.

[254] Forty-three states, the District of Columbia and the Commonwealth of Puerto Rico have adopted some form of the SCOR program or recognize the filing of Form U–7 (also referred to as uniform limited offering registration (''ULOR'')). *See* CCH Blue Sky Law Reporter, Blue Sky Findings Lists, Small Corporate Offering Registration Program and Form U–7, ¶ 6461 (2016). SCOR and Form U–7 were developed by NASAA as a registration format for companies registering securities under state securities laws when relying upon an exemption from Securities Act registration, including Rule 504. A company may not use the SCOR Form to offer and sell its securities if the company or any of its officers, directors, principal stockholders or promoters are disqualified because of prior violations of the securities laws. A company also may not use salespersons who are disqualified because of prior violations of the securities laws. *See* SCOR Overview, available from the NASAA Web site at *http://www.nasaa.org/industry-resources/corporation-finance/scor-overview/*.

[255] *See* Section I above.

[256] 17 CFR 230.504.

[257] 17 CFR 230.504(a)(1).

[258] 17 CFR 230.504(a)(2).

[259] 17 CFR 230.504(a)(3).

of a disclosure document before sale, if the securities have been registered in at least one state that provides for such registration, public filing and delivery before sale, offers and sales are made in that state in accordance with such provisions, and the disclosure document is delivered before sale to all purchasers (including those in the states that have no such procedure); or

• exclusively according to state law exemptions from registration that permit general solicitation and general advertising so long as sales are made only to ''accredited investors'' as defined in Rule 501(a) of Regulation D.[260]

Rule 504, together with Rules 505 and 506, comprise the Securities Act exemptions and safe harbor in Regulation D.[261] Regulation D offerings are exempt from the registration requirements of the Securities Act. Offerings conducted pursuant to Rule 504 or Rule 505, however, must be registered in each state in which they are offered or sold unless an exemption to state registration is available under state securities laws.[262] The vast majority of states have adopted a uniform registration form for offerings relying upon Rule 504.[263] One state, however, recently adopted a form of state-based crowdfunding that permits the use of general solicitation but has provided for an abbreviated state registration procedure where, in addition to following various state-specific requirements for registration, an issuer also complies with Rule 504 of Regulation D.[264] Additionally, offerings conducted pursuant to Rules 505 and 506 are subject to bad actor disqualification provisions, while offerings conducted pursuant to Rule 504 are not subject to such provisions.[265]

B. Amendments to Rule 504

1. Proposed Amendments to Rule 504

In an effort to facilitate capital formation, including facilitating the development of comprehensive regional coordinated review programs at the state level, and enhance investor protection, we proposed to increase the aggregate amount of securities that may be offered and sold in any twelve-month period pursuant to Rule 504 from $1 million to $5 million and to disqualify certain bad actors from participation in Rule 504 offerings. We further proposed a technical amendment to Rules 504 and 505 to account for the re-designation of Securities Act Section 3(b) as Section 3(b)(1) that occurred as a result of the enactment of the JOBS Act in 2012.[266] Additionally, to account for the proposed increase in the Rule 504 aggregate offering amount limitation, we proposed technical amendments to the notes to Rule 504(b)(2) that would update the current illustrations in the rule regarding how the aggregate offering limitation is calculated in the event that an issuer sells securities pursuant to Rule 504 and Rule 505 within the same twelve-month period.[267]

2. Comments on the Proposed Amendments to Rule 504

Many commenters supported, and no commenters opposed, increasing the Rule 504 offering amount limit from $1 million to $5 million.[268] These commenters stated that increasing the offering amount limit will allow more small businesses to use this capital raising tool, better satisfying the needs of these businesses for capital formation and helping to facilitate multi-state offerings.[269] Several commenters stated that Rule 504 is currently being underutilized, in part, due to the low offering amount limit of $1 million and the erosion of the dollar's value due to inflation since the offering amount limit was last raised in 1988 from $500,000 to $1 million.[270] As Rule 504 allows issuers to conduct an offering in multiple states and provides an opportunity for states to coordinate a regional review of the offering, commenters stated that an increase in the Rule 504 offering amount limit will encourage new interstate, regional approaches to crowdfunding and other small business offerings and will provide greater utility to a regional review of those offerings.[271] Two commenters stated that the offering amount limit should be increased to $10 million in order to offset the significant compliance costs involved in state registration and review.[272] In addition, the 2015 Small Business Forum recommended that the Commission increase the proposed limit on Rule 504 to $10 million, permitting the states to set their own limit as appropriate.[273] Another commenter stated that Rule 504 should be automatically indexed for inflation in order to preserve the utility of the rule from the erosion of the dollar's value in real terms.[274] Two commenters stated the Commission should use its general exemptive

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[260] 17 CFR 230.504(b)(1). State exemptions of this nature include those based upon the ''Model Accredited Investor Exemption,'' which was adopted by NASAA in 1997. CCH NASAA Reporter Para. 361. Generally, the model rule exempts offers and sales of securities from state registration requirements, if among other matters, the securities are sold only to persons who are, or are reasonably believed to be, ''accredited investors'' as defined in Rule 501(a) of Regulation D, 17 CFR 230.501(a). The model rule restricts transfer of the securities for 12 months after issuance except to other accredited investors or if registered. General solicitations by any means under that provision are generally limited to a type of ''tombstone'' ad. *See* Model Accredited Investor Exemption, available from the NASAA Web site at *http://www.nasaa.org/wp-content/uploads/2011/07/24-Model_Accredited_Investor_Exemption.pdf*.

[261] 17 CFR 230.500 through 508. Rules 501 through 503 contain definitions, conditions, and other provisions that apply generally throughout Regulation D. Rules 504, 505 and 506(c) are exemptions from registration under the Securities Act, while Rule 506(b) is a ''safe harbor'' for compliance with the non-public offering exemption in Section 4(a)(2) of the Securities Act. Rule 507 disqualifies issuers from relying on Regulation D, under certain circumstances, for failure to file a Form D notice. Rule 508 provides a safe harbor for certain insignificant deviations from a term, condition, or requirement of Regulation D.

[262] Section 18(b)(4)(D) of the Securities Act provides ''covered security'' status to all securities sold in transactions exempt from registration under Commission rules promulgated under Section 4(a)(2), which includes Rule 506 of Regulation D. Covered security status under Section 18 provides for the preemption of state securities laws registration and qualification requirements for offerings of such securities. In comparison, securities issued pursuant to either Rules 504 or 505 are not covered securities as these two exemptions are adopted pursuant to the Commission's authority under Section 3(b)(1) of the Securities Act.

[263] *See* note 254 above.

[264] Of the 34 states and the District of Columbia that have adopted intrastate crowdfunding provisions, only Maine allows an issuer to rely upon Rule 504 of Regulation D where the issuer is required to file with the Maine securities regulator in an abbreviated registration procedure. *See* Me. Rev. Stat. tit. 32, § 16304(6–A)(D) (2013).

[265] *See* Rule 505(b)(2)(iii), 17 CFR 230.505(b)(2)(iii), and Rule 506(d), 17 CFR 230.506(d), of Regulation D.

[266] Public Law 112–106, 126 Stat. 306.

[267] *See* proposed Notes 1 and 2 to Rule 504(b)(2). *See also* 17 CFR 230.504(b)(2).

[268] ABA Letter; CFA Letter; CFIRA Letter; CrowdCheck Letter; Milken Letter; NASAA Letter.

[269] *Id.*

[270] ABA Letter; Milken Letter; NASAA Letter.

[271] NASAA Letter (''Maine currently permits interstate crowdfunding under the federal exemption in Rule 504 and Mississippi and Vermont dually offer intrastate crowdfunding under Section 3(a)(11) and interstate crowdfunding under Rule 504. Many other states are presently exploring a dual option for crowdfunding, including additional regional review programs under Rule 504.''). *See also* CFA Letter.

[272] CrowdCheck Letter (''Having recently gone through the coordinated review process in the context of a Regulation A offering, we believe that the compliance cost involved in state registration and review is significant, and Rule 504 will only be of interest to issuers if they can raise enough capital to offset this burden.''); CFIRA Letter.

[273] *See* 2015 Small Business Forum Recommendations.

[274] Milken Letter (''Rule 504's current obsolescence is largely a result of the erosion of the dollar's value in real terms . . . Indexing would place Rule 504 in a similar position to Regulation Crowdfunding offerings where, under Section 4A(h)(1) of the 1933 Act the annual dollar amount is to be adjusted for inflation at least every five years.'').

authority under Section 28 for future increases in the Rule 504 offering limitation.[275] Several commenters also supported, and no commenters opposed, amending Rule 504 to include bad actor disqualification provisions to provide a more uniform set of bad actor triggering events across Regulation D.[276]

In response to our solicitation for comment on whether to repeal Rule 504(b)(1)(iii) or amend the rule to place limitations on resale, one commenter recommended that the Commission not repeal or amend Rule 504(b)(1)(iii), but retain this provision to provide an environment that ''allow[s] the states to experiment'' and innovate in a manner that may prove useful for state and federal policy makers.[277] Rule 504(b)(1)(iii) provides an exemption from registration for offers and sales of securities that are conducted ''according to state law exemptions from registration that permit general solicitation and general advertising so long as sales are made only to 'accredited investors' as defined in Rule 501(a).'' Securities sold without registration in reliance on this provision are not subject to the limitations on resale established in Rule 502(d) and, as such, are not ''restricted securities'' for purposes of Rule 144(a)(3)(ii). Another commenter indicated that ''the Commission should consider amending Rule 504 to permit resales of securities issued in Rule 504 'public offerings' in states where the offering complies with exemptions that permit general solicitation or advertising and that require dissemination of a state law compliant disclosure document.''[278]

One commenter recommended that the Commission exempt securities sold under Rule 147 and 504 from the requirements of Section 12(g) of the Securities Exchange Act of 1934.[279] In addition, the 2015 Small Business Forum recommended that the Commission provide a permanent exemption from Section 12(g) registration under the Exchange Act for securities sold in a Rule 504 offering.[280]

3. Final Amendments to Rule 504

The amendments that we are adopting to Rule 504 will raise the aggregate amount of securities an issuer may offer and sell in any twelve-month period from $1 million to $5 million, which is the maximum statutorily allowed under Section 3(b)(1).[281] The Commission has not raised the 12-month aggregate offering amount limit in Rule 504 since 1988, when the Commission increased the original Rule 504 offering amount limit of $500,000 to $1 million.[282] Adjusted for inflation, the $1 million limit in 1988 would equate to approximately $2 million today.[283] We believe the $5 million limit will facilitate issuers' ability to raise capital. We also believe that our amendments to increase the aggregate offering amount limit in Rule 504 to $5 million may bolster efforts among the states to enter into, or revise existing, regional coordinated review programs that are designed to increase efficiencies associated with the registration of securities offerings in multiple jurisdictions without increasing risks to investors. Increasing the aggregate offering amount limit from $1 million to $5 million will also increase the flexibility of state securities regulators to set their own limits and to consider whether any additional requirements should be implemented at the state level.

Although two commenters and the 2015 Small Business Forum recommended that the Commission increase the Rule 504 offering amount limit to $10 million, we are not exceeding the maximum offering amount permitted under Section 3(b)(1). Although, as several commenters noted, we could use our exemptive authority under Section 28 of the Securities Act to raise the maximum offering amount above $5 million,[284] in accord with the suggestion of one of those commenters,[285] we believe it appropriate to first observe market activity under a new maximum offering amount of $5 million before raising the Rule 504 offering limit higher.

In conjunction with our increase to the Rule 504 aggregate offering amount limit, we are also adopting provisions that will disqualify certain bad actors from participation in offerings conducted pursuant to the exemption.[286] We believe that the disqualification provisions that we are adopting, which are substantially similar to related provisions in Rule 506 of Regulation D,[287] will create a more consistent regulatory regime across Regulation D and provide additional protections to investors in Rule 504 offerings.

The Rule 504 disqualification provisions will be implemented by reference to the disqualification provisions of Rule 506 of Regulation D.[288] We believe that creating a uniform set of bad actor triggering events across the various exemptions from Securities Act registration should simplify due diligence, particularly for issuers that may engage in different types of exempt offerings. In accordance with the views of several commenters,[289] the bad actor triggering events for Rule 504 will be substantially similar to existing provisions in Regulation D,[290] Regulation A,[291] and Regulation Crowdfunding[292] and will apply to the issuer and other covered persons (such as underwriters, placement agents, and the directors, officers and significant shareholders of the issuer). Consistent with the Commission's treatment of disqualification in Rule 506(e),[293] disqualification will only occur for triggering events that occur after effectiveness of any amendments, but disclosure will be required for triggering

[275] ABA Letter; Milken Letter.

[276] ABA Letter; CFA Letter (''It not only clarifies the applicability to new Rule 504 offering limits, but also provides consistency across Regulation D.''); CFIRA Letter; CrowdCheck Letter; NASAA Letter (''We also strongly support a more uniform set of bad actor triggering events across Regulation D . . . as this would align with bad actor disqualification provisions already included in state crowdfunding exemptions.'').

[277] Milken Letter (noting that this approach ''will allow for innovation in a tightly controlled environment that may prove useful for other state and federal policy makers.'').

[278] ABA Letter.

[279] Milken Letter (''Given the expected local nature of Rule 147 offerings and the likelihood that they will be made to the general public for relatively small amounts, it is very possible that small companies making even modest offerings would accrue sufficient numbers of non-accredited investors to be forced to register with the Commission.'').

[280] *See* 2015 Small Business Forum Recommendations.

[281] Rules 504 and 505 were adopted pursuant to the Commission's small issues exemptive authority under Section 3(b)(1) of the Securities Act, which gives the Commission authority to adopt an exemption for offerings not exceeding $5 million where the Commission believes registration under the Securities Act is not necessary by reason of the small amount involved or the limited character of the public offering.

[282] *See* SEC Rel. No. 33–6758 (Mar. 3, 1988) [53 FR 7870 (Mar. 10, 1988)].

[283] Annual inflation rates (1988–2015) based on consumer price index data, for all urban consumers, obtained from the Bureau of Labor Statistics.

[284] ABA Letter; Milken Letter.

[285] ABA Letter (''If the increase to $5 million is adopted, after there is experience with the use and operation of new Rule 504, the Commission may wish to consider using its exemption authority under Section 28 to increase the dollar limitation amount that may be offered under Rule 504.'').

[286] *See* Rule 504(b)(3).

[287] *See* 17 CFR 230.506(d). *See also* Rule 262 of Regulation A, 17 CFR 230.262, and Rule 505(b)(2)(iii) of Regulation D, 17 CFR 230.505(b)(2)(iii).

[288] *See* Rule 504(b)(3), referencing the disqualification provisions of Rule 506(d), 17 CFR 230.506(d), and Instruction to paragraph (b)(3) of Rule 504, referencing the disclosure provisions of Rule 506(e), 17 CFR 230.506(e).

[289] CFA Letter; NASAA Letter.

[290] *See* Rules 505(b)(2)(iii) and 506(d) of Regulation D, 17 CFR 230.505(b)(2)(iii), 230.506(d).

[291] *See* Rule 262 of Regulation A, 17 CFR 230.262.

[292] *See* Rule 503 of Regulation Crowdfunding, 17 CFR 227.503.

[293] *See* 17 CFR 230.506(e).

events that pre-date effectiveness of any amendments.[294]

We also sought public comment on whether additional changes to Rule 504 should be adopted in the final amendments. In particular, in conjunction with the increase in the Rule 504 offering amount limit, we contemplated amending the calculation of the aggregate offering limit in Rule 504(b)(2). Currently, this rule requires issuers to aggregate all securities sold within the preceding 12 months in any transaction that is exempt under Section 3(b) or in violation of Section 5(a) of the Securities Act for purposes of computing the aggregate offering amount under Rule 504.[295] This rule also includes illustrations of how the aggregate offering limit is calculated in the event that an issuer sells securities pursuant to Rule 504 and Rule 505 within the same twelve-month period.[296]

When the current aggregation provisions in Rules 504 and 505 were originally adopted in Rule 505's predecessor, Rule 242, the Commission noted that aggregating offering amounts across offerings conducted pursuant to Section 3(b) was intended to ''limit the potential for the issuer to raise large sums by circumventing the registration provisions of the Securities Act through multiple offerings pursuant to Section 3(b).''[297] In the intervening years, however, in implementing Congressional mandates,[298] the Commission has increased the number of exemptive provisions available to issuers, particularly smaller issuers, to raise large sums of capital in a more cost-effective manner in offerings that are exempt from registration, while continuing to provide appropriate safeguards for investors.[299] Therefore, we sought comment on whether the current requirements for Rule 504(b)(2), as they relate to the aggregation of offering proceeds across all offerings that are conducted pursuant to Securities Act Section 3(b)(1), should be retained in the amendments.[300]

Although no commenters responded to our request for comment on this issue, in light of our repeal today of Rule 505, which is the only other existing exemption in Regulation D promulgated under Section 3(b)(1), we are amending Rule 504(b)(2) to omit any reference to the aggregation of offering proceeds across all offerings that are conducted pursuant to Section 3(b) of the Securities Act. Correspondingly, we are also deleting the related note under Rule 504(b)(2) illustrating how the aggregate offering amount limitation is calculated in the event that an issuer sells securities pursuant to Rule 504 and Rule 505 within the same twelve-month period.

We are also adopting a further technical amendment to the second note to Rule 504(b)(2), as proposed. Specifically, we are updating the illustration of how the aggregate offering amount limitation is calculated to account for the increase to the Rule 504 aggregate offering amount limitation from $1 million to $5 million.[301]

One commenter[302] and the 2015 Small Business Forum recommended that the Commission provide an exemption from Section 12(g) registration under the Exchange Act for securities sold in a Rule 504 offering.[303] As discussed above, Section 12(g) requires, among other things, that an issuer with total assets exceeding $10,000,000 and a class of securities held of record by either 2,000 persons, or 500 persons who are not accredited investors, register such class of securities with the Commission.[304] Unlike Tier 2 offerings under Regulation A[305] or Regulation Crowdfunding,[306] where the Commission provided conditional exemptions from registration under Section 12(g), issuers that utilize the exemptions under amended Rule 504 will not be required to comply with ongoing reporting requirements. Given the lack of ongoing reporting requirements under Rule 504, we believe that the Section 12(g) record holder and asset thresholds continue to provide an important baseline above which issuers should generally be subject to the disclosure obligations of the Exchange Act. As the shareholder base of these companies and their total assets grow, we believe that the additional protections that will be provided by registration under Section 12(g) are necessary and appropriate.

Another commenter recommended that the Commission amend Rule 504 to permit the resale of securities issued in Rule 504 ''public offerings'' in states where the offering complies with exemptions that permit general solicitation or advertising and that require a public filing and delivery of a state law compliant disclosure document before any sales to purchasers.[307] As discussed above, Rule 504 currently permits the resale of securities issued in Rule 504 offerings that involve general solicitation or advertising where either the offering is registered in one or more states and one or more states require the dissemination of a state-approved disclosure document or the offering is exempt but sales are only made to accredited investors.[308] Consistent with the limitations on resales in other Securities Act exemptions that permit general solicitation or advertising, such as Rule 506(c) and Regulation Crowdfunding, we have concerns with expanding the ability to issue freely tradable securities under Rule 504 to offerings that permit general solicitation or advertising to non-accredited investors without state registration. Further, we believe that the additional protections that will be provided by the limitations on resale for securities offered and sold in these transactions, which are directed primarily to non-accredited investors,[309] are necessary and appropriate given that these offerings are not registered at either the state or federal level.

C. Repeal of Rule 505

In light of the proposed amendments to Rule 504, we solicited comments on whether we should repeal Rule 505 as an exemption from registration. Rule 505 is used far less frequently than Rule 506,[310] and in the Proposing Release, we noted that an increase in the Rule 504 offering amount limit from $1 million to $5 million could further diminish its utility.[311]

[294] *See* Rule 504(b)(3).

[295] 17 CFR 230.504(b)(2); *see also* 17 CFR 230.505(b)(2).

[296] *See* 17 CFR 230.504(b)(2).

[297] SEC Rel. No. 33–6180 (Jan. 17, 1980). This provision was subsequently carried over into Rule 505 and incorporated into Rule 504 when Regulation D was adopted by the Commission in 1982. *See* SEC Rel. No. 33–6389 (Mar. 8, 1982); SEC Rel. No. 33–6339 (Aug. 7, 1981).

[298] *See* JOBS Act, Public Law 112–106, 126 Stat. 306.

[299] *See, e.g.,* Regulation A, 17 CFR 230.251 *et seq.,* providing non-Exchange Act reporting companies with the option to raise up to $20 million annually pursuant to the requirements of Tier 1 and up to $50 million annually pursuant to the requirements of Tier 2.

[300] We are referring to Section 3(b)(1) instead of Section 3(b), due to the changes that occurred as a result of the Securities Act amendments in Title IV of the JOBS Act.

[301] *See* Instruction to paragraph (b)(2) to Rule 504.

[302] Milken Letter.

[303] *See* 2015 Small Business Forum Recommendations.

[304] *See* note 233 above.

[305] *See* 17 CFR part 251. *See also* 2015 Regulation A Release at Section II.B.6.

[306] *See* 17 CFR 227.100. *See also* Regulation Crowdfunding Adopting Release at Section II.E.4.

[307] ABA Letter.

[308] *See* 17 CFR 230.504(b).

[309] In contrast, general solicitation or advertising is permitted under Rule 506(c), so long as the issuer limits all sales exclusively to accredited investors and the issuer takes reasonable steps to verify that the investor is an accredited investor.

[310] *See* note 22 above. *See also* Table 5 in Section V.A.2.a below.

[311] *See* Proposing Release at Section III.C.

1. Comments on Repealing Rule 505

Three commenters responded to our request for comment on Rule 505. One commenter recommended that the Commission review the Rule 505 exemption ''to consider whether modifications may and/or should be made to modernize the exemption; for example, reviewing the aggregate offering amount or information requirements.'' [312] This commenter strongly opposed, however, replacing Rule 505 with a new Securities Act exemption providing ''covered security status'' under Section 18 of the Securities Act to securities issued in reliance on the new exemption.[313] This commenter cautioned ''against considering a new framework for Rule 505 that is contrary to the rule's original intent and purpose—to be a coordinated federal-state exemption and 'to achieve a uniform system of federal-state limited offering exemptions that facilitates capital formation consistent with the protection of investors.' '' [314]

Another commenter stated that changes to Rule 505 aimed at facilitating very small offerings by early stage companies merit further consideration.[315] This commenter also recommended that the Commission consider ''whether an exempt, simple debt-only offering is feasible and could be made cost-efficient for smaller issuers.'' [316] According to this commenter, the Commission should explore whether an exemption focused on simple debt securities could serve the needs of small businesses and investors, especially since the unique nature of simple debt securities may warrant more modest and easier compliance requirements, while not sacrificing investor protections, as compared to an exemption that permits both debt and equity offerings.[317]

Finally, another commenter stated that, if the proposed changes to Rule 504 are adopted, Rule 505 would be substantially similar to Rule 504, making Rule 505 unnecessary, unless the Commission increases the aggregate offering amount that may be raised under Rule 505 in any twelve-month period.[318] This commenter recommended, for example, that the ceiling could be raised from $5 million to $10 million or some larger amount, thereby preserving Rule 505 as a viable alternative exemption. Despite its infrequent use, the commenter noted that Rule 505 serves the purpose of permitting issuers to sell to up to 35 non-accredited investors without having to be satisfied that these investors meet a financial sophistication test.[319]

2. Repeal of Rule 505

After considering these comments, we are repealing Rule 505. After the effective date of the repeal of Rule 505, issuers will no longer be able to make offers and sales of securities in reliance on Rule 505. We believe that amending Rule 504 to increase the aggregate offering amount from $1 million to $5 million will further reduce the incentives to use Rule 505 by issuers contemplating an exempt offering. We also believe that, even if we were to raise the Rule 505 aggregate offering amount limit from $5 million to $10 million, or some higher amount, such a higher limit would not increase the utility of the Rule 505 exemption as compared to Rule 506, which has no limit, given the historical use of Rule 505 as compared to Rule 506. Further, although Rule 505 provides issuers the ability to sell securities to up to 35 non-accredited investors without having to make a finding, as in Rule 506(b)(2)(ii), that such persons have the knowledge and experience in financial matters that they are capable of evaluating the merits and risks of the prospective investment,[320] this provision does not appear to have historically resulted in the Rule 505 exemption being widely utilized.[321]

We believe the flexibility of the requirements of Rule 504, as amended today, as well as the availability of Rule 506(b) and Rule 506(c) will continue to fulfill the original objectives of Regulation D to achieve uniformity between state and federal exemptions in order to facilitate capital formation consistent with the protection of investors.[322] Amended Rule 504 will be available only to non-reporting issuers [323] that are not investment companies [324] or development stage companies [325] for offerings of up to $5 million in a twelve-month period and will permit general solicitation and the issuance of unrestricted securities in certain limited situations.[326] Rule 506(b) and 506(c) are available to all issuers without any aggregate offering amount limitations. Rule 506(b) prohibits general solicitation and limits sales to no more than 35 non-accredited investors.[327] Rule 506(c) permits general solicitation where all purchasers of the securities are accredited investors and the issuer takes reasonable steps to verify that the purchasers are accredited investors.[328] Securities issued pursuant to Rules 506(b) and 506(c) are deemed restricted securities.[329] Reporting issuers also can register the offer and sale of securities on Form S–1, for which the Commission recently promulgated rules permitting forward incorporation by reference.[330]

IV. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid,

[312] NASAA Letter.

[313] *Id.* (opposing extension of covered security status ''by either enacting a new 'safe harbor' pursuant to Securities Act Section 4(a)(2) or by defining purchasers of securities issued in an offering pursuant to the exemption as 'qualified purchaser,' pursuant to Securities Act Section 18(b)(3).'')

[314] *Id.* (''In 1983, NASAA adopted a model exemption, the Uniform Limited Offering Exemption (''ULOE''), designed to provide an exemption at the state level for offerings that are exempt at the federal level under Rules 505 and 506 of Regulation D.'').

[315] Milken Letter.

[316] *Id.*

[317] *Id.* In commenting on the proposed amendments to Rule 147, one commenter noted that small businesses are likely to seek debt financing more frequently than equity offerings. *See* Nextseed Letter (''equity offerings are more likely to be attractive to technology-based, high growth companies that cannot financially support debt obligations,'' as compared to ''Main Street'' businesses (*e.g.,* local restaurants operated by friends and families) that are inherently local in nature seeking to raise not millions of dollars, but much smaller amounts of capital that traditional lenders are increasingly reluctant to fund).

[318] ABA Letter.

[319] *Id.* In contrast, issuers relying upon Rule 506(b) may sell to up to 35 non-accredited investors, but each non-accredited investor must satisfy a financial sophistication test set forth in Rule 506(b)(2)(ii).

[320] *Cf.,* 17 CFR 230.506(b)(2)(ii).

[321] For the period 2009–2015, there were a total of 1,542 Rule 505 offerings. During this same time period, there were a total of 70,793 Rule 506(b) offerings of $5 million or less. *See* Table 5 in Section V.A.2.b below. *See also* Scott Bauguess, Rachita Gullapalli and Vladimir Ivanov, ''Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings, 2009–2014'' (October 2015) (''Unregistered Offerings White Paper''), *available at http://www.sec.gov/dera/staff-papers/white-papers/unregistered-offering10-2015.pdf.*

[322] *See* SEC Rel. No. 33–7644 (Feb. 25, 1999) [64 FR 11090 (Mar. 8, 1999)] (''Seed Capital Release'') at text accompanying note 4. *See also* Release No. 33–6389 (Mar. 8, 1982) [47 FR 11251] (Regulation D adopting release).

[323] *See* Rule 504(a)(1).

[324] *See* Rule 504(a)(2).

[325] *See* Rule 504(a)(3).

[326] *See* Rule 504(b)(1).

[327] *See* 17 CFR 230.506(b)(2).

[328] *See* 17 CFR 230.506(c).

[329] *See* 17 CFR 230.506(b)(2) and 17 CFR 230.502(d).

[330] *See* SEC Release No. 33–10003 [81 FR 2743] (Jan. 19, 2016) (revising Form S–1 to permit a smaller reporting company to incorporate by reference into its registration statement any documents filed by the issuer subsequent to the effective date of the registration statement). The information delivery requirements under Rule 505 for an Exchange Act reporting issuer that sells securities to a non-accredited investor are similar to the disclosure requirements for a registered offering under the Securities Act. *See* Rule 502(b)(2)(ii).

such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

V. Economic Analysis

This section analyzes the expected economic effects of the final rules relative to the current baseline, which is the regulatory framework and state of the market [331] in existence today, including current provisions available to potential issuers to raise capital up to $5 million. We are mindful of the costs imposed by, and the benefits obtained from, the final rules. Relative to this baseline, our analysis considers the anticipated benefits and costs for market participants affected by the final rules as well as the impact of the final rules on efficiency, competition and capital formation.[332] We also analyze the potential benefits and costs stemming from alternatives to the final rules that we considered. Many of the benefits and costs discussed below are difficult to quantify, especially when analyzing the likely effects of the final rules on efficiency, competition and capital formation. For example, it is difficult to precisely estimate the extent to which amended Rule 147 and new Rule 147A will promote future reliance by issuers on these provisions, or the extent to which future use of amended Rule 147 and new Rule 147A will affect the use of other offering methods. Similarly, it is difficult to quantify the effect of the final rules on investor protection. Therefore, much of the discussion in this section is qualitative in nature. However, where possible, we have attempted to quantify the expected effects of the final rules.

A. Baseline

The final rules will modernize Rule 147, a safe harbor under Section 3(a)(11), and establish new Rule 147A in order to facilitate intrastate offerings, including intrastate crowdfunded offerings under state securities laws. We also are amending Rule 504 of Regulation D to raise the aggregate amount that can be raised during a twelve-month period from $1 million as established in 1988, to $5 million and to disqualify certain bad actors from participating in Rule 504 offerings. In light of the amendments to Rule 504, we are also repealing Rule 505, an alternate exemption available under Regulation D for offerings of up to $5 million during a twelve-month period.

The final rules will primarily impact the financing market for startups and small businesses.[333] The baseline for our economic analysis—including the baseline for our consideration of the effects of the final rules on efficiency, competition and capital formation—is the regulatory framework and market structure in existence today in which startups and small businesses seeking to raise capital through securities offerings must register the offer and sale of securities under the Securities Act, unless they can rely on an existing exemption from registration under the federal securities laws.

In addition to a description of the type and number of issuers that currently offer and sell securities in reliance on Rules 147, 504 and 505, our analysis includes a description of the types of investors who purchase or may consider purchasing such securities and a discussion of the role of intermediaries in such offerings. Table 1 summarizes the main characteristics of Rules 147, 504 and 505.

[331] The term ''market'' as used throughout this economic analysis refers to capital markets in general, and where discussed in the context of a specific rule, relates to the provisions of the relevant exemption or safe harbor. We refer, for example, to the Rule 147 safe harbor and Rule 504 exemption as the Rule 147 and Rule 504 markets because each of those rules' provisions prescribe requirements that determine who can participate and how the participants (issuers/investors/intermediaries) can engage in transactions under each exemption. Participants face different trade-offs when choosing between the markets created by each of the exemptions and safe harbors.

[332] Securities Act Section 2(b) and Exchange Act Section 3(f) direct us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. *See* 15 U.S.C. 77b(b) and 15 U.S.C. 78c(f). In addition, Exchange Act Section 23(a)(2) requires us, when adopting rules, to consider the impact that any new rule would have on competition. *See* 15 U.S.C. 78w(a)(2)

[333] According to the Longitudinal Business Database of the U.S. Census Bureau, there were more than 6.7 million active establishments in the U.S., of which approximately 5.5 million had fewer than 500 paid employees and approximately 5.2 million had less than 100 paid employees. *See* U.S. Department of Commerce, United States Census Bureau, *Business Dynamics Statistics, Data: Firm Characteristics* (2013), *available at http://www.census.gov/ces/dataproducts/bds/data_firm.html*.

TABLE 1—MAIN CHARACTERISTICS OF EXISTING RULES 147, 504 AND 505

Type of offering	Offering limit [334]	Solicitation	Issuer and investor requirements	Filing requirement	Restriction on resale	Blue sky law preemption and bad actor disqualification provisions
Rule 147	None	Only intrastate solicitation.	All issuers must be incorporated and ''doing business'' in state. Statutory exemption excludes investment companies. All investors must be residents in state.	None	Interstate resales are restricted for nine months from the later of the last sale in, or the completion of, the offering [335].	State Law Preemption: No. Bad Actor Provisions: Required by the majority of states at the state level.[336]
Rule 504 Regulation D	$1 million	General solicitation permitted in specified circumstances [337].	Excludes investment companies, blank-check companies, and Exchange Act reporting companies.	File Form D	Restricted, unless offering is within specified circumstances [338].	State Law Preemption: No. Bad Actor Provisions: Required by the majority of states at the state level.[339]
Rule 505 Regulation D	$5 million	No general solicitation.	Excludes investment companies. Unlimited accredited investors and up to 35 non-accredited investors.	File Form D	Restricted securities	State Law Preemption: No. Bad Actor Provisions: Yes.

1. Current Market Participants

The final rules that amend existing Rules 147 and 504, establish new Rule 147A, and repeal Rule 505 will primarily affect securities issuers, particularly startups and small businesses, that rely on unregistered offerings under these and other provisions or safe harbors to raise capital, as well as accredited and non-accredited investors who participate in unregistered offerings.

a. Issuers

i. Rule 147 Issuers

Under current Rule 147, there is no limit on the amount of capital that can be raised. Since the Section 3(a)(11) exemption is not available for an investment company registered or required to be registered under the Investment Company Act,[340] the existing Rule 147 safe harbor is also not available to these issuers. Current Rule 147 has no other restrictions on the type of issuers that may rely on the safe harbor. However, there are in-state residency and eligibility requirements that an issuer must satisfy in order to rely on Rule 147. Eligible issuers are those that are incorporated or organized in-state, have their ''principal office'' in-state, and can satisfy three 80% threshold requirements concerning their revenues, assets and use of net proceeds.

While we lack data on the number and size of Rule 147 offerings [341] or the type of issuers currently relying on the Rule 147 safe harbor, the nature of the eligibility requirements and other restrictions of the rule lead us to believe that it is used by U.S. incorporated entities that are likely small businesses seeking to raise small amounts of capital locally without incurring the costs of registering with the Commission.

Currently, most of the states that have enacted crowdfunding provisions require issuers that intend to conduct intrastate crowdfunding offerings to use Rule 147.[342] Based on information from NASAA,[343] as of May 20, 2016, 34 states and the District of Columbia have enacted crowdfunding provisions, and more states are expected to promulgate similar provisions in the near future. Since December 2011, when the first state (Kansas) enacted its crowdfunding provisions, 179 state crowdfunding offerings have been reported to be filed with the respective state regulator.[344] Of these offerings, 166 were reported to be approved or cleared, as of July 2016.[345]

Given that investment companies are statutorily restricted from relying on Section 3(a)(11) [346] and that almost all the enacted state crowdfunding provisions currently exclude reporting companies, we expect that issuers that rely on Rule 147 are likely operating companies (''non-fund issuers'') that are not reporting under the Exchange Act. As stated above, information on the size of these issuers is not available. Data from NASAA shows that most issuers are from various industries including agriculture, manufacturing, business services, retail, entertainment, and technology.

[334] Aggregate offering limit on securities sold within a 12-month period.

[335] *See* 17 CFR 230.147(e). Additional resale restrictions may apply under state securities laws.

[336] *See* text accompanying notes 250, 251, 252, 253 and 254 above.

[337] No general solicitation or advertising is permitted unless the offering is registered in a state requiring the use of a substantive disclosure document or sold under a state exemption that permits general solicitation or advertising so long as sales are made only to accredited investors. *See* Rule 504(b).

[338] Restricted unless the offering is registered in a state requiring the use of a substantive disclosure document or sold under a state exemption limiting sales only to accredited investors. *See* Rule 504(b).

[339] *See* text accompanying notes 250, 251, 252, 253 and 254 above.

[340] *See* 15 U.S.C. 80a–24(d) and 1961 Release at note 1.

[341] Unlike Regulation D, which requires the filing of a Form D, Rule 147 does not require any filing with the Commission, and we thus have no source of reliable data about the prevalence and scope of Rule 147 offerings. Commission staff will seek to collaborate with state regulators in gathering information for the study of amended Rule 147 and new Rule 147A. *See* Section I above.

[342] *See http://www.nasaa.org/industry-resources/corporation-finance/instrastate-crowdfunding-resource-center/intrastate-crowdfunding-directory/.*

[343] *See* NASAA's Intrastate Crowdfunding Resource Center at *http://www.nasaa.org/industry-resources/corporation-finance/instrastate-crowdfunding-resource-center/. See also http://www.nasaa.org/industry-resources/corporation-finance/instrastate-crowdfunding-resource-center/intrastate-crowdfunding-directory/.*

[344] *See* Slide Presentation on ''NASAA Intrastate Crowdfunding Update,'' NASAA July 18, 2016 *available at http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2014/12/Intrastate-Crowdfunding-Slides-7-18-16.pdf.*

[345] *Id.* Most of the early approved or cleared offerings were in Georgia, Michigan, Oregon, Kansas and Indiana. *See* Slide Presentation on ''Intrastate Equity Crowdfunding'' by Anya Coverman, Deputy Director of Policy, NASAA at the SEC Government Business Forum on Small Business Capital Formation, November 19, 2015 available at *http://www.sec.gov/info/smallbus/sbforum119015-coverman-presentation.pdf.*

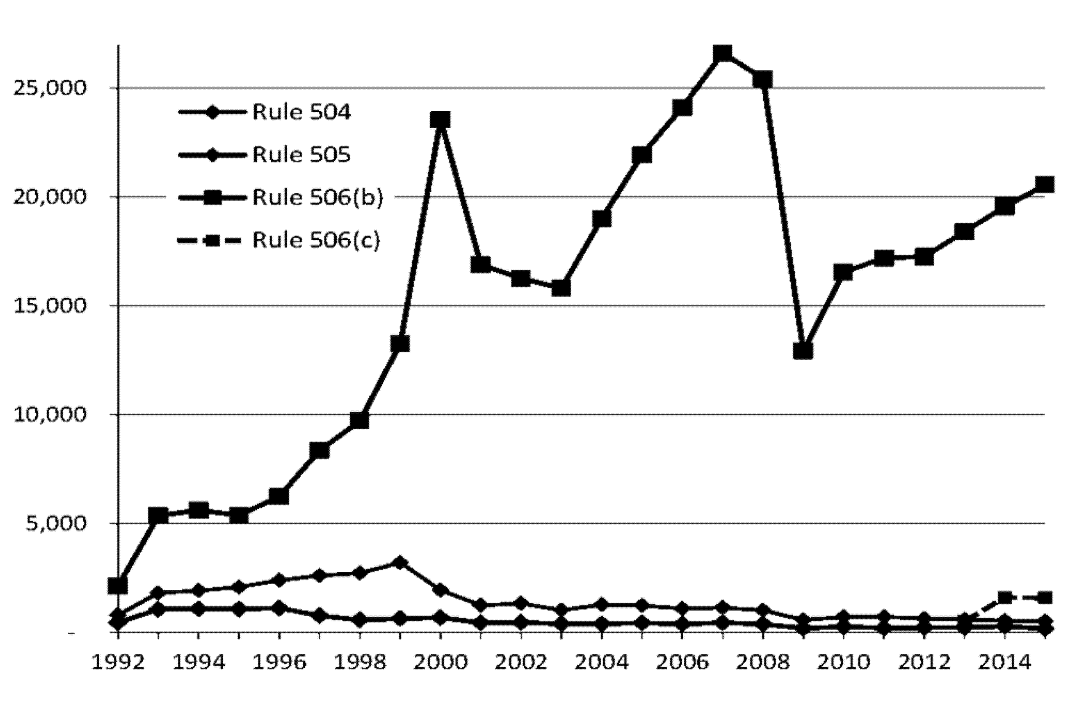
[346] *See also* note 241 above.

We anticipate that many potential issuers of securities under amended Rule 147 and new Rule 147A, particularly those utilizing the exemptions for intrastate crowdfunding, will continue to be small businesses, early stage firms and ''idea'' stage business ventures that have not yet commenced operations. Some of these issuers may lack business plans that are sufficiently developed to attract venture capitalists (VCs) or angel investors that invest in high risk ventures, or may not offer the profit potential or business model to attract such investors.[347]

ii. Rule 504 and Rule 505 Issuers

Rules 504 and 505 of Regulation D provide exemptions from registration under Section 3(b)(1) of the Securities Act for small offerings where the Commission believes registration under the Securities Act is not necessary by reason of the small amount involved or the limited character of the public offering. An analysis of Form D filings indicates that reliance on these two exemptions has been declining over time. As shown in Figure 1, while offerings under Rule 506(b) of Regulation D grew significantly from 1993 to 2015, offerings under Rule 504 and Rule 505 in 2015 were approximately a quarter of 1993 levels. In addition, while offering activity under Rule 504 has been higher than under the Rule 505 exemption, the number of new Rule 504 offerings peaked in 1999, with 3,402 new offerings initiated, and steeply declined afterward.[348] Compared to the early 1990s when Rule 504 offerings constituted approximately 28% of all new Regulation D offerings, the proportion of Rule 504 offerings between 2009 and 2015 ranged between 3% and 4% of all new Regulation D offerings. The number of new Rule 505 offerings peaked in 1996 at 1,124 (12% of all new Regulation D offerings), and during 2015, less than 1% of all new Regulation D offerings claimed the Rule 505 exemption.

Figure 1: Number of New Offerings under Regulation D Exemptions[349]



The current limited use of the Rule 504 and Rule 505 exemptions and the predominance of Rule 506, especially Rule 506(b), are also evident when we consider the total amount raised in offerings under each of these exemptions. Overall, capital formation in the Rule 504 and Rule 505 markets individually constituted approximately 0.1% of the capital raised in all Regulation D offerings initiated during 2009–2015.[350] Considering only Regulation D offerings of up to $1 million (the maximum amount that a Rule 504 offering can raise in a year) initiated by non-fund issuers, the share of Rule 504 offerings was slightly higher at approximately 7%. Similarly, considering only Regulation D offerings by non-fund issuers of up to $5 million (the maximum amount that an existing

[347] In this regard, a study of one large crowdfunding platform revealed that relatively few companies on that platform operate in technology sectors that typically attract VC investment activity. *See* Ethan R. Mollick, *The Dynamics of Crowdfunding: An Exploratory Study,* J. BUS. VENT., January 2014 (1–16).

[348] While there is a strong, positive correlation of the incidence of new Regulation D offerings with the economic conditions of the public market (*see* Section 4.2 of Unregistered Offerings White Paper), some of the decline in Rule 504 offerings during the early 2000s could also be attributed to the 1999 Commission decision to reinstate the ban on general solicitation in Rule 504 offerings. *See* Seed Capital Release and Release No. 34–69959 (July 10, 2013). Though the incidence of new Rule 506 offerings recovered in 2003 with improved conditions in the public markets, the number of new Rule 504 offerings remained well below the pre-2000 levels.

[349] Data is not readily available for the period 2002–2008 during which Form D was a paper-based filing. The form became available electronically in March 2009. Since the data for year 2009 is only for the period April to December, the number of new Regulation D offerings shown is underestimated for 2009.

[350] Based on staff analysis of Form D filings. *See also* Unregistered Offerings White Paper.

Rule 505 offering or amended Rule 504 offering can raise in a year), the share of the total amount raised for Rule 505 offerings was less than 2%.

Table 2 presents data on the number of new Rule 504 and 505 offerings and amounts reported to be raised in these offerings during the period 2009–2015.[351] Since investment companies are excluded from using the two exemptions, issuers relying on Rules 504 and 505 are predominantly non-fund issuers.[352] Form D data also indicates that the mean and median Rule 504 offering sizes during 2009–2015 were approximately $0.5 million and $0.36 million, respectively, while the average and median Rule 505 offering sizes were approximately $1.90 million and $1.54 million, respectively.

TABLE 2—RULE 504 AND RULE 505 CAPITAL RAISING ACTIVITY, 2009–2015

	Number of offerings [353]		Total amount raised ($ million)	
	Rule 504	Rule 505	Rule 504	Rule 505
2009	579	195	$91	$185
2010	714	262	131	257
2011	721	207	113	205
2012	632	227	109	193
2013	599	229	97	203
2014	544	289	94	238
2015	519	179	84	134
2009–2015	4,308	1,588	719	1,415

Companies that file reports with the Commission under Section 12(b), Section 12(g) or Section 15(d) of the Exchange Act can use the Rule 505 exemption but not the Rule 504 exemption. Data from Form D filings indicates that approximately 10 of 278 unique Rule 505 issuers during 2014 and 8 of 163 unique Rule 505 issuers during 2015 were reporting companies.[354] These reporting companies initiated 12 Rule 505 offerings during 2014 and 11 such offerings during 2015. The mean size of Rule 505 offerings by reporting companies was approximately $824,000 and the median size was approximately $200,000.

Figure 2 shows the financial size of Rule 504 and Rule 505 issuers based on revenues or net asset value during the period 2009–2015.[355] Of all the issuers that disclosed these metrics in their Form D filings (approximately 70% of all Rule 504 issuers and 80% of all Rule 505 issuers), more than three quarters of those offerings were initiated by issuers that had no revenues or had revenues or net asset values of less than $1 million. From this reported size, we believe that a vast majority of Rule 504 and Rule 505 issuers likely consist of startups and small businesses. These issuers' small size is also consistent with their younger age, as measured by years since incorporation. Based on Form D filings, 51% of Rule 504 issuers and 62% of Rule 505 issuers initiated their offerings during the year of their incorporation or in the subsequent year. Another 14% of Rule 504 and Rule 505 issuers initiated their offerings between two and three years since incorporation.[356]

[351] *Id.* This analysis uses the same assumptions and methodologies described in the Unregistered Offerings White Paper.

[352] Non-fund issuers constituted 98% and 93% of all Rule 504 and Rule 505 offerings, respectively. In terms of amounts reported to be raised, non-fund issuers raised 96% and 76% of all amounts reported to be raised in Rule 504 offerings and Rule 505 offerings, respectively. Based on information in Form D filings, funds using the Rule 504 or Rule 505 exemption were not registered under the Investment Company Act.

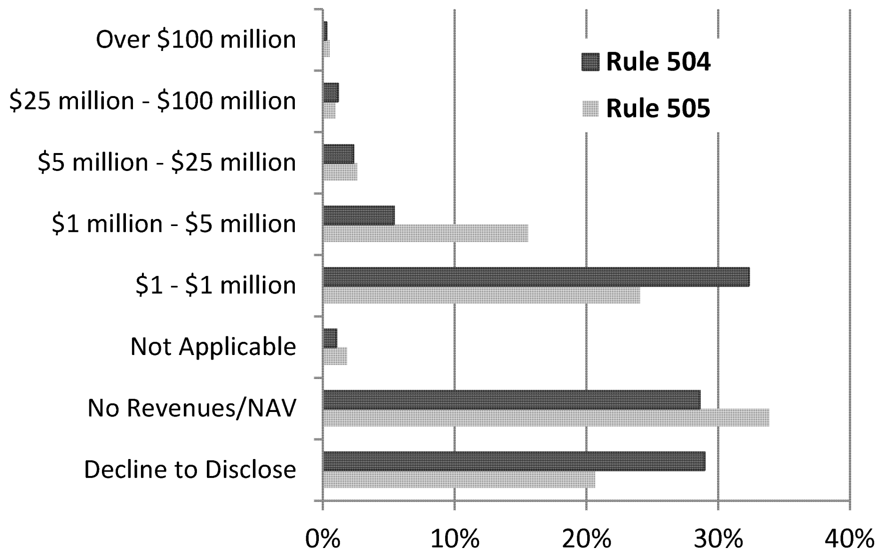
[353] Based on staff analysis of Form D filings. This analysis uses the same assumptions and methodologies described in the Unregistered Offerings White Paper. As noted in the Unregistered Offerings White Paper, some issuers in Regulation D offerings check multiple exemptions in their Form D filing. Under those circumstances, staff assigns the highest checked numerical exemption to the offering. While issuers in 4,308 offerings checked only the Rule 504 exemption and reported to raise $719 million during the period 2009–2015, issuers in an additional 1,224 offerings checked the Rule 504 exemption along with the Rule 505 and/or the Rule 506 exemption and safe harbor. Similarly, issuers in 1,520 offerings checked only the Rule 505 exemption and reported to raise $1,399 million during 2009–2015; issuers in an additional 68 new offerings checked the Rule 504 and 505 exemptions; and issuers in 2,170 new offerings checked the Rule 505 exemption along with the Rule 506 exemption.

[354] Based on staff analysis of Form D filings and Form 10–K filings made during 2014 and 2015.

[355] Based on staff analysis of Form D filings.

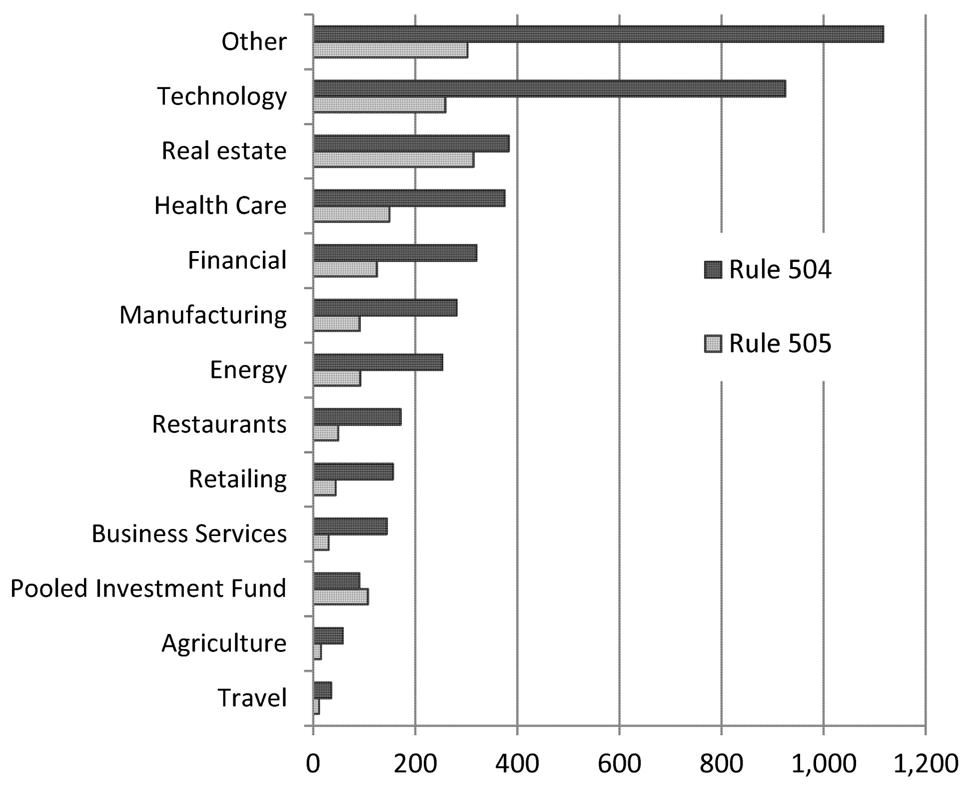
[356] *Id.*

Figure 2: Financial Size (Revenues/Net Asset Value) of Rule 504 and Rule 505 Issuers, 2009-2015



Most Rule 504 and Rule 505 issuers that initiated offerings in the past seven years operate in the technology, real estate or other industry (Figure 3).[357]

Figure 3: Number of Rule 504 and Rule 505 Offerings by Industry, 2009-2015



With regard to the geographical location of issuers, Form D filings indicate that during the period 2009–2015, most Rule 504 and Rule 505 issuers had their principal place of business in California (22% and 21%), followed by Texas, New York, Florida, Colorado and Illinois; most were incorporated in Delaware (19%, 23%),

[357] *Id.*

California (13%, 12%), Nevada and Texas. In addition, approximately 37% of Rule 504 offerings and 39% of Rule 505 offerings reported having different states of incorporation and principal places of business. While only approximately 2% of Rule 504 and Rule 505 offerings were initiated by foreign-incorporated issuers, a larger number of issuers (4–5%) reported their principal place of business to be outside the United States. In addition, approximately 89% of issuers in the Rule 504 market and 93% of issuers in the Rule 505 market initiated only one offering. Approximately 83% of Rule 504 offerings and 79% of Rule 505 offerings during the period 2009–2015 were equity offerings.[358]

b. Investors

Currently, Rule 147 limits offers and sales to residents of the same state or territory as the issuer. While there are generally no limitations on who can invest in Rule 504 offerings, only accredited investors and up to 35 non-accredited investors can participate in Rule 505 offerings. Although the Commission does not require a form to be filed in connection with Rule 147 offerings, and thus does not receive information concerning investors participating in these offerings, data from Form D filings provide some insights into the number and characteristics of investors in Rule 504 and Rule 505 offerings.

Data in Table 3 below shows that more than 34,000 investors participated in new Rule 504 offerings initiated during the period 2009–2015, while almost 14,400 investors participated in new Rule 505 offerings initiated during the same period.[359] An analysis of the same Form D filings indicates that, for new Rule 504 offerings that reported sales, the mean number of investors was approximately 11 and the median number of investors was approximately four. The mean and median number of investors in new Rule 505 offerings that reported sales was 12 and seven, respectively.

TABLE 3—NUMBER AND TYPE OF INVESTORS IN RULE 504 OFFERINGS, 2009–2015 [360]

	Rule 504 Offerings			Rule 505 Offerings		
	Total investors	Mean number of investors	% Offerings with non-accredited investors	Total investors	Mean number of investors	% Offerings with non-accredited investors
2009	4,004	9	53	1,818	12	38
2010	5,427	10	54	2,234	11	41
2011	5,512	11	57	1,676	12	43
2012	6,295	13	58	2,027	13	44
2013	5,573	13	61	2,167	13	41
2014	3,996	10	60	2,943	13	36
2015	3,398	9	61	1,520	11	43
2009–2015	34,205	11	57	14,385	12	41

The presence of non-accredited investors was larger in Rule 504 offerings, where the number of non-accredited investors is not limited, than in Rule 505 or Rule 506 offerings, where the number of non-accredited investors is limited to 35. Data in Table 3 above shows that issuers in approximately 57% of Rule 504 offerings and 41% of Rule 505 offerings during 2009–2015 reported having sold or intending to sell to non-accredited investors.[361]

Given existing investment limitations under state crowdfunding provisions, we believe that many investors affected by amended Rule 147 and new Rule 147A will likely be individual retail investors whose broad access to potentially riskier investment opportunities in early-stage ventures is currently limited, either because they do not have the necessary accreditation or sophistication to invest in most private offerings, or because they do not have sufficient funds to participate as angel investors. Intrastate crowdfunding offerings may provide retail investors with additional investment opportunities, although the extent to which they invest in such offerings will likely depend on their view of the potential return on investment as well as the potential risks, including fraud.

In contrast, larger, more sophisticated or well-funded investors may be less likely to invest in intrastate crowdfunding offerings. The relatively low offering amount limits, in-state investor residency requirements, and low investment limits for crowdfunding investors under state laws [362] may make these offerings less attractive for such investors, which include VCs and angel investors.[363] While an intrastate crowdfunding offering can result in increased visibility for an issuer, it is likely that such investors will elect to invest in offerings relying on Rule 506, which are not subject to the investment limitations applicable to crowdfunding.

c. Intermediaries

Issuers that undertake private offerings may use broker-dealers to help them with various aspects of the offering and to help ensure compliance with the ban on general solicitation and advertising that exists for most private offerings. Private offerings can also involve finders and investment advisers

[358] *Id.*

[359] *Id. See also* Unregistered Offerings White Paper.

[360] *Id.* The data shown in the table represents offerings that reported sales to investors.

[361] Form D data shows that Rule 504 offerings that involved non-accredited investors were, on average, smaller and had a fewer mean number of investors (8) than those offerings that involved only accredited investors (9). In contrast, Rule 505 offerings that indicated potential sales to non-accredited investors were, on average, larger and had a greater mean number of investors (11) than Rule 505 offerings that sold only to accredited investors (8). We note that since issuers do not file Form D at the close of the offering, the number of investors reported in initial Form D filings may be an underestimate (offerings reporting zero investors are included).

[362] Most state crowdfunding provisions allow up to a $2 million offering size and a maximum investment of $10,000 by non-accredited investors.

[363] An observer suggests that, unlike angels, VCs may be less interested in crowdfunding because, if VCs rely on crowdfunding sites for their deal flow, it would be difficult to justify charging a 2% management fee and 20% carried interest to their limited partners. *See* Ryan Caldbeck, *Crowdfunding—Why Angels, Venture Capitalists And Private Equity Investors All May Benefit,* Forbes, Aug. 7, 2013.

who connect issuers with potential investors for a fee.[364] We do not have information on the extent of intermediary use in Rule 147 offerings; however, an analysis of Form D filings indicates that intermediaries are used less frequently in Rule 504 offerings than in registered offerings. Approximately 20% of Rule 504 offerings and 29% of Rule 505 offerings reported using an intermediary during the period 2009–2015.[365] The average commissions and fees paid by issuers that reported using an intermediary was approximately 6% of the offering amount for Rule 504 and 5.6% for Rule 505.[366]

Although we are unable to predict the potential use of broker-dealers, transfer agents,[367] investment advisers and finders in private offerings as a result of the adoption of the final rules, data on the use of broker-dealers and finders in the Rule 506 market suggests that they do not currently play a large role in private offerings. Form D filings indicate that approximately 17% of Rule 506 offerings with an offering size up to $5 million, including 18% of such Rule 506 offerings initiated by non-fund issuers, used an intermediary during 2009–2015.[368] The use of a broker-dealer or a finder increased with offering size, while the average percentage of the total fee declined with offering size.[369] We base these estimates, however, only on available data from the Regulation D market. It is possible that issuers engaging in other types of unregistered offerings, for which data is not available to us, may use broker-dealers and finders more frequently or less frequently.[370]

2. Alternative Methods of Raising Up to $5 Million of Capital

The potential economic impact of the final rules, including their effects on efficiency, competition and capital formation, will depend primarily on the extent of use of amended Rules 147 and 504 and new Rule 147A and how these methods compare to alternative sources of capital that startups and small businesses can utilize.

As the amendments to Rule 504 would permit offerings up to $5 million by all types of issuers (other than investment companies, Exchange Act reporting companies and development stage companies), the analysis below discusses alternatives available for startups and small businesses to access up to $5 million in capital. Current state crowdfunding provisions, most of which require issuers to rely on Rule 147 for federal exemption, have offering limits of up to $4 million and most restrict private funds from utilizing the crowdfunding provisions. In addition, final Rules 147, 147A and 504 all exclude investment companies. Thus, our analysis below also includes a discussion of alternative sources for non-fund issuers to raise capital up to $5 million.[371]

Startups and small businesses can potentially access a variety of external financing sources in the capital markets through, for example, registered or unregistered offerings of debt, equity or hybrid securities and bank loans. Issuers seeking to raise capital must register the offer and sale of securities under the Securities Act or qualify for an exemption from registration under the federal securities laws. Registered offerings, however, are generally too costly to be viable alternatives for startups and small businesses. Issuers conducting registered offerings incur a variety of fees and expenses related to registration and reporting requirements. Two surveys concluded that the average initial compliance cost associated with conducting an initial public offering is $2.5 million, followed by an ongoing compliance cost for public companies of $1.5 million per year.[372] Moreover, issuers conducting registered offerings usually pay underwriter fees, which average approximately 7% for initial public offerings, approximately 5% for follow-on equity offerings and approximately 1–1.5% for public bond issuances.[373] Hence, for a small issuer seeking to raise less than $5 million, a registered offering typically may not be economically feasible relative to options available under exempt offerings.

[364] Depending on the nature and scope of their activities, these persons may need to be registered as broker-dealers or finders under state law.

[365] Based on staff analysis of Form D filings.

[366] *Id.*

[367] Aside from their standard role in maintaining records of ownership of securities, transfer agents play an important role in private offerings that involve restricted securities, in which there may be limitations on resale of such securities for a certain period or to certain types of investors. In addition to ensuring compliance with such provisions, only a transfer agent can remove a restrictive legend from the security, which is done with the consent of the issuer.

[368] Based on staff analysis of Form D filings.

[369] Based on analysis of Form D filings for 2009–2015, approximately 20% of all Rule 506 offerings reported using an intermediary. Further, intermediaries participated in approximately 16% of Rule 506 offerings of up to $1 million and 31% of offerings of more than $50 million during the period 2009–2015. The average total fee (commission plus finder fee) paid by issuers conducting offerings of up to $1 million was 6.2%, while the average total fee paid by issuers conducting offerings of more than $50 million was 1.9%. *See also* Section 5.3 in the Unregistered Offerings White Paper.

[370] A number of states that have enacted crowdfunding provisions require that the offer and sale of securities by means of intrastate crowdfunding be conducted through a funding portal or a broker-dealer. Some intrastate crowdfunding provisions require the offering portals to be registered with the state or as a broker-dealer. Based on FOCUS Reports filed with the Commission, as of December 2015, there were 4,122 registered broker-dealers, with average total assets of approximately $0.98 billion per broker-dealer. The aggregate assets of these registered broker-dealers totaled approximately $4.1 trillion. *See* Regulation Crowdfunding Adopting Release for a more detailed discussion of intermediaries in crowdfunding offerings.

[371] While offerings greater than $5 million that are registered or exempt under state law, subject to certain conditions, could be raised under amended Rule 147 or new Rule 147A, we believe that the impact of the final rules on larger offerings is not likely to be significant, given the local nature of offerings under these exemptions and current state regulations applicable for larger offerings. *See* Section V.B (discussing the impact of the final rules in detail).

[372] *See* IPO Task Force, *Rebuilding the IPO On-Ramp* (Oct. 20, 2011), at 9, *available at http://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf* (''IPO Task Force''). The estimates should be interpreted with the caveat that most companies in the IPO Task Force surveys likely raised more than $1 million. The IPO Task Force surveys do not provide a breakdown of costs by offering size. However, compliance related costs of an initial public offering and subsequent compliance related costs of being a reporting company likely have a fixed cost component that would disproportionately affect smaller issuers.

Title I of the JOBS Act provided certain accommodations to issuers that qualify as emerging growth companies (EGCs). According to a recent working paper, the underwriting, legal and accounting fees of EGC and non-EGC initial public offerings were similar (based on a time period from April 5, 2012 to April 30, 2015). For a median EGC initial public offering, gross spread comprised 7% of proceeds and accounting and legal fees comprised 2.4% of proceeds. *See* Susan Chaplinsky, Kathleen W. Hanley, and S. Katie Moon, ''*The JOBS Act and the Costs of Going Public,*'' working paper, October 4, 2015, *available at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2492241*, (''Chaplinsky Study'').

[373] *See, e.g.,* Hsuan-Chi Chen and Jay R. Ritter, ''*The Seven Percent Solution,*'' 55 J. Fin. 1105–1131 (2000); Mark Abrahamson, Tim Jenkinson, and Howard Jones, ''*Why Don't U.S. Issuers Demand European Fees for IPOs?*'' 66 J. Fin. 2055–2082 (2011); Shane A. Corwin, ''*The Determinants of Underpricing for Seasoned Equity Offers,*'' 58 J. Fin. 2249–2279 (2003); Lily Hua Fang, ''*Investment Bank Reputation and the Price and Quality of Underwriting Services,*'' 60 J. Fin. 2729–2761 (2005); Rongbing Huang and Donghang Zhang, ''*Managing Underwriters and the Marketing of Seasoned Equity Offerings,*'' 46 J. Fin. Quant. Analysis 141–170 (2011); Stephen J. Brown, Bruce D. Grundy, Craig M. Lewis and Patrick Verwijmeren, ''*Convertibles and Hedge Funds as Distributors of Equity Exposure,*'' 25 Rev. Fin. Stud. 3077–3112 (2012).

Recent studies that analyze IPOs by EGCs and non-EGCs find that the costs of raising capital through an IPO are similar pre- and post-JOBS Act. *See, e.g.,* Michael Dambra, Laura Fields and Matthew Gustafson, ''*The JOBS Act and IPO Volume: Evidence that Disclosure Costs Affect the IPO Decision*'', 116 J. Fin. Econ.121–143 (2015); *see also* Chaplinsky Study.

a. Exempt Offerings

For startups and small businesses that can potentially access capital under Rules 147, 504 and 505, offerings under other existing exemptions or safe harbors from registration may represent alternative methods of raising capital. For example, startups and small businesses could rely on current exemptions and safe harbors, such as Section 3(a)(11), Section 4(a)(2),[374] Regulation A,[375] Section 4(a)(6),[376] and Rule 506 of Regulation D.[377]

Each of these provisions, however, includes restrictions that may limit its suitability for startups and small businesses seeking to raise capital up to $5 million. Table 4 below lists the main requirements of these provisions.

TABLE 4—OTHER PROVISIONS CURRENTLY AVAILABLE FOR CAPITAL RAISING

Type of offering	Offering limit [378]	Solicitation	Issuer and investor requirements	Filing requirement	Restriction on resale	Blue sky law pre-emption and bad actor disqualification provisions
Section 3(a)(11)	None	All offerees must be resident in state.	All issuers and investors must be resident in state, and an issuer, if a corporation, must be incorporated in state; investment companies are excluded.	None	No [379]	State Law Preemption: No. Bad Actor Provisions: Required by the majority of states at the state level. [380]
Section 4(a)(2)	None	No general solicitation.	Transactions by an issuer not involving any public offering [381].	None	Restricted securities.	State Law Preemption: No. Bad Actor Provisions: No.
Regulation A	Tier 1: up to $20 million with $6 million limit on secondary sales by affiliates of the issuer; Tier 2: up to $50 million with $15 million limit on secondary sales by affiliates of the issuer.	Testing the waters permitted both before and after filing the offering statement.	U.S. or Canadian issuers, excluding investment companies, blank-check companies, reporting companies, and issuers of fractional undivided interests in oil or gas rights, or similar interests in other mineral rights [382].	File testing the waters materials, Form 1–A for Tier 1 and Tier 2 offerings; file annual, semiannual, and current reports for Tier 2 offerings; file exit report for Tier 1 offerings; and file exit report to suspend or terminate reporting for Tier 2 offerings.	No	State Law Preemption: Tier 1: No Tier 2: Yes. Bad Actor Provisions: Yes.
Section 4(a)(6) Regulation Crowdfunding [383].	$1 million	Allowed after Form C is filed and with limitations on advertising.	Excludes foreign private issuers; investment limitations based on annual income and net worth.	File Form C; reviewed financial statements required for offerings greater than $100,000; audited financial statements required for offerings greater than $500,000 (unless it is the first offering made pursuant to the exemption); file annual reports.	12-month resale limitation; resale within one year to issuer and certain investors.	State Law Preemption: Yes. Bad Actor Provisions: Yes.
Rule 506(b) Regulation D.	None	No general solicitation.	No issuer exclusion; unlimited accredited investors and up to 35 non-accredited investors.	File Form D	Restricted securities.	State Law Preemption: Yes. Bad Actor Provisions: Yes.
Rule 506(c) Regulation D.	None	General solicitation is permitted, subject to certain conditions [384].	No issuer exclusion; unlimited accredited investors; no non-accredited investors.	File Form D	Restricted securities.	State Law Preemption: Yes Bad Actor Provisions: Yes

[374] Securities Act Section 4(a)(2) provides that the provisions of the Securities Act shall not apply to ''transactions by an issuer not involving a public offering.''

[375] Regulation A provides an exemption from registration for certain small issuances. The Commission recently adopted amendments to Regulation A that became effective on June 19, 2015. *See* 2015 Regulation A Release.

[376] Regulation Crowdfunding provides an exemption from registration for small offerings up to $1 million sold within a twelve month period. The rules became effective on May 16, 2016. *See* Regulation Crowdfunding Adopting Release.

[377] Rule 506(b) of Regulation D provides a nonexclusive safe harbor from registration for certain types of securities offerings. Rule 506(c) of Regulation D is an exemption from registration that the Commission adopted to implement Section 201(a) of the JOBS Act.

[378] Aggregate offering limit on securities sold within a twelve-month period.

[379] Although Section 3(a)(11) does not have explicit resale restrictions, the Commission has explained that ''to give effect to the fundamental purpose of the exemption, it is necessary that the entire issue of securities shall be offered and sold to, and come to rest only in the hands of residents within the state.'' *See* 1961 Release. State securities laws also may have specific resale restrictions. Rule 147 limits resales to persons residing in-state for a period of nine months after the last sale by the issuer.

[380] *See* text accompanying notes 250, 251, 252, 253 and 254 above.

[381] Section 4(a)(2) of the Securities Act provides a statutory exemption for ''transactions by an issuer not involving any public offering.'' *See SEC* v. *Ralston Purina Co.,* 346 U.S. 119 (1953) (holding that an offering to those who are shown to be able to fend for themselves is a transaction ''not involving any public offering.'')

[382] The Regulation A exemption is also not available to companies that have been subject to any order of the Commission under Exchange Act Section 12(j) entered within the past five years, have not filed ongoing reports required by the regulation during the preceding two years, or are disqualified under the regulation's ''bad actor'' disqualification rules.

[383] See Table 6 below for a more detailed comparison between Regulation Crowdfunding and intrastate crowdfunding provisions.

[384] General solicitation and general advertising is permitted under Rule 506(c). All purchasers must be accredited investors and the issuer must take reasonable steps to verify accredited investor status.

While we do not have data on offerings relying on an exemption under Section 3(a)(11) or Section 4(a)(2), data available from Regulation D and Regulation A filings allow us to gauge how frequently issuers seeking to raise up to $5 million rely on these provisions. Based on Form D filings from 2009 to 2015, a substantial number of issuers chose to raise capital by relying on Rule 506(b), even though their offering size would qualify under Rule 504 or Rule 505.[385] As shown in the upper part of Table 5, most Regulation D issuers made offers for amounts of up to $1 million from 2009 to 2015. A large majority of offerings up to $5 million relied on the Rule 506(b) exemption. The lower part of Table 5 shows a similar pattern for the number of offerings by non-fund issuers.

The overwhelming majority of non-fund issuers (approximately 73%) conducting offerings less than $5 million were five years or younger, and 64% of such issuers were two years or younger, with a median age of approximately one year. More than 93% of the non-fund issuers that made Regulation D offerings of $5 million or less during this period were organized as either a corporation or a limited liability company. Almost 21% reported having no revenues, while approximately 20% had revenues of less than $5 million.[386]

TABLE 5—NUMBER OF REGULATION D AND REGULATION A OFFERINGS BY SIZE, 2009–2015

	Offering size				
	< = $1 million	$1–$2.5 million	$2.5–5 million	$5–50 million	> $50 million
All offerings:					
Rule 504	4,224				
Rule 505	592	518	432		
Rule 506(b)	35,688	18,998	16,107	31,978	14,726
Rule 506(c)	1,233	529	512	975	268
Total	41,737	20,045	17,051	32,953	14,994
Regulation A	10	6	33	6	
Non-fund offerings:					
Rule 504	4,143				
Rule 505	568	496	378		
Rule 506(b)	32,095	16,975	13,866	22,291	3,375
Rule 506(c)	1,007	447	472	763	153
Total	37,813	17,918	14,716	23,054	3,528

Note: Data based on Form D filings for Regulation D offerings and Form 1–A filings for qualified Regulation A offerings from 2009 to 2015. We consider only new offerings and exclude offerings that do not report offering size and report amount sold as $0 on Form D. Data on Rule 506(c) offerings covers the period from September 23, 2013 (the date the rule became effective) to December 31, 2015. We also use the maximum amount indicated in Form 1–A to determine offering size for Regulation A offerings.

Table 5 also includes the number of Regulation A offerings by size. From 2009 to 2015, 49 issuers relied on Regulation A for offerings of up to $5 million.[387] This data includes 17 offerings, of which 11 have offering sizes of up to $5 million, initiated subsequent to the effectiveness of amendments to Regulation A in June 2015. The amendments allow issuers to raise up to $50 million over a 12-month period and preempt state registration requirements for certain Regulation A offerings (Tier 2 offerings). As these amendments became effective only recently, more time is needed to assess how the changes in Regulation A will affect capital raising by small issuers.[388]

b. Regulation Crowdfunding

The analysis above does not include data regarding securities-based crowdfunding transactions under the recently adopted Regulation Crowdfunding exemption. The new rules, which became effective on May 16, 2016, supplement the existing regulatory scheme of exemptions and safe harbors that are described above and provide start-ups and small businesses with an alternate source for raising capital through offerings exempt from registration under the Securities Act. As of September 30, 2016, approximately 114 offerings relying on the federal crowdfunding exemption filed a Form C with the Commission.[389]

Offerings pursuant to these rules are limited to a maximum amount of $1 million over a 12-month period and are subject to ongoing disclosure requirements. Securities issued pursuant to these rules can be sold to an unlimited number of investors (subject to specified investment limits), are freely tradable after one year, and can be offered and sold without state qualification or registration. Unlike intrastate crowdfunding provisions enacted at the state level, the new federal crowdfunding exemption allows interstate offerings, whereby an issuer can make offers and sell to investors in multiple states. Table 6 presents a comparison of the provisions of Regulation Crowdfunding and current intrastate crowdfunding provisions that rely on current Rule 147 for federal exemption.

[385] *See* Unregistered Offerings White Paper. This tendency could, in part, be attributed to two features of Rule 506: preemption from state registration (''blue sky'') requirements and an unlimited offering amount. *See also* report from U.S. Government Accountability Office, *Factors That May Affect Trends in Regulation A Offerings,* GAO–12–839 (Jul. 3, 2012), *available at http://www.gao.gov/products/GAO-12-839.*

[386] These percentages could be higher because almost 55% of the issuers that conduct Regulation D offerings of $5 million or less declined to disclose the size of the offering.

[387] We only consider offerings with offering statements that have been qualified by the Commission. For purposes of counting offerings, we exclude amendments or multiple 1–A filings by the same issuer in a given year. For purposes of determining the offering size for Regulation A offerings, we use the maximum amount indicated on the latest pre-qualification Form 1–A or amended Form 1–A. We reclassify two offerings that are dividend reinvestment plans with uncertain offering amounts as having the maximum permitted offering amount.

[388] *See* 2015 Regulation A Adopting Release.

[389] Based on Form C filings, as of September 30, 2016. Analysis of data reported in Form C and Form C–U filings indicates that the mean maximum offer size was approximately $643,150 and the mean amount reported to be raised per offering was $440,480. Based on filings of Form C–U as of September 30, 2016, 12 offerings were reported to be completed.

TABLE 6—INTRASTATE CROWDFUNDING AND REGULATION CROWDFUNDING PROVISIONS

	Current Rule 147 + state level crowdfunding provisions [390]	Regulation crowdfunding
Investor Base	Rule 147 requires that all investors reside in the state of the issuer.	All investors, all states.
State Registration	Exemption provided by state	Preemption of state registration.
Issuer Incorporation/Residency Limitations.	Rule 147 requires issuer to be incorporated and ''doing-business'' in state.	Excludes foreign private issuers.
Excluded Issuers	Investment companies are excluded under the federal exemption. Although not excluded under Rule 147, most state crowdfunding provisions also exclude Exchange Act reporting companies and blank check companies.	Exchange Act reporting companies, investment companies, pooled investment funds, and blank check companies.
Offering Size Limits	Although not limited under Rule 147, state provisions limit between $250,000 and $4 million, depending on state. Mean (median) limit: $1.6 ($2) million.	Up to $1 million.
Security Type	Although not limited under Rule 147, equity and debt permitted in some states; equity only in other states; any security in some other states.	Any security.
Audited Financials Requirement.	Although no requirements under Rule 147, most states require, if offer greater than $1 million.	Required for offerings greater than $500,000 with the exception of first-time crowdfunding issuers offering more than $500,000 but not more than $1,000,000, who are permitted to provide financial statements reviewed by an independent accountant, unless the issuer has audited statements otherwise available. Reviewed financial statements are required for offerings greater than $100,000 but not more than $500,000, unless the issuer has audited statements otherwise available.
General Solicitation	Rule 147 and states allow, but only to investors residing in state.	Allowed after filing of Form C and subject to limitations on advertising.
Investment Limits	No limits under Rule 147 $2,500–$10,000, depending on state, for non-accredited investors. None, in most states, for accredited investors.	(a) the greater of $2,000 or 5% of the lesser of the investor's annual income or net worth if either annual income or net worth is less than $100,000, or (b) 10% of the lesser of the investor's annual income or net worth if both annual income and net worth are $100,000 or more, subject to investment cap of $100,000.
Restrictions on Resale.	Rule 147 restricts interstate resales for nine months [391].	12-month resale limitation; resale within one year to issuer and certain investors.
Exemption from Section 12(g) Registration Requirements.	None	Conditional exemption, provided that the issuer is current in its ongoing annual reports required pursuant to Rule 202 of Regulation Crowdfunding, has total assets as of the end of its last fiscal year not in excess of $25 million, and has engaged the services of a transfer agent registered with the Commission pursuant to Section 17A of the Exchange Act.

c. Private Debt Financing

While equity-based financing, including principal owner equity, accounts for a significant proportion of the total capital of a typical small business, other sources of capital for startups and small businesses include loans from commercial banks, finance companies and other financial institutions, business credit cards and credit lines.[392]

For example, a 2014 study reports that startups frequently resort to bank financing early in their lifecycle.[393] The study finds that businesses rely heavily in the first year after formation on external debt sources such as bank financing, mostly in the form of personal and commercial bank loans, business credit cards, and credit lines.[394] Another report shows a decline in cumulative bank lending to small businesses, which fell by $100 billion from 2008 to 2011.[395] This report also shows that less than one-third of small businesses reported having a business bank loan by 2012. Similarly, an FDIC report shows that, as of December 2015, small business lending, specifically business loans of up to $1 million, by

[390] Information in this column is based on the provisions that are reflective of most states that have enacted crowdfunding provisions. *See http://www.nasaa.org/industry-resources/corporation-finance/instrastate-crowdfunding-resource-center/intrastate-crowdfunding-directory/.*

[391] *See* 17 CFR 230.147(e). States may impose additional resale restrictions.

[392] Using data from the 1993 Survey of Small Business Finance, one study indicates that financial institutions account for approximately 27% of small companies' borrowings. *See* Allen N. Berger and Gregory F. Udell, *The Economics of Small Business Finance: The Roles of Private Equity and Debt Markets in the Financial Growth Cycle,* 22 J. Banking & Fin. 613 (1998). *See also* 1987, 1993, 1998 and 2003 Surveys of Small Business Finances, *available at http://www.federalreserve.gov/pubs/oss/oss3/nssbftoc.htm.* The Survey of Small Business Finances was discontinued after 2003. Using data from the Kauffman Foundation Firm Surveys, one study finds that 44% of startups use loans from financial institutions. *See* Rebel A. Cole and Tatyana Sokolyk, *How Do Start-Up Firms Finance Their Assets? Evidence from the Kauffman Firm Surveys* (2012), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2028176.*

[393] *See* Alicia M. Robb, and David T. Robinson, 2014, *The Capital Structure Decisions of New Firms,* Review of Financial Studies 27(1), pp. 153–179 (''Robb Study'').

[394] *See also* NextSeed Letter.

[395] *See* The Kauffman Foundation, *2013 State of Entrepreneurship Address* (Feb. 5, 2013), *available at http://www.kauffman.org/~/media/kauffman_org/research%20reports%20and%20covers/2013/02/soe%20report_2013pdf.pdf.* The report cautions against prematurely concluding that banks are not lending enough to small businesses as the sample period of the study includes the most recent recession.

FDIC-insured depository institutions amounted to approximately $606 billion, which is 15% lower than the June 2008 level but 2% above December 31, 2014 level.[396]

An earlier study by Federal Reserve Board staff covering the pre-recessionary period suggests that 60% of small businesses had outstanding credit in the form of a credit line, a loan or a capital lease.[397] These loans were borrowed from two types of financial institutions: depository and non-depository institutions (*e.g.,* finance companies, factoring or leasing companies).[398] Lines of credit were the most widely used type of credit.[399] Other types included mortgage loans, equipment loans, and motor vehicle loans.[400]

Small businesses may also receive funding from various loan guarantee programs of the Small Business Administration (''SBA''), which makes credit more accessible to small businesses by either lowering the interest rate of the loan or enabling a market-based loan that a lender would not be willing to provide, absent a guarantee.[401] SBA loan programs include 7(a) loans,[402] microloans[403] and Certified Development Company loans (CDC loans).[404] For example, in fiscal year 2015, the SBA supported approximately $33.2 billion in 7(a) and CDC loans, microloans and surety bonds distributed to approximately 61,000 small businesses.[405] In addition, investments in high-growth small businesses through its Small Business Investment Company program increased from $5.5 billion in 2014 to $6.3 billion in 2015.[406] SBA guaranteed loans, however, currently account for a relatively small share (20%) of the balances of small business loans outstanding.[407]

Borrowing from financial institutions is, however, relatively costly for many early-stage issuers and small businesses as they may have low revenues, irregular cash-flow projections, insufficient assets to offer as collateral, and high external monitoring costs.[408] Many startups and small businesses may find loan requirements imposed by financial institutions difficult to meet and may not be able to rely on these institutions to secure funding. For example, financial institutions generally require a borrower to provide collateral and/or a guarantee,[409] which startups, small businesses and their owners may not be able to provide. Collateral may also be required for loans guaranteed by the SBA.

Other sources of debt financing for startups and small businesses include peer-to-peer and peer-to-business lending,[410] microfinance,[411] and other alternative online lending channels.[412] According to some industry estimates, the global volume of ''lending-based crowdfunding,'' which includes peer-to-peer lending to consumers and businesses, had risen to approximately $11.08 billion in 2014.[413] Technology has facilitated the growth of alternative models of small business lending. According to one academic study,[414] the outstanding portfolio balance of online alternative lenders has doubled every year, albeit this market represents less than $10 billion in outstanding loan capital. According to the 2015 Small Business Credit survey,[415] 20% of all

[396] We define small business loans to include commercial and industrial loans of up to $1 million and loans secured by nonfarm nonresidential properties and commercial and industrial loans of up to $1 million to U.S. addressees. *See* Federal Deposit Insurance Corporation, *Statistics on Depository Institutions Report, available at http://www2.fdic.gov/SDI/SOB/.*

[397] *See* Federal Reserve Board, *Financial Services Used by Small Businesses: Evidence from the 2003 Survey of Small Business Finances* (October 2006), *available at http://www.federalreserve.gov/pubs/bulletin/2006/smallbusiness/smallbusiness.pdf* (''2003 FRB Survey'').

[398] *See* Rebel Cole, *What Do We Know About the Capital Structure of Privately Held Firms? Evidence from the Surveys of Small Business Finance* (Working Paper) (Feb. 2013), *available at http://onlinelibrary.wiley.com/doi/10.1111/fima.12015/epdf.*

[399] *See* 2003 FRB Survey, note 397 (estimating that 34% of small businesses use lines of credit).

[400] *Id.*

[401] Numerous states also offer a variety of small business financing programs, such as Capital Access Programs, collateral support programs and loan guarantee programs. These programs are eligible for support under the State Small Business Credit Initiative, *available at http://www.treasury.gov/resource-center/sb-programs/Pages/ssbci.aspx.*

[402] 15 U.S.C. 631 *et seq.* 7(a) loans provide small businesses with financing guarantees (up to $5 million) for a variety of general business purposes through participating lending institutions.

[403] SBA also offers the Microloan program, which provides funds to specially designated intermediary lenders that administer the program for eligible borrowers. The maximum loan amount is $50,000, but the average is approximately $13,000. *See* Microloan Program, U.S. Small Business Administration, *available at http://www.sba.gov/content/microloan-program.*

[404] 15 U.S.C. 695 *et seq.* The CDC loans (up to $5.5 million) are made available through ''certified development companies'' or ''CDCs,'' typically structured with the SBA providing 40% of the total project costs, a participating lender covering up to 50% of the total project costs and the borrower contributing 10% of the project costs.

[405] *See* U.S. Small Business Administration, *Agency Financial Report: Fiscal Year 2015, available at https://www.sba.gov/sites/default/files/aboutsbaarticle/Agency_Financial_Report_FY_2015.pdf.*

[406] *Id.*

[407] As of the end of fiscal year 2015, the SBA guaranteed business loans outstanding (including 7(a) and CDC loans) equaled $118.8 billion. *See SBA Agency Financial Report: Fiscal Year 2015.* This comprises approximately 20% of the approximately $606 billion in outstanding small business loans for commercial real estate and commercial and industrial loans discussed above. In addition to loan guarantees, the SBA program portfolio also includes direct business loans, which are mainly microloans and disaster loans.

[408] *See* Robb Study.

[409] Approximately 92% of all small business debt to financial institutions is secured, and owners of the company guarantee about 52% of that debt. *See* Allen N. Berger and Gregory F. Udell, 1995, *Relationship Lending and Lines of Credit in Small Firm Finance,* Journal of Business 68(3), pp. 351–381. Some studies of small business lending also document the creation of local captive markets with higher borrowing costs for small, informationally opaque companies as a result of strategic use of soft information by local lenders. *See* Sumit Agarwal and Robert Hauswald, 2010, *Distance and Private Information in Lending,* Review of Financial Studies 13(7), pp. 2757–2788.

[410] Such debt transactions are facilitated by online platforms that connect borrowers and lenders and potentially offer small businesses additional flexibility with regard to pricing, repayment schedules, collateral or guarantee requirements, and other terms. *See* Ian Galloway, *Peer-to-Peer Lending and Community Development Finance,* Federal Reserve Bank of San Francisco (Working Paper) (2009), *available at http://www.frbsf.org/publications/community/wpapers/2009/wp2009-06.pdf.*

[411] *See* Craig Churchill and Cheryl Frankiewicz, *Making Microfinance Work: Managing for Improved Performance,* Geneva International Labor Organization (2006). Microfinance consists of small, working capital loans provided by microfinance institutions that are invested in microenterprises or income-generating activities. According to one report, in fiscal year 2012, the U.S. microfinance industry was estimated to have disbursed $292.1 million across 36,936 microloans, with an estimated $427.6 million in outstanding microloans (across 45,744 in microloans). *See* FIELD at the Aspen Institute, *U.S. Microenterprise Census Highlights,* FY 2012, *available at http://fieldus.org/Publications/CensusHighlightsFY2012.pdf.*

[412] Several models of online small business lending have emerged: Online lenders raising capital from institutional investors and lending on their own account (*e.g.,* short-term loan products similar to a merchant cash advance); peer-to-peer platforms; and ''lender-agnostic'' online marketplaces that facilitate small business borrower access to various loan products from traditional and alternative lenders, including term loans, lines of credit, merchant cash advances and factoring products,. *See* Karen Gordon Mills and Brayden McCarthy, *The State of Small Business Lending: Credit Access during the Recovery and How Technology May Change the Game,* Harvard Business School Working Paper 15–004 (2014), *available at http://ssrn.com/abstract=2470523* (''Mills Study'').

[413] *See* Massolution, *2015CF Crowdfunding Industry Report: Market Trends, Composition and Crowdfunding Platforms, available at http://reports.crowdsourcing.org/index.php?route=product/product&product_id=54* (''Massolution 2015 Report'') at 56. The Massolution 2015 Report refers to peer-to-peer lending to consumers and peer-to-business lending to small businesses as ''lending based'' crowdfunding. Our discussion refers to peer-to-peer lending more broadly in a sense synonymous with ''lending-based'' crowdfunding.

[414] *See* Mills Study.

[415] The survey was conducted by the Federal Reserve Banks of New York, Atlanta, Boston, Cleveland, Philadelphia, Richmond and St. Louis during 2015. It focused on credit access among

Continued

small businesses surveyed applied for credit with an online lender.[416]

Family and friends are also sources through which startups and small businesses can raise capital. This source of capital is usually available early in the lifecycle of a small business, before the business engages with arm's-length, more formal funding channels.[417] Among other things, family and friends may donate funds, loan funds or acquire an equity stake in the business. A recent study finds that most of the capital supplied to startups by friends and family is in the form of loans.[418] Family and friends, however, may be able to provide only a limited amount of capital compared to more formal sources. We do not have data available on these financing sources that could allow us to quantify their magnitude or compare them to other current sources of capital.

B. Analysis of Final Rules

1. Broad Economic Considerations

The final rules are intended to streamline and modernize the capital raising options available to startups and small businesses, including through the use of intrastate and regional securities offering provisions that have been enacted or could be enacted by various states, and thereby promote capital formation within the larger economy.

Securities-based crowdfunding is a relatively new and evolving capital market that provides startups and small businesses an alternative mechanism of raising funds by selling small amounts of securities to a large number of investors using the Internet. Title III of the JOBS Act directed the Commission to establish rules for an exemption that would facilitate this market at the federal level. Around the same time, some states began enacting intrastate crowdfunding statutes and rules that provide issuers with exemptions from state registration. Most intrastate crowdfunding provisions require issuers to comply with the requirements of Section 3(a)(11) and Rule 147, while three states currently provide issuers with the option of utilizing Rule 504 or another Regulation D exemption.[419]

By establishing new Rule 147A and modernizing the existing requirements under Rule 147, the final rules could facilitate capital formation through intrastate crowdfunded offerings as well as through other state registered or state exempt offerings. Raising the offering amount limit under amended Rule 504 from $1 million to $5 million may facilitate smaller offerings, including those registered or exempt from registration in a particular state, or regional offerings made pursuant to regional state coordinated review programs.[420] Such programs, when implemented, may enable issuers relying on Rule 504 to register an offering in any one rather than in each of the several states where they conduct offers and sales, thereby saving them time and money. In light of the current infrequent use of the Rule 505 exemption and the increase in the maximum offering size under Rule 504 to $5 million, repealing Rule 505 will simplify the existing Securities Act exemptive framework without significantly diminishing issuers' capital raising options.

The amendments to Rule 147 and Rule 504 and the establishment of Rule 147A will remove or reduce certain impediments to capital raising identified by market participants and commenters.[421] As discussed below, the effects of the final rules on capital formation will depend, first, on whether issuers that currently raise or plan to raise capital will choose to rely on the safe harbor and exemptions provided by amended Rules 147 and 504 and new Rule 147A in lieu of other methods of raising capital, such as Regulation Crowdfunding and Rule 506 of Regulation D. To assess the likely impact of the final rules on capital formation, we consider the features of amended Rules 147 and 504 and new Rule 147A that potentially could increase securities offerings by new issuers and by issuers that already rely on other private offering methods.

Second, to the extent that securities offerings relying on the final rules provide capital raising options for issuers that currently do not have access to capital, the final rules could enhance the overall level of capital formation in the economy, in addition to any reallocation of demand for capital amongst the various capital raising methods that could arise from issuers changing such methods.

Third, to the extent that states currently have residency and eligibility requirements that correspond to existing Rule 147, the impact of amended Rule 147 and new Rule 147A on capital formation will significantly depend on whether state law is amended to align with the final rules. Any changes to intrastate and regional securities offering provisions that may be enacted by states would, in turn, affect the expected use of amended Rules 147 and 504 and new Rule 147A. Currently, most intrastate crowdfunding provisions require issuers to rely on Rule 147 and Section 3(a)(11) for exemption from Securities Act registration. To the extent state law provisions are amended to allow these offerings to comply with amended Rule 147, new Rule 147A or amended Rule 504, the choice between these three exemptions could depend on issuers' preferences with respect to general solicitation, target investor base, issuer incorporation and investor location. For example, while issuers relying on the amended Rule 147 safe harbor must be incorporated in the state where they seek to conduct an intrastate offering, there is no such restriction for issuers relying on the Rule 147A exemption. While both Rule 147 and Rule 147A offerings will be restricted to in-state investors, Rule 504 offerings will be available to investors in more than one state, thus facilitating regional offerings. At the same time, there is no limit on the maximum offering amount under amended Rule 147 or new Rule 147A, while amended Rule 504 limits the maximum amount that can be sold over a twelve-month period to $5 million.

Finally, the impact of the final rules on aggregate capital formation also will depend on whether new investors are attracted to the Rule 147, Rule 147A and Rule 504 markets or whether investors reallocate existing capital among

businesses with fewer than 500 employees in 26 states. The survey authors note that since the sample is not a random sample, results were reweighted for industry, age, size, and geography to reduce coverage bias. *See 2015 Small Business Credit Survey: Report on Employer Firms, available at https://www.clevelandfed.org/community-development/small-business/about-the-joint-small-business-credit-survey/2015-joint-small-business-credit-survey.aspx*.

[416] *Id.* The survey also showed differences in the use of online lenders by type of borrower: 26% and 21% of small businesses that have been in business for less than 2 years and 3–5 years, respectively, applied for credit with online lenders. By comparison, 11% of small businesses with revenue between $1million-$10 million and 6% of small businesses with revenue greater than $10 million applied for credit to an online lender. Mature (older, higher revenue, greater number of employees) categories of small businesses were much more likely to apply for credit with bank lenders than with online lenders.

[417] *See* Paul Gompers and Josh Lerner, *The Venture Capital Cycle* (MIT Press 2006).

[418] *See* Robb Study, at 1219.

[419] Maine's provisions currently permit interstate crowdfunding utilizing the Rule 504 exemption and Mississippi and Vermont dually offer intrastate crowdfunding under Section 3(a)(11) and interstate crowdfunding under Rule 504. *See* NASAA Letter.

[420] *See http://www.nasaa.org/industry-resources/corporation-finance/coordinated-review/. See also* the ''Reciprocal Crowdfunding Exemption'' proposed by the Massachusetts Securities Division *available at http://www.sec.state.ma.us/sct/crowdfundingreg/Reciprocal%20Crowdfunding%20Exemption%20-%20MA.PDF.*

[421] *See e.g.,* Transcript of Record at 78, SEC Advisory Committee on Small and Emerging Companies (June 3, 2015), *available at http://www.sec.gov/info/smallbus/acsec/acsec-minutes-060315.pdf. See also* 2015 Small Business Forum Recommendations; ABA Letter; CFIRA Letter; CrowdCheck Letter; Milken Letter.

various types of offering methods. If the final rules allow issuers to reach a category of potential investors significantly different from those that they can reach through other offering methods, or attract existing investors to invest a greater share of their wealth in primary offerings, then capital formation, in aggregate, could increase. On the other hand, if the final rules are viewed as substantially similar to alternate offering methods, investors with limited investment capital may simply reallocate their capital from other markets to the Rule 147, Rule 147A or Rule 504 markets. Investor demand for securities offered under the final rules could, in particular, depend on the extent to which expected risk, return and liquidity of the offered securities compare to what investors can obtain from securities in other exempt offerings and in registered offerings.

Investor demand also will depend on whether state disclosure requirements are sufficient to enable investors to evaluate the aforementioned characteristics of offerings made pursuant to Rules 147, 147A or 504. For example, investors may be less willing to participate in offerings that are made in reliance on exemptions both from state and federal registration and that are subject to fewer disclosure requirements. For some investors, these concerns may be mitigated by other state and federal provisions, such as the amendment being adopted to disqualify certain bad actors from participation in Rule 504 offerings or the disclosure requirements for larger intrastate crowdfunding offerings under state law provisions.[422]

In sum, we believe that the potential use of Rules 147, 147A and 504 will depend largely on how issuers perceive the trade-off between the costs of compliance under federal provisions as well as state regulation, if any, and the benefits of access to non-accredited investors. For instance, relative to Regulation Crowdfunding, the extent to which issuers rely on Rules 147, 147A or 504 for intrastate crowdfunding offerings will depend on whether the benefits of a larger offering amount and fewer reporting requirements outweigh the costs of a more geographically limited investor base, compliance with issuer residency requirements and the potential for registration under Section 12(g) of the Exchange Act. In this regard, we believe a small, local business that serves local customers (*e.g.,* a hair salon or a pizza shop), rather than a scalable business like a technology start-up, is more likely to use intrastate crowdfunding than interstate crowdfunding.[423] Compared to Rules 147, 147A and 504, other exemptions and safe harbors already being utilized could remain attractive to issuers. For example, offerings conducted pursuant to the exemption from registration under Rule 506(b) of Regulation D, which accounts for a significant amount of exempt offerings,[424] are subject to limits on participation by non-accredited investors. In contrast, issuers relying on Rules 147, 147A or 504 could generally sell securities to an unlimited number of non-accredited investors, which would allow for a more diffuse investor base. General solicitation is currently permitted under Rule 506(c) of Regulation D, and issuers relying on Rule 506(c) can more easily reach institutional and accredited investors, making it less necessary for them to seek capital from a broader non-accredited investor base, especially if trading platforms aimed at accredited investors in privately placed securities continue to develop.[425] In addition, offerings under Rule 506(b) that are limited to accredited investors require only a notice filing with the Commission and have no specified disclosure requirements. Finally, relative to Regulation A, Rules 147, 147A and 504 will have fewer disclosure and other regulatory requirements at the federal level. However, unlike securities issued in reliance on Regulation A, which are freely tradable, securities issued under Rules 147, 147A and 504 could be less liquid due to their resale restrictions.

Overall, the amendments to Rules 147, 147A and 504 could increase the aggregate amount of capital raised if used by issuers that have not previously conducted securities offerings. The net effect also will depend on whether investors find the rules' investor protections to be sufficient to evaluate the expected return and risk of such offerings. As noted above, the final rules may have a limited impact on capital formation if they simply cause issuers to conduct, and investors to reallocate their participation across, different types of offerings. However, even redistribution among capital raising methods will have a net positive effect on capital formation and allocative efficiency if it allows issuers to access capital at a lower cost.

As the final rules are not currently in effect, data does not exist to estimate the effect of the final rules on the potential rate of substitution between alternative methods of raising capital and the overall expansion or decline in capital raising by potential issuers affected by the rules. However, we anticipate that the final rules, by lowering investor search costs and easing issuer eligibility requirements, will result in an increased use of the federal intrastate offering provisions, including for intrastate crowdfunding, as more states enact provisions facilitating such offerings. Similarly, we expect the final rules will increase the use of the Rule 504 exemption, especially by facilitating efforts among state securities regulators to implement regional coordinated review programs that will enable regional offerings. Although it is not possible to predict the extent of such increase or the type and size of issuers that will conduct intrastate and small regional offerings, the current number of businesses pursuing similar levels of financing through alternative capital raising methods, as discussed in the baseline analysis above, provide an upper bound for Rule 147, Rule 147A and Rule 504 usage.[426] Nevertheless, the baseline data show that the potential number of issuers that might seek to offer and sell securities in reliance on Rules 147, 147A and 504 is large, particularly when compared to the current number of approximately 9,000 reporting companies.[427]

We recognize that the amendments to Rules 147 and 504 and new Rule 147A could raise investor protection concerns. For instance, as discussed in detail further in this section, allowing issuers with more geographically dispersed assets and revenues than currently permitted to rely on Rules 147 and 147A may raise concerns about reduced oversight by state securities regulators. We believe however, that the amended ''doing business'' tests along

[422] *See* NASAA's Intrastate Crowdfunding Resource Center, *available at http://www.nasaa.org/industry-resources/corporation-finance/instrastate-crowdfunding-resource-center/.*

[423] *See* Nextseed Letter.

[424] *See* discussion in Section V.2 above.

[425] *See e.g.,* NASDAQ Private Market overview, *available at https://www.nasdaqprivatemarket.com/market/overview* (explaining that ''NASDAQ Private Market's affiliated marketplace is an electronic network of Member Broker-Dealers who provide accredited institutions and individual clients with access to the market. Companies use a private portal to enable approved parties to access certain information and transact in its securities.'').

[426] We believe the numbers in the baseline analysis provide an upper bound because, unlike Rule 147 offerings, investors from multiple states are permitted to invest in Regulation D offerings, which attracts more issuers, especially those that want to raise larger amounts. Similarly, unlike Rule 504, Rule 506 provides state law preemption and permits unlimited offering amounts, which appears to make Rule 506 offerings more attractive for issuers.

[427] *See* U.S. Securities and Exchange Commission, *FY 2016 Congressional Budget Justification, 2016 Annual Performance Plan, FY 2014 Annual Performance Report, available at http://www.sec.gov/about/reports/secfy16congbudgjust.pdf.*

with the principal place of business requirement are sufficient to provide assurance of the local nature of an issuer's business operations.[428] We also believe such concerns are mitigated by the continuing applicability of state regulatory requirements, which may impose additional eligibility conditions for issuers in these offerings, as well as the residency requirements for investors that remain under the final rules.

Similarly, there could be concerns about not having an offering size limit at the federal level or not requiring a limit under state law if the issuer relies on a state exemption for an intrastate offering. In adopting existing Rules 147, 504 and 505, the Commission relied substantially upon state securities laws and regulations on the rationale that the size and/or local nature of smaller offerings conducted pursuant to these provisions does not warrant imposing extensive regulation at the federal level.[429] The final rules preserve this approach by permitting state legislators and securities regulators to determine the specific additional rule requirements, if any, that should be mandated to regulate local offerings and provide additional investor protections. In this regard, the final rules provide greater flexibility to states in designing regulations that would work best for issuers and investors in their respective jurisdictions. We believe that such latitude could improve the efficiency of local capital markets and lead to competition between states in attracting issuers to locate to their jurisdictions.

In addition to state regulations, the amendments to Rule 504 to disqualify certain bad actors from participation in Rule 504 offerings could help to address such investor protection concerns. We also note that the Commission will retain authority under the antifraud provisions of the federal securities laws to pursue enforcement action against issuers and other persons involved in such offerings.[430] Nevertheless, if investors demand higher returns because of a perceived increase in the risk of fraud as a result of less extensive federal regulation, issuers may face a higher cost of capital. We are unable to predict if or how the final rules will affect the incidence of fraud in intrastate and Rule 504 offerings.

The impact of the repeal of Rule 505 will depend on the trade-offs that Rule 505 issuers and investors face when switching to alternate offering methods, predominantly other unregistered offerings. This will be contingent on whether issuers can raise the desired amount of capital at the same or lesser cost as under Rule 505 in a timely manner.

For example, if issuers switch to offerings under Rule 506(b), they may only offer and sell to investors that are accredited or that, unlike in a Rule 505 offering, either alone or with a purchaser representative,[431] are sophisticated (*i.e.,* have sufficient knowledge and experience in financial and business matters to make them capable of evaluating the merits and risks of the prospective investment). However, the possibility of raising unlimited amounts of capital and preemption from state blue sky laws may offset some of these concerns for potential issuers that subsequent to the repeal of Rule 505, would switch to a Rule 506 offering. In contrast, if issuers switch to offerings under amended Rule 504, they could replicate most characteristics of an offering under existing Rule 505 and receive some additional benefits, such as access to an unlimited number of non-accredited investors and the ability to engage in general solicitation in certain situations. However, reporting companies, albeit a small proportion of all Rule 505 issuers,[432] are not permitted to utilize the Rule 504 exemption.

As an alternative to Rule 505, issuers may also opt for a registered offering to raise capital. As noted above, a registered offering may not be economically feasible for small issuers relative to an exempt offering,[433] but may provide a reasonable alternative for Rule 505 issuers that are reporting companies. Registered offerings, unlike Rule 505 or Rule 506(b) offerings, have benefits like providing investors with unrestricted securities, and providing issuers access to an unlimited number of non-accredited investors and investors who prefer offerings that have the protections of the registration process. On the other hand, the costs of registering an offering compared with costs of raising capital through an exempt offering, including Rule 505 or Rule 506(b) offerings, may also affect an issuer's willingness to switch to a registered offering. Such costs include the costs of disclosure required for a registered offering relative to the disclosure required under Rule 505 or 506(b) when non-accredited investors are solicited,[434] including any costs associated with Commission staff review of the registration statement. Recent regulatory changes to Form S–1 [435] that permit forward incorporation by reference of certain information required under Exchange Act reporting requirements may have lowered the costs of registered offerings for eligible smaller reporting companies by eliminating the need to update information in the Form S–1 that has become stale or is incomplete through a post-effective amendment. Whether Rule 505 issuers, in particular those that are reporting companies, switch to a registered offering or another form of unregistered offering such as Rule 506 offering will depend on how they assess such costs of registration relative to the benefits like broader access to non-accredited investors.[436]

The effect of the repeal of Rule 505 will also depend on investors' willingness and ability to participate in an alternate unregistered offering, such as a Rule 504 or Rule 506 offering, or a registered offering. This willingness will rest on whether investors find disclosure requirements and investor protections in alternate markets to be sufficient, relative to the Rule 505 market, to evaluate the expected return and risk of such offerings. For example, it is possible that investor protection levels will be perceived to be lower in a Rule 506 offering as these offerings are preempted from state or Commission registration. In addition, ''unsophisticated'' non-accredited investors that may have been able to participate in a Rule 505 investment

[428] See also NASAA Letter and CFA Letter.

[429] *See* Seed Capital Release and Rule 147 Adopting Release. *See also,* ABA Letter and NASAA Letter.

[430] *See, e.g.,* Seed Capital Release at note 20 and accompanying text (Rule 504 offerings are subject to Section 17 of the Securities Act [15 U.S.C. 77q(a), Section 10(b) of the Exchange Act [15 U.S.C. 78j(b) and Rule 10b–5 thereunder [17 CFR 240.10b–5]).

[431] A purchaser representative is someone who is not an affiliate of the issuer but has such knowledge and experience in financial and business matters that he is capable of evaluating, alone, or together with other purchaser representatives of the purchaser, or together with the purchaser, the merits and risks of the prospective investment. *See also* Rule 501, Regulation D of Securities Act.

[432] As discussed in Section IV(A)(1)(ii), the number of reporting companies that conducted a Rule 505 offering during 2014 and 2015 was 10 and 8, respectively.

[433] *See discussion in Section V(A(1)(c)(2) above.*

[434] The disclosure requirements under Rule 505 and Rule 506(b) for an Exchange Act reporting issuer that sells securities to a non-accredited investor are similar to the disclosure requirements for a registered offering under the Securities Act. *See* Rule 502(b)(2)(ii) of Regulation D. Note that if the Rule 505 or 506(b) offering is soliciting only accredited investors, there is no equivalent requirement for information being furnished.

[435] *See* note 330 above.

[436] *See, e.g.,* Armando Gomes and Gordon Phillips, ''Why Do Public Firms Issue Private and Public Securities?'', J. FINAN. INTERMEDIATION, March 21, 2012 which find that choice of public versus private financing depends on asymmetric information, risk and market timing. *See also* Hsuan-Chi Chen, Na Dai, John Schatzberg, ''The Choice of Equity Selling Mechanisms: PIPEs versus SEOs'', J. CORP. FIN., August 21, 2009.

opportunity may not be able to participate in a Rule 506(b) offering without a purchaser representative and hence may find their set of investment opportunities reduced. Similarly, while more than 35 non-accredited investors (the maximum eligible to invest in a Rule 505 offering) will be able to participate in an offering under amended Rule 504, Rule 504 has fewer disclosure requirements at the federal level relative to a Rule 505 or 506 offering, which may raise potential investor protection concerns. Such concerns, however, may be offset by disclosure requirements imposed at the state level. Thus, the net impact on the overall level of investor protection will likely depend on the capital markets that substitute for the repealed Rule 505 market.

Overall, the repeal of Rule 505 may not have a significant or any impact on capital formation if issuers can successfully find commensurate investor interest in an alternate unregistered or registered offering market. If issuers are not able to find an alternate exemption and raise sufficient amounts of capital, an outcome we believe is unlikely, overall capital formation in the economy and allocative efficiency of capital markets could slightly decline.

In the sections below, we analyze in more detail the potential costs and benefits stemming from the specific amendments and new rule being adopted today, as well as their impact on efficiency, competition and capital formation, relative to the baseline discussed above.

2. Analysis of Amendments to Existing Rule 147 and New Rule 147A

The amendments to Rule 147 and new Rule 147A will modernize and expand the options available under federal law for exempt intrastate offerings by local companies, including offerings relying upon crowdfunding provisions under state securities laws.

a. Retention of Existing Rule 147

The proposed amendments would have replaced the existing Rule 147 safe harbor with a new intrastate offering exemption. In contrast, the final rules amend Rule 147 and retain it as a safe harbor under Section 3(a)(11), while also establishing new Rule 147A pursuant to the Commission's general exemptive authority under Section 28. Because most state crowdfunding provisions require issuers to comply with Section 3(a)(11) and Rule 147, retention of Rule 147 within the statutory parameters of Section 3(a)(11) will enable issuers to continue to rely upon the existing safe harbor to conduct intrastate offerings until states update their laws or regulations to allow issuers to rely on new Rule 147A.[437] This will help to ensure that intrastate offering activity is not adversely affected during the interim period or in states that do not amend their laws, and will thus provide greater certainty to market participants, including issuers and investors who participate in such intrastate offerings.[438] Together, the amendments to Rule 147 and new Rule 147A seek to modernize federal regulation of intrastate offerings to comport with contemporary business practices and communications technology, while retaining the underlying intent of the rules to permit issuers to raise money from investors resident within the same state without registering the offering at the federal level.

Amended Rule 147 will differ from new Rule 147A with respect to two provisions that are statutorily mandated by Section 3(a)(11). Under Section 3(a)(11), and by extension the safe harbor under Rule 147, offers can be made only to in-state residents and issuers are required to be incorporated in the state where they conduct the intrastate offering. The provisions of new Rule 147A will not include these two limitations; however, both Rule 147 and 147A will require an issuer to have its principal place of business within the state or territory of the offering. In the following sections, we first discuss the economic effects of not including the two statutory limitations contained in Rule 147 within new Rule 147A and then discuss the amendments that are substantially identical under Rules 147 and 147A.

b. Distinguishing Provisions Under New Rule 147A

i. Elimination of Restrictions on Manner of Offering

Offers pursuant to current and amended Rule 147 must be limited to in-state residents.[439] However, the provisions under new Rule 147A will allow an issuer to make offers to out-of-state residents, as long as sales are made only to residents of the issuer's state or territory.[440] Both amended Rule 147 and new Rule 147A require issuers to include prominent disclosures on all offering materials stating that sales will be made only to residents of the same state or territory as the issuer, while also disclosing that the securities are being sold in an unregistered offering and have resale restrictions for a six-month period.[441] In addition, under both rules, states retain the flexibility to impose additional disclosure or other requirements related to offers and sales made in the intrastate offering. As Internet-based advertising is easily accessible across state lines, issuers relying on existing Rule 147 that choose to disseminate offering materials using online media could have a higher risk of being non-compliant unless they take additional and potentially costly precautions to restrict any advertising that can be viewed outside their state of incorporation. Eliminating manner of offering restrictions in Rule 147A will allow issuers to engage in broad-based solicitations, including on publicly accessible Web sites, in order to successfully locate potential in-state investors. For example, an issuer resident in New Jersey will be permitted under Rule 147A to advertise and disseminate offering information through online media to reach New Jersey residents, including those who may work and access the online solicitation while in New York. Thus, Rule 147A will provide issuers with the flexibility to utilize a wider array of options to advertise their offerings, allowing them to take advantage of modern communication technologies such as the Internet and other social media platforms to reach investors.[442] In this regard, we expect Rule 147A to be particularly effective at facilitating state-based crowdfunding offerings that rely heavily on online platforms to bring issuers and investors together.[443] Online advertising provides a lower cost and more efficient means of communicating with a more diffused base of prospective investors. Consequently, eliminating manner of offering restrictions in Rule 147A should result in lower search costs for Rule 147A issuers. The provisions may facilitate compliance with the rules' requirements as issuers will not need to limit advertising or take additional precautions to ensure that only in-state residents view the offering.

Under the final rules, issuers will be able to choose between utilizing Rule 147 and Rule 147A for intrastate offerings based on their preferences for communicating with investors. This

[437] Most states that have enacted state crowdfunding provisions require issuers to comply with the provisions of Section 3(a)(11) and Rule 147. See note 30 above.

[438] *See, e.g.,* ABA Letter, NASAA Letter, CrowdCheck Letter, Guzik Letter, NextSeed Letter and the 2015 Small Business Forum Recommendations.

[439] *See* Rule 147(b).

[440] *See* Rule 147A(b).

[441] *See* Rules 147(f) and 147A(f).

[442] *See also* ABA Letter, CFA Letter, Nextseed Letter.

[443] *See* Massolution 2015 Report.

could enable a larger number of issuers to utilize intrastate offerings to meet their capital raising needs. To the extent issuers shift from another unregistered capital market to the Rule 147A market, capital formation may not increase but the allocative efficiency of capital markets could improve, if issuers are able to meet their capital raising needs more effectively and investors are better able to find investment opportunities that satisfy their financial objectives. We believe that eliminating the manner of offering restrictions in Rule 147A will attract a number of new issuers that previously could not avail themselves of lower-cost capital raising opportunities, such as intrastate crowdfunding, that primarily rely on online media to advertise the offering to large numbers of investors. Such improved access to cheaper capital raising methods may result in higher levels of capital formation in the economy.

In addition, eliminating manner of offering restrictions in Rule 147A may result in a greater number of investors becoming aware of a larger and more diverse set of investment opportunities in private offerings, enabling them to diversify their investment portfolios and allocate their capital more efficiently. Further, broadly advertised offerings under Rule 147A may compete for potential investors more effectively with offerings where general solicitation is also permitted, such as Rule 504, Rule 506(c), and Regulation A offerings. The final rules could thus intensify competition among unregistered capital markets for attracting issuers that want to raise capital and investors that are looking for suitable investment opportunities. An increase in competition could change the number and type of market participants across various markets, which would impact the relative demand for and supply of capital in each of these markets.

However, as issuers utilizing Rule 147A advertise more widely and freely, the likelihood of out-of-state investors purchasing into an intrastate offering could increase. The inclusion of legends and other mandatory disclosures may mitigate this concern and may provide a certain measure of investor protection, although out-of-state investors in their desire to participate in an attractive investment opportunity may overlook the legends or disclosures or may simply disregard them. While issuers are required to have a reasonable belief that all their purchasers are resident within the state and obtain a written representation from each purchaser as to his or her residence, the probability of circumventing the out-of-state sale restrictions by investors who misrepresent their residency status could increase as out-of-state residents may view Internet-based advertising and become aware of Rule 147A offerings in another state. Likewise, there may be an increased probability that out-of-state purchasers will attempt to purchase in resale transactions that occur within the restricted period. However, due to inclusion of rule provisions such as the requirement of written representation by investors as to their residency status as well as requirements related to legends, transfer agent instructions and prominent disclosure about limitations on resales, we believe that such concerns may not be significantly higher than under amended Rule 147, which retains the restrictions related to manner of offerings. Allowing Internet-based advertising of Rule 147A offerings and the potential increased use of the intrastate offering exemptions could also impact the effectiveness of state oversight if regulators do not have adequate resources to monitor the manner in which these securities are marketed to the general public. Overall, we believe that the final rules will modernize existing regulations to reflect modern business practices and technological developments while maintaining appropriate investor protections.

ii. Incorporation and Principal Place of Business Requirements

New Rule 147A will eliminate the current requirements in Rule 147 for issuers to be incorporated and have their principal office in the state where an offering is being conducted. In order to establish sufficient in-state presence to be eligible to conduct an exempt intrastate offering, in lieu of such requirements, Rule 147A will require issuers to have their principal place of business in the state where an offering is conducted. The principal place of business will be defined as the location from which officers, partners or managers of the issuer primarily direct, control and coordinate the activities of the issuer.[444]

We believe that the elimination of the incorporation or organization in-state requirement in Rule 147A better comports with modern business practices and thereby will make it easier for a greater number of issuers to utilize the new exemption, relative to amended Rule 147. A significant number of public and private companies are incorporated in states other than the state in which their principal place of business is located, thereby precluding otherwise eligible issuers from utilizing Rule 147 to conduct an intrastate offering.[445]

Most of these companies have chosen to incorporate in jurisdictions where corporate laws are consistent with modern business practices or provide more flexibility.[446] For example, according to one academic study, corporate laws affect company value, even after controlling for company size, diversification, profitability, investment opportunities and industry.[447] Thus, companies may have strong incentives to select perceived favorable regimes, such as that of Delaware.[448] These studies and industry practices indicate that companies' choice of state of incorporation depends on the economic benefits derived from the regulatory environment in which the company is organized and not necessarily where the company operates most efficiently.

Since the geographical location of investment and employment is aligned more closely with the principal place of business of a company than where it is incorporated, we believe replacing the current incorporation and residency requirements of current Rule 147 with a principal place of business requirement in Rule 147A will be sufficient to

[444] *See* Rule 147A(c)(1). Corporations, limited partnerships and trusts relying on amended Rule 147 will continue to be required to be organized or incorporated in the state where the offering is being conducted in order to establish in-state residency. Rule 147(c), however, will be amended by replacing the principal office requirement with a principal place of business requirement. We believe principal place of business is conceptually similar to principal office location. *See* Section II(A)(2).

[445] For example, based on analysis of EDGAR filing data, 76% of Exchange Act reporting companies indicated, in their 2015 Form 10–K filings, that they had a separate state of principal executive office and state of incorporation. Analyzing by size (assets), more than two-thirds of the smallest 10% of reporting companies reported different states of incorporation and principal office. The practice of incorporating in different states extends beyond public companies to private and smaller companies. During 2009–2015, 37% of Rule 504 offerings and 39% in Rule 505 offerings indicated in their Form D filings that they had different states of incorporation and principal place of business. See baseline analysis in Section IV(A)(1)(ii). Form D data also indicates that approximately 65% of all Rule 506 offerings initiated during 2009–2015 reported different states of incorporation and operations. While smaller companies may be less likely than larger companies to have separate states of incorporation and principal places of business, Form D data indicates that a considerable number of small businesses are currently unable to meet the state of incorporation requirement in existing Rule 147.

[446] *See* ABA Letter, CFA Letter, CrowdCheck Letter, Milken Letter.

[447] Robert Daines, ''*Does Delaware Law Improve Firm Value?*'' J. Fin. Econ., Volume 62, Issue 3 (2001) at 525–558.

[448] *See* Scott D. Dyreng, Bradley P. Lindsey, Jacob R. Thornock, ''*Exploring the Role Delaware Plays as a Domestic Tax Haven,*'' J. Fin. Econ., Volume 108, Issue 3, (2013) at 751–772 (explaining that Delaware's tax laws play an economically important role in U.S. companies' decision to locate in Delaware).

establish the in-state nature of the issuer's business. Such a change will also be consistent with the objectives of the current intrastate offering exemption, while making it easier for more issuers to utilize the new exemption relative to the amended Rule 147 safe harbor under Section 3(a)(11).

By not requiring issuers to be incorporated in-state, it may be possible for foreign incorporated issuers that have their principal place of business in a U.S. state to be able to access the Rule 147A capital market. This will create a uniform standard for companies that are operating locally, irrespective of their country or state of incorporation, to utilize the Rule 147A exemption. Form D filings for the period 2009–2015 reported that approximately 2.5% of Regulation D offerings (approximately 3,211 offerings) were initiated by issuers that were incorporated outside of the United States and had their principal place of business in a U.S. state. Allowing issuers to raise capital in the state in which it has its principal place of business, without regard to the jurisdiction of incorporation under new Rule 147A, could enable issuers to organize or incorporate in foreign jurisdictions with perceived advantages that may increase the financial viability of such issuers, especially for early stage companies. However, to the extent that it is more difficult to enforce securities and other relevant laws against such foreign organized or incorporated issuers, risks to investors in such issuers could increase. Overall, given the intrastate character of Rule 147A offerings, we do not think it likely that a significant number of foreign issuers will seek to utilize this exemption.

Under Rule 147 and Rule 147A, issuers will be able to have a ''principal place of business'' within only one state or territory, and therefore the issuer will be able to conduct an intrastate (Rule 147 or Rule 147A) offering in only one state or territory. To mitigate the risk of issuers switching their principal place of business to a different state in order to conduct Rule 147 or Rule 147A offerings in multiple states, the final rules limit issuers that change their principal place of business from utilizing the exemption to conduct another intrastate offering in a different state for a period of six months from the date of last sale of securities under the prior Rule 147 or Rule 147A offering. These provisions will help to deter issuers from misusing the amended residency requirements to change their principal place of business in order to sell to residents in multiple states. The duration of this limitation is consistent with the period for which resales to out-of-state investors will be prohibited.

To the extent a change in principal place of business to a new state is motivated by business or regulatory considerations, this amendment could affect the capital raising prospects of companies by requiring them to delay their subsequent intrastate offerings or seek to conduct an offering under another exemption. For example, certain start-ups and small businesses that could potentially relocate their principal place of business in pursuit of costs savings could be affected by the final rules.

c. Common Requirements of Amended Rule 147 and New Rule 147A

i. ''Doing Business'' In-State Tests

Similar to the proposed amendments, the final rules will modify the current ''doing business'' in-state requirements in Rule 147 by requiring issuers to satisfy one of four specified tests. A similar requirement will be included in Rule 147A. The specified tests will include a new test whereby issuers can satisfy the ''doing business'' requirement if a majority of their employees are located in the offering state. Specifically, under amended Rule 147 and new Rule 147A, in order to be deemed ''doing business'' in a state, issuers will have to satisfy at least one of the following requirements:

- 80% of the issuer's consolidated assets are located within such state or territory;
- 80% of the issuer's consolidated gross revenues are derived from the operation of a business or of real property located in or from the rendering of services within such state or territory;
- 80% of the net proceeds from the offering are intended to be used by the issuer, and are in fact used, in connection with the operation of a business or of real property, the purchase of real property located in, or the rendering of services within such state or territory; or
- A majority of the issuer's employees are in such state or territory.

The modifications to the existing ''doing business'' in-state tests will modernize the Rule 147 safe harbor and provide greater flexibility to potential issuers relying on Rules 147 and 147A to conduct intrastate offerings. This will ease issuer burden in complying with the provisions, while also better aligning the rules with modern business practices such that issuers will be able to use the test that best reflects the local nature of their business operations.[449]

Rule 147 currently requires issuers to satisfy all three ''doing business'' in-state tests, which can be burdensome even for small businesses that have a strong nexus to one state. For example, for some startups and early stage ventures that are unable to access alternate methods of raising capital and therefore seek to rely on the intrastate offering exemption, the existing ''doing business'' tests, by restricting these issuers' operations and capital investments substantially to one state may have adverse effects on their growth and viability. Moreover, in recent years new business models have emerged that may make satisfying all three tests ill-suited for issuers who would otherwise be able to rely on Rule 147 as a capital raising option. For example, businesses that use new technologies (*e.g., e*-businesses) to make their operations more efficient tend to be more geographically distributed in their operations or revenues than what is permitted under current Rule 147.[450] According to an academic study, advances in computing and communications have fundamentally changed how information can be stored, distributed, modified or assimilated, which has enabled businesses to become more geographically dispersed and modular rather than centralized into discrete units.[451] Similarly, the growth of modern technologies has made it easier for companies, through *e*-commerce and shared logistical networks, to reach a larger and more diffused customer base, leading to more dispersed revenue streams.

Requiring an issuer to own a majority of its assets, invest most of the capital it raises, and obtain its revenue in one state could create inefficient constraints for startups and small businesses to operate and grow in the modern business environment. While the original intent of Section 3(a)(11) and Rule 147 was to ensure that investors and issuers are located in the same state so that they are potentially familiar with each other,[452] current business practices of issuers, consumption habits of customers, and the set of available investment opportunities of investors have expanded greatly since Rule 147

[449] *See also* CFA Letter.

[450] Consider the example of an *e*-commerce company that invests in distribution facilities outside its state to meet the needs of customers who are resident outside that state. Under current requirements, such an issuer may be able to invest only a small part (less than 20%) of the capital raised in a Rule 147 offering outside its principal state of business to remain eligible for the exemption. *See also* NASAA Letter.

[451] *See* Mohanbir Sawhney and Deval Parikh, ''*Where Value Lives in A Networked World,*'' Harvard Business Review (2001).

[452] *See* Rule 147 Adopting Release.

was adopted in 1974. In view of these changes, we believe that the modifications to the ''doing business'' requirements in the final rules will provide issuers with greater flexibility in conducting intrastate offerings and help to eliminate potential uncertainty about the availability of intrastate offering exemptions.

Compared to current Rule 147, the revised ''doing business'' requirements in the final rules will enable a greater number of companies to rely on Rule 147 or Rule 147A to raise capital through local offerings. Such new issuers could be those entities that are currently accessing capital through alternate means, or they could be issuers that could not previously raise sufficient amounts of capital in any market but would be able to use amended Rule 147 or new Rule 147A to meet their funding needs. In addition, to the extent raising capital in a Rule 147 or Rule 147A offering is less costly than raising capital using alternate means, issuers will benefit from such lower costs. Easier access to local capital may enable issuers to finance investment opportunities in a timely manner, thereby accelerating company growth and promoting state employment and economic growth.

As more companies become eligible or are willing to raise capital pursuant to amended Rule 147 or new Rule 147A, the set of investment opportunities for investors will also increase in a corresponding manner, resulting in greater allocative efficiency and capital formation. These economic benefits generally depend on the extent to which increased use of the intrastate offering provisions, compared to current Rule 147, arises as a result of substitution out of other types of offerings. On one hand, if increased use of the intrastate offering provisions causes issuers and investors to migrate from other types of offerings as a result of marginally more attractive prospects for investment and capital raising, the aggregate increase in capital formation may not be significant but competition amongst types of private offerings will be higher.[453] On the other hand, if amended Rule 147 or new Rule 147A attracts new issuers, capital formation levels will increase in the economy. We believe that, by facilitating intrastate crowdfunding, the final rules could provide new company growth and consequently lead to an overall increase in capital formation. Further, the final rules could lead to increased capital formation by facilitating other state registered or exempt offerings, including those with amounts greater than what is allowed for intrastate crowdfunding offerings. However, since we do not have data on the existing use of Rule 147, we are unable to quantify or predict the extent of any increase in offering activity under amended Rule 147 or new Rule 147A.

At the same time, if issuers with assets and operations dispersed over more than one state make use of amended Rule 147 or new Rule 147A, there may be concerns that state oversight of such issuers could weaken, with a consequent reduction in investor protection. We believe, however, that qualifying under any one of the four ''doing business'' in-state tests and requiring an issuer to have its principal place of business in the state, such that the officers and managers of the issuer primarily direct, control and coordinate the activities of the issuer in the state, will provide state regulators with a sufficient basis from which to monitor an issuer's activities and enforce state securities laws for the protection of their residents.[454] Further, state enforcement actions aimed at protecting in-state investors can extend to issuers whose assets are located beyond the boundaries of the state, which could potentially deter issuers from engaging in fraudulent intrastate offerings. Moreover, with the adoption of amendments to Rule 147 and new Rule 147A, state regulators may choose to amend their state regulations to comport with these provisions, which would allow them to consider any additional requirements, including qualification tests, for issuers to comply with state securities offerings regulations.

Finally, we note that the high threshold levels specified in the final rules' ''doing business'' tests may preclude certain issuers whose business models result in widely distributed operations (*e.g.,* some *e*-commerce companies) from qualifying under any of the four tests and thus from relying on these intrastate offering provisions. Such issuers could rely on alternate capital raising methods such as Regulation Crowdfunding. To the extent these issuers are unable to raise the required capital through alternate methods, these provisions could adversely impact capital formation and investment opportunities for such firms. We believe, however, that the vast majority of issuers will be able to satisfy the ''doing business'' test requirements in order to qualify for local capital-raising.

ii. Reasonable Belief and Written Representation as to Purchaser Residency Status

Amended Rule 147 and new Rule 147A include a reasonable belief standard for determining whether a purchaser is a state resident at the time of the sale of the securities. In a change from the proposed rules, the final rules will retain the requirement of current Rule 147 that an issuer obtain investor representations as to his or her residency status. The reasonable belief standard is conceptually consistent with similar requirements in Regulation D offerings and will provide greater certainty to issuers as to their compliance with the conditions of the exemption, potentially encouraging greater reliance on the final rules.[455]

Retaining the written representation requirement could constrain issuer flexibility if the requirement predisposes them to rely on particular modes of residency verification over others.[456] It could also result in somewhat higher compliance costs for issuers. At the same time, the requirement could help to better ensure that issuers are selling to investors who are residents of the state in which the offering is being conducted. In this way, requiring a representation as to the purchaser's residency may mitigate some of the investor protection concerns raised by commenters.[457] While a formal representation of residency by itself is not sufficient to establish a reasonable belief that such purchasers are in-state residents, the representation requirement, together with the reasonable belief standard, may result in better compliance with the final rules, which would serve to increase investor protections. It is possible, however, that some issuers may consider a written representation to be dispositive of reasonable belief of investor's residency status, which would increase the risk of issuers' violating the final rules.

As an alternative, we considered providing a safe harbor for determining purchaser's residence, as requested by several commenters.[458] A safe harbor could provide greater certainty for issuers as to their compliance with the rules' provisions, potentially

[453] We note that issuers that meet current requirements under existing Rule 147 will also be eligible to rely on amended Rule 147 or Rule 147A.

[454] See also CFA Letter and NASAA letter.

[455] *See* NASAA Letter.

[456] For example, issuers may find it easier to obtain a proof of residency document directly from the purchaser along with a written representation, whereas they may have found it more efficient to rely on an alternate mode like third-party verification if a written representation was not required.

[457] *See* CFA Letter, CrowdCheck Letter, NASAA Letter.

[458] *See* CFIRA Letter; CrowdCheck Letter; Localstake Letter; WBA Letter.

encouraging greater use of the intrastate offering exemptions and enhancing capital formation. However, a safe harbor also could be viewed as an exclusive or a minimum standard that could restrict issuer choice of verification methods, and we believe that requiring issuers to consider the facts and circumstances of the offering and sale will best serve issuers' compliance with the final rules.

iii. Residence of Entity Purchasers

Amended Rule 147 and new Rule 147A define the residence of a purchaser that is a legal entity—such as a corporation, partnership, trust or other form of business organization—as the location where, at the time of the sale, the entity has its principal place of business. This definition will create consistency in defining the place of residence of entity investors with that of the issuer while also helping to ensure that investors are sufficiently local by nature.

iv. Limitations on Resales

Consistent with the proposal, amended Rule 147 and new Rule 147A will limit resales to in-state residents during a defined restricted period from the date of sale by the issuer. In a change from the proposed rules, this restricted period has been reduced from nine to six months. Current Rule 147 provides a restricted period of nine months, and the start date for the restricted period is from ''date of *last* sale'' rather than from the ''date of sale'' for the particular security in question. In addition, the issuers' ability to rely on Rules 147 and 147A will not be conditioned on a purchaser's compliance with the rules' resale restrictions.

Under the final rules, after expiration of the restricted period, investors will be able to sell their securities to out-of-state purchasers, even if the offering is not yet completed. While reducing the restricted period to six months may raise investor protection concerns, including concerns about increased probability that the securities will be purchased with an intention to distribute, we are persuaded by commenters that suggested a six-month period would be adequate to assure that the securities have come-to-rest in the state of issuance.[459] In addition, state regulators will have the flexibility to impose additional transfer restrictions under amended Rule 147 or new Rule 147A, if warranted within their jurisdiction. Additional language in amended Rule 147(e) and new Rule 147A(e) that specifies that all re-sales during this six-month restricted period will be limited to the state or territory in which the issuer is a resident at the time of the sale of the security by the issuer will help to maintain the intrastate nature of the offering even if the issuer relocates its principal place of business to a different state. The final rules, by shortening the restricted period, will provide greater liquidity for Rule 147 and Rule 147A securities, making them more attractive to investors, which could lead to greater investor participation and an increase in the supply of capital available in intrastate offerings. Further, it could improve price discovery and lead to lower capital raising costs for issuers.

Additionally, not conditioning the availability of amended Rule 147 or new Rule 147A on the issuer complying with the provisions relating to resale restrictions will provide greater certainty to issuers conducting an offering pursuant to these provisions. For example, issuers will not need to be concerned about potentially losing the exemption if the resale provisions are violated under circumstances that are beyond their control. At the same time, given that issuers will continue to be subject to other compliance requirements, such as in-state sales limitations, mandatory offeree and purchaser disclosures, and stop transfer instructions, as well as federal antifraud and civil liability provisions, we believe that the final rules will not reduce investor protections.

Rule 147(f) and new Rule 147A(f) require disclosure of the resale restrictions to every offeree in the manner in which the offering is communicated. Compared to the requirements in current Rule 147, which require written disclosure of resale restrictions, these provisions will provide greater flexibility to issuers and ease compliance burdens in cases of oral offers, while potentially making it easier for investors to be made aware of the resale restrictions at the time an offer is made. This change will lower the regulatory burden for issuers, especially smaller issuers; however, where an offer is communicated other than in writing, it also may adversely impact the information provided to potential investors (offerees) because the investor may not receive such information in writing at the time an offering is initially made and being considered. To the extent that investors would be more likely to comprehend or heed written disclosures, these changes may adversely impact investor protection. This impact will be mitigated by the requirement to provide disclosure about resale restrictions, in writing, to every purchaser a reasonable period of time before the date of sale.[460]

Rule 147(f)(3) is also being amended to remove the requirement to disclose to offerees and purchasers the stop transfer instructions provided by an issuer to its transfer agent and the provisions of Rule 147(f)(2) regarding the issuance of new certificates during the resale period, which also will ease compliance burdens for issuers. These changes are not expected to adversely affect investor protection, since the information in question relates to technical aspects of the securities transfer process and does not address securities ownership rights as such.

v. Integration

The final rules, similar to the proposed rules, will expand the current Rule 147 integration safe harbor such that offers and sales pursuant to amended Rule 147 or Rule 147A will not be integrated with: (i) Any offers or sales of securities made prior to the commencement of the offering, (ii) any offers or sales made more than six months after the completion of the offering, or (iii) any subsequent offer or sale of securities that is either registered under the Securities Act, exempt from registration pursuant to Regulation A, Regulation S, Rule 701, or Section 4(a)(6), or made pursuant to an employee benefit plan. Compared to the integration safe harbor in current Rule 147, the expanded integration safe harbor in the final rules will provide issuers with greater certainty that they can engage in other exempt or registered offerings either prior to or near in time of an intrastate offering without risk of becoming ineligible to rely on Rule 147 or Rule 147A. Similarly, the addition of Section 4(a)(6) to the list of exempt offerings that will not be integrated with a Rule 147 or Rule 147A offering will provide certainty to issuers that they can conduct concurrent crowdfunding offerings as per the provisions of the respective exemptions. This flexibility and ensuing regulatory predictability will be especially beneficial for small issuers who likely face greater challenges in relying on a single financing option for raising sufficient capital. While the expanded scope of the integration safe harbor may raise concerns that an issuer could more easily structure a single transaction as a series of exempt offerings to avoid securities registration,[461] the final rules

[459] *See* note 157. *See also* text accompanying notes 167 and 168.

[460] *Id.*

[461] *See* NASAA Letter.

provide for non-integration only to the extent that the issuer meets the requirements of each of the offering exemptions being used to raise capital.[462] Furthermore, the final rules require an issuer to wait at least 30 calendar days between its last offer made to investors other than qualified institutional buyers or institutional accredited investors in reliance on Rule 147 or Rule 147A and the filing of a registration statement with the Commission, which will provide additional protection to investors in registered offerings who might otherwise be influenced by an earlier intrastate offering. Therefore, we do not believe that the adoption of the integration safe harbor will result in reduced investor protections.

vi. Intrastate Broker-Dealer Exemption and Additional Considerations

We are also providing guidance regarding the use of the Internet by a person that seeks to rely on the intrastate broker-dealer exemption.[463] Our guidance clarifies that a person whose business otherwise meets the requirements of the intrastate broker-dealer exemption should not cease to qualify for the exemption solely because it has a Web site that may be viewed by out-of-state persons, so long as the broker-dealer takes measures reasonably designed to ensure that its business remains exclusively intrastate. This guidance will provide greater certainty to market participants about intermediaries' ability to participate in intrastate offerings that seek to raise capital via online media without having to register as a broker-dealer with the Commission. Such certainty may increase both the demand for and the supply of intermediaries in Rule 147 and Rule 147A offerings, which could facilitate a greater number of intrastate offerings, especially crowdfunding offerings. At the same time, despite the measures taken by broker-dealers that are reasonably designed to ensure that their businesses remain exclusively intrastate, the risk of non-compliance with the exemptions under Section 5 may somewhat increase for issuers if out-of-state investors, attracted by the intrastate broker's Web site, invest in the offering through misrepresentations of their residency status.

[462] *See also* note 177.

[463] Exchange Act Section 15(a)(1) exempts from broker-dealer registration requirements under Section 15(b) a broker-dealer whose business is exclusively intrastate and who does not use any facility of a national securities exchange.

vii. Alternatives Considered

The paragraphs below discuss major alternatives that we considered in addition to the alternatives discussed in the individual sub-sections above.

(a) ''Doing Business'' Tests

As an alternative to the ''doing business'' tests in the final rules, we considered lowering the percentage thresholds for the existing tests but retaining the requirement that all tests be satisfied. For example, compared with the current 80% threshold requirements, requiring issuers to have the majority of their assets, derive the majority of their revenue, and use the majority of their offering proceeds in-state could better comport with modern business practices, provide greater flexibility and make it less burdensome for issuers to satisfy these requirements, while still providing some indicia of the in-state nature of the issuer's business.[464] Such a change would also provide a consistent standard for the ''doing business'' tests in Rule 147 and Rule 147A, aligning the current tests with the new majority employees test and tests from other rules that use a majority threshold for determining issuer status, such as the test for determining foreign private issuer status.[465] In this way, such an alternative could encourage greater reliance on Rule 147 and Rule 147A and thereby promote additional capital formation through exempt intrastate offerings. However, lowering the percentage thresholds would necessarily weaken the required nexus between the issuer and the state contemplated by current Rule 147 and Section 3(a)(11). To the extent that such a change would result in less effective state regulation, there could be increased concerns that investor protections in exempt intrastate offerings may be reduced.

As another alternative to the final rules, we considered eliminating the requirement to qualify under any of the ''doing business'' tests. This alternative would significantly ease the burden for potential issuers in complying with Rules 147 and 147A, while also modernizing the rules to better align them with current business practices. As described above, in recent years new business models have emerged that may make the eligibility tests ill-suited for relying on the intrastate exemptions as a capital raising option. In view of broad changes in modern business practices, the principal place of business requirement may be sufficiently effective in establishing the local nature of an offering pursuant to Rule 147 or Rule 147A for purposes of compliance with the ''doing business'' in-state requirement at the federal level. The alternative will enable a larger number of issuers to qualify under the intrastate exemptions, which could increase capital formation. Relative to the adopted approach, this alternative also could provide more flexibility to state regulators to enact their own eligibility and residency requirements that better suit the interests of issuers and investors in their state, rather than imposing a uniform approach at the federal level that may function more effectively in some states than others.

[464] *See, e.g.,* Milken Letter.

[465] *See* Securities Act Rule 405 and Exchange Act Rule 3b–4.

However, eliminating the ''doing business'' tests could allow issuers with widely-dispersed operations over more than one state or even no business operations (besides having a principal place of business in-state) to make greater use of amended Rule 147 or new Rule 147A. Without sufficient local presence or an appropriate nexus with the issuer and the state, local oversight of such issuers could weaken, with a consequent decrease in investor protection. Although some of these concerns could be mitigated by continuing to restrict sales to in-state residents and the inclusion of the principal place of business requirement, as well as by the ability of states to extend their enforcement activities to issuers whose assets are located beyond state borders, we believe the approach we are adopting in the final rules will provide issuers with sufficient flexibility to satisfy these requirements, while maintaining important indicia of the in-state nature of the issuer's business. As noted above, given the other changes we are adopting to modernize our exemptive framework for intrastate offerings, we believe it is appropriate to first observe how the updated doing business in-state requirements are used by issuers in practice before making any further changes

(b) State Law Requirements and Additional Federal Restrictions

In a change from the proposed rules, the final rules will not require that the offering be registered under state law or conducted pursuant to a state law exemption that limits the amount of securities an issuer may sell pursuant to amended Rule 147 or new Rule 147A and the amount of securities than can be purchased by an investor in the offering. These requirements, as proposed, could provide additional protections at the federal level and could mitigate investor protection concerns that may arise from the modernization of the federal regulatory regime applicable to intrastate offerings. However, as noted by some commenters, conditioning the final rules on specified state law requirements would reduce the flexibility of state regulators to design rules that best conform to the requirements of issuers and investors in their states and, by imposing a uniform standard, could disadvantage certain jurisdictions relative to others.[466] Such requirements could thus unduly restrict capital raising options of issuers, especially those issuers that sell primarily to accredited investors, and could also restrict legitimate state interests in permitting larger offerings within their jurisdictions that otherwise rely on the federal intrastate exemptions.

We also note that the maximum amount that can be raised under existing intrastate crowdfunding provisions is less than the limit of $5 million that was proposed as a limit on certain intrastate offerings. Most of these states have also adopted provisions that impose investment limitations on investors. Thus, the protections provided by such limitations will remain available to investors in many intrastate crowdfunding offerings. States also retain the flexibility to enact additional measures under state law to strengthen issuer eligibility requirements for intrastate offerings.

We recognize that conditioning the federal exemption on certain state law exemptions or requirements could raise concerns that the provisions will be utilized to conduct offerings in states that lack sufficient investor protection safeguards, leading to a ''race-to-the-bottom'' between state legislators and regulators through significant easing of compliance provisions in order to attract more issuers. We believe, however, that such an outcome may be unlikely because state legislators and regulators have economic and reputational incentives to provide local issuers and investors with robust capital markets that are sustainable over the long run. Robust competition between states to enact securities laws that attract issuers to their territories would result in better regulations that promote effective functioning of local financial markets among the states, issuers and investors.

We also considered excluding certain types of issuers from relying on Rule 147 or Rule 147A, since it is likely that intrastate offerings and, especially crowdfunded offerings, may have a large proportion of retail investors.[467] Further, we also considered whether to extend bad actor disqualification provisions to these rules, similar to the provisions under Rule 506(d) of Regulation D.[468] Such provisions could enhance investor protections and promote regulatory consistency with other unregistered offering exemptions. However, these provisions are already a feature of most state crowdfunding exemptions, and additional restrictions at the federal level could reduce states' flexibility in enacting provisions that work best for their local jurisdictions. In this regard, we believe that states are well positioned to determine whether these or additional requirements are necessary in their jurisdictions.

(c) Exemption From Section 12(g) Requirements

Amended Rule 147 and new Rule 147A do not exempt securities issued in intrastate crowdfunding from reporting requirements under Section 12(g) of the Exchange Act.[469] As crowdfunded offerings are purchased in small amounts by a relatively large number of investors, issuers using Rule 147 or Rule 147A for state crowdfunding offerings may exceed record holder thresholds that trigger registration requirements under Section 12(g). In contrast to intrastate crowdfunding offerings, securities issued under Regulation Crowdfunding do not count toward the record holder thresholds for triggering registration under Section 12(g), subject to certain conditions. This may place an additional regulatory burden on Rule 147 and Rule 147A issuers, making them less likely to initiate intrastate crowdfunding offerings. As an alternative to the final rules, an exemption from the registration requirements under Section 12(g) for intrastate crowdfunded offerings could encourage issuers to rely on Rule 147 or Rule 147A by allowing such issuers to delay registration, and thereby avoid the regulatory obligations of ongoing reporting requirements under the Exchange Act.[470] However, as Rule 147 and Rule 147A issuers will not be required to submit financial reports on an ongoing basis, such a provision may result in less information about these issuers being available to the market to the possible detriment of existing and prospective investors. Such concerns are mitigated under Regulation Crowdfunding as issuers relying on that exemption are required to file ongoing financial reports with the Commission. Under Rule 147 and Rule 147A, however, issuers will not be subject to any federal ongoing reporting requirements, which could make the additional protections provided by registration under Section 12(g) especially beneficial to the issuers' investors.

3. Analysis of Amendments to Rule 504

The final rules related to Rule 504 will increase the maximum aggregate amount that can be raised under a Rule 504 offering, in a 12-month period, from $1 million to $5 million and will disqualify certain bad actors from participation in Rule 504 offerings. Additionally, in order to account for the increase in the Rule 504 aggregate offering amount limitation, we are adopting technical amendments to the notes to Rule 504(b)(2) that will update the current illustrations in the rule regarding how the aggregate offering limitation is calculated in the event that an issuer sells securities in multiple offerings pursuant to Rule 504, within the same twelve-month period.[471] All other provisions of current Rule 504 of Regulation D will remain unchanged.

a. Increase in Maximum Aggregate Amount to $5 Million

As shown in the baseline analysis above, use of Rule 504 offerings has been declining over the past decade, in absolute terms as well as relative to Rule 506 of Regulation D. Compared to Rule 504 offerings, Rule 506 offerings have the advantage of preemption from state registration. Thus, even though Rule 506(b) offerings, unlike Rule 504 offerings, are limited to accredited investors and up to 35 non-accredited investors, capital raising activity during the last two decades suggests that the benefits of state preemption outweigh unrestricted access to non-accredited investors. With the adoption of Rule 506(c), which allows for general solicitation, the comparative advantage of current Rule 504 has further diminished.

The current $1 million maximum amount was set by the Commission in 1988 and was meant to provide ''seed capital'' for small and emerging businesses.[472] Given the high costs of raising capital from public sources, the

[466] *See* CFIRA Letter, Milken Letter, NASAA Letter, NextSeed letter. See also ABA Letter stating that such limits would be inconsistent ''with Congressional intent that local offerings do not require federal regulation and are best left to be regulated by the states''.

[467] *See* NASAA Letter.

[468] *Id.*

[469] *See* Section II.C. above.

[470] *See* CFIRA Letter, CrowdCheck Letter, Guzik Letter, Milken Letter. *See also* 2015 Small Business Forum Recommendations.

[471] *See* Notes 1 and 2 to Rule 504(b)(2), 17 CFR 230.504(b)(2).

[472] *See* Seed Capital Release.

unregistered offerings market has expanded significantly in the past twenty-five years. The growth of angel investors and VCs, who invest primarily through unregistered offerings, has also increased seed capital available for investment at the initial stages of a company. Angel investments in 2015 amounted to approximately $25 billion, and the average angel deal size was approximately $346,000.[473] According to PWC MoneyTree, in 2008, U.S. VCs made $1.5 billion of seed investments in 440 companies.[474] This represents an average seed investment of $3.5 million per company. While the involvement of VCs at the seed stage has been increasing over the years, it is reported that some angel investments at the seed stage have included investments as large as $2.5 million per entity.[475] Given these changes, amending the Rule 504 offering size from $1 million to $5 million would better comport with market trends that indicate demand for larger seed capital infusions.

Four parallel developments may further change the regulatory landscape surrounding existing Rule 504. First, the use of current Rule 504 could be diminished by interstate crowdfunding offerings pursuant to Regulation Crowdfunding, which allows issuers to raise up to $1 million over a 12-month period with unlimited access to non-accredited investors, permits general solicitation, and provides preemption from state regulation and exemption from Exchange Act reporting, subject to certain conditions. Second, at least 34 states and the District of Columbia have enacted and several other states are in the process of enacting their own crowdfunding exemptions where the maximum amount that can be raised in a 12-month period ranges from $250,000 to $4 million, depending on the state (up to $2 million for all but three states). The maximum offering amounts for intrastate crowdfunding thus exceed the current offer limit under Rule 504. While most state crowdfunding exemptions require use of Rule 147, currently three states allow issuers to conduct intrastate crowdfunding under the Rule 504 exemption.[476] Third, state regulators have been working to implement regional coordinated review programs in order to facilitate regional offerings that could potentially save issuers time and money. Additionally, at least one state is in the process of enacting reciprocal crowdfunding provisions, which may allow issuers to conduct regional crowdfunding offerings under state law.[477] Since amended Rule 147 and new Rule 147A will be restricted to intrastate offerings, Rule 504 will be the most likely federal exemption that could be used for such regional offerings. Fourth, Tier 1 of amended Regulation A, which became effective in June 2015 and has similar eligibility criteria as Rule 504, allows offerings up to $20 million without any restrictions on resale of securities. In light of these developments, the increase in the maximum amount that can be raised in Rule 504 offerings to $5 million could help make this market more attractive for startups and small businesses while also facilitating intrastate and regional offerings greater than $1 million.

A higher offering amount limit for Rule 504 offerings could increase the number of issuers that rely on the exemption.[478] To the extent that amended Rule 504 permits issuers to raise larger amounts of capital at lower costs than other unregistered capital markets, the final rules could also lower issuer cost of capital and facilitate intrastate crowdfunding and the regional offerings market as it evolves. In addition to new issuers raising capital for the first time, it is likely that some issuers currently using other unregistered capital markets may shift to the amended Rule 504 market. Such potential trends would increase competition for supply of and demand for capital between the different unregistered markets, especially the exemptions pursuant to amended Rule 147, Rule 147A, Rule 506 of Regulation D, Regulation A, Regulation Crowdfunding, and Sections 4(a)(2) and 3(a)(11). Further, modernizing our exemptive scheme in order to provide issuers, and especially small businesses, with more viable options for capital raising could foster an environment that encourages new market participants with promising ventures to enter the capital markets, thereby enhancing the overall level of capital formation in the economy and investment opportunities. The amendments could also encourage new interstate and regional approaches to crowdfunding and other offering methods[479] and lead to greater coordination for regional review of capital raising options.

Increasing the Rule 504 offering amount limit could also increase the number of investors (including non-accredited investors) that can access such exempt offerings, thereby providing them with a wider array of investment opportunities to diversify their investment portfolios. This, in turn, could have positive effects on the supply of capital and the allocative efficiency of unregistered capital markets. To the extent that non-accredited investors are less capable of evaluating investment opportunities than accredited investors,[480] an increase in the number of Rule 504 offerings could raise investor protection concerns.

A higher offering amount limit, together with a potential increase in the number of investors that can access Rule 504 offerings, may raise concerns about a potential increase in the incidence of fraud under the final rules. The Commission's experience with the elimination of the prohibition against general solicitation for Rule 504 offerings in 1992[481] and its subsequent reinstatement in 1999 as a result of heightened fraudulent activity[482] illustrates the potential for fraud in the Rule 504 market. It should be noted, however, that in 1998 and 1999 the Commission concluded that the increase in fraud occurred because of rule provisions that permitted general solicitation of investors and free

[473] According to a recent report, angel investments amounted to $24.6 billion in 2015, with approximately 71,100 entrepreneurial ventures receiving angel funding and approximately 304,930 active angel investors. Seed/startup stage investments accounted for approximately 28% of the $24.6 billion. *See* Jeffrey Sohl, *The Angel Investor Market in 2015: A Buyer's Market,* Center for Venture Research, May 25, 2015, *available at https://paulcollege.unh.edu/sites/paulcollege.unh.edu/files/webform/Full%20Year%202015%20Analysis%20Report.pdf.*

[474] *See* PricewaterhouseCoopers, Investment by Stage of Development, *available at https://www.pwcmoneytree.com/CurrentQuarter/BySoD.*

[475] *See* Fenwick & West Survey 2012 (March 2013), *available at https://www.fenwick.com/publications/Pages/Seed-Finance-Survey-2012.aspx.* The survey defines a ''seed'' financing as the first round of financing by a company in which the company raises between $250,000 and $2,500,000 and in which professional investors play a lead role.

[476] Maine's provisions currently permit interstate crowdfunding utilizing the Rule 504 exemption, and Mississippi and Vermont dually offer intrastate crowdfunding under Section 3(a)(11) and interstate crowdfunding under Rule 504. *See* NASAA Letter.

[477] *See http://www.nasaa.org/industry-resources/corporation-finance/coordinated-review/.* See also, the ''Reciprocal Crowdfunding Exemption'' proposed by the Massachusetts Securities Division, *available at http://www.sec.state.ma.us/sct/crowdfundingreg/Reciprocal%20Crowdfunding%20Exemption%20-%20MA.PDF.*

[478] *See* CFA Letter, CFIRA Letter, NASAA Letter.

[479] *Id.*

[480] *See* Staff of the U.S. Securities and Exchange Commission, Report on the Review of the Definition of ''Accredited Investor'' (Dec. 18, 2015) at 43–46 *available at https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf* (describing criticisms of the current definition of accredited investor).

[481] *See* Adoption of Small Business Initiatives, SEC Release No. 33–6949 (July 30, 1992).

[482] *See* Seed Capital Release.

transferability of issued securities.[483] As a result, under that regime, a non-reporting company was able to sell up to $1 million of unrestricted securities in a 12-month period and be subject only to the antifraud and civil liability provisions of the federal securities laws. In contrast, the final rules will only increase the aggregate offering amount limitation of Rule 504, thereby retaining existing restrictions on general solicitation and the restricted securities status of most offered securities. State registration requirements may also mitigate the risk for investor abuse in Rule 504 offerings.

Enforcement cases over the past several years involving Rule 504 offerings could also raise concerns about the potential for increased incidence of fraud under the final rules. Most of these cases have involved promoters who engaged in secondary market sales of unrestricted securities that were previously issued in reliance on Rule 504(b)(1)(iii), defrauding investors and, in some cases, unsophisticated issuers.[484] Securities issued in reliance on Rule 504(b)(1)(iii) are exempt from state registration, and issuers relying on the exemption are permitted to market the securities using general solicitation so long as sales are made only to accredited investors.[485] We recognize that an increase in the maximum offering size could increase the risk of investor harm, at least in offerings that are exempt from state registration. Some of these concerns could be mitigated by the inclusion of bad actor disqualification provisions in Rule 504, as discussed below.

b. Bad Actor Disqualification Provisions and Additional Amendments

The amendments to Rule 504 will include bad actor disqualification provisions that are substantially similar to related provisions in Rule 506 of Regulation D. [486] Consistent with Rule 506(d), the final rules will require that the covered person's status be assessed at the time of the sale of securities. As in Rule 506(d), the disqualification provisions will not preclude the participation of bad actors whose disqualifying events occurred prior to the effective date of the final rules, which could expose investors to risks that arise when bad actors are associated with an offering. However, similar to Rule 506(e), issuers will be required to disclose bad actor disqualifying events that occurred prior to the effectiveness of the final rules. The risks to investors from participation of covered persons who otherwise would be disqualified may therefore be partly mitigated as investors will have access to relevant information that could inform their investment decisions. Disclosure of prior bad actor disqualifying events may make it more difficult for issuers to attract investors, and as a result, issuers may experience a similar impact to being disqualified. Some Rule 504 issuers may accordingly choose to exclude involvement by prior bad actors to avoid such disclosures.

We expect that the bad actor disqualification provisions could help reduce the potential for fraud in these types of offerings and thus strengthen investor protection.[487] If disqualification standards lower the risk premium associated with the risk of fraud due to the presence of bad actors in securities offerings, they could also reduce the cost of capital for issuers that rely on the amended Rule 504 exemption. In addition, the requirement that issuers determine whether any covered persons are subject to disqualification might reduce the need for investors to conduct their own due diligence on such persons and could therefore increase efficiency. While fraud can still occur without prior incidence of disqualification on the part of the issuer or covered persons, these provisions could mitigate some of the concerns relating to incidence of fraud in offerings pursuant to amended Rule 504, including offerings subject to regional coordinated review programs that could be registered in one jurisdiction but offered and sold in multiple other jurisdictions.

The disqualification provisions could also impose costs on issuers and covered persons. Issuers that are disqualified from using amended Rule 504 may experience an increased cost of capital or a reduced availability of capital, which could have negative effects on capital formation. Similarly, other covered persons may experience reductions in revenue or market share (for market intermediaries) or demotion or termination of employment or other limitations on career advancement (for individuals) as a result of disqualification from Rule 504 offerings. In addition, issuers may incur costs and transactional delays related to seeking disqualification waivers from the Commission and replacing personnel or avoiding the participation of covered persons who are subject to disqualifying events. Issuers also might incur costs to restructure their share ownership to avoid beneficial ownership of 20% or more of the issuer's outstanding voting equity securities by individuals subject to disqualification.

The final rules will provide, by reference to Rule 506(d), a reasonable care exception, similar to other exemptions and safe harbors under Regulation D. A reasonable care exception could facilitate capital formation by encouraging issuers to proceed with Rule 504 offerings in situations in which issuers otherwise might have been deterred from relying on Rule 504 if they risked potential liability under Section 5 of the Securities Act for unknown disqualifying events. At the same time, this exception also could increase the potential for fraud, compared with an alternative of not providing a reasonable care exception, by limiting issuers' incentives to determine whether bad actors are involved with their offerings. We also recognize that some issuers might incur costs associated with conducting and documenting their factual inquiry into possible disqualifications. The rule's flexibility with respect to the nature and extent of the factual inquiry required could allow an issuer to tailor its factual inquiry as appropriate to its particular circumstances, thereby potentially limiting costs. Finally, we note that

[483] *Id. See also* Proposed Revision of Rule 504 of Regulation D, the ''Seed Capital'' Exemption, No. 33–7541 (May 21, 1998). As the Commission noted at the time it proposed to eliminate the unrestricted status of securities issued under Rule 504, securities issued in these Rule 504 offerings may have facilitated a number of fraudulent secondary transactions in the over-the-counter markets. The Commission also noted that these securities were issued by ''microcap'' companies, characterized by thin capitalization, low share prices and little or no analyst coverage. As the freely-tradable nature of the securities facilitated the fraudulent secondary transactions, the Commission proposed to ''implement the same resale restrictions on securities issued in a Rule 504 transaction as apply to transactions under the other Regulation D exemptions,'' in addition to reinstating the prohibition against general solicitation. Although the Commission recognized that resale restrictions would have ''some impact upon small businesses trying to raise 'seed capital' in bona fide transactions,'' it believed at the time that such restrictions were necessary so that ''unscrupulous stock promoters will be less likely to use Rule 504 as the source of the freely tradable securities they need to facilitate their fraudulent activities in the secondary markets.''

[484] *See, e.g.,* SEC v. Stephen Czarnik, Case No. 10-cv-745 (S.D.N.Y.), Litigation Release No. 21401 (Feb. 2, 2010); SEC v. Yossef Kahlon, a/k/a Jossef Kahlon and TJ Management Group, LLC, Case No. 4:12-cv-517 (E. D. Tex.) (Aug. 14, 2012).

[485] The extent to which general solicitation may be used in connection with an offering conducted in reliance on Rule 504(b)(1)(iii) will depend on the specific state exemption being relied upon. In this regard, the NASAA Model Accredited Investor Exemption specifies that only a tombstone ad may be used in making a general solicitation. *See* Model Accredited Investor Exemption, available from the NASAA Web site at *http://www.nasaa.org/wp-content/uploads/2011/07/24-Model_Accredited_Investor_Exemption.pdf*.

[486] *See* Rule 506(d) of Regulation D, 17 CFR 230.506(d).

[487] *See also* ABA Letter, CFA Letter.

extending the disqualification provisions to Rule 504 will create a more consistent regulatory regime under Regulation D that will simplify due diligence requirements and thereby benefit issuers and investors that participate in different types of exempt offerings.[488]

The amendment to Rule 504(b)(2) will update the current illustrations of how the aggregate offering limitation is calculated in the event that an issuer sells securities in multiple offerings pursuant to Rule 504 within the same twelve-month period. By enabling market participants to calculate more easily the amounts permitted to be sold, this amendment will facilitate issuer compliance with the increased aggregate offering limitation.

c. Alternatives Considered

As an alternative to the final rules, we considered raising the offering limit under Rule 504 to an amount less than $5 million. For example, adjusted for inflation, the $1 million in 1988 would equate to approximately $2 million today.[489] Additionally, offering amount limits under various state crowdfunding provisions generally are set around $2 million for most jurisdictions, with $4 million being the highest offering limit in one state. Increasing the maximum Rule 504 offering to an amount less than $5 million could help alleviate concerns about a decrease in investor protection from unlimited access to non-accredited investors. At the same time, this alternative could limit the use of Rule 504 as a capital raising option for issuers.

We also considered increasing the maximum offering limit under amended Rule 504 to an amount greater than $5 million. For example, we could align the maximum offering limit to that of the Tier 1 offer limit ($20 million) under amended Regulation A. This could allow for more cost-effective state registration, while also providing a competitive alternative to eligible issuers in Tier 1 of the Regulation A market. However, unlike the Regulation A market, non-accredited investors have no investment limits under the Rule 504 provisions. Moreover, enforcement cases over the past several years have highlighted instances of fraud in Rule 504(b)(1)(iii) offerings.[490] A higher maximum offering amount may thus lead to greater investor protection concerns.

In light of concerns about potential abuses involving securities issued in reliance on Rule 504(b)(1)(iii),[491] we considered, as an alternative, to impose resale restrictions on such securities. This could increase investor protection by helping to ensure that securities initially sold pursuant to the exemption are only resold by initial purchasers after the passage of a specified time period. However, these restrictions would reduce the liquidity of Rule 504(b)(1)(iii) securities, which could increase the cost of capital for issuers seeking to raise capital in reliance on this rule provision. At the same time, increasing investor protection through resale restrictions could attract somewhat greater investor interest and lower the expected risk premium, which would mitigate, to some extent, the higher costs arising from less liquid securities. We note that states are free to enact additional restrictions in such offerings if they deem them necessary or appropriate.

Additionally, Rule 504 could be amended to include additional mandatory disclosures, or other requirements, to address investor protection concerns arising from the increase in the maximum offering size. While such additional requirements could mitigate some of these concerns, they would also increase the compliance obligations for Rule 504 issuers and may also overlap with similar requirements under state law in the jurisdiction in which such Rule 504 offering is registered.

4. Analysis of Repeal of Rule 505

The final rules also eliminate the exemption under Rule 505 of Regulation D. Rule 505, like Rule 504, was created under Section 3(b)(1) of the Securities Act to exempt offerings of up to $5 million over a 12-month period. As discussed in the baseline analysis, reliance on Rule 505 is much less frequent than even Rule 504 and has declined steadily in the past 15–20 years in terms of the number of new offerings and the amount of capital raised.[492]

We believe that amended Rule 504, by allowing offerings up to $5 million, will likely further diminish the utility of current Rule 505 for issuers that are currently eligible to use both exemptions because Rule 504 provides access to an unlimited number of non-accredited investors and restricted access to general solicitation.[493] Other exemptions from registration may also provide an alternative to Rule 505 offerings. For example, Rule 506(b) enables issuers to raise unlimited amounts of capital along with providing preemption from state registration, although being limited to 35 non-accredited investors who need to be sophisticated, either individually or through a purchaser representative. Similarly, while Regulation A offerings have greater disclosure requirements, they may be sold to non-accredited investors and have the added benefit of unrestricted resales of securities. We recognize that reporting companies that are potential Rule 505 issuers may find it relatively harder to shift to another type of unregistered offering as they are excluded from using Rule 504, Regulation A and Regulation Crowdfunding. Such issuers, however, constitute a small proportion of current Rule 505 issuers and, absent disqualifying bad actor events, could likely avail themselves of Rule 506. Alternatively, Rule 505 issuers, particularly those that are reporting companies, could also raise capital through a registered offering if they seek investment from non-accredited investors and investors who prefer securities issued through registered offerings. In view of recent changes to Form S–1 [494] and the availability of shelf registration to eligible reporting issuers, the costs of raising capital through a registered offering for issuers that are reporting companies, may be comparable to costs of a Rule 505 offering that solicits non-accredited investors and requires registration under state regulations. Whether Rule 505 issuers, particularly those that are reporting companies, switch to an unregistered offering such as a Rule 506 offering or a registered offering will depend on how these issuers assess the costs of registration relative to benefits such as broader access to non-accredited investors and investors who prefer securities issued through registered offerings.[495]

The impact of the elimination of Rule 505 will depend on whether issuers are

[488] *See* NASAA Letter.

[489] Annual inflation rates (1988–2015) based on consumer price index data, for all urban consumers, obtained from the Bureau of Labor Statistics. *See http://data.bls.gov/cgi-bin/surveymost?cu*.

[490] *See* note 484 and related discussion above.

[491] *Id.*

[492] During the period 2009–2015, there were 1,588 new offerings of less than or equal to $5 million by non-fund issuers that relied on Rule 505 compared to 64,862 such offerings that relied on Rule 506. Including offerings in which the issuer checked both the Rule 505 and Rule 506 exemptions on the Form D (2,170 new offerings), the proportion of Rule 505 offerings in Regulation D offerings rises from 2% to 5.3%. *See* Section V.A.2 and Table 5.

[493] Unlike offerings conducted pursuant to Rule 506, Rule 504 and Rule 505 offerings are subject to state securities law registration and qualification requirements.

[494] *See* note 435 above.

[495] *See* discussion in Section V(B)(1) and note 436.

able to access alternate capital markets and raise the desired amount of capital at a comparable cost and in a timely manner, as they would in the current Rule 505 market. To the extent that issuers are not able to raise sufficient or any amount of capital in such alternate markets, overall capital formation in the economy and allocative efficiency of capital markets could decline. We believe that Rule 505 issuers likely will be able to shift to other exemptions or alternately to follow-on registered offerings in case of issuers that are reporting companies, at little or no additional cost. In the short term, the repeal likely will increase competition amongst markets for attracting potential Rule 505 issuers and investors, but in the long-run, it may decrease the overall level of competition amongst the various capital markets to attract new issuers and investors.

As discussed above, the impact on efficiency, competition and capital formation of the repeal of Rule 505 also will depend on investor willingness and ability to purchase in an alternate unregistered capital market. For example, unsophisticated investors that may be eligible to purchase in a Rule 505 offering may not be able to purchase in a Rule 506 offering and hence may find their set of investment opportunities reduced. Further, as Rule 506 offerings are preempted from state registration, potential Rule 505 investors may be reluctant to purchase in a Rule 506 offering once Rule 505 is repealed, due to investor protection concerns. Similarly, Rule 504 offerings are subject to fewer investor disclosure requirements at the federal level, relative to a Rule 505 offering, that could also raise potential investor protection concerns. The net impact on the overall level of investor participation could thus depend on the type of offering that primarily substitutes for the repealed Rule 505 market.

Overall, we believe that the repeal of Rule 505 will not have a significant impact or any impact on capital formation because issuers will likely be successful at finding commensurate capital supply in an alternate unregistered capital market. Repeal of Rule 505 will streamline the existing exemptive framework to provide a clearer and less complex set of rules and regulations for the issuer to choose among.

As an alternative to the repeal of Rule 505, we considered increasing the maximum amount that can be raised over a period of 12 months to a higher amount. For example, adjusting for inflation, $5 million in 1988 would equate to approximately $10 million today. Retention of Rule 505 with a higher offering limit would allow issuers (in contrast to Rule 506) to access to up to 35 non-accredited investors without having to ensure that these investors are sophisticated investors. It would also allow reporting companies (in contrast to Rule 504) to avail themselves of the exemption for raising capital. However, we believe that in view of the widespread use of Rule 506 and the decreased use of Rule 505 in capital formation in the Regulation D market, a higher ceiling is not likely to increase reliance on the exemption.

VI. Paperwork Reduction Act

A. Rules 147(f)(1)(iii) and 147A(f)(1)(iii)

Rule 147 and new Rule 147A contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[496] Specifically, Rules 147(f)(1)(iii) and 147A(f)(1)(iii) each contain a provision requiring issuers relying on the rules to ''obtain a written representation from each purchaser as to his or her residence.'' There are two titles for these collection of information requirements. The first title is: ''Rule 147(f)(1)(iii) Written Representation as to Purchaser Residency,'' a new collection of information. The second title is: ''Rule 147A(f)(1)(iii) Written Representation as to Purchaser Residency,'' a new collection of information. We are requesting comment on these collection of information requirements in this adopting release, and intend to submit these requirements to the Office of Management and Budget (''OMB'') for review in accordance with the PRA and its implementing regulations.[497] If approved, responses to the new collection of information requirement would be mandatory for issuers seeking to rely upon the rules to conduct exempt intrastate offerings. An agency may not sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

In the Proposing Release, we solicited comment on our proposal to eliminate the requirement in Rule 147(f)(1)(iii) to obtain a written representation as to the purchaser's residency. In response to comments received, we have decided not to eliminate the requirement and are adopting an identical requirement in new Rule 147A(f)(1)(iii) under the Securities Act.[498]

Both Rule 147(f)(1)(iii) and new Rule 147A(f)(1)(iii) will require the issuer to obtain from the purchaser a written representation as to the purchaser's residency. The representation is not required to be presented in any particular format, although it must be in writing. Representations obtained by the issuer are not required to be kept confidential, and there is no mandatory retention period. The hours and costs to the issuer and purchaser associated with preparing, furnishing, obtaining and collecting these written representations constitute paperwork burdens and costs imposed by these collection of information requirements.

The required written representation by the purchaser as to his or her residence is identical under both Rule 147(f)(1)(iii) and new Rule 147A(f)(1)(iii). Similarly, both rules define the residence of the purchaser in the same manner. If the purchaser is a corporation, partnership, limited liability company, trust or another form of business organization, it shall be deemed to be a resident of the territory or state if, at the time of the offer and sale to it, it has its principal place of business within such territory or state. Principal place of business is defined as the territory or state in which the officers, partners or managers of the entity primarily direct, control and coordinate the activities of the entity. If the purchaser is an individual, such person shall be deemed to be a resident of the territory or state if such person has, at the time of the offer and sale, his or her principal residence in the territory or state.[499]

We expect that the determination of a purchaser's residence will be easiest for natural persons.[500] This determination may be more difficult for purchasers who have more than one place of residence. We also expect this determination to be more difficult for purchasers who are legal entities, such as corporations, partnerships, limited liability companies and trusts which will have to undertake a factual inquiry to determine in what state or territory their ''principal place of business'' is located.

We anticipate that the requirement for issuers to obtain a written

[496] 44 U.S.C. 3501 *et seq.*

[497] In the Proposing Release, we did not submit a PRA analysis because we proposed to eliminate the written representation requirement in Rule 147(f)(1)(iii), and our other proposed amendments to Rule 147 did not contain a ''collection of information'' requirement within the meaning of the PRA. At this time, we do not have any comments regarding overall burden estimates for the final rules. This release is requesting such comments.

[498] *See* text accompanying notes 119, 120, and 121 above.

[499] *See* Rules 147(d) and 147A(d).

[500] *See* Section II.B.2(c) above.

representation from each purchaser as to his or her residence, as required under Rule 147(f)(1)(iii) and Rule 147A(f)(1)(iii), will result in a burden and cost to issuers to meet these requirements in order to sell securities in an exempt intrastate offering. For purposes of the PRA, for each of Rule 147 and Rule 147A, we estimate that the total annual paperwork burden for all affected issuers arising from this collection of information requirement will be approximately 175 hours of issuer (company) personnel time and approximately $70,000 for the services of outside professionals at an average cost of $400 per hour.

Similarly, we anticipate that the written representation required by purchasers, including the obligation to determine the state or territory of their residence, as required under Rule 147(f)(1)(iii) and Rule 147A(f)(1)(iii), will result in a burden incurred by purchasers in order to purchase securities in an exempt intrastate offering. For purposes of the PRA, for each of Rule 147 and Rule 147A, we estimate that the total annual paperwork burden for all affected purchasers arising from this collection of information requirements will be approximately 1,750 hours of purchaser time and no cost incurred for the services of outside professionals.

In deriving our estimates, we assume that:

- Approximately 700 issuers [501] will conduct a Rule 147 and Rule 147A offering each year, respectively, and each issuer will spend an average of fifteen minutes to obtain and collect the written representation from each purchaser in the offering as to his or her state or territory of residence;
- Each of the approximately 700 issuers will retain outside professional firms to spend an average of fifteen minutes helping the issuer comply with this requirement to obtain and collect the written statement of residency from each purchaser in the offering at an average cost of $400 per hour;
- Each Rule 147 and Rule 147A offering will have an average of approximately 10 purchasers of securities, resulting in approximately 7,000 purchasers per year for each exemption; and
- Each purchaser in a Rule 147 and Rule 147A offering will spend an average of approximately fifteen minutes preparing a written statement of residency to provide to the issuer and will incur no cost for the services of outside professionals to satisfy this requirement.

Since Rule 147 does not require the issuer to file any type of notice form with the Commission, it is difficult to determine accurately the number of Rule 147 offerings conducted annually or estimate the annual number of offerings that will be made in reliance on the updated rule and the new Rule 147A exemption. As a result, we are using the number of offerings made in reliance on the exemptions in Rules 504 and 505 of Regulation D for the year ended December 31, 2015 as a proxy to estimate the average annual number of Rule 147 offerings, given that both Rule 147 and Rules 504 and 505 provide exemptions to Securities Act registration designed to facilitate smaller issuers raising seed capital. Given that Rule 147A is very similar to Rule 147, as amended, we are using this same methodology and estimate for the number of offerings under newly adopted Rule 147A.

It is also difficult to provide any standardized estimates of the burdens and costs involved for the issuer to obtain and collect these written statements of purchaser residency. We expect, however, that the burdens and costs to issuers may be higher or lower depending on the size of the offering and the number of purchasers acquiring securities in the offering, which may, in turn, be affected by the state or territory where the offering occurs.

These estimates include the time and cost to the issuer to implement a system to obtain and collect the written statements of residency by purchasers in their offerings, including the preparation of written materials, such as subscription agreements or questionnaires to potential purchasers. These estimates also include the time and cost incurred by an issuer's in-house and outside counsel and executive officers of collecting these written statements received from purchasers in their offerings.

In deriving our estimates, we recognize that these burdens and costs will likely vary among issuers based on the size of their offerings and the number of purchasers acquiring securities in their offerings. We believe that some issuers will experience burdens and costs in excess of these estimated averages and other issuers may experience less than these estimated average burdens and costs.

Similarly, it is difficult to provide any standardized estimates of the burdens and costs to purchasers in determining their state or territory of residence and preparing their related written statements of residency to the issuer. We expect, however, that the burden to purchasers may be higher or lower depending on whether the purchaser is a natural person or legal entity, and, if a legal entity, the extent of the entity's activities in other states or territories. If a legal entity, we realize there may be a wide range of management structures, involving management teams potentially residing in multiple states or territories, thereby complicating the determination of the purchaser's principal place of business.

These estimates include the time and cost to the purchaser to determine the purchaser's state or territory of residence and prepare a written statement of residency for the issuer. In the case of purchasers who are legal entities, these estimates also include the time and cost incurred by purchasers' in-house counsel and executive officers to undertake a factual inquiry to determine the state or territory of the purchaser's principal place of business.

In deriving our estimates, we recognize that the burdens and costs will likely vary between natural person and legal entity purchasers. In the case of purchasers who are legal entities, these burdens and costs will be based on a number of factors, including the location and structure of their management teams. We believe that some natural person and legal entity purchasers will experience burdens and costs in excess of our estimated averages, and that others may experience burdens and costs less than our estimated averages.

Request for Comment

We request comment on our approach and the accuracy of the current estimates. Pursuant to 44 U.S.C. 3506(c)(2)(A), the Commission solicits comments to: (1) 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; (2) evaluate the accuracy of the Commission's estimate of the burden of the collections of information; (3) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (4) evaluate whether there are ways to minimize the burden of the collections of information on those who are required to respond,

[501] We rely upon the number of offerings under Rules 504 and 505 of Regulation D for the year ended December 31, 2015 as a proxy for the average annual number of offerings under Rule 147 and new Rule 147A. Based on staff analysis of Form D filings, there were 519 new Form D filings reporting reliance on Rule 504 and 179 new Form D filings reporting reliance on Rule 505 in 2015. *See* Figure 1 in Section V.A.1, above. For purposes of these PRA estimates, we estimate that an average of 700 issuers will conduct a Rule 147 and new Rule 147A offering each year, respectively.

including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Commission by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/final.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number S7–22–15 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

Comments should be received on or before: January 20, 2017. Comments submitted in response to this document 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.

B. Amendments to Rule 504 of Regulation D

The amendments to Rule 504 of Regulation D contain ''collection of information'' requirements within the meaning of the PRA. There are two titles for the collection of information requirements contemplated by the amendments. The first title is: ''Form D'' (OMB Control No. 3235–0076), an existing collection of information.[502] The second title is: ''Regulation D Rule 504(b)(3) Felons and Other Bad Actors Disclosure Statement,'' (OMB Control No. 3235–0746), a new collection of information. Although the amendments to Rule 504 do not alter the information requirements set forth in Form D, the amendments are expected to increase the number of new Form D filings made pursuant to Regulation D. Additionally, the mandatory bad actor disclosure provisions that will be required under Rule 504 contain ''collection of information'' requirements within the meaning of the PRA. We published a notice requesting comment on these collection of information requirements in the Proposing Release, and we submitted the proposed amendments to the Office of Management and Budget (''OMB'') for review and approval in accordance with the PRA and its implementing regulations.[503] While several commenters provided qualitative comments on the possible costs of the proposed amendments, we did not receive comments on our PRA analysis and thus are adopting our estimates substantially as proposed, except as otherwise noted herein.

The information collection requirements related to the filing of Form D with the Commission are mandatory to the extent that an issuer elects to make an offering of securities in reliance on the relevant exemption. Responses are not confidential, and there is no mandatory retention period for the information disclosed. The hours and costs associated with preparing and filing forms and retaining records constitute reporting and cost burdens imposed by the collection of information requirements. We applied for an OMB control number for the proposed new collection of information in accordance with 44 U.S.C. 3507(j) and 5 CFR 1320.13, and OMB assigned a control number to the new collection, as specified above. Responses to the new collection of information will be mandatory for issuers raising capital under Rule 504 of Regulation D.

Form D (OMB Control No. 3235–0076)

The Form D filing is required for issuers as a notice of sales without registration under the Securities Act based on a claim of exemption under Regulation D or Section 4(a)(5) of the Securities Act. The Form D must include basic information about the issuer, certain related persons, and the offering. This information is used by the Commission to observe use of the Regulation D exemptions and safe harbor.

As the amendments are not altering the information requirements of Form D, the amendments will not affect the paperwork burden of the form, and the burden for responding to the collection of information in Form D will be the same as before the amendments to Form D. However, we estimate that the amendments to increase the aggregate amount of securities that may be offered and sold in any 12-month period in reliance on Rule 504 will increase the number of Form D filings that are made with the Commission. We do not believe this increase will be materially offset by a decrease in the number of Form D filings that are made with the Commission attributable to our repeal of Rule 505 of Regulation D.

The table below shows the current total annual compliance burden, in hours and in costs, of the collection of information pursuant to Form D. For purposes of the PRA, we estimate that, over a three-year period, the average burden estimate will be four hours per Form D. Our burden estimate represents the average burden for all issuers. This burden is reflected as a one hour burden of preparation on the company and a cost of $1,200 per filing. In deriving these estimates, we assume that 25% of the burden of preparation is carried by the issuer internally and that 75% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours.

TABLE 1—ESTIMATED PAPERWORK BURDEN UNDER FORM D, PRE-AMENDMENT TO RULE 504

	Number of responses	Burden hours/form	Total burden hours	Internal issuer time	External professional time	Professional costs
	(A) [504]	(B)	(C) = (A)*(B)	(D)	(E)	(F) = (E)*$400
Form D	25,900	4	103,600	25,900	77,700	$31,080,000

[502] Form D was adopted pursuant to Sections 2(a)(15), 3(b), 4(a)(2), 19(a) and 19(c)(3) of the Securities Act, 15 U.S.C. 77b(a)(15), 77c(b), 77d(a)(2), 77s(a) and 77s(c)(3).

[503] 44 U.S.C. 3507(d); 5 CFR 1320.11.

[504] Although the number of responses for Form D is reported as 21,824 in the OMB's Inventory of Currently Approved Information Collections, *available at http://www.reginfo.gov/public/do/PRAMain;jsessionid=D37174B5F6F9148DB767D63DF6983A65*, we have prepared a new estimate based on the historical trend of the annual number of new Form D filings. Based on an average increase of approximately 1,515 new Form D filings per year over the past six years, we believe that the average number of new Form D filings in each of the next three years will be approximately 25,884, or 25,900 rounded to the nearest hundredth.

For the year ended 2015, there were 22,854 new Form D filings. The annual number of new Form D filings rose from 13,764 in 2009 to 22,854 in 2015, an average increase of approximately 1,515 Form D filings per year, or approximately 9%. Assuming the number of Form D filings continues to increase by 1,515 filings per year for each of the next three years, the average number of Form D filings in each of the next three years would be approximately 25,900.

We estimate that the amendments to Rule 504 will result in a much smaller annual increase in the number of new Form D filings than the average annual increase that has occurred over the past six years. To estimate how the amendments to Rule 504 will impact the number of new Form D filings, we used as a reference point the impact of a past rule change on the market for Regulation D offerings. In 1997, the Commission amended Rule 144(d) under the Securities Act [505] to reduce the holding period for restricted securities from two years to one year,[506] thereby increasing the attractiveness of Regulation D offerings to investors and to issuers. Prior to amending Rule 144(d), there were 10,341 Form D filings in 1996, which was followed by a 20% increase in the number of Form D filings in each of the subsequent three calendar years, reaching 17,830 by 1999. Although it is not possible to predict with any degree of certainty the increase in the number of Rule 504 offerings following the amendments, we estimate for purposes of the PRA that there will be a similar 20% increase over the number of new Form D offerings that relied on either Rule 504 or 505 in 2015 after the amendments become effective.[507] In 2015, there were 519 new Form D filings reporting reliance on Rule 504 and 179 new Form D filings reporting reliance on Rule 505.[508] We estimate that there will be approximately 100 new Form D filings in each of the next three years attributable to the amendments.[509]

Based on these increases, we estimate that the total annual compliance burden of the collection of information requirements for issuers making Form D filings after amending Rule 504 to increase the aggregate offering amount from $1 million to $5 million will be 26,000 hours of issuer personnel time and $31,200,000 for the services of outside professionals.

TABLE 2—ESTIMATED PAPERWORK BURDEN UNDER FORM D, POST-AMENDMENT TO RULE 504

	Number of responses (A) [510]	Burden hours/form (B)	Total burden hours (C) = (A)*(B)	Internal issuer time (D)	External professional time (E)	Professional costs (F) = (E) * $400
Form D	26,000	4	104,000	26,000	78,000	$31,200,000

Regulation D Rule 504(b)(3) Felons and Other Bad Actors Disclosure Statement (OMB Control No. 3235–0746)

Under the amendments, Rule 504 will disqualify issuers from reliance on Rule 504 if such issuer would be subject to disqualification under Rule 506(d) of Regulation D.[511] Consistent with the requirements of Rule 506(e), the amendments require the issuer in a Rule 504 offering to furnish to each purchaser, a reasonable time prior to sale, a written description of any disqualifying events that occurred before effectiveness of the amendments and within the time periods described in the list of disqualification events set forth in Rule 506(d)(1) of Regulation D,[512] for the issuer or any other ‘‘covered person’’ associated with the offering. For purposes of the mandatory disclosure provision described in the note to Rule 504(b)(3),[513] issuers will be required to ascertain whether any disclosures are required in respect of covered persons involved in their offerings, prepare any required disclosures and furnish them to purchasers.

The disclosure required to be furnished to investors does not involve submission of a form filed with the Commission and is not required to be presented in any particular format, although it must be in writing. The hours and costs associated with preparing and furnishing the required disclosure to investors in the offering constitute reporting and cost burdens imposed by the collection of information.

The disclosure or paperwork burden imposed on issuers appears in an instruction to Rule 504(b)(3) and pertains to events that occurred before effectiveness of the final rules but which would have triggered disqualification had they occurred after effectiveness. Issuers relying on Rule 504 will be required to furnish disclosure of any relevant past events that would have triggered disqualification under Rule 504(b)(3) that relate to the issuer or any other covered person. If there are any such events, a disclosure statement will be required to be furnished, a reasonable time before sale, to all purchasers in the offering. The disclosure requirement will serve to protect purchasers by

[505] 17 CFR 230.144(d).

[506] *See* SEC Rel. No. 33–7390 (Feb. 20, 1997) [62 FR 9242].

[507] We include the number of new Form D filings that rely on Rule 505 in these estimates since we are repealing Rule 505, which has provided an alternative Regulation D exemption available for both non-reporting and reporting issuers under the Exchange Act. Rule 505 has a maximum offering limitation of no more than $5 million in a twelve month period. We believe that issuers who are non-reporting under the Exchange Act that have previously relied upon Rule 505 will rely upon Rule 504 upon effectiveness of the amendments, which will raise the maximum offering limitation under Rule 504 from $1 million to $5 million. Reporting issuers under the Exchange Act, who would have otherwise relied upon Rule 505, will now have to rely upon Rule 506 of Regulation D, once the repeal of Rule 505 becomes effective, since Rule 504 is unavailable to reporting issuers.

[508] Only 10 of the 179 new Form D filings that reported reliance on Rule 505 in 2015 were filed by reporting issuers under the Exchange Act. The remaining 169 new Form D filings were filed by non-reporting issuers.

[509] We estimate the number of new Form D filings attributable to the amendments over the next three years, as follows: 698 new Form D filings in 2015 relying on either Rules 504 or 505, less 10 new Form D filings made by reporting issuers under Rule 505 in 2015, multiplied by 20%, equals 138. Rounding 138 to the nearest hundredth provides an estimate of 100 new Form D filings attributable to the amendments.

[510] The information in this column is not based on the number of responses for Form D of 21,824, as reported in the OMB's Inventory of Currently Approved Information Collections, but rather on a new estimate of the average number of new Form D filings in each of the next three years. We prepared this estimate based on the historical trend of the annual number of new Form D filings. *See* text accompanying note 503 above. Based on an average increase of approximately 1,515 new Form D filings per year over the past six years, we estimate that the number of new Form D filings after the amendment to Rule 504 would be the average number of new Form D filings we estimate in each of the next three years of 25,900, plus the additional 100 filings we estimate would be filed as a result of the amendment to Rule 504.

[511] *See* Rule 504(b)(3); *see also* 17 CFR 230.506(d).

[512] 17 CFR 230.506(d)(1).

[513] *See* Note to Rule 504(b)(3).

ensuring that they receive information about any covered persons that were subject to such disqualifying events.

The disclosure requirement will not apply to triggering events occurring after the effective date of the amendments, because those events will result in disqualification from reliance on Rule 504 (absent a waiver or other exception provided in Rule 506(d)), rather than any disclosure obligation.

The steps that issuers take to comply with the disclosure requirement are expected to mirror the steps they would take to determine whether they are disqualified from relying on Rule 504. For purposes of estimating burdens and costs, we have assumed that issuers planning or conducting a Rule 504 offering will undertake a factual inquiry to determine whether they are subject to any disqualification in order to utilize the reasonable care provisions set forth in Rule 506(d)(2)(iv). Disqualification and mandatory disclosure will be triggered by the same types of events in respect of the same covered persons, with disqualification arising from triggering events occurring after the adoption and effectiveness of the amendments and mandatory disclosure applicable to events occurring before that date. Therefore, we expect that the factual inquiry process for the disclosure statement requirement will impose a limited incremental burden on issuers.

The burdens and costs may vary depending on the size of the issuer and the circumstances of the particular Rule 504 offering. We do not anticipate that it will generally be necessary for any issuer or any compensated solicitor to make inquiry of any covered individual with respect to ascertaining the existence of events that require disclosure more than once, because the period to be covered by the inquiry will end with the effective date of the new disqualification rules. However, issuers may incur additional burden and costs for each Rule 504 offering due to changes in management or intermediaries, other changes to the group of covered persons or if questions arise about the accuracy of previous responses.

We anticipate that the Regulation D Rule 504(b)(3) Felons and Other Bad Actors Disclosure Statement will result in an incremental increase in the burdens and costs for issuers that rely on the Rule 504 exemption. For purposes of the PRA, we estimate the total annual increase in paperwork burden for all affected Rule 504 issuers to comply with our collection of information requirements will be approximately 880 hours of company personnel time and approximately $9,600 for the services of outside professionals. These estimates include the incremental time and cost of conducting a factual inquiry to determine whether the Rule 504 issuers have any covered persons with past disqualifying events. The estimates also include the cost of preparing a disclosure statement that issuers will be required to furnish to each purchaser a reasonable time prior to sale.

In deriving our estimates, consistent with those assumptions used in the PRA analysis for the Rule 506 bad actor disqualification provisions,[514] we assume that:

- Approximately 800 issuers[515] relying on Rule 504 of Regulation D will spend on average one additional hour to conduct a factual inquiry to determine whether any covered persons had a disqualifying event that occurred before the effective date of the amendments; and
- On the basis of the factual inquiry, approximately eight issuers (or approximately 1%) will spend ten hours to prepare a disclosure statement describing matters that would have triggered disqualification under Rule 504(b)(3) of Regulation D had they occurred on or after the effective date of the amendments; and
- For purposes of the Rule 504(b)(3) disclosure statement, approximately eight issuers will retain outside professional firms to spend three hours on disclosure preparation at an average cost of $400 per hour.

The increase in burdens and costs associated with conducting a factual inquiry for the disclosure statement requirement should be minimal given that issuers are likely to conduct simultaneously a similar factual inquiry for purposes of determining disqualification from Rule 504.

It is difficult to provide any standardized estimates of the costs involved with the factual inquiry. There is no central repository that aggregates information from all federal and state courts and regulators that would be relevant in determining whether a covered person has a disqualifying event in his or her past. In this regard, we are currently unable to estimate the burdens and costs for issuers in a verifiable way. We expect, however, that the costs to issuers may be higher or lower depending on the size of the issuer and the number and roles of covered persons. We realize there may be a wide range of issuer sizes, management structures, and offering participants associated with Rule 504 offerings and that different issuers may develop a variety of different factual inquiry procedures.

Where the issuer or any covered person will be subject to an event covered by Rule 504(b)(3) that existed before the effective date of these rules, the issuer will be required to prepare disclosure for each relevant Rule 504 offering. The estimates include the time and the cost of data gathering systems, the time and cost of preparing and reviewing disclosure by in-house and outside counsel and executive officers, and the time and cost of delivering or furnishing documents and retaining records.

Issuers conducting ongoing or continuous offerings may need to update their factual inquiry and disclosure as necessary to address additional covered persons. The annual incremental paperwork burden, therefore, depends on an issuer's Rule 504 offering activity and the changes in covered persons from offering to offering. For example, some issuers may only conduct one Rule 504 offering during a year while other issuers may have multiple, separate Rule 504 offerings during the course of the same year involving different financial intermediaries, newly hired executive officers or new 20% shareholders, any of which will result in a different group of covered persons. In deriving our estimates, we recognize that the burdens will likely vary among individual companies based on a number of factors, including the size and complexity of their organizations. We believe that some companies will experience costs in excess of this estimated average and other companies may experience less than the estimated average costs.

[514] *See* SEC Rel. No. 33–9414 (July 10, 2013).

[515] Based on staff analysis of Form D filings, there were 519 new Form D filings reporting reliance on Rule 504 and 179 new Form D filings reporting reliance on Rule 505 in 2015. *See* Figure 1 in Section V.A.1, above. Of the 179 new Form D filings reporting reliance on Rule 505 in 2015, 10 new Form D filings were made by reporting issuers under the Exchange Act and 169 new Form D filings were made by non-reporting issuers under the Exchange Act. For purposes of the PRA estimates, and based on the data provided for Rule 504 and Rule 505 offerings in 2015, we assume that approximately 800 issuers would file a Form D indicating reliance on Rule 504 after the effectiveness of the amendments to Rule 504 (calculated as follows: 519 new Rule 504 filings and 169 new Rule 505 filings by non-reporting issuers in 2015, rounded to the nearest hundredth, or 700 new Form D filings, plus 100 additional new Form D filings attributable to the amendments to Rule 504). This figure includes non-reporting issuers under the Exchange Act that, before adoption of amendments to Rule 504, would have conducted offerings pursuant to Rule 505, but that after adoption of the amendments to Rule 504 and repeal of Rule 505 will likely conduct their offerings pursuant to Rule 504.

VII. Final Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (''RFA'') [516] requires the Commission, in promulgating rules under Section 553 of the Administrative Procedure Act,[517] to consider the impact of those rules on small entities. The Commission has prepared this Final Regulatory Flexibility Analysis (''FRFA'') in accordance with Section 604 of the RFA.[518] This FRFA relates to the amendments to Rules 147 and 504, new Rule 147A and the repeal of Rule 505, all of which rules are under the Securities Act. An Initial Regulatory Flexibility Analysis (IRFA) was prepared in accordance with the RFA and included in the Proposing Release.

A. Need for the Rules

The amendments to Rule 147 are designed to modernize the safe harbor, consistent with the Section 3(a)(11) exemption from registration for intrastate securities offerings. New Rule 147A, which will be similar to amended Rule 147 but will have no restriction on offers and will allow issuers to be incorporated or organized out-of-state, establishes a new Securities Act exemption for intrastate offerings of securities by local companies. Together, the amendments to Rule 147 and new Rule 147A are designed to facilitate capital formation by making it easier to engage in exempt intrastate offerings while maintaining appropriate protections for investors who purchase securities in these offerings.

The amendments to Rule 504 are designed to facilitate capital formation by increasing the flexibility of state securities regulators to implement regional coordinated review programs that will facilitate regional offerings. The amendments to Rule 504 will raise the aggregate amount of securities an issuer may offer and sell in any 12-month period from $1 million to $5 million and disqualify certain bad actors from participating in Rule 504 offerings. We believe that raising the aggregate offering limitation and disqualifying certain bad actors will maximize the flexibility of state securities regulators to implement regional coordinated review programs and provide for greater consistency across Regulation D. We believe our amendment to Rule 504 to increase its aggregate offering ceiling from $1 million to $5 million will significantly diminish the utility of Rule 505 of Regulation D, and we are therefore repealing that rule.

[516] 5 U.S.C. 601 *et seq.*

[517] 5 U.S.C. 553.

[518] 5 U.S.C. 604.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on all aspects of the IRFA, including the number of small entities that would be affected by the proposed amendments, the existence or nature of the potential impact of the proposals on small entities discussed in the analysis, and how to quantify the impact of the proposed amendments. We did not receive any comments specifically addressing the IRFA. We did, however, receive comments from members of the public on matters that could potentially impact small entities. These comments are discussed at length by topic in the corresponding subsections of Sections II. and III. above.

Many commenters recommended making changes to the proposed rules that, in their view, would make the exemptions a more viable capital raising option for smaller issuers. Numerous commenters supported [519] the proposal to eliminate the Rule 147 limitation on offers to in-state residents while continuing to require that all sales be made to in-state residents. However, many commenters also supported [520] and the 2015 Small Business Forum recommended [521] retaining Rule 147 as a safe harbor under Section 3(a)(11), while adopting a substantially similar new exemption pursuant to the Commission's general exemptive authority under Section 28 as an alternative to the Section 3(a)(11) exemption for companies that are conducting an intrastate offering. Many commenters opposed any limits at the federal level on offering size or investment size,[522] and the 2015 Small Business Forum recommended permitting the states to set their own limits as appropriate.[523] In addition, several commenters supported [524] and the 2015 Small Business Forum recommended [525] exempting securities issued in reliance upon Rule 147 from the reporting requirements of Section 12(g) of the Exchange Act. Several commenters also supported interpreting the intrastate broker-dealer exemption under the Exchange Act to include intermediaries whose activities are limited to facilitating intrastate offerings using the Internet.[526]

Amended Rule 147 and new Rule 147 take into account some of the suggestions by commenters and the recommendations of the 2015 Small Business Forum on ways to make the intrastate offering exemptions more useful for small entities. For example, the final rules retain Rule 147 as a safe harbor under Section 3(a)(11), while adopting a substantially similar new exemption pursuant to the Commission's general exemptive authority under Section 28 as an alternative to the Section 3(a)(11) exemption for companies that are conducting an intrastate offering. As described above, the final rules will modernize existing Rule 147 and maintain a consistent approach across the two intrastate offering provisions, where possible. Also, given the comments received, the recommendations of the 2015 Small Business Forum and the local intrastate nature of the exemptions, amended Rule 147 and new Rule 147A will not contain any limits at the federal level on offering size or investment size.

As noted in Section II.C above, however, we are not persuaded that securities issued in reliance upon Rule 147 or Rule 147A should be exempt from the reporting requirements of Section 12(g) of the Exchange Act. Given the lack of ongoing reporting requirements under these rules, we believe that the Section 12(g) record holder and asset thresholds continue to provide an important baseline above which issuers should generally be subject to the disclosure obligations of the Exchange Act. As the shareholder base and total assets of these issuers grow, we believe that the additional protections that will be provided by registration under Section 12(g) are necessary and appropriate.

Additionally, as noted in Section II.B.2.c above, in response to the request by several commenters to interpret the intrastate broker-dealer exemption

[519] ABA Letter; City of Adrian Letter; Bishop Letter; Brelion Letter; CFA Letter; CFIRA Letter; CrowdCheck Letter; CrwdCorp Letter; Ely Letter; Guzik Letter; Love Letter; MacDougall Letter; Milken Letter; NASAA Letter; Newcomer Letter; NextSeed Letter; Pearl Letter; Terdal Letter; Wolff Letter; Zeoli Letter. *See also* Congressional Letter (expressing general support for the proposed amendments to Rule 147).

[520] ABA Letter; City of Adrian Letter; Bishop Letter; California Bar Letter; CFIRA Letter; Congressional Letter; CrowdCheck Letter; Guzik Letter; Milken Letter; NASAA Letter; NextSeed Letter; Pearl Letter; Wallin Letter; Orloff Letter; Zeoli Letter. No commenters supported eliminating Rule 147 as a safe harbor under Section 3(a)(11).

[521] *See* 2015 Small Business Forum Recommendations.

[522] ABA Letter; Campbell Letter; CFIRA Letter; Congressional Letter; CrowdCheck Letter; Guzik Letter; Milken Letter; NASAA Letter; NextSeed Letter; WBA Letter.

[523] *See* 2015 Small Business Forum Recommendations.

[524] CFIRA Letter; CrowdCheck Letter; Guzik Letter; Milken Letter; City of Adrian Letter.

[525] *See* 2015 Small Business Forum Recommendations.

[526] NASAA Letter; NextSeed Letter; WBA Letter.

under the Exchange Act to include intermediaries whose activities are limited to facilitating intrastate offerings using the Internet,[527] we are providing guidance that a broker-dealer whose business otherwise meets the requirements of the intrastate broker-dealer exemption should not cease to qualify for the intrastate broker-dealer exemption solely because it has a Web site that may be viewed by out-of-state persons, so long as the broker-dealer takes measures reasonably designed to ensure that its business remains exclusively intrastate.

A few commenters also recommended changes to Rules 504 and 505 that, in their view, would make the exemptions a more viable capital raising option for smaller issuers. Two commenters suggested[528] and the 2015 Small Business Forum recommended[529] that the Rule 504 offering amount limit be increased to $10 million. In addition, one commenter suggested[530] and the 2015 Small Business Forum recommended[531] that securities sold under Rule 504 be exempt from the requirements of Section 12(g). For Rule 505, one commenter suggested that the Commission consider changes to Rule 505 to facilitate very small offerings by early stage companies, such as a simple debt-only offering exemption for smaller issuers.[532] Another commenter noted that, if the proposed changes to Rule 504 are adopted, Rule 505 would be substantially similar to Rule 504, making Rule 505 unnecessary, unless the Commission increases the aggregate offering amount that may be raised under Rule 505 in any twelve-month period.[533]

As supported by many commenters, the final amendments to Rule 504 will increase the offering amount limit from $1 million to $5 million.[534] We believe that the $5 million threshold will facilitate issuers' ability to raise capital, while remaining within the statutory requirements of Section 3(b)(1). As noted in Section III.B above, although two commenters and the 2015 Small Business Forum recommended that the Commission increase the Rule 504 offering amount limit to $10 million, we are not exceeding the maximum offering amount permitted under Section 3(b)(1). Although, as several commenters noted, we could use our exemptive authority under Section 28 of the Securities Act to raise the maximum offering amount above $5 million,[535] in accord with the suggestion of one of those commenters,[536] we believe it appropriate to first observe market activity under a new maximum offering amount of $5 million before raising the Rule 504 offering limit any higher.

As noted in Section III.B above, we are not persuaded that securities issued in reliance upon Rule 504 should be exempt from the reporting requirements of Section 12(g) of the Exchange Act. Similar to Rules 147 and 147A, given the lack of ongoing reporting requirements under Rule 504, we believe that the Section 12(g) record holder and asset thresholds continue to provide an important baseline above which issuers should generally be subject to the disclosure obligations of the Exchange Act. As the shareholder base and total assets of these companies grow, we believe that the additional protections that will be provided by registration under Section 12(g) are necessary and appropriate.

After considering the comments, we are repealing Rule 505. As discussed in Section III.C, amending Rule 504 to increase the aggregate offering amount limit from $1 million to $5 million may further reduce the incentives to use Rule 505 by issuers contemplating an exempt offering. We also believe that, even if we were to raise the Rule 505 aggregate offering amount limit from $5 million to $10 million, or some higher amount, such a higher limit would not increase the utility of the Rule 505 exemption as compared to Rule 506 which has no limit, given the historically diminished utility of Rule 505 as compared to Rule 506.[537] Further, although Rule 505 provides issuers the ability to sell securities to up to 35 non-accredited investors without having to make a finding, as in Rule 506(b)(2)(ii), that such persons have the knowledge and experience in financial matters that they are capable of evaluating the merits and risks of the prospective investment,[538] this provision does not appear to have historically resulted in the Rule 505 exemption being widely utilized.[539] We will continue to evaluate whether we should replace Rule 505 with a substantially different exemption with new criteria, such as an exemption limited to a very small aggregate offering amount by early stage companies, or an exemption limited only to ''simple debt securities'' with very modest compliance requirements.

In the light of the changes discussed above, we believe that the final rules provide smaller issuers with an appropriately tailored regulatory regime that takes into account the needs of small entities to have viable intrastate capital formation options, while maintaining appropriate investor protections.

C. Small Entities Subject to the Rules

For purposes of the RFA, under our rules, an issuer, other than an investment company, is a ''small business'' or ''small organization'' if it has total assets of $5 million or less as of the end of its most recent fiscal year and is engaged or proposing to engage in an offering of securities which does not exceed $5 million.[540] For purposes of the RFA, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[541]

While we lack data on the number and size of Rule 147 offerings or the type of issuers currently relying on the Rule 147 safe harbor, the nature of the eligibility requirements and other restrictions of the rule lead us to believe that it is used by U.S. incorporated entities that are likely small businesses seeking to raise small amounts of capital locally without incurring the costs of registering with the Commission. Currently, most states that have enacted crowdfunding provisions require issuers that intend to conduct intrastate crowdfunding offerings to rely upon Rule 147. Since December 2011, when the first state crowdfunding provision was enacted, 179 state crowdfunding offerings have been reported to be filed with the respective state regulators.[542] Of these offerings, 166 were reported to be approved or cleared, as of June 20,

[527] NASAA Letter; NextSeed Letter; WBA Letter.

[528] CrowdCheck Letter; CFIRA Letter.

[529] *See* 2015 Small Business Forum Recommendations.

[530] Milken Letter.

[531] *See* 2015 Small Business Forum Recommendations.

[532] Milken Letter.

[533] ABA Letter. This commenter recommended, for example, that the offering amount limit could be raised from $5 million to $10 million or some larger amount, thereby preserving Rule 505 as a viable alternative exemption.

[534] ABA Letter; CFA Letter; CFIRA Letter; CrowdCheck Letter; Milken Letter; NASAA Letter.

[535] ABA Letter; Milken Letter.

[536] ABA Letter (''If the increase to $5 million is adopted, after there is experience with the use and operation of new Rule 504, the Commission may wish to consider using its exemption authority under Section 28 to increase the dollar limitation amount that may be offered under Rule 204.'').

[537] *See* note 22 above.

[538] *Cf.* 17 CFR 230.506(b)(2)(ii).

[539] *See* Unregistered Offerings White Paper.

[540] 17 CFR 230.157.

[541] 17 CFR 270.0–10(a).

[542] Based on estimates provided by NASAA in a meeting with staff of the SEC Division of Corporation Finance on July 20, 2016, *available athttps://www.sec.gov/comments/s7-22-15/s72215-32.pdf.*

2016.[543] We expect that almost all of the entities conducting these offerings were small issuers.

It is difficult to predict the number of small entities that will use amended Rule 147 and new Rule 147A due to the many variables included in the amendments. Nevertheless, we believe that the final rules will increase the overall number of offerings relying on the intrastate exemptions due to the ability to make out-of-state offers under Rule 147A, the expanded number of issuers that will be eligible to use the intrastate exemptions due to the lack of an in-state incorporation requirement in Rule 147A and the modernized ''doing business'' requirements of Rules 147 and 147A, and other significant changes summarized in Section II above.

The amendments to Rule 504 will affect small issuers that rely on this exemption from Securities Act registration. All issuers that sell securities in reliance on Regulation D are required to file a Form D with the Commission reporting the transaction. For the year ended December 31, 2015, 20,736 issuers made 22,854 new Form D filings, and of these Form D filings, 493 issuers relied on the Rule 504 exemption. Based on the information reported by issuers on Form D, we estimate that there were 269 small issuers [544] relying on the Rule 504 exemption in 2015. This number likely underestimates the actual number of small issuers relying on the Rule 504 exemption, however, because 41% of issuers that are not pooled investment funds and 38% of issuers that are pooled investment funds declined to report their amount of revenues or assets on their Form D filed with the Commission.

It is difficult to predict the number of small entities that will use amended Rule 504 due to the variables included in the amendments. Nevertheless, we believe that the final rules for Rule 504 will increase the overall number of offerings relying on the exemption due to the increase in the offering amount limit from $1 million to $5 million, as summarized in Section III above.

The repeal of Rule 505 will affect small issuers that rely on this exemption from Securities Act registration. For the year ended December 31, 2015, of the 20,736 issuers that made new Form D filings, 163 issuers relied on the Rule 505 exemption. Based on the information reported by issuers on Form D, we estimate that there were 112 small issuers [545] relying on the Rule 505 exemption in 2015. This number likely underestimates the actual number of small issuers relying on the Rule 504 exemption, however, because 25% of issuers that are not pooled investment funds and 38% of issuers that are pooled investment funds declined to report their amount of revenues or assets on their Form D filed with the Commission.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

Amended Rule 147 and new Rule 147A will not impose any reporting or recordkeeping requirements, but will require that issuers conducting offerings in reliance on these rules make certain specific disclosures to each offeree and purchaser in the offering. These disclosures will be made to each offeree in the manner in which any such offer is communicated and to each purchaser of a security in writing. Amended Rule 147 and new Rule 147A will also require that issuers place a specific legend on the certificate or other document evidencing the securities that are being offered in reliance on the rules.

In order to comply with Rules 147(d) and 147A(d), sales of securities must be made only to residents of the state or territory in which the issuer has its residence or who the issuer reasonably believes, at the time of sale, are residents of the state or territory in which the issuer has its residence. In light of the comments received on the proposal, Rules 147 and 147A will include a requirement that issuers obtain a written representation from each purchaser as to his or her residence.[546] This written representation, however, will not be sufficient, by itself, to establish reasonable belief. In addition to the written representation, an issuer will need to consider other facts and circumstances.

The amendments to Rule 504 will increase the aggregate offering ceiling from $1 million to $5 million and disqualify certain bad actors from participating in Rule 504 offerings. Issuers will need to comply with all the current requirements of Rule 504, including the filing of a Form D.[547] Also, as is the case under current Rule 504, issuers relying on the rule that wish to engage in general solicitation and issue freely tradable securities may also be required to register their offering with at least one state regulator. The amendments to Rule 504 will also impose a disclosure requirement with respect to bad actor disqualifying events that occurred before the effective date of the disqualification provisions and that would have triggered disqualification had they occurred after that date.[548] Such disclosure will be required to be in writing and furnished to each purchaser a reasonable time prior to sale. There no prescribed format for such disclosure.

In addition, we assume that issuers will exercise reasonable care to ascertain whether a disqualification exists with respect to any covered person and document their exercise of reasonable care. The steps undertaken by issuers to exercise reasonable care may vary with the circumstances. In addition, issuers will have to prepare any necessary disclosure about preexisting events. We expect that the costs of compliance will vary depending on the size and nature of the offering but will generally be lower for small entities than for larger ones because of the relative simplicity of their organizational structures and securities offerings and the generally smaller numbers of individuals and entities involved.

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives of our amendments, while minimizing any significant adverse impact on small entities. Specifically, we considered the following alternatives: (1) Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarifying, consolidating or simplifying compliance and reporting requirements for small entities under the rule; (3) using performance rather than design

[543] *Id.*

[544] Of this number, 265 of these issuers are not pooled investment funds, and 4 are pooled investment funds. We also note that issuers that are not pooled investment funds disclose only revenues on Form D, and not total assets. To estimate the number of small issuers, for non-pooled investment funds, we have included issuers that disclosed up to $5 million in revenues, including those with no revenues, and for pooled investment funds, we have included issuers that disclosed up to $5 million in net asset value, including those with no asset value.

[545] Of this number, 107 are not pooled investment funds, and 5 are pooled investment funds. We also note that issuers that are not pooled investment funds disclose only revenues on Form D and not total assets. To estimate the number of small issuers, for non-pooled investment funds, we have included issuers that disclosed up to $5 million in revenues, including those with no revenues, and for pooled investment funds, we have included issuers that disclosed up to $5 million in net asset value, including those with no asset value.

[546] *See* Rules 147(f)(1)(iii) and 147A(f)(1)(iii).

[547] Rule 503 requires an issuer relying on any exemption under Regulation D to file a Form D within 15 calendar days after the first sale of securities in the offering.

[548] *See* Rule 504(b)(3).

standards; and (4) exempting small entities from coverage of all or part of the amendments.

With respect to clarification, consolidation and simplification of the final rules' compliance and reporting requirements for small entities, amended Rule 147 and new Rule 147A do not impose any new reporting requirements. To the extent the final rules may be considered to create a new compliance requirement to have a reasonable belief that a prospective purchaser is a resident of the state or territory in which the issuer is a resident, including a requirement that issuers obtain a written representation from each purchaser as to his or her residence (as currently required in Rule 147), the precise steps necessary to meet the ''reasonable belief'' requirement will vary according to the circumstances, and this flexible standard will be applicable to all issuers, regardless of size. Overall, the final rules are designed to streamline and modernize the rule for all issuers, both large and small.

In connection with amended Rule 147 and new Rule 147A, we do not think it feasible or appropriate to establish different compliance or reporting requirements or timetables for small entities. The final rules are designed to facilitate access to capital for both large and small issuers, but particularly smaller issuers who may satisfy their financing needs by limiting the sales of their securities only to residents of the state or territory in which the issuers are resident. The final rules do not contain any reporting standards and the compliance requirements they do include are minimal and designed with the limited resources of smaller issuers in mind. Similarly, we do not believe it is necessary to clarify, consolidate or simplify reporting or compliance requirements for small entities as the final rules contain more streamlined requirements for all issuers, both large and small. For example, the rules simplify the ''doing business'' in-state determination by amending the current requirements in Rule 147 so that an issuer's ability to rely on the safe harbor will be based on its ability to satisfy updated and modernized issuer requirements, while continuing to require issuers to have an in-state presence sufficient to justify reliance on the Section 3(a)(11) exemption. New Rule 147A includes similar modernized ''doing business'' in-state requirements. With respect to using performance rather than design standards, we note that the final rules establish a ''reasonable belief'' standard for the determination of a prospective purchaser's residency status, which we believe is a performance standard. Although the final rules will require a written representation from investors, the rules recognize that reasonable belief can be established in a variety of ways (*e.g.,* through pre-existing knowledge of the purchaser, obtaining supporting documentation, or using other appropriate methods). We believe that the use of a performance standard accommodates different types of offerings and purchasers without imposing overly burdensome methods that may be ill-suited or unnecessary to a particular offering or purchaser, given the facts and circumstances.

With respect to exempting small entities from amended Rule 147 and new Rule 147A, we believe such an approach would increase, rather than decrease, their regulatory burden. The final rules are designed to facilitate an issuer's access to capital, regardless of the size of the issuer. We have endeavored throughout these rules to minimize the regulatory burden on all issuers, including small entities, while meeting our regulatory objectives.

In connection with our amendments to Rule 504 of Regulation D, we do not think it is feasible or appropriate to establish different compliance or reporting requirements or timetables for small entities. Our amendments are intended to facilitate issuers' access to capital and are particularly designed for smaller issuers who are not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act and who are offering no more than $5 million of their securities in any twelve month period. The amendments also exclude felons and other ''bad actors'' from involvement in Rule 504 offerings, which we believe could benefit small issuers by increasing investor protection and trust in such offerings. Increased investor trust could potentially reduce the cost of capital and create greater opportunities for small businesses to raise capital.

With respect to clarification, consolidation and simplification of the compliance and reporting requirements for small entities, the amendments to Rule 504 do not impose any new reporting requirements. To the extent the amendments may be considered to create a new compliance requirement to exercise reasonable care to ascertain whether a disqualification exists with respect to any offering and to furnish a written description of preexisting triggering events, the precise steps necessary to meet that requirement will vary according to the circumstances. In general, we believe the requirement will more easily be met by small entities than by larger ones because we believe that their structures and securities offerings would be generally less complex and involve fewer participants.

With respect to the use of performance or design standards, we note that the ''reasonable care'' exception is a performance standard. With respect to exempting small entities from coverage of these amendments, we believe that such an approach would increase, rather than decrease, their regulatory burden. Regulation D was designed, in part, to provide exemptive relief for smaller issuers. Furthermore, exempting small entities from Rule 504's bad actor provisions could result in a decrease in investor protection and trust in this small offerings market, thereby potentially increasing the issuer's cost of capital. We have endeavored to minimize the regulatory burden on all issuers, including small entities, while meeting our regulatory objectives, and have included a ''reasonable care'' exception and waiver authority for the Commission to provide additional flexibility with respect to the application of these amendments.

VIII. Statutory Basis and Text of Final Amendments

The amendments contained in this release are being adopted under the authority set forth in Sections 3(b)(1), 19 and 28 of the Securities Act of 1933, as amended, Sections 12, 13, 15, 23(a) and 36 of the Securities Exchange Act of 1934, Section 38(a) of the Investment Company Act of 1940 and Section 211(a) of the Investment Advisers Act.

List of Subjects

17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

17 CFR 230, 239, 240, 249, 270 and 275

Reporting and recordkeeping requirements, Securities.

Text of Final Amendments

For the reasons set out above, the Commission is amending Title 17, chapter II of the Code of Federal Regulations, as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart A—Organization and Program Management

■ 1. The authority citation for Part 200, Subpart A, continues to read, in part as follows:

Authority: 15 U.S.C. 77c, 77o, 77s, 77z–3, 77sss, 78d, 78d–1, 78d–2, 78o–4, 78w, 78ll(d), 78mm, 80a–37, 80b–11, 7202, and 7211 *et seq.,* unless otherwise noted.

* * * * *

§ 200.30–1 [Amended]

■ 2. Amend § 200.30–1 by:

■ a. In paragraph (a)(7), removing the references to ''4(3)'', ''4(3)(b)'' and ''77d(3)(B)'' and adding in their places ''4(a)(3)'', ''4(a)(3)(B)'' and ''77d(a)(3)(B)'' respectively; and

■ b. In paragraph (c), removing the reference to ''§§ 230.505(b)(2)(iii)(C)'' and adding in its place ''§§ 230.504(b)(3)''.

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 3. The authority citation for part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l,* 78m, 78n, 78o, 78o–7 note, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, and Public Law 112–106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

■ 4. § 230.147 is revised to read as follows:

§ 230.147 Intrastate offers and sales.

(a) This section shall not raise any presumption that the exemption provided by section 3(a)(11) of the Act (15 U.S.C. 77c(a)(11)) is not available for transactions by an issuer which do not satisfy all of the provisions of this section.

(b) *Manner of offers and sales.* An issuer, or any person acting on behalf of the issuer, shall be deemed to conduct an offering in compliance with section 3(a)(11) of the Act (15 U.S.C. 77c(a)(11)), where offers and sales are made only to persons resident within the same state or territory in which the issuer is resident and doing business, within the meaning of section 3(a)(11) of the Act, so long as the issuer complies with the provisions of paragraphs (c), (d), and (f) through (h) of this section.

(c) *Nature of the issuer.* The issuer of the securities shall at the time of any offers and sales be a person resident and doing business within the state or territory in which all of the offers and sales are made.

(1) The issuer shall be deemed to be a resident of the state or territory in which:

(i) It is incorporated or organized, and it has its principal place of business, if a corporation, limited partnership, trust or other form of business organization that is organized under state or territorial law. The issuer shall be deemed to have its principal place of business in a state or territory in which the officers, partners or managers of the issuer primarily direct, control and coordinate the activities of the issuer;

(ii) It has its principal place of business, as defined in paragraph (c)(1)(i) of this section, if a general partnership or other form of business organization that is not organized under any state or territorial law;

(iii) Such person's principal residence is located, if an individual.

Instruction to paragraph (c)(1): An issuer that has previously conducted an intrastate offering pursuant to this section (§ 230.147) or Rule 147A (§ 230.147A) may not conduct another intrastate offering pursuant to this section (§ 230.147) in a different state or territory, until the expiration of the time period specified in paragraph (e) of this section (§ 230.147(e)) or paragraph (e) of Rule 147A (§ 230.147A(e)), calculated on the basis of the date of the last sale in such offering.

(2) The issuer shall be deemed to be doing business within a state or territory if the issuer satisfies at least one of the following requirements:

(i) The issuer derived at least 80% of its consolidated gross revenues from the operation of a business or of real property located in or from the rendering of services within such state or territory;

Instruction to paragraph (c)(2)(i): Revenues must be calculated based on the issuer's most recent fiscal year, if the first offer of securities pursuant to this section is made during the first six months of the issuer's current fiscal year, and based on the first six months of the issuer's current fiscal year or during the twelve-month fiscal period ending with such six-month period, if the first offer of securities pursuant to this section is made during the last six months of the issuer's current fiscal year.

(ii) The issuer had at the end of its most recent semi-annual fiscal period prior to an initial offer of securities in any offering or subsequent offering pursuant to this section, at least 80% of its assets and those of its subsidiaries on a consolidated basis located within such state or territory;

(iii) The issuer intends to use and uses at least 80% of the net proceeds to the issuer from sales made pursuant to this section (§ 230.147) in connection with the operation of a business or of real property, the purchase of real property located in, or the rendering of services within such state or territory; or

(iv) A majority of the issuer's employees are based in such state or territory.

(d) *Residence of offerees and purchasers.* Offers and sales of securities pursuant to this section (§ 230.147) shall be made only to residents of the state or territory in which the issuer is resident, as determined pursuant to paragraph (c) of this section, or who the issuer reasonably believes, at the time of the offer and sale, are residents of the state or territory in which the issuer is resident. For purposes of determining the residence of offerees and purchasers:

(1) A corporation, partnership, limited liability company, trust or other form of business organization shall be deemed to be a resident of a state or territory if, at the time of the offer and sale to it, it has its principal place of business, as defined in paragraph (c)(1)(i) of this section, within such state or territory.

Instruction to paragraph (d)(1): A trust that is not deemed by the law of the state or territory of its creation to be a separate legal entity is deemed to be a resident of each state or territory in which its trustee is, or trustees are, resident.

(2) Individuals shall be deemed to be residents of a state or territory if such individuals have, at the time of the offer and sale to them, their principal residence in the state or territory.

(3) A corporation, partnership, trust or other form of business organization, which is organized for the specific purpose of acquiring securities offered pursuant to this section (§ 230.147), shall not be a resident of a state or territory unless all of the beneficial owners of such organization are residents of such state or territory.

Instruction to paragraph (d): Obtaining a written representation from purchasers of in-state residency status will not, without more, be sufficient to establish a reasonable belief that such purchasers are in-state residents.

(e) *Limitation on resales.* For a period of six months from the date of the sale by the issuer of a security pursuant to this section (§ 230.147), any resale of such security shall be made only to persons resident within the state or territory in which the issuer was resident, as determined pursuant to paragraph (c) of this section, at the time of the sale of the security by the issuer.

Instruction to paragraph (e): In the case of convertible securities, resales of either the convertible security, or if it is converted, the underlying security, could be made during the period described in paragraph (e) only to persons resident within such state or territory. For purposes of this paragraph (e), a conversion in reliance on section 3(a)(9) of the Act (15 U.S.C. 77c(a)(9)) does not begin a new period.

(f) *Precautions against interstate sales.* (1) The issuer shall, in connection with any securities sold by it pursuant to this section:

(i) Place a prominent legend on the certificate or other document evidencing the security stating that: ''Offers and sales of these securities were made under an exemption from registration and have not been registered under the Securities Act of 1933. For a period of six months from the date of the sale by the issuer of these securities, any resale of these securities (or the underlying securities in the case of convertible securities) shall be made only to persons resident within the state or territory of [identify the name of the state or territory in which the issuer was resident at the time of the sale of the securities by the issuer].'';

(ii) Issue stop transfer instructions to the issuer's transfer agent, if any, with respect to the securities, or, if the issuer transfers its own securities, make a notation in the appropriate records of the issuer; and

(iii) Obtain a written representation from each purchaser as to his or her residence.

(2) The issuer shall, in connection with the issuance of new certificates for any of the securities that are sold pursuant to this section (§ 230.147) that are presented for transfer during the time period specified in paragraph (e), take the steps required by paragraphs (f)(1)(i) and (ii) of this section.

(3) The issuer shall, at the time of any offer or sale by it of a security pursuant to this section (§ 230.147), prominently disclose to each offeree in the manner in which any such offer is communicated and to each purchaser of such security in writing a reasonable period of time before the date of sale, the following: ''Sales will be made only to residents of [identify the name of the state or territory in which the issuer was resident at the time of the sale of the securities by the issuer]. Offers and sales of these securities are made under an exemption from registration and have not been registered under the Securities Act of 1933. For a period of six months from the date of the sale by the issuer of the securities, any resale of the securities (or the underlying securities in the case of convertible securities) shall be made only to persons resident within the state or territory of [identify the name of the state or territory in which the issuer was resident at the time of the sale of the securities by the issuer].''

(g) *Integration with other offerings.* Offers or sales made in reliance on this section will not be integrated with:

(1) Offers or sales of securities made prior to the commencement of offers and sales of securities pursuant to this section (§ 230.147); or

(2) Offers or sales made after completion of offers and sales of securities pursuant to this section (§ 230.147) that are:

(i) Registered under the Act, except as provided in paragraph (h) of this section (§ 230.147);

(ii) Exempt from registration under Regulation A (§§ 230.251 through 230.263);

(iii) Exempt from registration under Rule 701 (§ 230.701);

(iv) Made pursuant to an employee benefit plan;

(v) Exempt from registration under Regulation S (§§ 230.901 through 230.905);

(vi) Exempt from registration under section 4(a)(6) of the Act (15 U.S.C. 77d(a)(6)); or

(vii) Made more than six months after the completion of an offering conducted pursuant to this section (§ 230.147).

Instruction to paragraph (g): If none of the safe harbors applies, whether subsequent offers and sales of securities will be integrated with any securities offered or sold pursuant to this section (§ 230.147) will depend on the particular facts and circumstances.

(h) *Offerings limited to qualified institutional buyers and institutional accredited investors.* Where an issuer decides to register an offering under the Act after making offers in reliance on this section (§ 230.147) limited only to qualified institutional buyers and institutional accredited investors referenced in section 5(d) of the Act, such offers will not be subject to integration with any subsequent registered offering. If the issuer makes offers in reliance on this section (§ 230.147) to persons other than qualified institutional buyers and institutional accredited investors referenced in section 5(d) of the Act, such offers will not be subject to integration if the issuer (and any underwriter, broker, dealer, or agent used by the issuer in connection with the proposed offering) waits at least 30 calendar days between the last such offer made in reliance on this section (§ 230.147) and the filing of the registration statement with the Commission.

■ 5. Add § 230.147A to read as follows:

§ 230.147A Intrastate sales exemption.

(a) *Scope of the exemption.* Offers and sales by or on behalf of an issuer of its securities made in accordance with this section (§ 230.147A) are exempt from section 5 of the Act (15 U.S.C. 77e). This exemption is not available to an issuer that is an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*).

(b) *Manner of offers and sales.* An issuer, or any person acting on behalf of the issuer, may rely on this exemption to make offers and sales using any form of general solicitation and general advertising, so long as the issuer complies with the provisions of paragraphs (c), (d), and (f) through (h) of this section.

(c) *Nature of the issuer.* The issuer of the securities shall at the time of any offers and sales be a person resident and doing business within the state or territory in which all of the sales are made.

(1) The issuer shall be deemed to be a resident of the state or territory in which it has its principal place of business. The issuer shall be deemed to have its principal place of business in a state or territory in which the officers, partners or managers of the issuer primarily direct, control and coordinate the activities of the issuer.

(2) The issuer shall be deemed to be doing business within a state or territory if the issuer satisfies at least one of the following requirements:

(i) The issuer derived at least 80% of its consolidated gross revenues from the operation of a business or of real property located in or from the rendering of services within such state or territory;

Instruction to paragraph (c)(2)(i): Revenues must be calculated based on the issuer's most recent fiscal year, if the first offer of securities pursuant to this section is made during the first six months of the issuer's current fiscal year, and based on the first six months of the issuer's current fiscal year or during the twelve-month fiscal period ending with such six-month period, if the first offer of securities pursuant to this section is made during the last six months of the issuer's current fiscal year.

(ii) The issuer had at the end of its most recent semi-annual fiscal period prior to an initial offer of securities in any offering or subsequent offering pursuant to this section, at least 80% of its assets and those of its subsidiaries on a consolidated basis located within such state or territory;

(iii) The issuer intends to use and uses at least 80% of the net proceeds to the issuer from sales made pursuant to this section (§ 230.147A) in connection with the operation of a business or of real property, the purchase of real property located in, or the rendering of services within such state or territory; or

(iv) A majority of the issuer's employees are based in such state or territory.

Instruction to paragraph (c): An issuer that has previously conducted an intrastate offering pursuant to this section (§ 230.147A) or Rule 147 (§ 230.147) may not conduct another intrastate offering pursuant to this section (§ 230.147A) in a different state or territory, until the expiration of the time period specified in paragraph (e) of this section (§ 230.147A(e)) or paragraph (e) of Rule 147 (§ 230.147(e)), calculated on the basis of the date of the last sale in such offering.

(d) *Residence of purchasers.* Sales of securities pursuant to this section (§ 230.147A) shall be made only to residents of the state or territory in which the issuer is resident, as determined pursuant to paragraph (c) of this section, or who the issuer reasonably believes, at the time of sale, are residents of the state or territory in which the issuer is resident. For purposes of determining the residence of purchasers:

(1) A corporation, partnership, limited liability company, trust or other form of business organization shall be deemed to be a resident of a state or territory if, at the time of sale to it, it has its principal place of business, as defined in paragraph (c)(1) of this section, within such state or territory.

Instruction to paragraph (d)(1): A trust that is not deemed by the law of the state or territory of its creation to be a separate legal entity is deemed to be a resident of each state or territory in which its trustee is, or trustees are, resident.

(2) Individuals shall be deemed to be residents of a state or territory if such individuals have, at the time of sale to them, their principal residence in the state or territory.

(3) A corporation, partnership, trust or other form of business organization, which is organized for the specific purpose of acquiring securities offered pursuant to this section (§ 230.147A), shall not be a resident of a state or territory unless all of the beneficial owners of such organization are residents of such state or territory.

Instruction to paragraph (d): Obtaining a written representation from purchasers of in-state residency status will not, without more, be sufficient to establish a reasonable belief that such purchasers are in-state residents.

(e) *Limitation on resales.* For a period of six months from the date of the sale by the issuer of a security pursuant to this section (§ 230.147A), any resale of such security shall be made only to persons resident within the state or territory in which the issuer was resident, as determined pursuant to paragraph (c) of this section, at the time of the sale of the security by the issuer.

Instruction to paragraph (e): In the case of convertible securities, resales of either the convertible security, or if it is converted, the underlying security, could be made during the period described in paragraph (e) only to persons resident within such state or territory. For purposes of this paragraph (e), a conversion in reliance on section 3(a)(9) of the Act (15 U.S.C. 77c(a)(9)) does not begin a new period.

(f) *Precautions against interstate sales.* (1) The issuer shall, in connection with any securities sold by it pursuant to this section:

(i) Place a prominent legend on the certificate or other document evidencing the security stating that: ''Offers and sales of these securities were made under an exemption from registration and have not been registered under the Securities Act of 1933. For a period of six months from the date of the sale by the issuer of these securities, any resale of these securities (or the underlying securities in the case of convertible securities) shall be made only to persons resident within the state or territory of [identify the name of the state or territory in which the issuer was resident at the time of the sale of the securities by the issuer].'';

(ii) Issue stop transfer instructions to the issuer's transfer agent, if any, with respect to the securities, or, if the issuer transfers its own securities, make a notation in the appropriate records of the issuer; and

(iii) Obtain a written representation from each purchaser as to his or her residence.

(2) The issuer shall, in connection with the issuance of new certificates for any of the securities that are sold pursuant to this section (§ 230.147A) that are presented for transfer during the time period specified in paragraph (e), take the steps required by paragraphs (f)(1)(i) and (ii) of this section.

(3) The issuer shall, at the time of any offer or sale by it of a security pursuant to this section (§ 230.147A), prominently disclose to each offeree in the manner in which any such offer is communicated and to each purchaser of such security in writing a reasonable period of time before the date of sale, the following: ''Sales will be made only to residents of the state or territory of [identify the name of the state or territory in which the issuer was resident at the time of the sale of the securities by the issuer]. Offers and sales of these securities are made under an exemption from registration and have not been registered under the Securities Act of 1933. For a period of six months from the date of the sale by the issuer of the securities, any resale of the securities (or the underlying securities in the case of convertible securities) shall be made only to persons resident within the state or territory of [identify the name of the state or territory in which the issuer was resident at the time of the sale of the securities by the issuer].''

(g) *Integration with other offerings.* Offers or sales made in reliance on this section will not be integrated with:

(1) Offers or sales of securities made prior to the commencement of offers and sales of securities pursuant to this section (§ 230.147A); or

(2) Offers or sales of securities made after completion of offers and sales of securities pursuant to this section (§ 230.147A) that are:

(i) Registered under the Act, except as provided in paragraph (h) of this section (§ 230.147A);

(ii) Exempt from registration under Regulation A (§§ 230.251 through 230.263);

(iii) Exempt from registration under Rule 701 (§ 230.701);

(iv) Made pursuant to an employee benefit plan;

(v) Exempt from registration under Regulation S (§§ 230.901 through 230.905);

(vi) Exempt from registration under section 4(a)(6) of the Act (15 U.S.C. 77d(a)(6)); or

(vii) Made more than six months after the completion of an offering conducted pursuant to this section (§ 230.147A).

Instruction to paragraph (g): If none of the safe harbors applies, whether subsequent offers and sales of securities will be integrated with any securities offered or sold pursuant to this section (§ 230.147A) will depend on the particular facts and circumstances.

(h) *Offerings limited to qualified institutional buyers and institutional accredited investors.* Where an issuer decides to register an offering under the Act after making offers in reliance on this section (§ 230.147A) limited only to qualified institutional buyers and institutional accredited investors referenced in section 5(d) of the Act, such offers will not be subject to integration with any subsequent registered offering. If the issuer makes offers in reliance on this section (§ 230.147A) to persons other than qualified institutional buyers and institutional accredited investors referenced in section 5(d) of the Act, such offers will not be subject to integration if the issuer (and any underwriter, broker, dealer, or agent used by the issuer in connection with the proposed offering) waits at least 30 calendar days between the last such offer made in reliance on this section (§ 230.147A) and the filing of the registration statement with the Commission.

§ 230.501 [Amended]

■ 6. Amend § 230.501 paragraph (e) introductory text by removing the reference to ''§§ 230.505(b) and 230.506(b)'' and adding in its place ''§ 230.506(b)''.

§ 230.502 [Amended]

■ 7. Amend § 230.502 by:
■ a. In paragraph (b)(1), removing the reference to ''§ 230.505 or'';
■ b. In paragraph (b)(2)(iv), removing the reference to ''§ 230.505 or'';
■ c. In paragraph (b)(2)(v), removing the reference to ''§ 230.505 or''; and
■ d. In paragraph (b)(2)(vii), removing the reference to ''§ 230.505 or'';

§ 230.503 [Amended]

■ 8. Amend § 230.503 paragraph (a)(1) by removing the comma after ''§ 230.504'' and the reference to ''§ 230.505,''.

■ 9. In § 230.504, the section heading and paragraph (b)(2) are revised, and paragraph (b)(3) is added, to read as follows:

§ 230.504 Exemption for limited offerings and sales of securities not exceeding $5,000,000.

* * * * *

(b) * * *

(2) The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed $5,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this § 230.504, in violation of section 5(a) of the Securities Act.

Instruction to paragraph (b)(2): If a transaction under § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $5,000,000 of its securities on January 1, 2014 under this § 230.504 and an additional $500,000 of its securities on July 1, 2014, this § 230.504 would not be available for the later sale, but would still be applicable to the January 1, 2014 sale.

(3) *Disqualifications.* No exemption under this section shall be available for the securities of any issuer if such issuer would be subject to disqualification under § 230.506(d) on or after January 20, 2017; provided that disclosure of prior ''bad actor'' events shall be required in accordance with § 230.506(e).

Instruction to paragraph (b)(3): For purposes of disclosure of prior ''bad actor'' events pursuant to § 230.506(e), an issuer shall furnish to each purchaser, a reasonable time prior to sale, a description in writing of any matters that would have triggered disqualification under this paragraph (b)(3) but occurred before January 20, 2017.

§ 230.505 [Removed and Reserved]

■ 10. § 230.505 is removed and reserved.

§ 230.507 [Amended]

■ 11. Amend § 230.507 by:
■ a. In the section heading, removing the comma after ''§§ 230.504'' and the reference to ''230.505''; and
■ b. In paragraph (a), removing the reference to ''§ 230.505,'' and adding in its place ''§ 230.504'' and removing the reference to ''§ 230.505.''

§ 230.508 [Amended]

■ 12. Amend § 230.508 by:
■ a. In paragraph (a) introductory text, removing the comma after ''§ 230.504'' and the reference to ''§ 230.505'';
■ b. In paragraph (a)(2), removing the comma after ''§ 230.504'' and the reference to ''paragraphs (b)(2)(i) and (ii) of § 230.505'':
■ c. In paragraph (a)(3), removing the comma after ''§ 230.504'' and the reference to ''§ 230.505''; and
■ d. In paragraph (b), removing the comma after ''§ 230.504'' and the reference to ''§ 230.505.''

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 13. The authority citation for part 239 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78o–7 note, 78u–5, 78w(a), 78ll, 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, 80a–37, and Sec. 71003 and Sec. 84001, Pub. L. 114–94, 129 Stat. 1312, unless otherwise noted.

* * * * *

§ 239.500 [Amended]

■ 14. Amend § 239.500 by:
■ a. In the section heading, removing the reference to ''4(5)'' and adding in its place ''4(a)(5)'';
■ b. In paragraph (a)(1), removing the comma after ''§ 230.504'' and the reference to ''§ 230.505,''; and removing the reference to ''4(5)'' and adding in its place ''4(a)(5)''; and
■ c. Amend Form D (referenced in § 239.500) by:
■ i. In Item 6, removing the phrase ''Rule 505'' and the appropriate check box;
■ ii. Under ''Signature and Submission,'' replace the third paragraph under ''Terms of Submission'' with the following sentence: ''Certifying that, if the issuer is claiming a Regulation D exemption for the offering, the issuer is not disqualified from relying on Rule 504 or Rule 506 for one of the reasons stated in Rule 504(b)(3) or Rule 506(d). ''

(**Note:** The text of Form D does not, and the amendments will not, appear in the Code of Federal Regulations.)

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 15. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 et. seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111–203, 939A, 124 Stat. 1376, (2010), unless otherwise noted.

* * * * *

§ 240.15g–9 [Amended]

■ 16. Amend § 240.15g–9 paragraph (c)(2) by removing the reference to ''230.505 or''; and removing the reference to ''4(2)'' and adding in its place ''4(a)(2)''.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 17. The authority citation for part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* 18 U.S.C. 1350; Sec. 953(b), Public Law 111–203, 124 Stat. 1904; Sec. 102(a)(3), Public Law 112–106, 126 Stat. 309 (2012); Sec. 107, Public Law 112–106, 126 Stat. 313 (2012), and Sec. 72001, Public Law 114–94, 129 Stat. 1312 (2015), unless otherwise noted.

* * * * *

§ 249.308 [Amended]

■ 18. Amend the Instruction to Item 9.01 in Form 8–K (referenced in § 249.308) by removing the phrase ''Rules 505 and 506 of Regulation D (17

CFR 230.505 and'' and adding in its place ''Rule 506 of Regulation D (17 CFR''.

(Note: The text of Form 8–K does not, and the amendments will not, appear in the Code of Federal Regulations.)

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 19. The authority citation for Part 270 continues to read in part as follows:

Authority: 15 U.S.C. 80a–1 *et seq.,* 80a–34(d), 80a–37, and 80a–39, unless otherwise noted.

* * * * *

§ 270.17j–1 [Amended]

■ 20. Amend § 270.17j–1 paragraph (a)(8) by removing the references to ''4(2)'', ''4(5)'', ''77d(2)'' and ''77d(5)'' and adding in their places ''4(a)(2)'', ''4(a)(5)'', ''77d(a)(2)'' and ''77d(a)(5)'', respectively; and removing the comma after ''rule 504'', the reference to ''rule 505,'', the comma after ''230.504'' and the reference to ''230.505,''.

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 21. The authority citation for Part 275 continues to read in part as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(G), 80b–2(a)(11)(H), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6a, and 80b–11, unless otherwise noted.

* * * * *

§ 275.204A–1 [Amended]

■ 22. Amend § 275.204A–1 paragraph (e)(7) by removing the references to ''4(2)'', ''4(5)'', ''77d(2)'' and ''77d(5)'' and adding in their places ''4(a)(2)'', ''4(a)(5)'', ''77d(a)(2)'' and ''77d(a)(5)'', respectively; and removing the comma after ''230.504'' and the reference to ''230.505,''.

Dated: October 26, 2016.

By the Commission.

Brent J. Fields,

Secretary.

[FR Doc. 2016–26348 Filed 11–18–16; 8:45 am]

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Part V

Consumer Product Safety Commission

16 CFR Part 1241

Safety Standard for Portable Generators; Proposed Rule

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1241

[Docket No. CPSC–2006–0057]

RIN 3041–AC36

Safety Standard for Portable Generators

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Consumer Product Safety Commission has determined preliminarily that there may be an unreasonable risk of injury and death associated with portable generators. To address this risk, the Commission proposes a rule that limits CO emissions from operating portable generators. Specifically, the proposed rule would require that portable generators powered by handheld spark-ignition (SI) engines and Class I SI engines not exceed a weighted CO emission rate of 75 grams per hour (g/hr); generators powered by one-cylinder, Class II SI engines must not exceed a weighted CO emission rate of 150 g/h; and generators powered by Class II SI engines with two cylinders must not exceed a weighted emission rate of 300 g/h.

DATES: Submit comments by February 6, 2017.

ADDRESSES: You may submit comments, identified by Docket No. CPSC–2006–0057, by any of the following methods:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: *http://www.regulations.gov.* Follow the instructions for submitting comments. The Commission does not accept comments submitted by electronic mail (email), except through *www.regulations.gov.* The Commission encourages you to submit electronic comments by using the Federal eRulemaking Portal, as described above.

Written Submissions: Submit written submissions by mail/hand delivery/courier to: Office of the Secretary, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923.

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to: *http://www.regulations.gov.* Do not submit confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If furnished at all, such information should be submitted in writing.

Docket: For access to the docket to read background documents or comments received, go to: *http://www.regulations.gov,* and insert the docket number CPSC–2006–0057, into the ''Search'' box, and follow the prompts.

FOR FURTHER INFORMATION CONTACT:
Janet Buyer, Project Manager, Directorate for Engineering Sciences, Consumer Product Safety Commission, 5 Research Place, Rockville, MD 20850; telephone: 301–987–2293; email: *jbuyer@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A portable generator is an engine-driven machine that converts chemical energy from the fuel powering the engine into rotational energy, which, in turn, is converted to electrical power. Reports of portable generator-related fatalities and injuries prompted the U.S. Consumer Product Safety Commission (Commission or CPSC) to publish an advance notice of proposed rulemaking (ANPR) in December 2006 to consider whether there may be an unreasonable risk of injury and death associated with portable generators (71 FR 74472 (December 12, 2006)). The ANPR began a rulemaking proceeding under the Consumer Product Safety Act (CPSA). The Commission received 10 comments in response to the ANPR. Subsequently, in a two-part technology demonstration program, CPSC contracted with the University of Alabama (UA) to conduct a low CO emission prototype generator technology development and durability demonstration and contracted with NIST to conduct comparative testing of an unmodified carbureted generator and prototype generators in an attached garage of a test house facility. CPSC staff published a report regarding the results of the UA technology demonstration and received 12 comments in response to this report. NIST published a report concerning its comparative testing of generators and received four comments in response to its report. The Commission is now issuing a notice of proposed rulemaking (NPR) that would establish requirements for carbon monoxide emission rates.[1] The information discussed in this preamble is derived from CPSC staff's briefing package for the NPR, which is available on CPSC's Web site at: *https://www.cpsc.gov/s3fs-public/ProposedRuleSafetyStandardforPortableGenerators.pdf.*

II. Statutory Authority

Portable generators are ''consumer products'' that can be regulated by the Commission under the authority of the CPSA. *See* 15 U.S.C. 2052(a). Section 7 of the CPSA authorizes the Commission to promulgate a mandatory consumer product safety standard that sets forth certain performance requirements for a consumer product or that sets forth certain requirements that a product be marked or accompanied by clear and adequate warnings or instructions. A performance, warning, or instruction standard must be reasonably necessary to prevent or reduce an unreasonable risk or injury. *Id.*

Section 9 of the CPSA specifies the procedure that the Commission must follow to issue a consumer product safety standard under section 7. In accordance with section 9, the Commission may commence rulemaking by issuing an ANPR; as noted previously, the Commission issued an ANPR on portable generators in December 2006. (71 FR 74472 (December 12, 2006)). Section 9 authorizes the Commission to issue an NPR including the proposed rule and a preliminary regulatory analysis, in accordance with section 9(c) of the CPSA and request comments regarding the risk of injury identified by the Commission, the regulatory alternatives being considered, and other possible alternatives for addressing the risk. *Id.* 2058(c). Next, the Commission will consider the comments received in response to the proposed rule and decide whether to issue a final rule, along with a final regulatory analysis. *Id.* 2058(c)–(f). The Commission also will provide an opportunity for interested persons to make oral presentations of the data, views, or arguments, in accordance with section 9(d)(2) of the CPSA. *Id.* 2058(d)(2).

According to section 9(f)(1) of the CPSA, before promulgating a consumer product safety rule, the Commission must consider, and make appropriate findings to be included in the rule, on the following issues:

- The degree and nature of the risk of injury that the rule is designed to eliminate or reduce;
- the approximate number of consumer products subject to the rule;
- the need of the public for the products subject to the rule and the

[1] The Commission voted (4–1) to publish this notice in the **Federal Register**. Chairman Elliot F. Kaye and Commissioners Robert S. Adler, Joseph P. Mohorovic, and Marietta S. Robinson voted to approve publication of the proposed rule. Commissioner Ann Marie Buerkle voted against publication of the proposed rule.

probable effect the rule will have on utility, cost, or availability of such products; and

- the means to achieve the objective of the rule while minimizing adverse effects on competition, manufacturing, and commercial practices.

Id. 2058(f)(1). Under section 9(f)(3) of the CPSA, to issue a final rule, the Commission must find that the rule is ''reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product'' and that issuing the rule is in the public interest. *Id.* 2058(f)(3)(A)&(B). Additionally, if a voluntary standard addressing the risk of injury has been adopted and implemented, the Commission must find that:

- the voluntary standard is not likely to eliminate or adequately reduce the risk of injury, or that
- substantial compliance with the voluntary standard is unlikely. *Id.* 2058(f)(3)(D). The Commission also must find that expected benefits of the rule bear a reasonable relationship to its costs and that the rule imposes the least burdensome requirements that would adequately reduce the risk of injury. *Id.* 2058(f)(3)(E)&(F).

III. The Product

A portable generator is an engine-driven machine that converts chemical energy from the fuel powering the engine to mechanical energy, which, in turn, is converted to electrical power. The engine can be fueled by gasoline, liquid propane, or diesel fuel.[2] A portable generator has a receptacle panel for connecting appliances or other electrical loads[3] via a cord with a plug connection. Portable generators are designed to be carried, pulled, or pushed by a person.

Portable generators that are the subject of the proposed standard commonly are purchased by household consumers to provide electrical power during emergencies (*e.g.,* power outages caused by storms), during other times when electrical power to the home has been shut off, when power is needed at locations around the home without access to electricity, and for recreational activities (*e.g.,* camping or recreational vehicle trips). Built-in wheels or optional wheel kits are often available for heavier, more powerful units (*e.g.,* units with 3 kW power ratings and more).

One of the primary features of a generator is the amount of electrical power the generator can provide on a continuous basis. This power, commonly referred to in the industry as ''rated power,'' is advertised in units of watts or kilowatts (kW), and can range anywhere from under 1 kW for the smallest portable generators, to nominally 15 kW for the largest portable generators.[4] Knowing the generator's rated power is useful in choosing the appropriate size generator for a particular electrical load, such as providing power to power tools, household appliances, or recreational equipment.

IV. Risk of Injury

A. Description of Hazard

Carbon monoxide is a colorless, odorless, poisonous gas formed during incomplete combustion of fossil fuels, such as the fuels used in engines that power portable generators. The initial effects of CO poisoning result primarily from oxygen deprivation (hypoxia) due to compromised uptake, transport, and delivery of oxygen to cells. Carbon monoxide has a 250-fold higher affinity for hemoglobin than does oxygen. Thus, inhaled CO rapidly enters the bloodstream and effectively displaces oxygen from red blood cells, resulting in the formation of carboxyhemoglobin (COHb).[5] The heart, brain, and exercising muscle are the tissues with the highest oxygen requirements; consequently, they are most sensitive to CO-induced hypoxia. The CO-induced hypoxia is reflected in the non-specific, flu-like symptoms of mild CO poisoning and early symptoms of severe poisoning, *e.g.,* headache, lightheadedness, nausea, and fatigue. More severe CO poisoning can result in progressively worsening symptoms of vomiting, confusion, loss of consciousness, coma, and ultimately, death. The high CO emission rate of current portable generators can result in situations where the COHb levels of exposed individuals rise suddenly and steeply, causing people to experience rapid onset of confusion, loss of muscular coordination, and loss of consciousness. This can occur without people first experiencing milder CO poisoning symptoms associated with a low, or slowly rising, CO level.

B. Incident Data

1. Portable Generator Carbon Monoxide Fatalities

The Commission publishes an annual report that summarizes CO incidents associated with engine-driven generators and other engine-driven tools.[6] The Commission is using this report to provide the base number of incidents for the rulemaking. CPSC staff set a date of May 21, 2015, as a cut-off for the incident data used in the briefing package. As of May 21, 2015, CPSC databases contained reports of at least 751 generator-related consumer CO poisoning deaths resulting from 562 incidents that occurred from 2004 through 2014.[7] Due to incident reporting delays, statistics for the two most recent years, 2013 and 2014, are incomplete because data collection is ongoing. Therefore, the numbers for these years will likely increase.[8] Figure 1 shows the count of deaths involving a generator derived from CPSC databases for each of these years. Note that reporting of generator-related deaths is not a statistical sample or a complete count of incidents.

[2] Engines that operate on gasoline or liquid propane are called spark ignition (SI) engines and engines that operate on diesel fuel are called compression ignition (CI) engines.

[3] An electrical load is an electrical component or portion of a circuit that consumes electric power. This is opposed to a power source, which produces power, such as a battery or generator. Examples of loads include: Appliances, lights, and power tools.

[4] As we will discuss further herein, the generator's rated power is generally a function of the size of the engine. However, there is no industry standard for relating the generator's rated power to the size of the engine; nor is there any uniform way in which electrical output capacity is advertised as ''rated.''

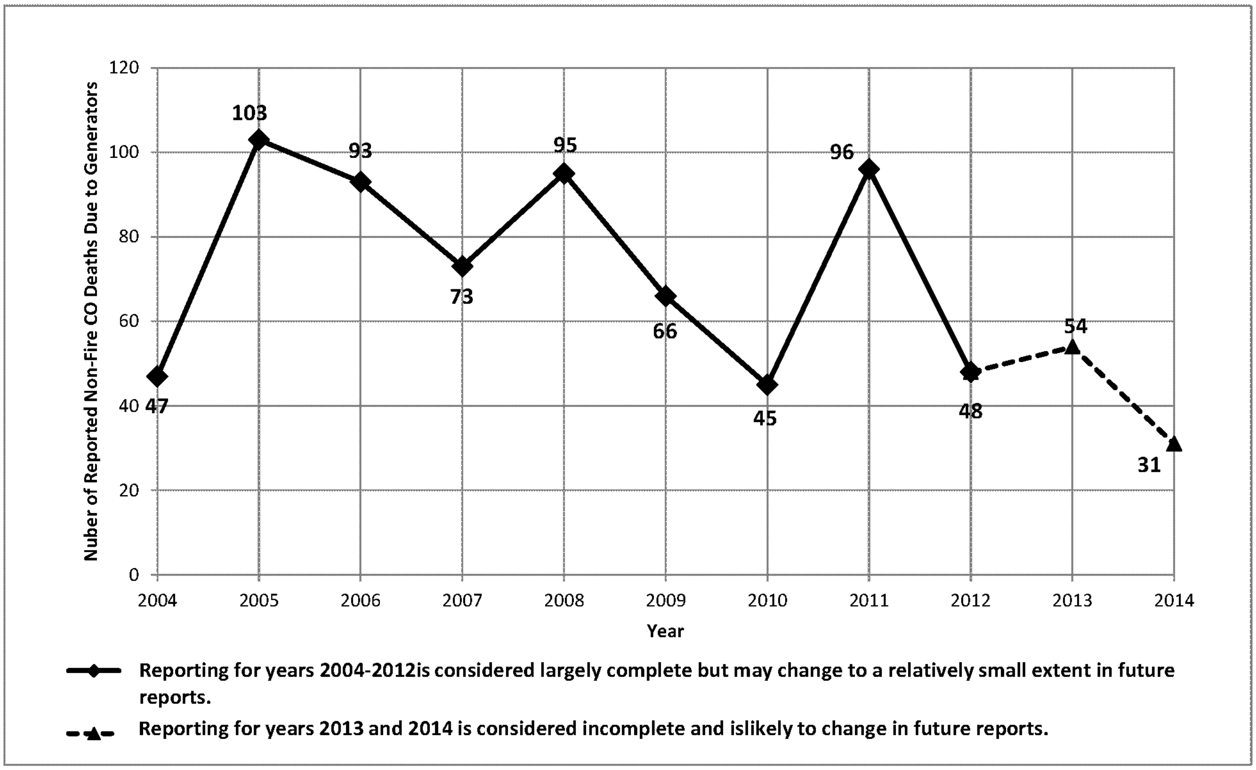
[5] COHb, expressed as a percentage, reflects the percentage share of the body's total hemoglobin pool occupied by CO. Although the relationship is not absolute, percent COHb levels can provide a useful index of CO poisoning severity. It is measured with a blood sample from the exposed person.

[6] These numbers are taken from a June 2015 reported by the CPSC, Hnatov, Matthew, *Incidents, Deaths, and In-Depth Investigations Associated with Non-Fire Carbon Monoxide from Engine-Driven Generators and Other Engine-Driven Tools, 2004–2014,* U.S. Consumer Product Safety Commission, Bethesda, MD, June 2015. (Docket Identification CPSC–2006–0057–0026, available online at: *www.regulations.gov*).

[7] Id.

[8] Note that the epidemiological benefits analysis and preliminary regulatory analysis, discussed in Sections IV and X, do not include the 85 deaths reported to CPSC as of May 21, 2015, for the years 2013 and 2014 because reporting for these years is considered incomplete. The epidemiological benefits analysis and preliminary regulatory analysis also exclude incidents involving generators that are out of the scope of the proposed rule (7 deaths in 5 incidents). Therefore, the Commission's epidemiological and regulatory analyses are based on 659 deaths in 493 incidents that occurred from 2004 through 2012.

Figure 1. Number of Reported Non-Fire Carbon Monoxide Poisoning Deaths Involving Generators Entered in CPSC Databases by Year, 2004-2014



Note: Out of the 751 deaths shown in Figure 1, sole use of a generator was responsible for 702 of these deaths, and the remaining 49 deaths involved concomitant use of a generator and another combustion product.

2. Portable Generator Carbon Monoxide Injuries

Based on CPSC's National Electronic Injury Surveillance System (NEISS) database,[9] CPSC estimates that for the 9-year period of 2004 through 2012, there were 8,703 CO injuries associated with generators seen in emergency departments (ED). This estimate should not be considered definitive because physicians have noted difficulty in correctly diagnosing these injuries. Carbon monoxide poisoning may mimic many nonfatal conditions, including alcohol or drug intoxication, psychiatric disorders, flulike illnesses, and other conditions that can lead to misdiagnosis. Measurement of COHb levels in the victim's blood, which could confirm CO poisoning, can also be confounded based on the time elapsed and any supplemental oxygen treatment administered, which can lower COHb counts prior to measurement. In addition, in some incidents, first responders transported severely poisoned victims found at the scene directly to a medical facility with a hyperbaric oxygen (HBO) chamber[10] for treatment rather than to a hospital ED. These incidents would not have been captured in NEISS. For these reasons, the Commission believes that the injury estimate for this proposed rule may be low.

In addition to using the NEISS database to estimate CO poisoning injuries for the years 2004 through 2012, the Commission examined the narratives of the 292 records of CO-related ED visits to NEISS-member hospitals associated with generators for the years 2004 through 2014. The narratives helped illustrate the range of treatments received, the symptoms, and the reasons why victims went to a hospital ED.[11]

The Commission used the Injury Cost Model (ICM) to estimate the number of injuries treated in locations other than hospital EDs. The ICM uses empirical relationships between the characteristics of injuries and victims in cases initially treated in hospital EDs and those initially treated in other medical settings (*e.g.,* physicians' offices, ambulatory care centers, emergency medical clinics), based primarily on data from the Medical Expenditure Panel Survey,[12] to estimate the number of medically attended

[9] The NEISS database is a national probability sample of hospitals in the United States and its territories. Patient information is collected from each NEISS hospital for every emergency visit involving an injury associated with consumer products. From this sample, the total number of product-related injuries treated in hospital emergency rooms nationwide can be estimated.

[10] An HBO chamber is a facility used for exposing patients to 100 percent oxygen under supra-atmospheric conditions, to shorten the time it would otherwise normally take for the CO to leave the bloodstream and to increase the amount of oxygen dissolved in the blood. A broad set of recommendations has been established for HBO treatment for CO poisoning, which includes a COHb level above 25 percent, loss of consciousness, severe metabolic acidosis, victims with symptoms such as persistent chest pain or altered mental status, and pregnant women. Treatment is not recommended for mild-to-moderate CO poisoning victims, other than those at risk for adverse outcomes.

[11] Hnatov, Matthew, *Summary of NEISS Records Associated with Carbon Monoxide Exposure Cases Related to Engine-Driven Generators in 2004 through 2014,* U.S. Consumer Product Safety Commission, Bethesda, MD, November 2015. (Docket Identification CPSC–2006–0057–0028, available online at: *www.regulations.gov*).

[12] The Medical Expenditure Panel Survey (MEPS) is a nationally representative survey of the civilian non-institutionalized population that quantifies individuals' use of health services and corresponding medical expenditures. The MEPS is administered by the Agency for Healthcare Research and Quality (U.S. Department of Health & Human Services). The MEPS has been collected continuously since 1999 and is the principal data set used to monitor medical spending in the United States.

injuries treated outside of hospital EDs. The ICM also analyzes data from the Nationwide Inpatient Sample of the Healthcare Cost and Utilization Project[13] to project the number of direct hospital admissions bypassing the hospital EDs. According to the ICM estimates, there were an additional 16,660 medically attended CO injuries involving generators during 2004–2012. Consequently, based on NEISS and ICM estimates, there was a minimum of about 25,400 medically attended CO injuries treated during the 9-year period. This is a ratio of almost 39 generator-related CO injuries to every CO death that occurred in that period.

Table 1 presents a list of the most commonly identified symptoms given in the NEISS case narratives of 292 cases involving generator-related CO injuries that occurred in the 11-year period from 2004 through 2014. In many cases, multiple symptoms were reported, but in 29 percent of the cases (85 of 292), symptoms were not described in the NEISS narrative, although the diagnosis was reported. The weighted proportion of the total appears to account for the selection probabilities of each case.

TABLE 1—MOST COMMON SYMPTOMS REPORTED IN NEISS CO POISONING OR CO EXPOSURE CASES INVOLVING GENERATORS, 2004–2014

Common symptoms *	Cases	Weighted proportion (%)
Headache	73	27
Nausea, Felt Sick	77	30
Dizzy/Confused, Disorientation, Lightheaded	70	25
Vomiting	34	16
Passed Out, Unconscious, Unresponsive	18	5

* Cases may appear multiple times in Table 1 because victims may have exhibited multiple symptoms.

Table 2 presents a summary of the reasons why the patients said they went to the emergency room for treatment or to be checked out. In the majority of cases, the medical records, from which the narratives were abstracted, provided little or no information on how the patients knew they needed to go to the emergency room or how they got there. However, in 47 of the 93 cases in which this information was available, the patient realized something was wrong and arranged to get to the emergency room.

TABLE 2—REASON VICTIM WENT TO ED FOR NEISS CO POISONING OR CO EXPOSURE CASES INVOLVING GENERATORS, 2004–2014

Reason	Cases	Weighted proportion (%)
Victim realized something was wrong and arranged to get to ER	47	23
Discovered in distress by family, friend, or due to a welfare check	24	6
Carbon monoxide alarm sounded, arranged to get to ER	22	9
Unknown why or how taken to Emergency Room	199	62
Total	292	100

Table 3 presents a summary of the location of the generator involved with the CO poisoning event. The three most common locations identified were ''Inside the home'' (33%); ''Inside the garage'' (25%); and ''In the basement'' (18%). In 11 percent of the reported cases, the generator was located outside. In half of the ''Outside the home'' scenarios, the narrative specifically states the location was near a window, door, or air conditioner.

TABLE 3—LOCATION OF GENERATOR IN CASES REPORTED IN NEISS CO POISONING OR CO EXPOSURE CASES ASSOCIATED WITH GENERATORS, 2004–2014

Generator location	Cases	Weighted proportion * (%)
Inside the home	86	33
Inside the garage	70	25
In the basement	56	18
Outside the home	29	11
Other/Unknown	51	14
Total	292	100

* Percentages do not sum to 100% due to rounding.

The high number of estimated injuries relative to fatalities suggests that many more people leave the scene of the generator, are rescued, or seek care than fatally succumb to CO poisoning. As detailed in subsequent sections, reduced CO emissions will greatly extend the time it takes for CO exposures to result in incapacitation and subsequent death. Moreover, in some cases, reduced CO emissions will actually prevent incapacitation and death from happening, even if an individual does not leave the exposure location. In situations where a generator is operated indoors, the extended window of time will allow exposed individuals a much greater chance of terminating their CO exposure or increase the chance of being found by others before serious injury and/or death can occur. Exposure termination could occur for several reasons, including the following:

- Exposed individuals might leave the exposure location to engage in everyday activities (*e.g.,* work, school),

[13] The National (Nationwide) Inpatient Sample (NIS) is part of a family of databases and software tools developed for the Healthcare Cost and Utilization Project (HCUP). The NIS is the largest publicly available all-payer inpatient health care database in the United States, yielding national estimates of hospital inpatient stays. HCUP is a family of health care databases and related software tools and products developed through a federal-state-industry partnership and sponsored by the Agency for Healthcare Research and Quality (U.S. Department of Health & Human Services).

without necessarily being aware of any developing CO hazard.

• In some cases, exposure termination might occur without the individual leaving the location, simply because the generator runs out of fuel, or power is restored and the generator is shut down in response, which allows CO levels to decay naturally without reaching lethal exposure.

• Exposed individuals might respond to a CO alarm activation.

• Exposed individuals might recognize a growing health concern and leave to seek treatment or summon help (call a friend, relative, or 9–1–1), even if they do not necessarily recognize CO emissions as the cause of early nonspecific adverse health effects of CO poisoning.

• Exposed individuals might be found in an impaired state by other, lesser affected, co-exposed individuals who had been in locations farther away from the generator.

• Exposed individuals might be found by concerned outside parties conducting welfare checks, or by outside parties simply arriving at their home for other reasons, such as, to co-commute to work, a social or official visit, or the return home of a co-occupant from work or school.

The Commission notes that all the reasons specified above for exposure termination have been reported in incidents where there are survivors of carbureted, generator-related CO poisoning. More such cases would be expected with reduced CO emissions, due to an overall downward shift in expected CO poisoning severity. The Commission recognizes that consumers cannot be relied upon to react appropriately to any indication of a CO exposure, and that even those who recognize a developing CO hazard, might decide to enter the area where a generator is located in an attempt to switch it off. This behavior is known to have resulted in lethal outcomes with carbureted generators because CO can accumulate to levels that can cause near-immediate loss of consciousness due to hypoxia/anoxia. However, with reduced CO emissions, the peak CO levels attained in an unventilated area where the generator is operated will be considerably lower than the level that would cause near-immediate loss of consciousness. This potentially could reduce the incidence of death among individuals who enter an unventilated area to turn off a generator, by allowing them time to egress the area before being overcome.

C. Hazard Characteristics

As stated in the previous section, as of May 2015, there were 562 incidents involving fatalities from portable generators reported to CPSC, which occurred between 2004 through 2014. CPSC assigned In-Depth Investigations (IDI) for 535 of these 562 incidents (95 percent), to gather more detailed information about the incident and the product(s) in use. CPSC categorized the incident data in the IDI reports according to the location where the incident occurred:

• 75 percent of deaths (565 deaths, 422 incidents) occurred in a fixed-structure home location, which includes detached and attached houses, apartments, fixed mobile homes, and cabins used as a permanent residence;

• 16 percent (117 deaths, 81 incidents) occurred at non-fixed-home locations or temporary structures, such as trailers, horse trailers, recreational vehicles (RV), cabins (used as a temporary shelter), tents, campers, and boats, and vehicles in which the consumer brought the generator on board or into the vehicle;

• 6 percent (48 deaths, 46 incidents) occurred in external structures at home locations, such as sheds and detached garages;

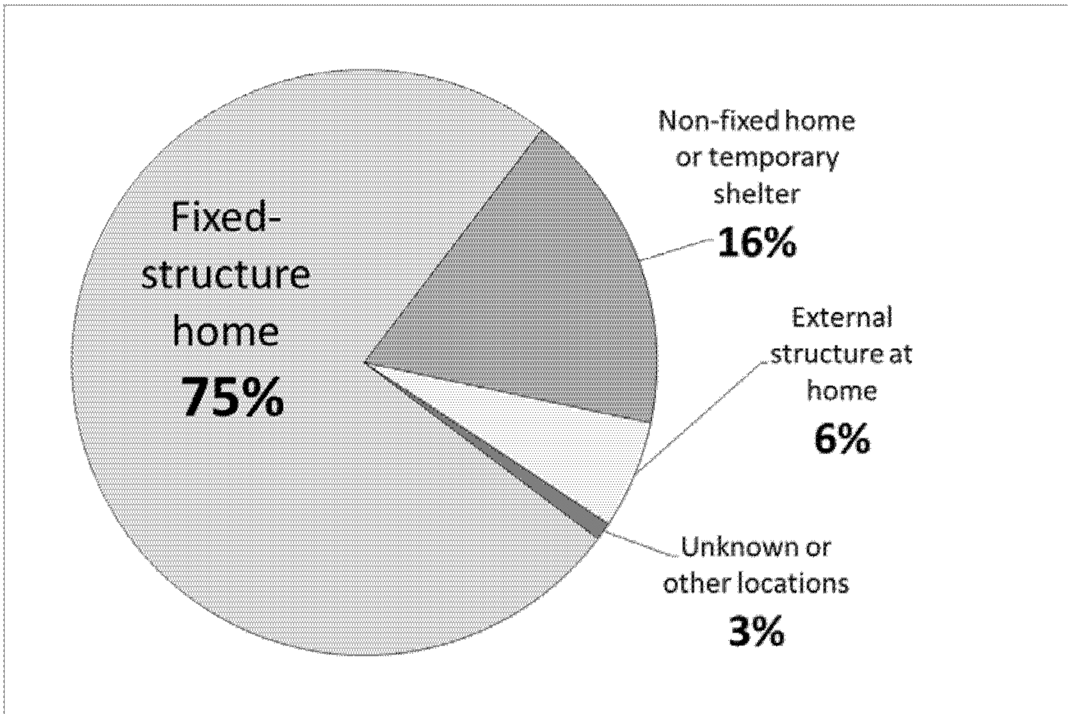
• 3 percent (21 deaths, 13 incidents) occurred at unknown or other locations.

In the same 11-year period, 42 deaths from 30 incidents [14] occurred with the generator operating outdoors, where the exhaust infiltrated into a nearby fixed-structure home, a non-fixed-structure home, or temporary shelter.[15] See Figure 2.

[14] These figures exclude two deaths in 2011 caused by a stationary generator operated outdoors.

[15] Hnatov, Matthew, *Carbon Monoxide Deaths Associated with Engine-Driven Generators Located Outdoors in 2004 through 2014,* U.S. Consumer Product Safety Commission, Bethesda, MD, November 2015. (Docket Identification CPSC–2006–0057–0028, available online at *www.regulations.gov*).

Figure 2. CO Deaths Associated with Generators by Location of the Incident, 2004-2014



Of the 565 deaths (422 incidents) that occurred at a fixed structure home:

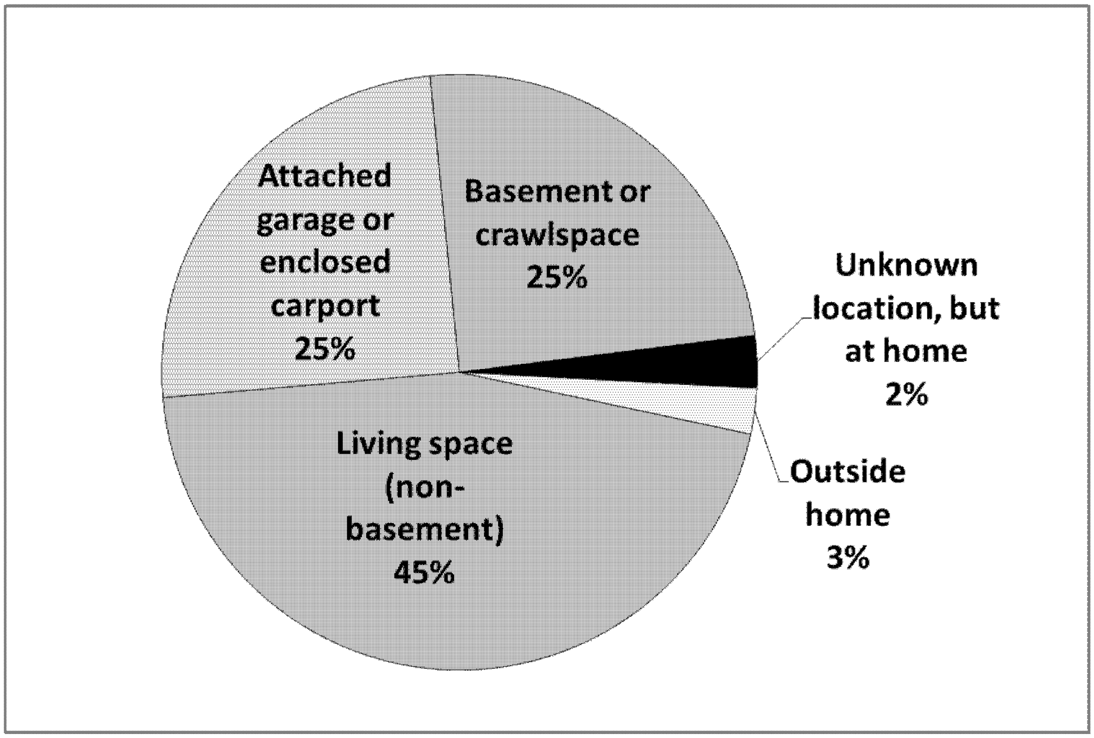
- 45 percent (256 deaths, 191 incidents) occurred when the generator was operated in the living space [16] of the house;
- 25 percent (140 deaths, 108 incidents) occurred when the generator was in the attached garage or enclosed carport;
- 25 percent (139 deaths, 98 incidents) occurred when the generator was in the basement or crawlspace;
- 3 percent (16 deaths, 12 incidents) occurred when the generator was operated outside; [17]
- 2 percent occurred when the generator was at the fixed-structure home site, but exact location was unknown.

See Figure 3.

[16] Used here, living space includes all rooms, closets, doorways and unidentified areas inside a home, but does not include basements, which are treated as a separate category.

[17] Another 28 deaths from 19 incidents occurred with generators operating outside structures other than fixed-structure home sites, such as RV, camper or trailer, vehicle, boat, or cabin used other than as a permanent residence.

Figure 3. CO Incidents Involving Generators that Occurred in a Fixed Structure Home Location, by Specific Location of the Generator, 2004-2014



The reason the generator was needed was identified in more than 80 percent of the 562 incidents. Following are the three biggest causes:

• 27 percent (152 incidents) were associated with the use of generators during a temporary power outage stemming from a weather problem or a problem with power distribution;

• 21 percent of the fatal incidents (116 incidents) were associated with the use of generators after a power shutoff by the utility company for nonpayment of a bill, a bill dispute, or other reason.

• 19 percent of the fatal incidents (109 incidents) did not indicate why the generator was in use, or why there was no electricity at the location of the incident.

Of the 152 fatal incidents associated with a power outage due to weather or a problem with power distribution, 93 percent were due to specific weather conditions. Ice or snow storms are associated with the largest percentage of weather-related CO fatal incidents, accounting for nearly half (49%) of the power outage-related incidents. Hurricanes and tropical storms were associated with 28 percent of CO fatal incidents. More than half (31 of 61) of the generator-related CO fatalities that were hurricane- or tropical storm-related (20 of 42 fatal incidents) occurred in 2005, a year of above-average hurricane activity.

The size of the generator involved in a CO fatality was identified in 45 percent of the 562 incidents. Because most of the generators that were associated with fatal CO poisoning were gasoline-fueled,[18] staff categorized the size of the generator by using the U.S. Environmental Protection Agency's (EPA) classification of the small SI engine powering it: A handheld engine [19]; a non-handheld, Class I engine; or a non-handheld, Class II engine.[20] The incidents involving generators powered by non-handheld, Class II engines were then divided by whether the engine had a single cylinder or twin cylinders.[21] In the majority of cases (55%), CPSC staff was unable to obtain sufficient information to be able to categorize the generator into one of these classifications. In the incidents where engine classification could be determined, slightly more than one-third (35 percent) involved Class I engine powered generators, and slightly less than two-thirds (63 percent) involved single-cylinder, Class II

[18] In 52 of the 562 incidents, the fuel type could not be ascertained. Of the 510 cases where the fuel type used in the generator was known, 99 percent (506 of 510) were gasoline-fueled generators. Of the remaining incidents, three involved propane-fueled generators, and the other incident involved a diesel-fueled generator.

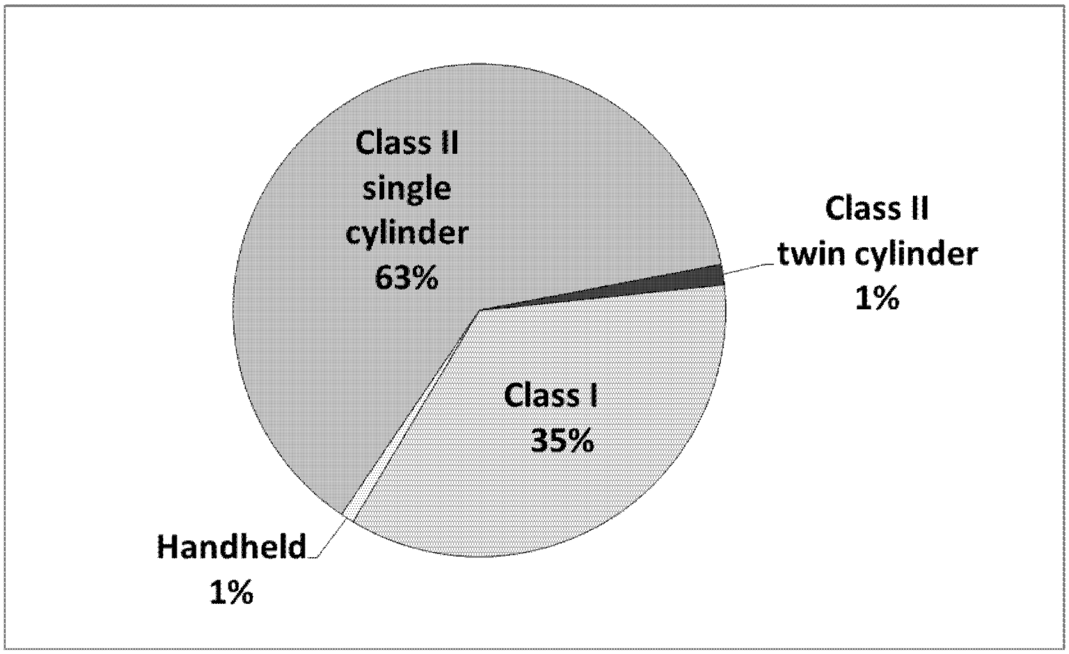
[19] Although handheld engines generally are used in equipment that is held or supported by an operator during use (such as trimmers), handheld engines may also be used to power non-handheld equipment, such as smaller portable generators.

[20] The EPA broadly categorizes small SI engines as either non-handheld or handheld, and within each of those categories, further distinguishes them into different classes, which are based upon engine displacement. Non-handheld engines are divided into Class I and Class II, with Class I engines having displacement above 80 cc up to 225 cc, and Class II engines having displacement at or above 225 cc, but with maximum power of 19 kilowatts (kW). Handheld engines, which are divided into Classes III, IV, and V, are all at or below 80 cc.

[21] When the IDI did not report the generator's engine displacement, or it was not obtainable from other information in the IDI, staff considered the power rating of the generator, if the IDI contained information regarding the power rating of the generator. Staff classified generators with a reported wattage of 3.5 kW and larger as powered by a Class II engine and those less than 3.5 kW as powered by either a handheld or a Class I engine. To distinguish the handheld powered generators from the Class I powered generators when there was no information to ascertain the engine displacement, generators with wattage of 2 kW to 3.5 kW were considered to have a Class I engine. To distinguish the single-cylinder Class II engines from the twin-cylinder Class II engines, staff determined from a search of EPA's exhaust emission certification database (*www3.epa.gov/otaq/certdata.htm#smallsi*) that twin-cylinder, class II engines generally have a maximum engine power of nominally 12 kW and higher. Based on manufacturers' generator specifications available online, generators with engines with power equal to or greater 12 kW, typically have a rated power of 9kW and higher. Therefore, staff considered generators with rated power of 3.5 kW up to 9 kW to be powered by a single-cylinder, Class II engine, and those 9 kW and greater to be powered by a twin-cylinder, Class II engine when there was no information to ascertain the engine displacement and number of cylinders.

engine-powered generators. See Figure 4. There were two incidents involving generators powered by handheld engines that caused one death in each incident. There were three incidents involving generators powered by twin-cylinder, Class II engines that caused seven deaths. Two of the incidents were single-death incidents, and the third incident, with the generator operating outside an RV, caused five deaths inside the RV.

Figure 4. Size of Generator Engine Involved In CO Incidents, When Engine Size Was Identified, 2004-2014



V. Overview of Proposed Requirements

The proposed standard would apply to portable generators powered by small handheld and non-handheld SI engines. The Commission categorized the size of the generator using the EPA's classification of the small SI engine powering it: A handheld engine, a non-handheld Class I engine, or a non-handheld Class II engine. The Commission further categorized the generators powered by non-handheld Class II engines by whether the engine had a single cylinder or twin cylinders. The Commission defines the *generator* categories (as distinguished from the *engine* categories) as follows:

- A *handheld generator* is a generator powered by an SI engine with displacement of 80 cc or less;
- A *class 1 generator* is a generator powered by an SI engine with displacement greater than 80 cc but less than 225 cc;
- A *class 2 single cylinder generator* is a generator powered by an SI engine with one cylinder having displacement of 225 cc or greater, up to a maximum engine power of 25 kW; and
- A *class 2 twin cylinder generator* is a generator powered by an SI engine with two cylinders having a total displacement of 225 cc or greater, up to a maximum engine power of 25 kW.

Although the Commission categorized generators based on the EPA classification of the engines powering them, it is important to distinguish these engines from the portable generators that they are used in because the engines are also used in other products. To provide a clear distinction, the Commission refers to *engines* according to EPA's classification: Handheld engines, non-handheld Class I engines, and non-handheld Class II engines, while referring to *portable generators* according to the Commission's definitions, handheld generators, class 1 generators, class 2 single-cylinder generators and class 2 twin-cylinder generators.

Generators within the scope of the proposed rule provide receptacle outlets for AC output circuits and are intended to be moved, although not necessarily with wheels. Products that would not be covered by the proposed rule include permanently installed stationary generators, 50 hertz generators, marine generators, generators permanently installed in recreational vehicles, generators intended to be pulled by vehicles, generators intended to be mounted in truck beds, and generators that are part of welding machines. Generators powered by compression-ignition (CI) engines (engines fueled by diesel) are also excluded from the scope of the proposed rule. These inclusions and exclusions are largely consistent with the scope of the two U.S. voluntary standards for portable generators, UL 2201—*Safety Standard for Portable Generator Assemblies* and PGMA G300—*Safety and Performance of Portable Generators.*

The great majority of the units that fall within the scope of the proposed standard are gasoline-fueled, but portable generators powered by engines fueled by liquid propane (LP) present similar risks of CO poisoning, and these units also would be covered by the proposed rule. Some portable generators can operate fueled by gasoline, LP and natural gas, and these would also be covered by the scope of the proposed rule.

The proposed rule specifies different limits on weighted carbon monoxide emission rates for different classes of generators in recognition of the effects of factors such as engine size and other engine characteristics on CO emissions, generator size, weight, and hazard patterns and the different challenges that may be faced in meeting CO emission rates expressed in grams per hour. The performance requirements for the different classes of generators also have a scaling factor of 1.5 applied to the technically feasible rates to account for production variation. Specifically, the proposed rule would require that handheld generators and class 1 generators not exceed a weighted CO rate of 75 grams per hour (g/hr); class 2 single-cylinder generators not exceed a weighted CO emission rate of 150 g/hr; and class 2 twin-cylinder generators not exceed a weighted CO emission rate of 300 g/h. The weighted emission rates are based on weighting of six modes of generator operation, ranging from maximum generator load capability (mode 1) to no load (mode 6), similar to a procedure used by EPA to certify compliance with its emission standards for small SI engines. More detail about this procedure can be found in CPSC's staff briefing package. The performance requirements apply when generators operate at normal oxygen content; however, the Commission remains interested in CO emissions when generators operate at reduced oxygen content of 17 percent. The Commission welcomes comments on the advantages and disadvantages of setting performance requirements at 17 percent oxygen instead of normal oxygen as well as comments on the technically feasible CO emission rates for generators operating at 17 percent oxygen, for each of the generator categories. Furthermore, the Commission welcomes comments on the test methods for CO emissions in both normal oxygen and 17 percent oxygen in Tab J, Appendices A2 and A3 of the staff's briefing package.

The proposed rule does not dictate how generators would meet the CO emission limits. Rather, under the proposed rule, firms have the flexibility to determine the appropriate technology to meet the specified performance requirements. To determine feasibility and to estimate likely costs of the proposed rule, staff's briefing package, and this preamble, discuss ways that staff believes companies might modify generators to meet the CO emission limits. However, companies could use other approaches.

The proposed rule describes the test procedure and equipment that the Commission would use to assess compliance with the standard. Manufacturers, however, need not use this particular test, so long as the test they use effectively assesses compliance with the standard. The Commission believes this approach provides added flexibility to manufacturers to reduce testing burdens. The Commission welcomes comments on the benefits and costs of this approach versus requiring a specifc test method for manufacturers to demonstrate compliance.

In accordance with Section 9 of CPSA, the proposed rule contains a provision that prohibits a manufacturer from ''stockpiling,'' or substantially increasing the manufacture or importation of noncomplying generators between the date that the proposed rule may be promulgated as a final rule, and the final rule's effective date. The rule would prohibit the manufacture or importation of noncomplying portable generators by engine class in any period of 12 consecutive months between the date of promulgation of the final rule and the effective date, at a rate that is greater than 125% of the rate at which they manufactured or imported portable generators with engines of the same class during the base period for the manufacturer. The base period is any period of 365 consecutive days, chosen by the manufacturer or importer, in the 5-year period immediately preceding promulgation of the rule.

Generator sales can vary substantially from year to year, depending upon factors such as widespread power outages caused by hurricanes and winter storms. Annual unit shipment and import data obtained by CPSC staff show that it has not been uncommon for shipments to have varied by 40 percent or more from year to year at least once in recent years. The anti-stockpiling provision is intended to allow manufacturers and importers sufficient flexibility to meet normal changes in demand that may occur in the period between promulgation of a rule and its effective date, while limiting their ability to stockpile noncomplying generators for sale after the effective date. The Commission seeks comments on the proposed product manufacture or import limits and the base period for the stockpiling provision.

VI. CPSC Technical Analysis and Basis for Proposed Requirements

A. CPSC's Two-Part Prototype Low CO Emission Generator Technology Demonstration Program

CPSC staff developed a two-part technology demonstration program to demonstrate that the small SI engine powering a commercially available portable generator could be modified with existing emission control technology to reduce its CO emission rate to levels expected to reduce the risk of fatal and severe CO poisoning. The objective of the first part of the program was to develop, from a current carbureted engine-driven generator, a prototype with a CO emission rate reduced to the lowest technically feasible level: (1) Without negatively impacting the engine's power output, durability, maintainability, fuel economy, and risk of fire and burn; and (2) while also ensuring that the engine continued to meet EPA's small SI engine exhaust emission standard for hydrocarbons and oxides of nitrogen ($HC+NO_X$), to which the unmodified OEM version of the engine was originally labeled as being certified. For this, CPSC staff sought a target CO emission rate reduction of 90 percent. The objective of the second part of the program was to assess the efficacy of the prototype generator in reducing occupant exposure profiles created by its operation in a fatal scenario commonly reported in CPSC's incident data compared to the exposure profiles created by the unmodified carbureted generator.[22]

Part One: Prototype Development and Durability Testing at University of Alabama

The Commission contracted with the University of Alabama (UA) to conduct the prototype development and durability phase of the program. The prototype development started with a commercially available generator with an advertised continuous electrical power output rating of 5.0 kW that was powered by a small, air-cooled, single-cylinder non-handheld Class II carbureted engine with a 389 cubic centimeter (cc) displacement and overhead valve (OHV) configuration. The prototype was a modification of that engine. To develop the prototype, UA replaced the engine's carburetor with a closed-loop electronic fuel-injection (EFI) system, used an oxygen sensor in the exhaust for closed-loop fuel-control feedback, tuned the fuel control to stoichiometry[23] and replaced the muffler with a muffler that had a small three-way catalyst (TWC) integrated into it. UA subjected the

[22] Complete documentation on the prototype generator and both parts of the demonstration program is provided in Buyer, Janet, *Technology Demonstration of a Prototype Low Carbon Monoxide Emission Portable Generator,* September 2012. (available online at: *http://www.cpsc.gov/PageFiles/129846/portgen.pdf* and in *www.regulations.gov* in docket identification CPSC–2006–0057–0002).

[23] Stoichiometry is the theoretical air-fuel ratio (AFR) for complete combustion and is the theoretical point for nearly the lowest amount of CO production. AFR associated with stoichiometry for typical gasoline formulations is nominally 14.6.

prototype generator to a durability program for a total of 500 hours, which was the manufacturer's rated useful life of the engine at the time of the program. Simultaneous to the durability program on the prototype generator, UA subjected a baseline unmodified carbureted generator, the identical model to the prototype generator before modification, to the same durability program. UA made periodic emission measurements on both the prototype and the unmodified carbureted generator during the 500 hours of operation to compare the performance of the prototype to the baseline unmodified carbureted generator. After the 500-hour durability program concluded on both the baseline carbureted generator and the prototype generator, an independent laboratory, Intertek Carnot Emission Services (CES), conducted end-of-life emission testing, both with the engine installed in the generator as well as on a dynamometer,[24] in accordance with the EPA small SI engine test procedures. The purpose of this testing was to ascertain whether, at the end of the engine's rated useful life, the prototype engine's emissions would meet: (1) The EPA's Phase 2 requirements for $HC+NO_X$, and (2) CPSC staff's target reduction for the exhaust CO emission rate.

CES's testing in accordance with EPA test procedures showed that the prototype engine, while mounted on a dynamometer and equipped with the muffler that had a catalyst installed, had a 6.0 g/kW-hr CO emission rate. This CO emission rate is 99 percent below the EPA's Phase 2 and Phase 3 CO standard of 610 g/kW-hr.[25] The prototype engine had an $HC+NO_X$ exhaust emission rate of 6.7 g/kW-hr. This rate is 45 percent below the EPA's Phase 2 $HC+NO_X$ standard for a Class II engine, to which the engine was originally certified, and 16 percent below the Phase 3 $HC+NO_X$ standard that came into effect shortly after CPSC's development program with UA began. CES's dynamometer testing also showed that the prototype engine delivered a maximum power of 7.9 kW, which is within 0.3 kW of the advertised rated power for the unmodified OEM carbureted engine. CES's emission testing of the prototype generator (with the engine still installed in the generator, as opposed to mounted on the dynamometer) measured a weighted CO emission rate of 26.10 g/hr.[26] Thus, at the end of the engine's rated useful life, the prototype engine's emissions met both EPA's Phase 2 requirements for $HC+NO_X$ and CPSC staff's target reduction for the exhaust CO emission rate. Staff's prototype findings have since been repeated by others who patterned their reduced CO emissions prototype generators on the design concept developed for CPSC by the University of Alabama.[27] Moreover, new generator products with reduced CO emissions, achieved by similar engine design modifications and use of catalysts, are beginning to enter the retail market.[28]

Part Two: Comparative Testing of Unmodified Carbureted (Baseline) and Prototype Generators at National Institute for Standards and Technology

The Commission entered into an interagency agreement with NIST to conduct the second part of the program. In this part of the demonstration program, NIST operated one generator in its unmodified carbureted configuration and another generator in the prototype configuration in the attached garage of a test house on NIST's campus. The test house is used for conducting indoor air quality (IAQ) studies. NIST measured the CO accumulation in the garage and transport into the house. The results provide a sense of how quickly a commonly fatal consumer scenario develops with an existing carbureted generator, and what the comparative results are from the same tests with the fuel-injected catalyzed prototype.[29]

NIST compared the garage CO concentrations from the prototype and the unmodified carbureted generator, after equal periods of generator run-time in the tests, with the garage bay door fully closed. NIST found that the prototype showed 97 percent reduction in the amount of CO released into the garage, compared to the unmodified carbureted generator. This reduction is consistent with UA's findings and translated to much lower levels of CO transporting throughout the house. Taking into consideration the CO time course profile (which is the CO concentration over time) of each room of the house and of the garage, the Commission performed health effects modeling and estimated that the prototype generator resulted in a significantly extended time interval for hypothetical occupants to escape or to be rescued before being incapacitated. For example, in one test in which the garage bay door and connecting door to the house were both closed, the time interval increased by a factor of 12 with the prototype, compared to the unmodified carbureted generator (from 8 minutes to 96 minutes) for the deadly scenario of a consumer in the garage with the generator. The time interval increased even more for occupants inside the house.

The Commission believes that this increased time interval could give occupants an opportunity to remove themselves from the exposure before being incapacitated (perhaps due to their symptoms or other reasons such as an unrelated need to leave the house) or to be found alive by others. In contrast, the Commission predicts that the high CO emission rate of the unmodified carbureted generator would cause some of the occupants, depending on where they are located, to experience relatively quick onset of confusion, loss of muscular coordination, loss of consciousness, and death, without having first experienced milder CO poisoning symptoms associated with low or slowly rising CO-induced hypoxia.

B. Staff Assessment of Feasible CO Rates Based Upon EPA's Technology Demonstration Program and Staff Testing of Fuel-Injected Generators

A technology demonstration conducted by EPA further demonstrates the feasibility of significantly lowering CO emission generators using EFI.[30] In

[24] A dynamometer is an instrument that measures the power output of an engine.

[25] The EPA sets emission standards for all small SI engines. These engines provide power for a wide range of products typically owned by consumers, including portable generators. The EPA's primary emphasis is on regulating emissions that contribute significantly to nonattainment of the National Ambient Air Quality Standards (NAAQS) for ozone, of which hydrocarbons and oxides of nitrogen ($HC+NO_X$) are precursors. For non-handheld engines, the EPA adopted emission standards referred to as Phase1 in 1995, Phase 2 in 1999, and Phase 3 in 2008.

[26] The highest of three tests was 26.10 g/hr. The other two tests yielded weighted CO rates of 23.47 and 19.38 g/hr.

[27] See Techtronic Industries (TTi) presentation on 3/17/16, at PGMA's Technical Summit on Carbon Monoxide Hazard Mitigation for Portable Generators—pages 85–105 of 178 page pdf file at: *http://www.cpsc.gov//Global/Newsroom/FOIA/Meeting%20Logs/2016/MeetingLogPGMA31716.pdf.*

[28] See Tab I staff's briefing package.

[29] Another objective of the IAG was to determine each generator's mass CO emission rates at each of the six loads used in the load profile. This work also supported NIST's validation of NIST's multizone airflow and contaminant transport model CONTAM, which is used to predict contaminant concentrations throughout a modeled structure resulting from a source mass emission rate located somewhere within the structure. NIST used CONTAM in predicting the health effects of the CO rates associated with the proposed performance requirements.

[30] McDonald, Joseph, Olson B, and Murawski M, *Demonstration of Advanced Emission Controls for Nonroad SI Class II Engines,* SAE paper 2009–01–1899; McDonald, Joseph, Memorandum, Re: Supplemental Engine Dynamometer Data, May 5, 2006. (available online in: *www.regulations.gov* in Continued

2006, EPA examined the feasibility of reducing HC+NO_X emissions beyond their Phase 2 standards.[31] EPA applied EFI and high-efficiency catalysts on two single-cylinder, air-cooled engines, both nominally 500 cubic centimeters (cc) in displacement with overhead valve (OHV) configurations. Because CO and NO_X emissions have an inverse relationship, in focusing on reducing HC+NO_X emissions, EPA specifically chose to test with catalysts formulations designed to *minimize* CO oxidation.[32]

EPA used low-cost engine management and fuel injection systems that were similar to that which UA used for the CPSC prototype generator. While the UA generator prototype used a closed-loop system and tuned the fuel to stoichiometry at the high loads, in interest of cost-savings, the EPA engines did not use an oxygen sensor necessary to make it a closed-loop fuel system. For its engines, EPA replaced the carburetor with open-loop EFI that was calibrated rich of stoichiometry, *i.e.,* a lower air-to-fuel ratio, at moderate-to-high loads and near stoichiometry at light load conditions to achieve the desired emission control of HC+NO_X. EPA developed integrated catalyst-muffler systems for its engines, all selected to prioritize NO_X reduction and HC oxidation over CO oxidation. Even though EPA was intentionally trying to select catalysts that would *minimize* CO oxidation, both engines achieved an average 68 percent reduction in the weighted CO emission rate. The average of the weighted CO emission rate of the two carbureted OEM configurations was 1,760 g/hr, and the average of the two EFI configurations with the catalyst providing the most reduction in CO emissions was 565 g/hr.

Although the EPA noted that some engines may need improvements to accommodate stoichiometric fuel control (such as redesign of cooling fins, fan design, combustion chamber design, and a pressurized oil lube system), EPA concluded that closed-loop EFI with fuel control at or near stoichiometry *is* technically feasible and *is not* cost prohibitive on all Class II engines.[33]

CPSC staff believes that with a focus on reducing CO emissions, a lower weighted CO emission rate could have been achieved by using an oxygen sensor for closed-loop feedback, operation closer to stoichiometric at the higher loads, and a different catalyst formulated for higher conversion efficiency of CO.[34]

CPSC staff tested three fuel-injected generators created by three different manufacturers.[35] Two of these generators, neither of which was designed for low CO emissions, are available in the marketplace, and the third is a manufacturer's prototype generator that was designed for low CO emissions. The first of the three generators is a 10.5 kW rated generator powered by a twin-cylinder Class II engine with nominal 700 cc displacement and overhead valve (OHV) configuration. The generator does not have a catalyst for aftertreatment and the generator's engine is calibrated rich of stoichiometry at higher loads and at stoichiometry with closed-loop fuel control at moderate-to-light load conditions. Based on CPSC staff's testing of this generator in normal atmospheric oxygen, which found a 670 g/hr weighted CO emission rate, as well as on staff's engineering assessment of its physical and operational characteristics, staff believes that it is reasonable to expect that this engine could operate closer to stoichiometric at the higher loads and that a catalyst formulated for some CO conversion efficiency could be used for aftertreatment to further reduce its CO emission rate to nominally 200 g/hr.

The second generator is a 5.5 kW rated power generator powered by a single-cylinder Class II engine with nominal 400 cc displacement and OHV configuration, equipped with an oxygen sensor for some form of partial closed-loop operation and a catalyst. The engine is calibrated rich of stoichiometry at all loads. Based on staff's testing in normal atmospheric oxygen that found a nominal weighted CO rate of 560 g/hr, staff believes a CO emission rate of nominally 100 g/hr is possible, if the generator were operated closer to stoichiometric for at least some of the loads and used a catalyst formulated for higher CO conversion efficiency.

The third generator is a 5.5 kW rated power generator powered by a closed-loop fuel-injected single-cylinder Class II engine with nominal 400 cc displacement and OHV configuration. It has a catalyst for aftertreatment and the engine is calibrated to stoichiometric AFR with closed-loop operation at all loads. Staff's testing of this generator in normal atmospheric oxygen found a weighted CO rate of 81 g/hr.

C. Assessment of Epidemiological Benefits of Reduced CO Emission Portable Generators—NIST CO and COHb Modeling Study

1. Background

To assess the epidemiological benefits of reduced CO emission generators, CPSC contracted NIST to perform a series of CO exposure simulations that would model the operation of a portable generator in various locations within various house configurations and other structures, and at various CO emission rates.[36] CPSC used these results to determine the possible deaths averted if reduced CO emission generators had been used, as described below.

2. CO Emission Modeling

NIST modeled 40 different structures, including houses with basements and others with crawlspaces, as well as ones with slab-on-ground construction, with and without attached garages, and including older construction and newer construction homes. Three different external residential structures designed to represent detached garages and sheds were included in the 40 structures. The 37 different house models included detached home, attached home, and manufactured home designs. House models and other structures used in the modeling study were matched to 503 out of the 659 actual generator-related CO fatalities reported to CPSC over the period 2004 to 2012. One hundred fifty-six fatalities (659 minus 503) were not included in the modeling analysis because the generator was either outdoors or in a structure such as a camper, RV, tent, church, boat, or apartment complex that was not similar to any of the structure models used by NIST. The Commission believes that reduced emission generator use in these scenarios would most likely have produced fewer CO fatalities than the number observed in the incident data.

docket identification EPA–HQ–OAR–2004–0008–0372.).

[31] U.S. EPA, *Control of Emissions from Marine SI and Small SI Engines, Vessels, and Equipment—Final Regulatory Impact Analysis,* EPA420–R–08–014, September 2008 (available online in *www.regulations.gov* in docket identification EPA–HQ–OAR–2004–0008–0929); U.S. EPA, *EPA Technical Study on the Safety of Emission Controls for Nonroad Spark-Ignition Engines <50 Horsepower,* EPA420–R–06–006, March 2006, Docket Identification EPA–HQ–OAR–2004–0008–0333. (available online at: (*http://www.epa.gov/nonroad/equip-ld/phase3/420r06006-rpt-2appdx.pdf*).

[32] Oxidation of CO to carbon dioxide (CO_2) is the means by which CO emissions are reduced in a catalyst.

[33] U.S. EPA, *EPA Technical Study on the Safety of Emission Controls for Nonroad Spark-Ignition Engines <50 Horsepower,* EPA420–R–06–006, March 2006, Docket Identification EPA–HQ–OAR–2004–0008–0333. (available online at: (*http://www.epa.gov/nonroad/equip-ld/phase3/420r06006-rpt-2appdx.pdf*).

[34] See CPSC staff's briefing memorandum and Tab I of the briefing package for a more detailed explanation.

[35] See Tab I of the staff's briefing package.

[36] Emmerich, Steven J., B. Polidoro, W. Dols, Simulation of Residential CO Exposure Due to Portable Generator Operation in Enclosed Spaces (NIST Technical Note 1925), 2016.

This would be especially true in scenarios with the generator running outdoors, or in a large-volume space, such as a church.

CPSC staff chose the modeled CO emission rates based on: (1) CPSC's estimates of elevated CO emission rates expected for the four categories of current carbureted generator products when operating in a reduced oxygen environment, and (2) a series of reduced CO generation rates that allowed CPSC to assess benefits and costs of various levels of reduced emissions within technically feasible rates for each generator category.

The first part of the modeling study used the NIST multizone airflow and contaminant transport model CONTAM, which predicted CO levels in different areas of each structure, over a 24-hour period.

Determination of CO Emission Rates, Run Times, and Heat-Release Rates for Carbureted Generators

Staff determined CO emission rates, run times, and heat release rates for NIST to model for current, carbureted generators (baseline carbureted generators) based on data from EPA's non-road small spark-ignition engine (NRSI) certification data Web site and advertised power ratings and engine specifications for representative products. These baseline parameters are shown in Table 4, and an explanation of the basis for the parameters follows.

TABLE 4—MODELED CO EMISSION RATES, RUN TIMES, AND HEAT-RELEASE RATES FOR BASELINE CARBURETED GENERATORS

Generator category	Average weighted CO rate at 17% O_2 (g/hr)	Average run time (hrs)	Average heat rlease rate (kW)
Handheld	900	8	2
Class 1	1,800	9	6
Class 2 Single Cylinder	4,700	10	13
Class 2 Twin Cylinder	9,100	9	25

To determine values for CO emission rates, run times, and heat-release rates representative of current generators involved in the fatal incidents, staff considered the generators produced by six large generator manufacturers. All of these manufacturers are members of the Portable Generator Manufacturers Association (PGMA), and, as documented on PGMA's Web site, are the major manufacturers of portable generators sold in North America and a significant majority of the industry.'' [37] Staff used the manufacturers' reported product specifications for 31 generators ranging from 900 to 15,000 watts rated power and developed the representative parameters for each of these inputs based on the range of generators in each of the four categories in Table 4.

Staff used the engine specifications provided by the generator manufacturer to search the EPA's NRSI engine certification data Web site to find the published CO emission rate corresponding to each generator's engine. Staff then calculated the weighted CO emission rate (in g/hr) for each generator's engine, by multiplying the g/kW-hr rate by 46.7 percent of the maximum engine power (46.7 percent of the maximum engine power is the weighted average based on the EPA six-mode calculations).[38] Staff assumes that the typical load profile of a portable generator used by a consumer is that of the weighted profile. In addition, staff assumes the engine's weighted CO rate is that of the generator.

Considering that 95 percent of the generator-related CO fatalities in CPSC's databases occurred when the generator was operated in an enclosed space, it is important for modeling studies to consider the CO emission rate when a carbureted generator is operating in such enclosed space scenarios. Evidence supporting this view is seen in results of findings from generator tests conducted by NIST under a prior interagency agreement with CPSC.[39] NIST's tests, as well as subsequent staff testing, showed that the CO emission rate of current carbureted generators increases threefold as the oxygen drops from normal levels (approximately 20.9 percent oxygen) to approximately 17 to 18 percent oxygen when a generator is operated in an enclosed space, such as those reported in the incident data. Consequently, to reflect more accurately current carbureted generator operation under oxygen depletion conditions, staff's calculated weighted CO emission rate, when each generator is operated outdoors at normal oxygen, was multiplied by a factor of 3.

The generators' run time on a full tank of gas that was associated with 50 percent of the advertised rated load was used to determine the full-tank run time used in the modeling. Fifty percent load was used because, as stated above, 46.7 percent of the engine's maximum power represents the weighted load profile, which is nominally 50 percent. Staff generally used manufacturer's product specifications for run time at 50 percent load, and in a few cases, used engineering estimates to determine the run times. Staff chose to model run times based on a full tank of fuel as a conservative assumption, despite knowledge of scenarios where a generator was used to allow completion of a specific short-duration task, in temporary power outage situations where power was restored within a few hours before a full tank of fuel could be consumed, or in scenarios where the generator was still running when victims were found, had summoned help, and/or had removed themselves from the area.

Staff estimated heat-release rates for these generators based on the fuel-consumption rate at 50 percent load, the manufacturer's specification for the generator's tank capacity, a heat of combustion of gasoline of 42.5 MJ/kg, and an assumed conservative 35 percent thermal efficiency of the engine.

[37] *www.pgmaonline.com.*

[38] The engine manufacturer's CO emission rate reported in the EPA's exhaust emission certification Web site, in terms of grams per kilowatt-hour (g/kW-hr), is the sum of six weighted CO rates in grams per hour (g/hr) that the engine emits while installed on a dynamometer test platform and operating with each of six steady-state loads applied (also referred to as modes) divided by the sum of the weighted power for those six modes. The EPA's six-mode test cycle was developed with industry to replicate typical in-use operation of small utility engines when used in all types of engine-driven products.

[39] Emmerich, S.J., A. Persily, and L. Wang, *Modeling and Measuring the Effects of Portable Gasoline-Powered Generator Exhaust on Indoor Carbon Monoxide Level* (NIST Technical Note 1781), Feb 2013.

Determination of CO Emission Rates, Run Times, and Heat Release Rates, for Reduced Emission Rate Portable Generators

NIST used the same values for run times and heat-release rates for the reduced CO emission rates of each generator category as those used for current generators.[40] NIST modeled the rates of 50, 125, 250, 500, 1,000 and 2,000g/hr. The three lowest of these approximates the range of CO emission rates that staff believes are technically feasible for both the handheld and class 1 generator categories (50 g/hr), class 2 single-cylinder category (100 g/hr), and class 2 twin-cylinder category (200 g/hr) in ambient air with normal atmospheric oxygen.

Weather, Temperature and CO Rate Parameters for Carbureted and Reduced CO Emission Generators

Simulations were run for each model structure and model generator location for 28 representative weather days to determine the CO time course profiles, which are the minute-by-minute CO concentration levels in each of the various rooms of the house. The 28 weather days were chosen to include 14 cold weather days (Detroit, MI), seven weather days from warm months (Miami, FL) and seven transition months weather days (Columbus, OH) to represent the distribution of fatalities, which has been seen to skew towards cold-weather days in a similar manner.[41] Starting indoor temperatures were assumed to be 23 °C in all rooms, and temperatures were modeled to change within the rooms, based on heat transfer related to the heat release from the generator. Thus, generators of various sizes were modeled to be running on 28 different weather days for a full-tank run time[42] in various rooms within each of the structures, with run times and heat-release rates appropriate to that size of generator, and emissions based on current carbureted generators, or based on possible reduced-emission generators for comparison. In the modeling of baseline carbureted generators, to simulate the increasing CO emission rate as the oxygen level drops in the space the generator is operating (and thus, a lower CO emission rate at the beginning of operation than later), NIST modeled CO rates for the first 2 hours of operation that were only two-thirds of the rates shown in Table 4. After 2 hours, the CO rates were increased to the rates in Table 4 for the duration of the run time. In contrast, as another conservative assumption, NIST modeled *reduced* CO emission rates as constant rates for the entire respective generator run time. The results of the models provided CO time-course profiles for each room of each structure on each weather day for each generator type and location and emission rate.

3. Application of COHb Modeling

The second part of the modeling study used the CONTAM-generated CO time course profiles as input values to predict corresponding COHb levels expected in healthy adults, as a function of time, using Coburn Forster Kane (CFK) modeling.[43] Conservative assumptions were made about respiratory rates, given expected activity rates over the 24-hours of modeled exposure. The respiratory minute volume (RMV), expressed in liters per minute (L/min), is the specific inhalation rate input value used in the CFK, and for the epidemiological benefits calculated in this analysis, staff used an RMV of 10 L/min. Staff's use of a constant 10 L/min RMV for light activity likely overestimates the breathing rate (and CO uptake rate) of a significant number of victims. In the majority of fatal incidents, victims were at home during an unplanned power outage, or an outage due to utility shut off, and there was no indication that they had engaged in more than sedentary-to-light activity levels for most of the time. For example, in several of these cases, a generator was first started in an enclosed space late in the evening/night at a time where victims were clearly preparing for/or retired to bed; in these instances, a sedentary/resting activity level of 6 L/min RMV would be more appropriate. Thus, use of an RMV of 10 L/min is another conservative assumption in the analysis. This is explained in more detail in Tab K of staff's briefing package and its appendix.

To assess the impact of low-emission generators on potential reductions in CO fatalities, the number of observed fatalities from the incident data were assigned to one of the model structures. The initial step was to assign the fatalities that occurred in an ''exact match'' structure type. ''Exact match'' structures are defined as those that match all of the NIST structure characteristic parameters used in the analysis to describe the structure, such as floor area, number of floors, existence of a garage and/or basement. Where exact matches could not be assigned, fatalities were apportioned among best matching structure types (those matching the most number of NIST parameters).

These simulations included various generator location scenarios, dependent on house/structure model designs (*i.e.,* only models that had a basement included the generator-in-basement scenario; and only models that had an attached garage included the generator-in-the-attached garage scenario). To match, as closely as possible, actual usage patterns, the simulation results of the generator locations within the house/structure were proportionately equal to those observed in the incident data.

The victim's location in the modeled house is assumed to have equal probability of occurring in any living space room. This assumption was made for three reasons. In multi-fatality incidents, victims were often found in different locations within a house. In many cases, the victim's location could not be determined from available reports. Moreover, it was frequently unclear whether victims were located in a single area in which they were found for the entire time or if the individual moved around through various parts of the structure. An example of the latter case could be that an individual felt sick and moved, perhaps, to a bedroom to lie down before expiring.

Next, CPSC staff incorporated criteria that staff developed to evaluate modeled COHb profiles considered indicative of

[40] CPSC staff reasons that an additional weight and volume of the emission control components needed to reduce the CO emission rate, could be offset by a smaller fuel tank and due to the improved fuel efficiency of reduced emission engines, the smaller tank would still be able to maintain similar run times to carbureted units with larger fuel tanks.

[41] The 28 individual days were selected using historic weather data recorded at three different geographic locations and three different temperature ranges to approximate the distribution of incidents observed in the CPSC incident data at a generalized level. Although the weather days may be consecutive (*e.g.,* 14 consecutive cold weather days), there was no carry-over effect from one day to the next. Each day modeled was reset to zero CO. Therefore, each day, from a CO standpoint, was an independent event.

[42] NIST also modeled half-tank run times to simulate scenarios where shorter duration were considered more appropriate (*e.g.,* in scenarios in which the generator was being used to allow completion of a specific short-duration task at an unpowered location, in temporary power outage situations, where power was restored within a few hours before a full tank of fuel could be consumed, or in scenarios where the generator was still running when victims were found, had summoned help, and/or had removed themselves from the area). While staff has these modeling results, staff only analyzed the modeling results for the full-tank run times to estimate those benefits so as to be consistent with a conservative estimate of benefits.

[43] The CFK modeling is a nonlinear differential equation that is a physiologically based mechanistic model for predicting CO uptake and COHb formation and elimination in humans; it has been validated by empirical data from human studies and is widely regarded by authoritative sources as a reasonably reliable and broadly applicable COHb model for acute exposures.

fatal versus nonfatal outcomes. CPSC's Health Sciences (HS) staff developed four ''COHb Analysis Criteria'' to assess whether predicted COHb profiles from modeled residential scenarios were likely indicative of fatal or nonfatal CO exposures in average adults.[44] Where a fatal outcome is predicted, the criteria can be used to assess the predicted time to reach fatal exposure during a 24 hour modeling period for each simulated CO exposure. The criteria are intended to reflect the fact that lethal CO health effects are not simply a function of acute hypoxia resulting from a critical reduction in blood levels of oxygen delivered to tissues, as indicated by attainment of a specific peak COHb level.[45] The criteria include some consideration of the level and duration of the predicted COHb elevation, which recognizes that, in addition to reducing oxygen delivery to tissues, CO can enter the non-vascular body compartment and adversely impact important cellular functions by displacing oxygen from various intracellular heme proteins (particularly myoglobin proteins found predominantly in cardiac and skeletal muscles, and certain cytochrome P–450 enzymes involved is cellular respiration). In some prolonged CO elevations, the additional nonvascular adverse effects of CO can result in death at COHb levels that are not typically lethal.

Although the relationship is not absolute, physiological, epidemiological, and clinical studies provide evidence that acute CO poisoning effects in healthy adults tend to follow toxicological dose-response principles, and that risk of more serious adverse CO poisoning effects worsen progressively as blood levels of COHb increase.[46] However, it is clear that lethal CO exposures cannot be defined simply by attainment of a single COHb level. Staff used several information sources to develop COHb assessment criteria to facilitate calculation of benefits estimates predicted for generators with reduced CO emissions.

A recent authoritative review of CO toxicity by the Agency for Toxic Substances and Disease Registry indicates that there is a high risk of lethal outcome once COHb levels have reached a critical window, which, for healthy individuals, is generally considered to lie between 40 percent and 60 percent COHb.[47] HS staff reviewed information on COHb levels of victims who experienced acute, generator-related CO poisoning; COHb levels documented in fatal CO poisoning cases reported to CPSC were compared with COHb levels reported for a select group of survivors who received hyperbaric oxygen treatment (HBO–T) for generator-related CO poisoning injuries considered to be of high severity. Staff also considered information on fatal and nonfatal COHb levels reported in non-fire-related CO poisoning cases that did not specifically involve generator-related CO exposures. Based on review of available data on COHb levels in fatal and nonfatal generator-related CO exposures, and other non-generator, non-fire related CO deaths and injuries, staff developed the following criteria to distinguish between modeled COHb levels indicative of lethal versus nonlethal outcome:

(1) If peak level is ≥60% COHb, assume death.

(2) If peak level is ≥50% COHb but <60%, assume death unless average duration of elevation >50% COHb is less than 2 hours, and average duration of elevation between ≥40% and <50% COHb is less than 4 hours.

(3) If peak level is ≥40% COHb, but <50% COHb, assume death if duration of the average in this range exceeds 6 hours.

(4) If peak level is ≤40% COHb, assume survival.

4. Determination of Deaths Averted

The final part of the modeling study used patterns evident in fatal incident data (such as the known percentages of deaths related to various generator locations for various generator sizes and structure types) to modulate the modeled COHb data to estimate the number of fatal CO exposures reported for each generator category that could have been averted at each reduced emission rate. The modeling included exposure duration of up to 24 hours, estimated on a minute-by-minute resolution, and determined the status of living versus dead for modeled occupants at each minute in time. The model assumed equal probabilities of intervention over a 24-hour period. This assumption was used because frequently, one could not determine from the incident data how long of an interval between when the generator was started and when the victim died or some other type of intervention occurred.

Although CPSC incident data reflect primarily fatal CO incidents, the assumption that surviving people eventually depart the exposure is supported by staff's estimates of at least 25,400 medically attended CO injuries involving generators over the period of the deaths modeled and the fact that in some fatal incidents, there were surviving victims. For each scenario (CO emission rate, structure model, generator location, occupied zone, weather day), the model produced estimated COHb levels. From these COHb levels, staff determined at each minute interval, whether the victim was dead or alive, based on the criteria outlined above. The average per-minute interval over the 28 days produced a probability of fatality at the given time. Under the assumption of equal probability of intervention over the 24-hour period, the average probability of fatality over the 24-hour period is the overall fatality rate for the given scenario. For the current carbureted generator model simulation, the probability was normalized (scaled up) to 100 percent of the allocated deaths because this is based on the actual incident data. The reduced emission rate simulation results were scaled up by the same factor to normalize the data. The difference between the allocated deaths per scenario and the number estimated for the reduced emission levels is the estimate of the deaths averted for the specified scenario. The summation of all the modeled scenarios (at a given emission level) represents an estimate of the potential deaths averted, if a reduced emission level generator had been in use in place of the current carbureted types. Thus, the same scenarios and assumptions were used for each generator size, generator location, structure, and weather day combination for current and reduced emissions generators so that the comparison was consistent and the assumptions would apply in the same way to current and reduced emissions.

Table 5 presents a summary of the number of deaths that potentially could have been averted over the 2004 to 2012 time span, if low-emission generators were used in place of the high CO output generators that were in use during this period. CPSC staff estimates that a total of 208 out of 503 deaths

[44] See Tab K and Tab K appendices of staff's briefing memorandum.

[45] Oxygen binding sites of hemoglobin molecules have more than 200-fold higher affinity for CO than for oxygen.

[46] For example, loss of consciousness is not generally expected in average adults if peak COHb levels remain below 20 percent, but becomes increasingly more likely as levels approach, and exceed, 40 percent COHb. (Note: Staff is referring to the acute COHb blood levels actually reached, or predicted by modeling, which is not necessarily the same as the highest measured COHb levels reported in clinical cases, where initial COHb measurements are typically reduced from peak levels attained, primarily due to the time lag between the end of CO exposure and blood sampling, plus use of supplemental oxygen during this interval).

[47] Agency for Toxic Substances and Disease Registry (ATSDR), (June 2012) Toxicological Profile for carbon monoxide (web link: *http://www.atsdr.cdc.gov/toxprofiles/tp201.pdf.*

could have been averted. CPSC staff realizes there is uncertainty associated with this estimate given the assumptions and estimations staff used in developing this estimate. However, CPSC staff used conservative values and believes the uncertainty in the estimate is within the range of the sensitivity analysis that staff performed on the effectiveness of the emission rates, as described in the preliminary regulatory analysis.

TABLE 5—SUMMARY OF POTENTIAL DEATHS AVERTED AT TECHNICALLY FEASIBLE CO EMISSION RATES IN REDUCED OXYGEN, 2004–2012

Generator category	CO emission rate * simulating generator operation in an enclosed space	Actual fatalities allocated by class	Potential deaths averted	Potential lives saved rate (%)
Handheld	150	3.7	1.7	46.6
Class 1	150	176.2	87.7	49.7
Class 2 Single Cylinder	300	321.3	117.9	36.7
Class 2 Twin Cylinder	600	1.8	0.3	17.2
Total	....	503.0	207.6 = ~208	41.3

* These rates are 3 times the technically feasible rates at normal ambient oxygen (~20.9%) to account for CO emission rate increase in reduced oxygen. To account for production variation the CO emission rates in the proposed requirements are 1.5 times the technically feasible rate in normal oxygen.

The numbers are based on the conservative assumption of CO emission rates tripling from technically feasible rates in normal oxygen for each generator category when operating in theorized oxygen depletion. Staff tripled the rates because staff determined that in reduced oxygen levels, the emission rates of generators that meet the technically feasible rates in ambient air may increase. This factor of 3 is based on testing of carbureted generators conducted by NIST [48] and CPSC staff.[49] However, test results from NIST [50] indicate that the EFI generator depleted the oxygen significantly less than the carbureted generator when tested in each matched pair identical test scenario. Furthermore, based on staff's testing of three generators with fuel-injected engines having different degrees of closed-loop operation, staff believes the factor of increase when the oxygen is 17 percent may be less than 3 for some generators that use closed-loop EFI.[51] Therefore, based on both of these issues, the factor of 3 could likely overstate the weighted CO emission rates for some EFI generators when operated indoors, and understate the reduction in deaths and injuries resulting from the proposed standard. Consequently, staff believes that the assumption of a threefold increase in the technically feasible rates in ambient oxygen is an appropriate assumption to model, conservatively, for generators operating in enclosed space. Thus, staff ultimately determined epidemiological benefits overall, based on emission rates of 150, 300, and 600 g/hr technically feasible rates, as shown in Table 5.

Staff expects that some additional, but unquantified deaths, could be averted in the remaining 24 percent of fatalities that were not modeled, especially in fatal incidents where a generator was operated outdoors, and/or, that had co-exposed survivors. Staff's epidemiological benefits analysis is contained in TAB K of the staff's briefing package.

VII. Relevant Existing Standards

A. Portable Generator Label

On January 4, 2007, the CPSC voted unanimously (2–0) to require manufacturers of portable generators to warn consumers of carbon monoxide (CO) hazards through a mandatory label containing performance and technical data related to the performance and safety of portable generators. The required warning label informs purchasers: ''Using a generator indoors CAN KILL YOU IN MINUTES''; ''Generator exhaust contains carbon monoxide. This is a poison you cannot see or smell''; ''NEVER use inside a home or garage, EVEN IF doors and windows are open''; ''Only use OUTSIDE and far away from windows, doors, and vents.'' The label also includes pictograms. The label requirement went into effect on May 14, 2007, and is required for any portable generator manufactured or imported after that date.[52] Although the Commission believes that the mandatory label for portable generators might prevent some incidents of CO poisoning and death, as discussed in more detail in Section VIII of this preamble, evidence suggests that labeling alone is not sufficient to address the CO poisoning hazard, and that performance requirements for portable generators are needed.

B. Voluntary Standards

Underwriters' Laboratories Inc. (UL) and the PGMA have each been accredited by the American National Standards Institute (ANSI) to develop a U.S. safety standard for portable generators. However, only PGMA has developed an ANSI standard for portable generators, ANSI/PMGA G300–2015. UL has also developed a standard, UL 2201, which has not become an ANSI standard, due to lack of consensus. International Organization for Standardization (ISO) 8528–13:2016, *Reciprocating Internal Combustion Engine Driven Alternating Current Generating Sets—Part 13: Safety,* is a standard applicable to portable generators sold overseas.

1. UL 2201

In 2002, UL formed a standards technical panel (STP) to develop the first voluntary standard in the United States, dedicated solely to portable generators, UL 2201 *Safety Standard for Portable Generator Assemblies.* CPSC technical staff joined the STP for UL 2201 at its inception and has been an active participant with a long record of

[48] Emmerich SJ, Polidoro, B, Dols WS. *Simulation of Residential CO Exposure Due to Indoor Portable Generator Operation,* NIST Technical Note 1925, 2016.

[49] See Tab J in the staff's briefing package.

[50] Buyer J. *Technology demonstration of a Prototype Low Carbon Monoxide Emission Portable Generator.* U.S. Consumer Product Safety Commission, Bethesda, MD, September 2012.

[51] Tab J of staff's briefing package.

[52] 16 CFR part 1407.

advocating that the standard address CO poisonings.

The requirements in UL 2201 cover internal combustion engine-driven generators rated 15 kW or less, 250 V or less, which are provided only with receptacle outlets for the AC output circuits. The scope section of UL 2201 states that the standard addresses: ''the electric shock, fire, and casualty aspects associated with the mechanical performance and the electrical features of portable engine-driven generator assemblies.'' The standard restates the mandatory CPSC label requirement, but the standard does not otherwise address the risks related to CO poisoning. UL 2201 includes construction requirements to define minimum acceptability of components of the fuel system, engine, alternator, output wiring and devices, frame/enclosures and others, to ensure their suitability in this application to mitigate the risk of shock, fire and physical injury to users. The standard includes tests applicable to electrical, fire or mechanical hazards, as well as manufacturing tests.

UL has been unable to achieve consensus within the STP for UL 2201 to be recognized as an ANSI standard. Therefore UL 2201, first published in 2009, currently exists as a UL standard without ANSI recognition.

In January 2014, CPSC staff sent a letter to the UL 2201 STP Chair to request that a task group be formed to work on proposals to address the CO hazard that would eventually be balloted by the STP.[53] The letter outlined a framework of requirements based on work done by and for CPSC staff, which could be used as a starting point for discussions. This letter is described in more detail in the staff's briefing package. Accordingly, UL formed a task group with a roster of 37 members representing a broad range of stakeholder interests, including manufacturers of engines, generators, fuel-control systems and emission control components; public health officials; first responders; medical experts; indoor air quality experts; and government representatives from National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC), NIST, and CPSC staff. The task group chair is a representative from NIOSH. The first meeting of the task group was held in May 2014. As of August 2016, there have been 26 meetings, all held as teleconference meetings, and there has been active participation and constructive input from a number of the members, but the task group has not yet sent a proposal to the STP to consider for adoption into UL 2201. A more detailed description of this effort is provided in TAB I of the staff's briefing package.

The Commission is unaware of any portable generator that is, or has been, certified to UL 2201; as such, it is unlikely that there would be substantial compliance with the standard it if CO emissions requirements were incorporated.

2. ANSI/PGMA G300–2015

In 2011, PGMA was accredited by ANSI to be a standards development organization, allowing PGMA, in addition to UL, to develop a standard for portable generators. PGMA is the accredited standards development organization for ANSI PGMA G300—*Safety and Performance of Portable Generators.* CPSC staff served on PGMA's canvass committee. CPSC staff submitted comments to the standard, including comments regarding the lack of requirements in the standard to address the CO hazard.[54] PGMA published the first edition PGMA G300 as an American National Standard in June 2015.

PGMA G300 provides a method for testing the safety and performance of portable generators ''rated 15 kW or smaller; single phase; 300 V or lower; 60 hertz; gasoline, liquefied petroleum gas (LPG) and diesel engine driven portable generators intended for multiple use and intended to be moved, though not necessarily with wheels.'' PGMA G300 includes construction requirements for engines, fuel systems, frame/enclosures, alternators, and output wiring and devices. The standard includes safety tests intended to address electrical, fire or mechanical hazards during intended generator operation. It also includes a section on testing for determination of output power rating that it delineates as non-safety based. PGMA G300 also includes manufacturing tests to ensure minimum levels of safety for production units. Although the standard restates the mandatory CPSC label requirement for portable generators, it does not otherwise address the risks related to CO poisoning.

CPSC staff continues to work with PGMA and urge them to address the CO hazard.[55] CPSC staff participated in a PGMA technical summit on March 17, 2016, and reaffirmed this commitment.[56] In April 2016, PGMA informed staff that ''the PGMA Technical Committee will create a performance based standard that addresses the CO hazard created when portable generators are misused by operating them in or near occupied spaces as its top priority. The performance standard, once developed, will be proposed to the canvass group for addition to ANSI/PGMA G300 in the next revision cycle.'' [57] CPSC staff responded to PGMA [58] and met with PGMA again at PGMA's request in August [59] and September 2016.[60]

On September 19, 2016, PGMA emailed a letter to Chairman Kaye indicating that PGMA is in the process of re-opening G300 and announcing its intent to develop a ''performance strategy focused on CO concentrations.'' [61] In the letter to Chairman Kaye and in CPSC staff's September meeting with PGMA, PGMA described only broad generalities of a framework for modifying G300 that involves testing a generator in an

[53] Buyer, Janet, letter to Diana Pappas-Jordan, RE: CPSC Staff Request for Formation of a Working Group and Staff's Recommendations for Requirements to Address the Carbon Monoxide Poisoning Hazard Associated with Portable Generators, January 14, 2014. *http://www.cpsc.gov/Global/Regulations-Laws-and-Standards/Voluntary-Standards/Portable-Generators/CPSCstaffletterto ULdatedJan142014.pdf.*

[54] Buyer, Janet, letter to Joseph Harding, Subj: CPSC Staff Comments on BSR/PGMA G300–201x, *Safety and Performance of Portable Generators,* January 2, 2015. *http://www.cpsc.gov/Global/Regulations-Laws-and-Standards/Voluntary-Standards/Portable-Generators/CPSCstaffletterto PGMAregardingG300draftstandarddated 122015.pdf;* Buyer, Janet, letter to Joseph Harding, Subj: CPSC Staff Comments on BSR/PGMA G300–201x, *Safety and Performance of Portable Generators* dated January 30, 2015, March 6, 2015. *http://www.cpsc.gov/Global/Regulations-Laws-and-Standards/Voluntary-Standards/Portable-Generators/CPSC-staff-letter-to-PGMA-with-comments-on-draft-G300-standard.pdf.*

[55] Letter from PGMA to Joel Recht, dated April 20, 2016, available online at: *http://www.cpsc.gov/Global/Regulations-Laws-and-Standards/Voluntary-Standards/Voluntary-Standards-Reports/PGMA LettertoRechtCPSCCooperationFinal.pdf.*

[56] CPSC staff presentation, *CPSC Staff Technical Research to Address the Carbon Monoxide Hazard for Portable Generators,* March 17, 2016.

[57] The Commission's understanding is that PGMA's revision cycle is every 5 years.

[58] Recht, Joel, Letter to Susan Orenga, Response to PGMA Letter to Joel Recht dated April 20, 2016, May 13, 2016. *http://www.cpsc.gov/Global/Regulations-Laws-and-Standards/Voluntary-Standards/Portable-Generators/CPSCRechtLetterto PGMAMay132016inresponsetoPGMAletterdated April202016.pdf.*

[59] Smith, Timothy, Log of Meeting, CPSC Staff, PGMA, and Exponent, August 12, 2016, available online at: *https://www.cpsc.gov/s3fs-public/Meeting%20Log%20for%20meeting%20with%20 PGMA%202016-08-12_0.pdf.*

[60] Recht, Joel, Log of Meeting, CPSC Staff and PGMA, September 6, 2016, available online at: *https://www.cpsc.gov/s3fs-public/09%2006%2016 %20Meeting%20with%20PGMA%20Follow%20up %20on%20Technical%20Summit%20on%20 Carbon%20Monoxide%20Hazard%20Mitigation %20for%20Portable%20Generators.pdf.*

[61] Letter from PGMA to Chairman Elliot Kaye, dated September 16, 2016, available online at: *https://www.cpsc.gov/s3fs-public/PGMALtrChair KayeVoluntaryStandardFinal.pdf.*

enclosed space (test chamber).[62] The Commission looks forward to working with PGMA on developing a performance requirement addressing the CO poisoning hazard associated with portable generators. Given that PGMA described only broad generalities to CPSC regarding PGMA's intent to modify G300, the Commission does not have an adequate basis to determine if modifications to the voluntary standard would likely eliminate or reduce the risk of injury or death. In addition, because the Commission is unaware of any portable generator that is or has been certified to G300, it is unlikely there would be substantial compliance if CO emissions requirements were incorporated.

3. ISO 8528–13:2016

ISO 8528–13:2016 *Reciprocating Internal Combustion Engine Driven Alternating Current Generating Sets—Part 13: Safety,* is a standard applicable to portable generators sold overseas. Its requirements regarding the CO poisoning hazard are limited to labels and markings. It requires that the generating set must have a visible, legible, and indelible label that instructs the user: ''exhaust gas is poisonous, do not operate in an unventilated area.'' The standard also requires that the general safety information section of the instruction manual mention: ''Engine exhaust gases are toxic. Do not operate in unventilated rooms. When installed in ventilated rooms, additional requirements for fire and explosion shall be observed.''

C. Adequacy of the Voluntary Standards for Portable Generators in Addressing CO Deaths and Injuries

The Commission does not believe that any of the standards discussed in the previous section are adequate because they fail to address the risk of CO hazard beyond restating the CPSC mandatory labeling requirement and the Commission does not believe that the mandatory labeling requirements, alone, are sufficient to address the hazard. Additionally, the Commission is not aware of any firms certifying products to these standards. Thus, the Commission does not believe there is substantial compliance with the standards. Therefore, the Commission concludes that the voluntary standards are not adequate in addressing CO deaths and injuries.

VIII. Response to Comments

In this section, we describe and respond to comments to the ANPR for portable generators. We present a summary of each of the commenter's topics, followed by the Commission's response. The Commission received 10 comments in response to the ANPR. Subsequently, in a two-part technology demonstration, CPSC contracted with UA to conduct a generator prototype development and durability demonstration program and contracted with NIST to conduct comparative testing of an unmodified carbureted generator and prototype generators in an attached garage of a test house facility. CPSC staff published a report regarding the results of the two-part technology demonstration program that included both the UA development and durability program and the NIST comparative testing program[63] and received 12 comments in response to this report. NIST published a report concerning its comparative testing of generators,[64] and staff received four comments in response to its report. The Commission responds to these comments, as well. The comments can be viewed on: *www.regulations.gov,* by searching under the docket number of the ANPR, CPSC–2006–0057.

A. Mandatory Carbon Monoxide Label

Comment: One commenter claimed that the CO hazard will continue to exist even if the Commission's demonstrated technology of the prototype were applied to commercially available generators and that ''educating owners about the proper use of their generators will therefore remain the first line of defense.'' The commenter claimed that, for this reason, the CPSC should ''conduct a study that includes a human factors analysis to determine the effectiveness of the CPSC mandated CO warning adopted in 2007.'' The commenter also encouraged CPSC to revise the mandated warning ''to incorporate the standards and format'' in ANSI Z535.3–2011, *American National Standard Criteria for Safety Symbols,* and Z535.4–2011, *American National Standard Product Safety Signs and Labels.*

Response: Although the Commission concurs with the commenter that the CO hazard associated with portable generators will continue to exist to some degree, even if CPSC's demonstrated technology were applied to commercially available generators, it does not necessarily follow that educating owners about the proper use of generators is, should be, or would remain, the first line of defense. Human factors and safety literature identify a classic hierarchy of approaches to control hazards, based primarily on the effectiveness of each approach in eliminating or reducing exposure to the hazard. The use of hazard communications such as warning labels is universally recognized as less effective than designing-out the hazard of the product or guarding the consumer from the hazard. Thus, hazard communications are lower in this ''hazard control hierarchy'' than these other two approaches.[65] Hazard communications are less effective because they do not prevent consumer exposure to the hazard; instead, they must persuade consumers, who see and understand the communication, to alter their behavior in some way to avoid the hazard. Thus, hazard communications should be thought of as ''last resort'' measures that supplement, rather than replace, product redesign or guarding efforts to address residual risks, unless these higher level hazard-control efforts are unfeasible.

The commenter recommends that CPSC conduct a study to determine the effectiveness of the CPSC-mandated CO warning. The commenter states that testing is needed because of the importance of ''educating owners about the proper use of their generators.'' Based on this assertion, the Commission infers that the commenter's measure of effectiveness is the extent to which the warning is understood by consumers, assuming the warning had initially captured and maintained the

[62] Product Safety Letter, *PGMA Talks Broad Strokes on Standards Work with CPSC,* Volume 45, Issue 34, September 12, 2016.

[63] Buyer, Janet, *Technology Demonstration Of A Prototype Low Carbon Monoxide Emission Portable Generator,* September 2012. (available online at: *http://www.cpsc.gov/PageFiles/129846/portgen.pdf* and in *www.regulations.gov* in docket identification CPSC-2006-0057-0002.).

[64] Emmerich, S.J., A. Persily, and L. Wang, *Modeling and Measuring the Effects of Portable Gasoline Powered Generator Exhaust on Indoor Carbon Monoxide Level* (NIST Technical Note 1781), National Institute of Standards and Technology, Gaithersburg, MD, February 2013. (available online at: *http://www.cpsc.gov/Global/Research-and-Statistics/Technical-Reports/Home/Portable-Generators/PortableGenerators041213.pdf.*

[65] Laughery, K.R., & Wogalter, M.S. (2011). The Hazard Control Hierarchy and its Utility in Safety Decisions about Consumer Products. In W. Karwowski, M.M. Soares, & N.A. Stanton (Eds.), *Human Factors and Ergonomics in Consumer Product Design: Uses and Applications* (pp. 33–39). Boca Raton, FL: CRC Press; Vredenburgh, A.G., & Zackowitz, I.B. (2005). Human Factors Issues to Be Considered by Product Liability Experts. In Y.I. Noy & W. Karwowski (Eds.), *Handbook of Human Factors in Litigation* (Chapter 26). Boca Raton, FL: CRC Press; Williams, D.J., & Noyes, J.M. (2011). Reducing the Risk to Consumers: Implications for Designing Safe Consumer Products. In W. Karwowski, M.M. Soares, & N.A. Stanton (Eds.), *Human Factors and Ergonomics in Consumer Product Design: Uses and Applications* (pp. 3–21). Boca Raton, FL: CRC Press.

consumers' attention. CPSC's mandatory labeling requirements for portable generators states that the product label shall be located on a part of the generator that is ''prominent and conspicuous to the operator,'' while performing at least two of the following operations: Filling the fuel tank, accessing the receptacle panel, and starting the engine.[66] The rule also requires that the label remain permanently affixed, intact, legible, and largely unfaded over the life of the product.[67] These requirements, as well as the minimum type size requirements,[68] were developed purposefully to address issues related to capturing and maintaining consumer attention and should address most concerns of this type, except for cases in which the user of the generator is not literate in English. However, the question of whether the label also should be provided in languages other than English was raised and addressed in detail in the final rule.[69] In summary: (1) Available generator-related incident data have revealed no pattern of incidents involving people who could not read English; (2) the overall positive impact of adding another language to a label is likely to be very small; and (3) the regulation does not prohibit the addition of another language version of the warning message to the mandatory label.

The Commission supports the testing of warnings and other hazard communications. However, as discussed in the preamble to the mandatory labeling final rule, an independent contractor already performed focus-group testing with low-literacy individuals on the product label initially proposed in the notice of proposed rulemaking (NPR), and the Commission revised the final label to address the message text comprehension problems identified during testing.[70] The Commission acknowledges that incremental improvements to the language of the label might be possible by conducting additional comprehension testing. However, the Commission also believes that the most significant label comprehension problems have already been addressed and that additional testing of this sort is unlikely to detect problems that would substantially impact comprehension among those at risk.[71] In terms of the formatting of the mandatory label, the Commission notes that the formatting and requirements of the mandatory generator label are virtually identical to the requirements of ANSI Z535.4–2011 and Z535.3–2011. Although the Commission acknowledges that the formatting of the mandatory label technically does not match the panel format requirements of ANSI Z535.4, these differences were deliberate and intended to improve warning comprehension. In addition, the Z535 series of standards includes exceptions and examples that are consistent with the formatting of the mandatory label. Revising the mandatory label to strictly meet the panel format requirements of Z535.4 is unlikely to improve the effectiveness of the label, and the Commission believes such changes actually could have a negative impact because it would separate the graphics from the relevant safety messages. Thus, the Commission believes that such revisions are neither appropriate, nor desirable.

B. Technical Requirements/ Specifications

1. *Comment:* Two commenters state that significant engine design changes would be required to incorporate and adapt emission technologies for use into any prototype portable generators. The commenters assert that engine designs that incorporate the prototype design changes are possible, but may not be suitable for all engines, especially when considering price and reliability considerations.

Response: To reduce the CO exhaust levels in portable generator units, staff developed the prototype generator with commercially available parts for better fuel delivery controls and exhaust emission controls. The prototype generator did not require extensive design changes. The prototype generator engine was derived from a readily available unit with a carburetor-equipped engine, which was retrofitted with sensors and components for electronic microprocessor controls of the intake manifold fuel injection and combustion spark timing. The prototype engine with electronic fuel controls required no disassembly between the engine cover, engine block, or cylinder head. Therefore, the head gasket and cylinder compression rings were left in their original condition. Considering price, staff agrees that there is an added cost to EFI engines, as discussed in the preliminary regulatory analysis. As to reliability, staff notes that the prototype generator was successfully tested for its longevity in service (durability) for 500 hours, which was the rated useful life, as established by the manufacturer.

Staff notes that the CPSC prototype generator was meant to be a durability program demonstration to support substantially reduced CO emission rates and encourage research on an approach to mitigate the risk of fatal and severe CO poisoning. The prototype portable generator was not intended to be a production unit, as manufacturers would need to consider appropriate suitable designs for their engine families in portable generators. Staff's prototype findings have since been repeated by others who patterned their reduced CO emissions prototype generators on the design concept developed for CPSC by the University of Alabama.[72]

2. *Comment:* The Truck and Engine Manufacturers Association (EMA) asserts that similar engine designs, including basic fuel-injection and ignition design are uniform across several manufacturers' product lines of gasoline-fueled engines, where possible. Products like lawn mowers and portable generators may use a similar engine design and components, and EMA states that this uniformity across many products provides manufacturing flexibility and economy of scale. EMA states the implementation of a different engine design in portable generators, such as described in the prototype program, may impact cost and availability of the product.

Response: The prototype design was specifically originated and developed through available off-the-shelf electronic fuel controller and components adapted onto an existing marketed portable generator engine. The prototype generator was successfully tested for its longevity in service (durability) for 500 hours, which were the longevity and emission outcomes of the new EFI engine through the rated useful life, as established by the manufacturer.

CPSC staff acknowledges the EMA concern that adoption of a portable generator engine, specifically designed to reduce CO emissions, may have

[66] 16 CFR 1407.3(a)(iii)(B).

[67] 16 CFR 1407.3(a)(iv).

[68] The signal word ''DANGER'' must be in letters not less than 0.15 inches and the remaining text must be in type whose uppercase letters are not less than 0.10 inches, or about 10-point type size.

[69] 72 FR 1443 (January 12, 2007).

[70] Id.

[71] Virzi, R.A. (1992). Refining the test phase of usability evaluation: How many subjects is enough? *Human Factors, 34*(4), 457–468, has found that about 80 percent of all usability problems tend to be detected with only four or five subjects; about 95 percent of all problems are detected with nine subjects; and each additional subject was less likely to detect new usability problems. The Commission believes that these general principles are likely to apply to comprehension testing as well, particularly in tests that oversample low-literacy individuals.

[72] See Techtronic Industries (TTi) presentation 3/17/16 at PGMA's Technical Summit on Carbon Monoxide Hazard Mitigation for Portable Generators—pages 85–105 of 178 page pdf file at: *http://www.cpsc.gov//Global/Newsroom/FOIA/Meeting%20Logs/2016/MeetingLogPGMA31716.pdf.*

different engine components pricing compared to the current portable generator engine without the emission reduction. CPSC staff notes that portable generators with EFI (though not specifically designed for low CO emissions) have been increasing in availability in the market as new models have been introduced.

3. *Comment:* Honda states that the photos of the prototype unit cylinder head in the University of Alabama report, *Prototype Low Carbon Monoxide Emission Portable Generator Build Description and Performance Evaluation,*[73] may indicate that combustion gases had been leaking to the outside because the head gasket was in the early stages of failure prior to the time that the engine was disassembled. Honda indicates that they made these findings based on the carbon deposits on the prototype cylinder head fin and head gasket seating surface, shown in the photos in Figure 22 of UA's report.

Response: The cylinder heads, pistons and several other components are photographed and compared in the post durability wear analysis section of Contractor University of Alabama's report, *Low Carbon Monoxide Emission Prototype Portable Generator Build Description and Performance Evaluation*. Figure 22 in UA's report shows a side-by-side comparison of the cylinder heads from the baseline generator (an unmodified unit) to the prototype generator unit after completion of the 500 hours of durability testing. CPSC staff partly agrees with the Honda photo assessment because more carbon deposits are visible on the prototype cylinder head gasket surface, compared to the same component in the baseline. However, the prototype's head gasket endured approximately 585 engine hours of the durability program and subsequent emission testing. According to UA's report, the head gasket with the baseline unit leaked after 175 engine hours into the durability test and was replaced. The cylinder head photos, which compared the generator units after completion of the durability test, showing less carbon deposit on the baseline engine's cylinder head gasket seating surface may be explained by fewer accumulated engine hours on the newer head gasket. Furthermore, staff notes that the prototype engine had been run for 585 hours by the time the photograph was taken, which was 85 hours beyond the manufacturer's rated useful life of the engine.

4. *Comment:* Honda states that that the increased combustion temperature due to the prototype's stoichiometric air-to-fuel mixture and reliance on radiant cooling is insufficient, as evident in the condition of photographed engine components, such as the pistons, after completion of the durability test.

Response: CPSC staff agrees with Honda that leaner fuel ratios generally result in increases in combustion temperatures. Increasing the air-to-fuel ratio available for combustion was intentional in the prototype engine, to influence and reduce the CO mass flow in the exhaust emission. Cylinder head temperatures were measured in generator units at all various load profiles for each occurrence of emission testing. These emission tests occurred before modifications to engine or durability testing, during the durability testing, in which hours of engine operation were accumulated, and after the durability tests.

Emission and engine test data were collected on the as-received, carburetor-fueled generators units. According to the University of Alabama report, *Low Carbon Monoxide Emission Prototype Portable Generator Build Description and Performance Evaluation,* the as-received generator unit selected to become the prototype, but not yet modified, measured a 13.98 AFR at full generator loading (mode 1), with an associated 227 °C cylinder head temperature. In addition, the range of AFR values for this pre-modified prototype generator measured 13.98–11.26, with progressively richer AFRs toward idle or no-load. The maximum cylinder head temperatures with the stoichiometric EFI after prototype engine modification were no hotter than the original unit. Staff believes that the 14.0 AFR carburetor design offered no cylinder head cooling capacity over the stoichiometric EFI design. Throughout the prototype generator program, including independent laboratory dynamometer emission testing after 500-cyclic engine hours of operation, the engine demonstrated a cylinder head temperature less than 227 °C at full load. The mid-to-no load operating temperatures were cooler. All of these recorded measurements of the prototype cylinder head temperatures, including full load, were well below the manufacturer-recommended temperature limits.

Another comparison of cylinder head temperatures involves the baseline generator, which remained unmodified as the original unit, and the prototype generator. According to the *Low Carbon Monoxide Emission Prototype Portable Generator Build Description and Performance Evaluation* report, the carburetor fuel system of the baseline generator delivered 13.4 to 10.5 AFR values for the range of generator loads throughout the durability program. Similar to the pre-modified prototype generator, progressively richer AFRs occurred in the baseline generator towards idle or no-load. Alternatively, the prototype generator fuel strategy sought to maintain the same stoichiometric AFR across all loads. These differences in AFR values created an average elevated temperature of 28 °C in the prototype unit to the baseline unit. Staff believes the 28 °C average hotter temperatures across all loads created more discoloration in the prototype piston. There appears to be more blackened areas of the piston ring, and more coloring below the seated position of the piston ring indicate hotter operating temperatures in the prototype cylinder compared to the baseline unit. However, as mentioned, the recorded measurements of the prototype cylinder head temperatures, including full load, were well below the manufacturer recommended temperature limits. For the technology demonstration program, the prototype's leaner AFR to minimize CO exhaust production was believed to be balanced with higher, but acceptable, cylinder temperatures.

5. *Comment:* EMA states that greater CO emission levels occurred with the prototype portable generator at 500 hour end-of-life compared to zero hour, suggesting that some deterioration of the prototype engine occurred with accumulation of engine hours.

Response: The UA report contains an appendix with prototype and baseline generator engine-hour durability emission test results for low-, high- and mid-life engine hours. This appendix shows prototype portable generator post-catalyst CO emission results at 2 g/kW-hr near 0 engine-hours and 17.5 g/kW-hr at 500 engine-hours. Staff does not believe that these results reflect deterioration, but rather, a mid-load controller calibration performance issue, which surfaced primarily in the post-durability emission tests.

This 500-hour prototype emission test performance was due to portions of the fuel look-up tables[74] that were not

[73] UA's report (Puzinauskas, P, Dantuluri, R, Haskew, T, Smelser, J, . Prototype *Low Carbon Monoxide Emission Portable Generator Build Description and Performance Evaluation,,* The University of Alabama, Tuscaloosa, AL, July 2011) is available as TAB G in the staff report referenced previously (Buyer, Janet, *Technology Demonstration Of A Prototype Low Carbon Monoxide Emission Portable Generator,* September 2012.)

[74] The fuel look-up tables are part of the electronic programming of the Engine Control Unit

calibrated in the initiation of the engine build. Initially, it was not known that rated engine speeds supporting an alternator would involve extensive variation. Therefore, only certain areas of the controller look-up tables were mapped. Retrospectively, it is known that the mode 4 or mid-load solution was simply to expand the same parameters throughout the ECU look-up tables and all engine speeds. In the final emission tests, larger AFR excursions and higher CO emissions occurred when the engine operated in the unmapped portions of the controller. While the post durability prototype generator CO emissions results show more than 90 percent reduction over the baseline unit, the emission reduction with the prototype could likely be reduced further with more comprehensive calibration of the controller.

6. *Comment:* Honda states that the CPSC testing did not evaluate engine and generator performance in transient load conditions of performance.

Response: The empirical testing in the NIST test house included transient loads. NIST Technical Note 1781,[i] *Modeling and Measuring the Effects of Portable Gasoline Powered Generator Exhaust on Indoor Carbon Monoxide Level,* describes how NIST evaluated the performance of both the prototype and baseline unmodified generators in the garage, with several electrical loading variations, including the generator cyclic load profile in the durability program and emission testing.[75] The measuring test equipment at the NIST test house continuously collects CO measurements as the electrical and engine load profile was altered. The proposed performance requirement is based on measuring emissions while the generator is operating with a steady load applied, as opposed to a transient load.

7. *Comment:* Two commenters asserted that CPSC's prototype components may cause exacerbated reliability issues after long-term storage.

Response: Staff disagrees because fuel-injection improves reliability. A fuel-injected system is sealed, so the fuel is not exposed to air like the vented system associated with a carburetor. Exposure to air significantly contributes to degrading gasoline during long-term storage and, in turn, causes problems with starting and running the engine. Manufacturers advertise improved reliability as one of the benefits associated with fuel injection.

Comment: One commenter asserted that it is harder to apply EFI and catalyst on the smaller engines used in 1 kW–3 kW units and that they are sold in higher numbers than 5 kW units. In a similar comment, another commenter noted that CPSC's prototype used a commercial-grade engine in open frame, yet closed-frame units are more popular.

Response: CPSC has observed that there are fuel-injected handheld Class I engines, with and without catalysts, in the marketplace. CPSC acknowledges, however, that there may be more challenges associated with implementing the emission control technology on these smaller engines and the generators that these engines power. Thus, there is a later compliance date in the proposed rule for these models, relative to the larger generators powered by Class II engines. Based on CPSC staff's analysis of the market data, CPSC concurs that smaller generators are becoming more popular, relative to larger generators. CPSC staff used a larger generator, powered by a class II, single-cylinder engine, in the technology demonstration program because the Commission's incident data show that generators with these engines were associated with almost two-thirds of the CO deaths involving generators that have been reported to CPSC, when the size of the generator was identified, for the years from 2004 through 2012. The lower proposed performance requirements for smaller generators are expected to reduce deaths that could otherwise be expected to occur with increasing popularity of these smaller units.

8. *Comment:* One commenter stated that stable engine operation under transient loads requires richer-than-stoichiometric AFR. Without it, the commenter asserted, there is unreliable operation, which can result in damaged electrical loads and warranty claims.

Response: The Commission acknowledges this operating challenge, and for this reason, the proposed performance requirement is based on measuring emissions while the generator is operating with a steady load applied, as opposed to a transient load.

9. *Comment:* One commenter noted that their company uses more severe modes and requirements to test product durability, which they are doubtful the prototype would have survived. In a related comment, a commenter asserted that significantly reduced CO emissions at the highest loads resulting from operation near stoichiometric fuel control will negatively impact engine durability.

Response: The Commission notes that the proposed performance requirement for generators powered by class II single-cylinder engines is nominally six times higher (less stringent) than the CO rate that the prototype generator achieved. The Commission believes that the proposed CO emission requirements can be achieved on many existing engines by replacing the carburetor with closed-loop EFI and integrating a catalyst without engine design modification and without negatively impacting engine durability. The Commission notes, however, that for some engines, modifications might be needed to enable operation closer to stoichiometry. For other engines that cannot be improved through design modifications, those could still be used in generator applications by using a product integration strategy that precludes installed engine operation at loads where fuel enrichment is needed.

10. *Comment:* One commenter stated that the performance standard for CO emission rates must take into account deterioration of emissions to achieve the target exposure over the life of the engine.

Response: The Commission took deterioration into account in developing the performance requirements. The Commission believes deterioration of CO emissions to be minimal. This is based on both the performance of CPSC's durability-tested prototype at end of life as measured by CES, as well as by observation of published deterioration factors for CO, which are measures of the increase in CO emissions for an aged engine, relative to its emissions when new. The Commission observed in the EPA's exhaust emission database for model year 2015 that a vast majority of the engines have a deterioration factor below 1.1 (thus indicating the emissions worsen by less than 10 percent above initial emissions).

11. *Comment:* One commenter stated that the target CO emission rate in terms of g/kW-hr should be based on engine displacement, with lower rates (in terms of g/kW-hr) for larger engines to achieve the same target exposure.

Response: The Commission believes lower CO emission rates are technically feasible for smaller engines, compared to larger engines. Consequently, the Commission is proposing performance requirements for four different size

(ECU) of the EFI system. The tables are used to associate engine operating parameters measured by the system's sensors with how much fuel the injectors need to deliver to the combustion chamber in order for the EFI system to maintain the desired air/fuel mixture.

[75] Emmerich, S. J., A. Persily, and L. Wang, *Modeling and Measuring the Effects of Portable Gasoline Powered Generator Exhaust on Indoor Carbon Monoxide Level* (NIST Technical Note 1781), National Institute of Standards and Technology, Gaithersburg, MD, February 2013 (available online at: *http://www.cpsc.gov/Global/Research-and-Statistics/Technical-Reports/Home/Portable-Generators/PortableGenerators041213.pdf* and in: *www.regultations.gov* in docket identification CPSC–2006–0057–0005.)

categories of generators that are each based on technical feasibility and analysis of benefits and costs as a function of engine displacement, and, for the largest category, also whether the engine has one or two cylinders. The epidemiological benefits considered exposure differences for different generator types, by allocating known incidents based on location of generator and location of victims in various house types.

12. *Comment:* One commenter asserted that reducing CO emissions will increase other pollutant emissions and risk of fire and burn hazard.

Response: The Commission does not agree that reducing CO emissions will increase other pollutant emissions. Based on the emission results from CPSC's prototype generator, as well as those from the EPA's demonstration program, reducing CO emission rates also results in reduced $HC+NO_X$ emissions. CPSC staff acknowledges that for CPSC's prototype, the leaner air fuel ratio resulted in elevated exhaust temperatures compared to the carbureted configuration. Staff notes, however, that the muffler that was used was chosen to easily accommodate integration of the small catalyst into it. This muffler had less internal baffling, which resulted in average muffler surface temperatures of approximately 70°C hotter than the OEM design. As a result, UA shrouded this muffler and that resulted in shroud surface temperatures that were lower than the OEM muffler that was not shrouded. Staff notes that use of better designed mufflers, and, if needed, improved flow of cooling air over the exhaust, could mitigate the effect of elevated exhaust temperatures.

13. *Comment:* One commenter stated that EFI systems are becoming more low cost and noted that an oxygen sensor of one particular design can serve as a safety switch if the engine starts operating rich of stoichiometric.

Response: The Commission has observed that small SI engines with EFI have entered the marketplace in recent years, and expects this would mean that they have become less expensive. The Commission is interested in combining reduced CO emissions with a mechanism that will shut off a generator when operated in an enclosed or semi-enclosed space.

14. *Comment:* One commenter stated that the results from testing the generators in NIST's garage should not be relied upon for any rulemaking related to portable generator safety because, the commenter asserted, the attached garage on NIST's test house is not sufficiently representative of how garages are conventionally constructed.

Response: The Commission used the results from NIST's test house to provide an example of the reduction in the house's hypothetical occupants' exposure that the reduced CO emission rate from a portable generator can yield when compared to a current carbureted generator when operated in the same garage. The Commission is basing the proposed performance requirements for the rule on technically feasible CO emission rates, along with an assessment of the impact of those rates through indoor air quality modeling of 40 structures, representative of the U.S. housing stock, where generators were operated in 503 of the deaths in CPSC's databases that occurred from 2004 through 2012.

15. *Comment:* Several commenters expressed concern about CO deaths caused by generators and expressed support for reducing generators' CO emission rates and their belief in the technical feasibility to do so.

Response: The Commission agrees with the commenters.

C. CO Poisoning Effects

1. *Comment:* The commenter considers that CPSC staff assumes COHb levels below 10 percent are not harmful. The commenter notes that there is no scientific basis for such an assumption and also notes that, in many studies, COHb levels do not correlate consistently with symptoms.

Response: The Commission does not assume that a CO exposure resulting in less than 10 percent COHb is incapable of causing adverse health effects. The Commission has long recognized the existence of populations especially sensitive to CO health effects (fetuses, asthmatics, and individuals with cardiovascular diseases). Most authorities, including CPSC, consider individuals with coronary artery disease [CAD] to be the population most sensitive to potential adverse health effects of CO at the lowest exposure levels. Some studies report individuals with CAD might perceive adverse health effects, and/or, tests show that they may experience adverse health effects that they are unaware of, at about 2 percent to 5 percent COHb. The Commission understands that the pathophysiological effects of CO are complex and strongly influenced by multiple factors, particularly CO level, exposure duration, and exposed individual's inhalation rate and health status. In the ANPR on portable generators, and in the prototype report documents, CPSC focused on extremely high-level, acutely lethal, CO exposures caused by generator exhaust. Therefore, rather than provide an exhaustive review of all studies, including equivocal findings in some low-level exposure studies, CPSC is providing an overview of the complex interactions between multiple variables that influence the end effects of acute, high-severity CO exposures in humans. CPSC emphasizes that CO poisoning effects should be understood to be a continuum of effects of the exposure, rather than be viewed as discrete health effects tightly tied to specific CO levels or COHb levels.

2. *Comment:* One commenter stated that although a low CO emissions generator would undoubtedly save lives if widely applied, ''prediction of confusion and incapacitation from COHb levels is not possible.'' The commenter cited his recent publication reporting that ''symptoms of CO poisoning do not correlate well with COHb levels.'' Based on his findings and other clinical reports, the commenter questions the validity and/or concept of a table relating COHb levels to particular symptoms, as used by the Commission. The commenter believes that it is incorrect to use COHb levels to calculate egress times from a CO-containing environment and notes that there are no data to support the method. Another commenter also questioned the validity of an approximate relationship between COHb levels and severity of CO poisoning symptoms and health effects.

Response: The Commission's use of predicted COHb levels was not intended to calculate an actual egress time from a CO exposure, and the Commission noted that reduced emission generators would not guarantee egress by exposed individuals. Rather, the Commission considers that reduced generator CO emissions, as achieved with its prototype unit, will substantially delay the rate at which CO levels rise in poorly ventilated spaces, and will thus delay the rate at which COHb levels of exposed individuals rise (in some cases reducing the peak COHb level attained). This will provide significantly increased time available for individuals to remove themselves from the exposure environment or to be rescued by an outside party. Supporting evidence that some individuals will react appropriately to slower onset of CO poisoning effects has been reported (*e.g.,* 111 of 167 patients with CO poisoning presented to Florida hospital emergency departments (ED) between 5 a.m. and 10 a.m., after waking and feeling ill consequent to overnight use of a generator during hurricane-related power outages). CPSC data indicate that in 69 of 93 cases where it was known how and why a patient with generator-related CO exposure presented to an ED, the patient had either transported themselves or contacted others (9–1–1, family, friends) to arrange for their transport to the ED. In the remaining cases, individuals were found in distress by others (either a lesser affected co-exposed individual or an outside party).

The Commission recognizes that even healthy individuals can exhibit variability in individual susceptibility to CO health effects under identical exposure scenarios. The Commission understands that, in clinical situations, CO poisoning symptoms and health effects do not necessarily correlate well with a patient's initial COHb measurement, which is often confounded (generally reduced by factors such as time interval relative to cessation of CO exposure and provision of supplemental oxygen). Clearly, COHb measurements can be of limited value to physicians when determining appropriate treatment plans for individual patients. Rather than make clinical decisions, the Commission needed to provide controlled, systematic comparisons of how CPSC's reduced CO emissions prototype generator could be expected to reduce the lethal CO hazard presented by the unmodified original generator. Therefore, CPSC used identical physiological input parameters for a healthy adult to model COHb formation and elimination from empirical generator CO time course exposure data. CPSC used predicted times taken to rise to, and progress through, three convenience benchmark percentile COHb values to compare the relative CO poisoning hazard presented by a generator before and after design modifications to reduce its CO emission rate. The Commission considered these benchmark values to approximate relatively mild (20% COHb), potentially incapacitating (40% COHb), and likely lethal (60% COHb) exposure levels. Although indicating health effects generally first reported at these benchmark COHb levels, CPSC did not intend to convey that they represented precise measures when appearance of symptoms and adverse health effects would be expected in all individuals. CPSC noted that rapidly rising, high-level CO exposures of several thousand ppm (as can occur with current carbureted generators) would result in extreme oxygen deprivation and fast-rising COHb levels, causing rapid incapacitation, loss of consciousness and death, without individuals necessarily experiencing milder, progressively worsening CO poisoning symptoms typically manifested in slowly rising or lower-level CO exposures.

As further detailed in the staff's briefing package, the available physiological research data and clinical findings in the scientific literature support the use of ''COHb benchmarks,'' for approximate estimation and comparison of CO-related health effects expected during generator-related exposures.[76] The Commission welcomes suggestions on alternative health-based approaches to compare the reduced CO emissions generators with current products in terms of improved safety benefits.

D. Jurisdiction

Comment: One commenter asserted that pursuant to § 31 of the CPSA, the CPSC lacks authority to regulate the risk of injury associated with CO emissions from portable generators because that risk could be addressed under the Clean Air Act (CAA). Specifically, the commenters rely on Section 213 of the CAA, which directs the EPA to conduct a study of emissions from non-road engines to determine if they cause or contribute to air pollution, ''which may reasonably be anticipated to endanger public health or welfare.'' 42 U.S.C. 7547(a)(1)(2006). Under this provision of the CAA, the EPA has promulgated regulations governing CO emissions from portable generators. In particular, 40 CFR part 90 imposes requirements to control emissions from non-road spark-ignition engines, which includes portable generators, at or below 19 kilowatts.

Response: Section 31 of the CPSA does not establish an absolute prohibition to CPSC action whenever the CAA is implicated. Rather, the Commission lacks authority to regulate a risk of injury associated with a consumer product if that risk ''could be eliminated or reduced to a sufficient extent through actions'' taken under the CAA. 15 U.S.C. 2080(a). Case law and the legislative history of § 31 confirm this. *See ASG Industries, Inc.* v. *Consumer Product Safety Comm'n,* 593 F.2d 1323 (D.C. Cir. 1979) (under section 31, CPSC is to consider all aspects of the risk and make a judgment whether the alternate statute can sufficiently reduce the risk of injury).

The legislative history indicates that Congress contemplated a stricter ban on the CPSC's jurisdiction and rejected it. Specifically, the Senate version of the bill for § 31 would have precluded CPSC's jurisdiction if the product was ''subject to safety regulations'' under one of the statutes listed in section 31 of the CPSA. S. Rep. No. 92–749, 92d Cong., 2d Sess. 12–13 (1972). In contrast, as the *ASG* court noted, under the House version of the bill, which was eventually enacted, the Commission has authority if there has not been sufficient reduction or elimination of the risk of injury. H.R. Rep. No. 92–1593, 92d Cong., 2d Sess. 38 (1972).

The CAA and the EPA regulations promulgated under it that address CO emissions from portable generators have not sufficiently reduced or eliminated the risk of CO poisoning associated with portable generators that the CPSC seeks to address. Deaths and injuries associated with CO emissions from portable generators have increased since the EPA adopted its regulations limiting CO emissions from the type of engines used in portable generators.

The CAA and the EPA's regulations create national standards intended to address large-scale ambient air pollution, not acute CO exposure from portable generators. The CAA and the EPA's regulations, created under 42 U.S.C. 7407, are designed to reduce CO emissions in regional areas that exceed National Ambient Air Quality Standards. These requirements are not designed to reduce the localized risk to consumers from acute CO poisoning when portable generators are used in the home.

Additionally, EPA's 2008 adoption of an averaging program for CO emissions from marine engines further demonstrates that its regulations are not concerned with the risk of acute CO poisoning, but only large-scale overall emission levels. This averaging program allows a manufacturer to exceed the EPA's CO emission limits for a group of similar engines, as long as the manufacturer offsets that increase with another ''engine family'' with emission levels below the EPA's limit. 73 FR 59,034 (Oct. 8, 2008). It is noteworthy that this averaging program applies to CO emissions from marine engines, which the EPA explicitly acknowledges are associated with ''a substantial number of CO poisonings and deaths.'' 73 FR 59,034, 59,048 (Oct. 8, 2008). Under this program, emissions from an individual engine are inconsequential to EPA's rule, and so is the individual consumer's exposure level. Rather, the EPA's determination of CO emission limits focuses on ambient air pollution on a large scale.

Finally, the structure of the CAA and its delegations of authority make the EPA unable to adequately address the risk of injury associated with CO poisoning to consumers from portable

[76] Tab K, Appendices, of staff's briefing package.

generators. Under the CAA, the EPA sets National Ambient Air Quality Standards (NAAQS) and has oversight and enforcement authority, but the states retain primary responsibility for ensuring air quality. Section 107 of the CAA sets out states' responsibilities for ensuring air quality, including determining how the state will meet NAAQS, and identifying attainment and non-attainment areas. 42 U.S.C. 7407. The U.S. Supreme Court has emphasized that the EPA is ''relegated by the [CAA] to a secondary role,'' as long as states adopt plans that meet the general requirements. *Train* v. *Natural Resources Defense Council, Inc.,* 421 U.S. 60 (1975). This broad leeway provided to states indicates that the CAA and the EPA's regulations are not intended to and cannot provide sufficient specificity to mitigate the risk of CO poisoning.

E. CO Sensor Systems and Exhaust Pipe Extension

1. Generator-Mounted CO Sensing Shutoff Systems

Comment: Four comments were submitted on the concept of a generator-mounted safety shutoff system using CO sensing technologies that could be used to limit consumer exposure to CO present in portable generator exhaust. Three of the four commenters advocated for such a system, and one advocated against it.

One comment in support of the use of residential CO alarm technology noted that a CO sensor that is used to activate ventilation systems in parking garages can be used for turning off the generator when it senses 35 ppm CO. The Commenter also recommended that the system be interlocked to prevent generator operation every 2 to 3 years, when the sensor's useful life is expended, and to prevent operation, if the user disables the system.

The commenter who did not recommend the use of residential CO alarm technology expressed the belief that COS sensing technology near a generator may impair its operation, causing users to disconnect the sensors to ensure a steady source of electricity. The Commenter also noted that CO sensors require routine maintenance, and their capabilities can degrade with time and during extended periods of inactivity, adding that it may be unreasonable to expect consumers to regularly check and maintain the CO sensing equipment, particularly when the generator is not even being used.

Response: The Commission shares the concern that using CO sensing technology in the vicinity of a portable generator may impair the generator's operation, causing users to disconnect the sensors. The Commission agrees that it is unreasonable to expect consumers to regularly check and maintain CO sensing equipment, particularly when a generator is not being used. Early in the portable generator project, the Commission investigated one version of the concept of an on-board CO sensing shutoff system; the investigation and its findings are documented in the staff report, *Phase 2 Test Report: Portable Generator Equipped with a Safety Shutoff Device* (Brown, 2013). Its goals were to: (1) Determine if a CO sensor/alarm output signal from commercially available residential CO alarms (meeting the requirements in UL 2034 *Single and Multiple Carbon Monoxide Alarms*), when retrofitted with circuitry connected to the generator, could trigger a shutoff device installed on a portable generator when the CO alarm activated; and (2) measure CO concentrations around the generator when operated in multiple environments to assess CO migration and levels that might occur under several scenarios. Test environments examined included outdoors, in a two-sided structure, as well as inside and under a temporary modular storage (TMS) building.

In that investigation, the Commission found that when the generator was operated inside the TMS building, the CO migrated and accumulated on the far side of the room more quickly than near the generator. The CO alarms on the generator never activated before those located elsewhere in the space activated, with the time difference generally ranging from 5 to 10 minutes. In some tests, CO levels in some parts of the room reached up to 1,000 ppm before the CO alarm on the generator activated and shut off the generator. When the generator was operated in wide-open outdoors in a light breeze condition, CO concentrations ranging up to 350 ppm were measured in the immediate vicinity of the generator. Although this did not activate the CO alarms mounted on the generator to shut it off, the Commission believes this could occur in some circumstances. This would detrimentally affect the utility of the generator when used in a proper location.

In addition to these performance deficiencies, the Commission is concerned about the ability of CO sensors to survive the environments produced by an operating generator. Currently available electrochemical and semiconductor CO sensors, which dominate the CO sensing market, have numerous vulnerabilities that will compromise their ability to maintain accuracy if they are used in an atmosphere containing high concentrations of hydrocarbons, as is present in a generator's exhaust, particularly when used in a confined space.

Regarding one commenter's recommendation to use CO sensors that turn on ventilation fans in parking garages, a recent energy efficiency study examining the performance of parking garages that have CO-sensing activated ventilation indicates that this type of system is subject to failure if not maintained on the manufacturer's recommended schedule (California Utilities Statewide Codes and Standards Team, 2011). Systems employing both electrochemical and solid state technology that were five and 12 years old, respectively, failed likely because they had not been calibrated. A properly maintained 2-year-old electrochemical sensor-equipped system performed well. The commenter suggested that to account for the referenced 2 to 3 year expected sensor life, the consumer replace the sensor at the end of the sensor's useful life. The Commission believes that it is not appropriate for consumers to be required to replace a primary safety device, let alone replace it every 2 to 3 years, when the life of the overall product is much longer. Furthermore, making the sensor replaceable makes it vulnerable to tampering. Notwithstanding the previously mentioned CO concentrations that CPSC measured around a generator operating in a proper location, the conflict between making the sensor consumer-replaceable and tamper-proof leads the Commission to conclude that currently available sensors are not likely to be effective, given the long service life of portable generators. With respect to the recommendation for a 35 ppm CO set point for an on-board sensor, CPSC measured CO concentrations in excess of 35 ppm in the immediate vicinity of the generator, while operating outdoors within 11 minutes after starting the generator (Fig C2 in Brown, 2013). A 35 ppm limit for shutoff would greatly limit the utility of portable generators when used properly.

2. Remotely Located CO-Sensing Shutoff Systems

Comment: Two commenters raised concerns about the concept of a remotely located CO-sensing shutoff system, such as that investigated and documented in the staff report, ''*Demonstration of a Remote Carbon Monoxide Sensing Automatic Shut-Off Device for Portable Generators*'' (Lee, 2006). Conceptually, a remotely located

CO-sensing shutoff system would use a CO sensor located indoors to monitor for CO infiltration at that location and when it detects an unsafe CO concentration there, the sensing shut-off device would communicate with the generator to shut it off. The report presents CPSC staff's investigation of one version of such a concept, consisting of a CO alarm retrofitted with a wireless transmitter, placed by the user in an indoor location, which communicated with a wireless receiver mounted onto a portable generator operating in an attached garage. When the CO alarm activated, it energized a circuit on the generator and shut off the generator.

One commenter raised a number of behavioral and technical issues on the utility of such a system. This commenter noted that the same technical comments he made on the generator-mounted safety shutoff concept, discussed above, apply to the remote-sensing concept as well. This commenter also noted that remote-sensing technologies require consumers to take affirmative actions to properly locate sensors inside buildings and to monitor them to make sure that they continue to be operational. The commenter stated that the risk of the CO poisoning hazard would not be mitigated when consumers fail to locate or use the sensing technology properly or the detector malfunctions due to infrequent use or lack of maintenance.

Another commenter enumerated a number of concerns about the concept of a remote CO-shutoff system that included:

- Sensor performance affected by ambient conditions
- battery life
- the ability of consumers to install
- nuisance trips causing consumers to disable system
- the need to maintain proper battery charge
- ability of consumer to start generator, then remove the remote sensor to an area without CO, to allow the generator to operate.

Regarding the staff report, the commenter objected that only one model generator was included in the tests and that only a limited number of hazard scenarios were tested. The commenter provided a list of options that would need to be investigated to document remote CO-sensing device acceptability. The options include: (1) Effectiveness of the mandatory warning label; (2) effects of environmental conditions on CO dispersion in a building; (3) effect of generator load profile on CO dispersion; (4) effect of walls and building materials on the sensor's radio frequency (RF) signal to the generator; and (5) maximum distance between sensor/transmitter and the generator. Additional areas the commenter listed include: (6) Consumer's ability to reset the system in adverse conditions (darkness, storms); (7) timing of product sales (pre- or post-storm); (8) minimum component performance requirements; and (9) minimum battery requirements.

Response: The Commission agrees that there are multiple challenges with a remote CO-shutoff concept for portable generators, including many of the challenges identified by the commenters and notes that the staff report concluded with the following:

The study was limited to proof-of-concept and did not consider issues such as life expectancy, reliability, usability, and environmental conditions. All of these factors would need to be considered in developing a remote CO detection/shut-off system for portable generators for consumer use.

In addition to having the same sensor-related concerns as those stated above in CPSC's response to the on-board CO sensing shutoff concept, CPSC has additional concerns, a primary one being that a system of this sort would need to be provided with the generator and would require the consumer to properly install the sensing devices. The consumer could easily defeat the features by operating the generator in an enclosed location and intentionally placing the sensor outdoors or other locations away from where the CO is infiltrating in order to keep the generator running. Another scenario of concern involves the user placing the CO sensor in a room where he/she thinks the CO will infiltrate, but the CO infiltrates faster in another room that the system is not monitoring. Transmitter range is another concern; if a consumer properly locates the generator outdoors at a distance far enough from the dwelling to prevent CO infiltration, the distance may render the generator inoperable if it is not within range of the sensor signal. Based on the concerns mentioned above, the Commission is not pursuing this concept as a means of reducing the CO hazard associated with portable generators.

3. Flexible Exhaust Pipe Extension

Comment: One commenter recommended using an exhaust hose that has one end that fits over the tailpipe and a laterally expandable window fitting on the other end to direct exhaust out through a window. The commenter recommended that the hose should have an electrical circuit wired through its entire length, which plugs into the generator to prevent operation if the hose is not properly attached.

Response: There are several drawbacks to this approach. First, if the hose must be attached for the generator to operate, then it must be attached even if the generator is correctly located away from the house. CPSC believes this is not practical. Second, the CPSC database includes fatal CO incidents where the generator was located outside the dwelling, but not so far away to prevent exhaust from entering the home through leaks or openings (Hnatov, 2015). Third, CPSC staff believes that it is unlikely that an expandable window insert can be installed in such a way as to be leak tight. Last, this system's successful use depends on the consumer's ability to properly install both the hose and the window fitting. Given these concerns, the hose extension is not a technically feasible approach to address the carbon monoxide poisoning hazard associated with engine-driven portable generators.

F. Economic Considerations

On February 12, 2007, counsel for American Honda Motor Co., Inc., Briggs & Stratton Company, and Yamaha Motor Corporation, USA (the companies), submitted comments jointly on the December 12, 2006 advance notice of proposed rulemaking (ANPR), concerning portable generators. The companies made the following comments on economic issues:

1. *Comment:* The vast majority of consumers use their portable generators properly and safely. CPSC should give proper weight to the benefits and widespread uses of portable generators, as well as the affordability of current models.

Response: Although the great majority of consumers might exercise proper safety precautions, improper use of the product can and does have disastrous consequences. The Commission evaluated different technologies to address the risk and has concluded that a performance standard that sets requirements that reduce CO emissions from generators is the most reliable regulatory alternative to address the risks of CO poisoning associated with portable generators. Manufacturing cost increases under the proposed rule would generally have a relatively greater impact on percentage price increases (and consumer demand) for low-price units, such as units lacking inverter technology (as discussed in the preliminary regulatory analysis section). However, the analysis finds that the estimated benefits outweigh the costs to comply with the proposed rule.

2. *Comment:* Staff has not provided consumer exposure data to support risk analysis of CO deaths associated with consumer use of generators.

Response: Since the comment was filed, additional information and analysis has greatly improved the analysis of risks associated with consumer use of portable generators. The Commission's preliminary regulatory analysis has analyzed historical shipment information acquired from market research firms (Power Systems Research and Synovate), from federal data sources (the International Trade Commission and Bureau of the Census), and from individual manufacturers to estimate the numbers of portable generators in use, by engine class and other characteristics, during the period covered by CPSC staff's epidemiological benefits analysis (Hnatov, Inkster & Buyer, 2016). The new information and analysis has enabled CPSC to estimate CO poisoning risks (and societal costs) per generator in use. Additional information on product sales and use, which the industry is encouraged to provide in comments to this NPR, could further refine these estimates.

3. *Comment:* In response to the technology demonstration report, one commenter stated that although engine designs that incorporate the report's design changes [77] are possible, they may not be suitable for all engines, including many used to power portable generators. This is especially true when considering the price point and reliability considerations associated with portable generators designed and sold to consumers for emergency or infrequent use.

Response: As noted, we agree that some types of generators (and engines) will be more severely affected by a proposed rule that is performance based, but is likely to be addressed by manufacturers through the use of EFI and catalysts (although some generators with handheld engines might not require catalysts) in terms of relative price increases that would result from incorporation of the technologies. The impact on demand for these products could affect their future availability to consumers.

[77] Mr. Gault is referring to the incorporation of an electronic control unit, manifold air pressure sensor, fuel pump, fuel injector . . . exhaust oxygen sensor, catalyst aftertreatment and other components used on the prototype generator.

IX. Description of the Proposed Rule

A. Scope, Purpose, and Compliance Dates—§ 1241.1

The proposed standard would apply to ''portable generators'' powered by small handheld and non-handheld SI engines, and would include requirements intended to limit carbon monoxide emission rates from these portable generators. The requirements are intended to reduce an unreasonable risk of injury associated with portable generators.

Generators within the scope of the proposed rule provide receptacle outlets for AC output circuits and are intended to be moved, although not necessarily with wheels. Products that would not be covered by the proposed rule include permanently installed stationary generators, 50 hertz generators, marine generators, generators installed in recreational vehicles, generators intended to be pulled by vehicles, generators intended to be mounted in truck beds, and generators that are part of welding machines.[78] Generators powered by compression-ignition (CI) engines fueled by diesel also are excluded from the scope of the proposed rule.[79]

The requirements would apply to four categories of portable generators: (1) Handheld generators; (2) class 1 generators; (3) class 2 single-cylinder generators; and (4) class 2 twin-cylinder generators. Handheld engines have total engine displacement of 80 cubic centimeters (cc) or less; non-handheld engines include EPA Class I engines, which have total engine displacement of less than 225cc, and Class II engines, which have displacement of 225cc and more. Class II engines have an upper limit determined by rated engine power, 19 kilowatts (kW), which is equivalent to 25 horsepower. Although the Commission categorized generators by the EPA classification of the engines powering them, it is important to distinguish these engines from the portable generators in which they are used because the engines are used in other products as well. To provide a clear distinction, the Commission refers to engines according to EPA's classification: Handheld engines, non-handheld Class I engines and non-handheld Class II engines, while referring to portable generators according to the Commission's definitions, handheld generators, class 1 generators, class 2 single-cylinder generators and class 2 twin-cylinder generators.

[78] Stationary generators, marine generators, and generators installed in recreational vehicles are excluded because they are not portable. Generators intended to be pulled by vehicles, intended to be mounted in truck beds, generators that are part of welding machines, and 50-hertz generators are excluded because they are not typically used by consumers.

[79] CI engines are not typically used by consumers. In addition, CI engines have relatively low CO emission rates. The current EPA standard for CO emissions from CI engines rated below 8 kW is 8.0 g.kW-hr, which is significantly lower than the EPA standard of 610 g/kW-hr applicable to small SI engine classes used in portable generators.

Under the CPSA, the effective date for a consumer product safety standard must not exceed 180 days from the date the final rule is published, unless the Commission finds, for good cause, that a later effective date is in the public interest. To meet the proposed performance requirements, it is likely that engines will need closed-loop fuel-injection, and with the exception of some handheld engines, the addition of a catalyst. Implementing closed-loop EFI and catalyst integration on all class II (single- and twin-cylinder) engines powering generators may require design modifications, such as redesign of cooling fins and a fan, to accommodate fuel control closer to stoichiometry. The Commission believes 180 days may not be adequate time to allow for such design modifications, and is instead proposing an effective date of 1 year following publication of the final rule, at which time portable generators with Class II single- and twin-cylinder engines, or class 2 single- and twin-cylinder portable generators, would be required to comply with the applicable requirements of the rule. The Commission proposes a compliance date of 3 years after publication of the final rule for generators powered by Class I engines and handheld generators, or class 1 and handheld generators. This later compliance date is to address manufacturers' concerns that, while industry has gained some limited experience with incorporating fuel injection on handheld and Class I engines, there may be different challenges associated with accommodating the necessary emission control technologies on these smaller engines. In addition, later compliance dates potentially could reduce the impact on manufacturers of generators, including small manufacturers, by providing them with more time to develop engines that would meet the requirements of the proposed rule, or, in the case of small manufacturers that do not manufacture the engines used in their generators, by providing them with additional time to find a supplier for compliant engines so that their generator production would not be interrupted.

B. Definitions—§ 1241.2

The proposed standard would provide that the definitions in section 3 of the Consumer Product Safety Act (15 U.S.C. 2051) apply. In addition, the proposed standard would include the following definitions:

(a) *handheld generator* means a generator powered by a spark-ignited (SI) engine with displacement of 80 cc or less.

(b) *class 1 generator* means a generator powered by an SI engine with displacement greater than 80 cc but less than 225 cc.

(c) *class 2 single-cylinder generator* means a generator powered by an SI engine with one cylinder having displacement of 225 cc or greater, up to a maximum engine power of 25 kW.

(d) c*lass 2 two-cylinder generator* means a generator powered by an SI engine with two cylinders having a total displacement of 225 cc or greater, up to a maximum engine power of 25 kW.

C. Requirements—§ 1241.3

1. Description of Requirements

The proposed rule would require that portable generators powered by handheld engines and Class I engines, or handheld and class 1 generators, not exceed a weighted CO at a weighted rate more than 75 grams per hour (g/h); generators powered by one-cylinder Class II engines, or class 2 generators, must not exceed a weighted CO emission rate of 150 g/h; and generators powered by Class II engines with two cylinders, or class 2 twin-cylinder generators, not exceed a weighted CO emission rate of 300 g/h. The weighted emission rates are based on weighting of six modes of generator operation, ranging from maximum generator load capability (mode 1) to no load (mode 6), similar to a procedure used by EPA to certify compliance with its emission standards for small SI engines.

2. Rationale

The proposed rule would impose different limits on weighted CO emission rates for different categories of generators in recognition of the effects of factors such as engine size and other engine characteristics on CO emissions, in addition to the different challenges that may be faced in meeting CO emission rates expressed in grams per hour. The proposed rule would apply different criteria to generators, based on EPA's classification of engines (and on the number of engine cylinders), rather than on power ratings of either the generators or the engines. This determination was based mainly on the absence of standard methods for defining the rated power, maximum power, or surge power of generators. Furthermore, staff determined that the technically feasible emission rates were different for different categories of generators. Staff also found differences in hazard patterns for different categories; this is reflected in the determination of epidemiological benefits (for example more fatalities associated with large generators involved their use in garages as opposed to basements, while for small generators the reverse was true, as described in detail in staff's briefing package in Tab K).

The requirements of the proposed rule are based on technically feasible emission rates and an analysis of the benefits and costs associated with these technically feasible emission rates. The benefits analysis and cost analysis are explained in detail in Section VI and Section X, respectively, of this preamble.

D. Test Procedures—§ 1241.4

The proposed rule details the test procedure that the Commission would use to determine compliance with the standard, but also provides that any test procedure that will accurately determine the emission level of the portable generator may be used.

The procedure the Commission would use is largely based on a test method that was developed in a collaborative effort with industry stakeholders and is explained in greater detail in Tab J of the briefing package. In brief, the Commission intends to perform the tests in ambient temperature in the range of 10–38 °C (50–100 °F) using E10 gasoline. The six loads that will be applied to the generator for determining the weighted CO emission rate are based on the generator's maximum load capability. Maximum load capability is determined by increasing the load applied to the generator to the maximum observed power output, without causing the voltage or frequency to deviate by more than 10 percent of the nameplate rated voltage and 5 percent of the nameplate rated frequency and can be maintained for 45 minutes with stable oil temperature. The loads will be applied using a resistive load bank capable of achieving each specified load condition to within 5 percent and will be measured using a power meter with an accuracy of ± 5 percent. The Commission will use constant volume sampling (CVS) emissions measurement equipment, as described in the EPA's regulations 40 CFR part 1054 and 40 CFR part 1065 as of 2016. If the generator is equipped with an economy mode or similar feature that has the engine operating in low speed when not loaded, the setting that produces the highest weighted CO emission rate will be used to verify whether the applicable carbon monoxide emissions rate is met.

E. Prohibited Stockpiling—§ 1241.5

In accordance with Section 9 of the CPSA, the proposed rule contains a provision that prohibits a manufacturer from ''stockpiling'' or substantially increasing the manufacture or importation of noncomplying generators between the date of the final rule and its effective date (or compliance date, in the case of generators with handheld and Class I engines). The rule would prohibit the manufacture or importation of noncomplying portable generators by engine class in any period of 12 consecutive months between the date of the promulgation of the rule and the effective/compliance date at a rate that is greater than 125 percent of the rate at which they manufactured or imported portable generators with engines of the same class during the base period for the manufacturer. The base period is any period of 365 consecutive days, chosen by the manufacturer or importer, in the 5-year period immediately preceding the promulgation of the final rule.

Generator sales can vary substantially from year to year, depending upon factors such as widespread power outages caused by hurricanes and winter storms. Annual unit shipment and import data obtained by CPSC staff show that it has not been uncommon for shipments to have varied by 40 percent or more from year to year at least once in recent years. The 5 year period in the anti-stockpiling provision is intended to allow manufacturers and importers sufficient flexibility to meet normal changes in demand that may occur in the period between the promulgation of a rule and its effective/compliance date while limiting their ability to stockpile noncomplying generators for sale after that date. Allowing manufacturers to produce noncomplying generators in amounts that total 125 percent of their peak 365-day period over the prior 5 years could give manufacturers enough flexibility to respond to demand if there is a year of major power outages that create a demand for consumers to purchase portable generators. The Commission is aware of some large manufacturers that have seen year-to-year shipments increase by 50 percent and 70%, so the Commission believes that the allowable stockpiling percentage over a base period should be greater for generators than most other consumer products. The Commission seeks comments on the proposed product manufacture or import limits and the base period.

F. Findings—§ 1241.6

In accordance with the requirements of the CPSA, we are proposing to make the findings stated in section 9 of the CPSA. The proposed findings are discussed in section XVI of this preamble.

X. Preliminary Regulatory Analysis

The Commission is proposing to issue a rule under sections 7 and 9 of the CPSA. The CPSA requires that the Commission prepare a preliminary regulatory analysis and that the preliminary regulatory analysis be published with the text of the proposed rule. 15 U.S.C. 2058(c). The following discussion is extracted from staff's memorandum, ''Draft Proposed Rule Establishing Safety Standard for Portable Generators: Preliminary Regulatory Analysis.''

A. Introduction

The CPSC is issuing a proposed rule for portable generators. This rulemaking proceeding was initiated by an ANPR published in the **Federal Register** on December 12, 2006. The proposed rule includes weighted carbon monoxide emission limits from four different categories of portable generators.

Following is a preliminary regulatory analysis of the proposed rule, including a description of the potential costs and potential benefits.

B. CPSC Staff Assessment of the Adequacy of Voluntary Standards for Portable Generators in Addressing CO Deaths and Injuries

As indicated in Section VII.B of this preamble, two organizations, Underwriters' Laboratories, Inc. (UL), and the Portable Generator Manufacturers Association (PGMA), have been accredited by the American National Standards Institute (ANSI) to develop U.S. safety standards for portable generators. Although each organization has developed a standard (designated as UL 2201 and PGMA G300, respectively), only PGMA's standard has achieved the consensus needed to be recognized by ANSI (as ANSI/PGMA G300–2015). A UL 2201 task group has been working on developing proposals to address CO hazards of portable generators; however, the task group has not yet sent a proposal to the standards technical panel established by UL to consider for adoption into UL 2201. The current version of UL 2201 includes the mandatory CPSC label, but does not otherwise address the risks related to CO poisoning. In the Commission's view, the label alone is insufficient to address the risk of injury from CO poisoning. CPSC is unaware of any portable generator that has been certified to UL 2201. Therefore, it is unlikely whether there would be substantial compliance with UL 2201 if the standard were to incorporate CO emissions requirements (Buyer, 2016b).

PGMA G300 also includes the mandatory CPSC label for portable generators, but it does not otherwise address the risks related to CO poisoning. In a letter emailed to Chairman Kaye on September 19, 2016, PGMA announced its intention to reopen G300 to develop a ''performance strategy focused on CO concentrations.'' As discussed in Section VII.B of this preamble, the Commission does not have an adequate basis to determine that PGMA's modification to G300 would likely eliminate or reduce the risk of injury or that there likely will be substantial compliance with the voluntary standard, once modified. In addition, based on the complex nature of setting CO limits and the fact that G300 is just now being re-opened, the Commission is not convinced that a modification to the voluntary standard adequately addressing the risk of injury identified in the rulemaking would be accomplished within a reasonable period of time. CPSC believes that significant technical work, requiring significant time, would be required to develop appropriate requirements and test methods within the broad framework identified in the PGMA letter [80] and at a September 6, 2016, public meeting between PGMA and staff.[81] Specifically, as discussed at the meeting and in the NPR briefing memorandum, there are several technical concerns about shutoff criteria and testing that would need to be investigated (Buyer, 2016a). The Commission is concerned whether the test methodologies would be accurate, dependable and practicable and sufficient to ensure that the generators would shut off quickly enough in a sufficient number of common scenarios seen in portable generator incidents to result in an adequate reduction in the risk of injury and death. The Commission expects that significant periods of time will be needed to evaluate each of these factors. For example, determining the expected epidemiological benefits for the proposed rule required nearly a year for NIST to conduct a modeling study and for staff to evaluate the study. For the PGMA to develop an effective voluntary standard, similar efforts will be required to assess the standard after the technical details have been established.

C. Market Information

1. Manufacturers

Based on data obtained from Power Systems Research, Inc. (''PSR''), a total of 78 domestic or foreign manufacturers produced or exported gasoline-powered portable generators for the U.S. market in recent years. However, most of these manufacturers were based in other countries. The Commission has identified 20 domestic manufacturers of gasoline-powered portable generators, 13 of which would be considered small businesses based on the Small Business Administration (''SBA'') size guidelines for North American Industry Classification System (''NAICS'') category 335312 (Motor and Generator Manufacturing), which categorizes manufacturers as small if they have fewer than 1,250 employees.

Few of the 78 firms involved in production for the U.S. market in recent years have held significant market shares: Less than half of these firms have reportedly had annual shipments of 1,000 units of more, and only six firms have had annual shipments of 50,000 units or more. From 2009 through 2013, the top five manufacturers combined for an estimated 62 percent of the U.S. market for portable generators with power ranges more likely to be in consumer use and the top 10 manufacturers combined for about 84 percent of unit sales during that period. Under the CPSA, firms that import generators from foreign producers would be considered manufacturers of the products. A review of import records for portable generators found that the annual number of individual importers of record has ranged from about 25 to 30 in recent years. These firms would be responsible for certifying that the products they import comply with the rule, should it be finalized by the Commission.

2. Annual Shipments/Sales of Portable Generators

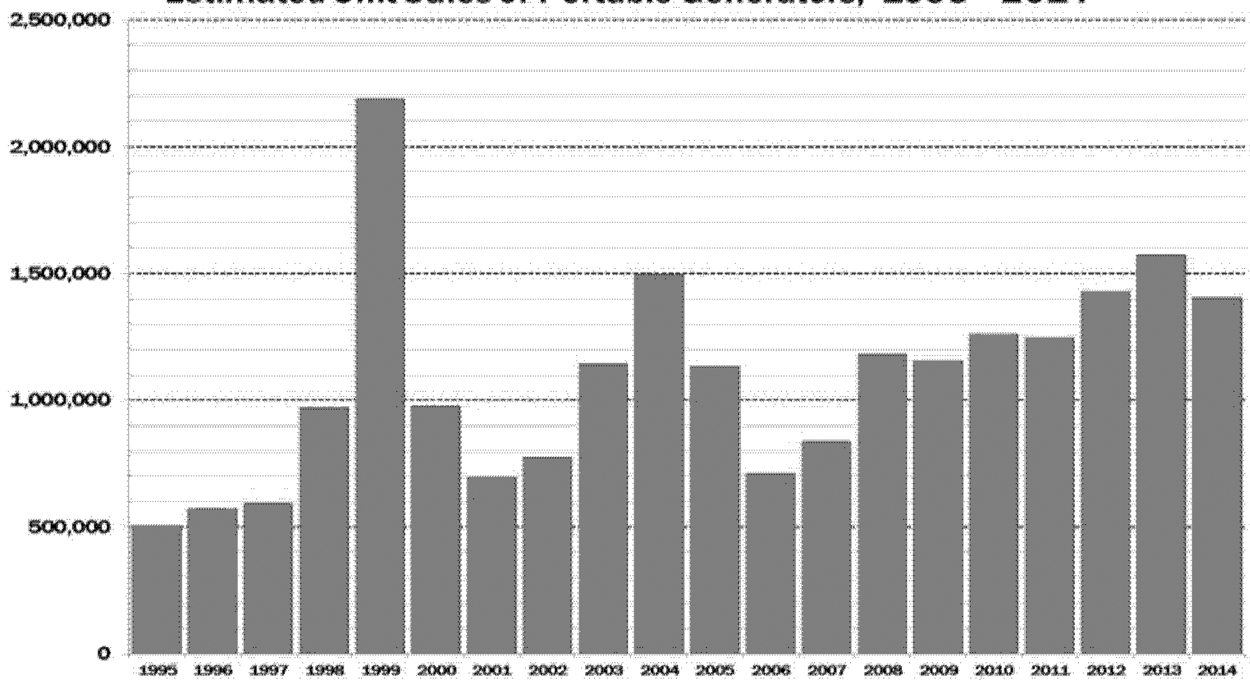
CPSC Directorate for Economic Analysis staff acquired information on annual unit sales of portable generators through contract purchases from market research firms, from federal data sources (*e.g.,* the International Trade Commission [ITC] and Bureau of the

[80] *https://www.cpsc.gov/s3fs-public/PGMALtrChairKayeVoluntaryStandardFinal.pdf.*

[81] *https://www.cpsc.gov/s3fs-public/09%2006%2016%20Meeting%20with%20PGMA%20Follow%20up%20on%20Technical%20Summit%20on%20Carbon%20Monoxide%20Hazard%20Mitigation%20for%20Portable%20Generators.pdf.*

Census), and other sources.[82] Chart 1 presents information on sales of portable generators for 1995 through 2014. Sales estimates are based on estimated portable generator shipments and projected shipments to U.S. retailers for the years 1998–2002 and 2007–2013 (RTI International, 2006; [83] Power Systems Research, 2012, 2013); [84] and estimated U.S. consumer purchases of portable generators for 1995–1997 and 2004–2008 (Synovate, 1999, 2006, 2009).

Chart 1.
Estimated Unit Sales of Portable Generators, 1995 – 2014



As shown by the chart, consumer demand for portable generators from year to year fluctuates with power outages, such as those caused by hurricanes and other storms along the Gulf and Atlantic coasts and by winter storms in other areas. Periods of increased demand for portable generators may be followed by reduced demand because a larger percentage of households had made recent purchases. Evidence of the importance of weather-related power outages in driving demand for portable generators was highlighted in the fiscal 2007 annual report issued by Briggs & Stratton, a leading manufacturer of engines used in the production of generators (its own and others). The report, noted that for 2007, the company had ''a 66% reduction of engine shipments for portable generators caused by a lack of events, such as hurricanes, that cause power outages'' (Briggs & Stratton, 2007). Additionally, spurred by widespread concerns over the possible impact of Y2K in disrupting power supplies, estimated portable generator shipments rose to about 2.2 million in 1999, still the highest year for estimated sales (RTI, 2006).

3. Product Characteristics of Portable Generators Shipped in Recent Years

Power Ratings

Data obtained by the Commission in recent years show that portable generators purchased by consumers and in household use generally range from under 1 kW of rated power up to perhaps 15 kW of rated power. The Commission believes that the most powerful portable generators are mainly purchased for construction or commercial use, although some also end up in household use.[86] In Table 6, we present information on generator power ratings for shipments of portable generators powered by Class I or Class II engines for the U.S. market for the years 2010 through 2014, based on Commission analysis of data obtained from PSR, import data from the U.S. International Trade Commission, and information provided by individual firms. The generators are separated into six power-rating categories. Over this 5-year period for shipments, about 6.9 million gasoline-powered portable generators were shipped for consumer use, or an average of about 1.4 million units per year. Shipments of nearly 1.6

[82] Power Systems Research, compiled information on domestic production and imports of portable generators from its OE Link™ market intelligence database of original equipment and original equipment manufacturer (OEM) production & forecast data. Synovate (which was purchased by another market research firm, Ipsos, in 2011), based on analysis of surveys of the firm's Continuing Consumer Survey panel and the firm's Multi-Client Research Group (SMRG) sample.

[83] RTI International (2006, October), Industry Profile for Small Nonroad Spark-Ignition Engines and Equipment—revised draft report. Authored by Alex Rogozhin, William White & Brooks Depro.

[84] Power Systems Research, Inc. (2012, 2013), Excel data file: OE Link™ original equipment database, portable generator sets produced and sold in the United States, Attached to email from Marilyn Tarbet, PSR, to Charles Smith, Directorate for Economic Analysis, CPSC, October 3, 2012, Excel data file: OE Link™ original equipment production—forecast database with sales data, portable generators produced outside of the United States, sold in the United States, Attached to email from Marilyn Tarbet, PSR, to Charles Smith, Directorate for Economic Anaylsis, CPSC, October 4, 2013.

[86] Although generator power ratings are only known for about 48 percent of the units involved in death reports as of May 21, 2015, for the period of 2004 through 2012, fewer than 3 percent of these units had power ratings of 8 kW or greater, and the most powerful unit involved was 10 kW (Hnatov. 2014).

million units in 2013, made 2013 the peak year for sales during this period.

Data on recent portable generator shipments, as shown in Table 6, compared to information on consumer purchases before 2010, indicate that the U.S. market has shifted toward smaller, less powerful units. Synovate surveys on generators purchased by consumers from 2004 to 2006, found that about 9 percent of units likely purchased for consumer use (< 15kW) had continuous electrical outputs of under 2 kW and about 12 percent had ratings of 2–3.49 kW (Synovate, 2008). Data acquired from PSR and individual manufacturers on portable generator shipments in more recent years show that units with power ratings of under 2 kW comprised an estimated 21 percent of the market, and units with power ratings of 2–3.49 kW have held an estimated market share of about 36 percent over 2010 to 2014 (as shown in Table 6). The market share of larger units, with outputs of 6.5 kW or more, fell from about 22 percent of the market in 2004 to 2006, to about 9 percent over 2010 to 2014.[87]

Table 6.
Shipments of Portable Generators, 2004—2006 & 2010—2014, by Rated Generator Power, in Kilowatts (kW)

Generator kW Range	2004 — 2006 Annual Average	2010 — 2014 Annual Average
Under 2 kW	100,900	283,923
percent	9.1%	20.5%
2 to 3.49 kW	136,245	496,684
percent	12.2%	35.9%
3.5 to 4.99 kW	196,552	184,874
percent	17.6%	13.4%
5 to 6.49 kW	437,669	289,669
percent	39.3%	20.9%
6.5 to 7.99 kW	142,277	46,938
percent	12.8%	3.4%
8 kW & Greater*	100,893	81,808
percent	9.1%	5.9%
All Portable Generators	1,114,536	1,383,896

Source: Power Systems Research, Inc. data; market estimates for individual firms; analysis by Directorate for Economic Analysis, CPSC.

* Limited to generators powered by Class II engines (*i.e.*, under 19 kW).

Engine Classes

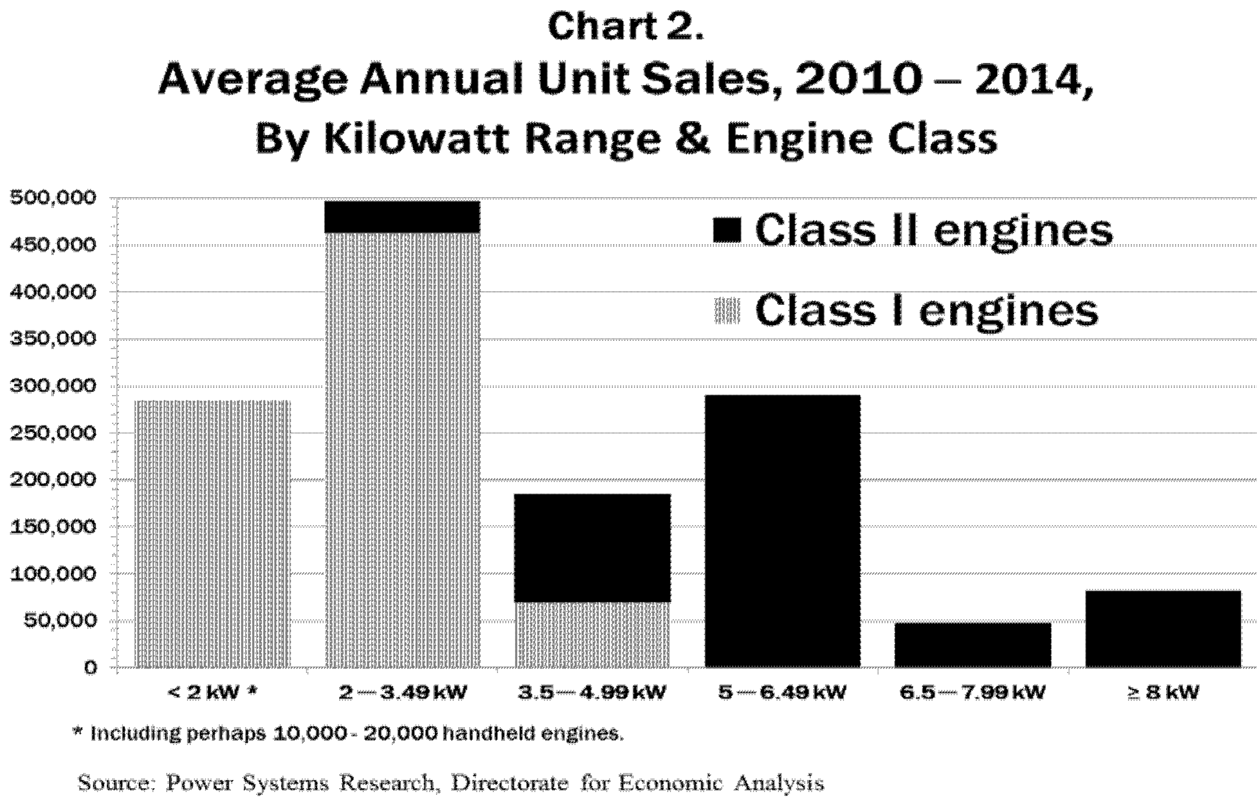
Small spark-ignition engines used in the manufacture of portable generators are classified (by EPA and for the CPSC proposed rule) according to their total cylinder displacement in cubic centimeters (cc). Data on this engine characteristic were obtained from PSR and individual firms for recent shipments of portable generators, which enabled CPSC to estimate engine classes for the kilowatt ranges discussed above. Data on shipments of portable generators for 2010 through 2014 show that portable generators with Class I engines (those with a total cylinder displacement of <225 cc) comprised about 59 percent of units shipped, and those with Class II engines (those with total displacement ≥225 cc) comprised about 41 percent. We estimate that total annual shipments of portable generators over 2010 to 2014 averaged almost 1.4 million units; about 816,000 of these generators had Class I engines and about 568,000 had Class II engines.

Although sometimes used in non-handheld equipment (such as portable generators), engines are classified as handheld by EPA if they have total displacement of less than or equal to 80 cc. Based on information provided by PSR and individual firms, we estimate that generators with handheld engines account for an average of about 10,000 to 20,000 units sold annually; about 1 percent of the overall consumer market for portable generators; and perhaps 2 percent of the units with smaller (<225 cc) engines.

Chart 2 shows the relationship between rated kilowatt power of portable generators and their engine classes for 2010 through 2014. As can be seen, generators with rated power of under 2 kW were made with Class I engines; and virtually all of those with rated power of 5 kW or greater were made with Class II engines. For units with 2 to 3.49 kW (which was the largest single kW category, accounting for 36 percent of units in 2010 to 2014), the great majority (93%) were made

[87] It is possible that some of the demand for generators with greater power in recent years has been increasingly met by sales and installation of stationary stand-by generators.

with Class I engines, while a majority (63%) of units with rated power in the range of 3.5 to 5 kW were made with Class II engines.



Engine Cylinders

Engines used in the manufacture of portable generators intended for consumer use have either one or two cylinders for combustion of fuel. Based on information on engine characteristics gathered and reported by PSR, virtually all of the portable generators with sustained power ratings below 6.5 kW that were sold from 2010 to 2014 were powered with one-cylinder engines. These power categories comprised about 91 percent of all units purchased by consumers during that period, as shown in Table 1. PSR data reveal that one-cylinder engines powered about 91 percent of the generators with 6.5 to 7.99 kW and about 58 percent of units with power ratings from 8 to 9.99 kW. It is in more powerful generators, with sustained power ratings of 10 kW and greater, that two-cylinder engines are more common, accounting for about 93 percent of units sold from 2010 to 2014. Overall, the data indicate that one-cylinder engines were used in the manufacture of at least 95 percent of total unit sales of portable generators to consumers, and in about 89 percent of the Class II engines used to produce portable generators.

Fuel Distribution Systems

The Commission believes that compliance with the CO emission requirements of the proposed rule likely would lead OEM manufacturers of portable generators to select engines that have fuel distribution systems that are more capable of controlling air-to-fuel ratios than traditional carbureted systems.[88] Specifically, manufacturers are expected to switch to use of electronic fuel injection (EFI) instead of conventional carburetors to control the delivery of gasoline to the pistons of generator engines. The Commission is aware of at least five portable generator manufacturers that have either developed models with EFI for evaluation or actually marketed such models within the last 2 years; and some of these models have been evaluated by the Commission at the National Product Test and Evaluation Center.[89] However, virtually all generators currently in consumer use have carbureted fuel distribution systems.

[88] Tab I of staff's briefing package.

[89] See Tab J of staff's briefing package.

Engine Cycles

Spark-ignition engines used in portable generators have either two or four piston strokes per combustion cycle. Two-stroke engines have simpler designs with fewer moving parts, making them easier to maintain and lighter in weight at a given displacement than four-stroke engines. They also reportedly can produce up to 40 percent more power than four-stroke engines with the same displacement (MECA, 2009). These characteristics, and the ability to operate in many directions without flooding, make two-stroke engines attractive for use in handheld equipment, such as chainsaws, trimmers and leaf-blowers. Portable generators and other larger non-handheld equipment, such as lawn and garden equipment and pressure-washers, typically have 4-stroke engines. Although all of the portable generators reported in PSR's database of recent shipments had 4-stroke engines, the Commission found portable units with small (<80 cc) 2-stroke engines advertised for sale on internet Web sites. These units likely comprise an extremely small share of the market for portable generators.

Retail Prices

With the wide range of engine power and other features available on portable generators shipped in recent years, these products also have been offered to consumers at a wide range of retail prices. The most recent survey data on retail prices was provided to the Commission by Synovate and covered the years 2004 through 2006. Consumer survey data developed by Synovate found that the average retail price paid by consumers for portable generators intended primarily for backup power in the event of electric power outages (the primary stated purpose for the purchase by about 75% of consumers) was about $1,040 in 2006.

More recent pricing information was gained through an informal survey of advertised prices for portable generators by CPSC staff in October 2015 (which included units available in stores and via the Internet). This survey found that that retail prices generally vary by kW rating of the units, engine class and number of cylinders. For rated generator power, average prices were $393 for units under 2 kW; $606 for 2 to 3.49 kW generators; $640 for 3.5 to 4.99 kW units; $936 for those with 5 to 6.49 kW ratings; $1,002 for units with 6.5 to 7.99 kW ratings; and $1,745 for units with kW ratings of 8 or more. Generator characteristics other than power ratings also affect price. For example, ''inverter generators'' have electronic and magnetic components that convert the AC power to DC power, which is then ''inverted'' back to clean AC power that maintains a single phase, pure sine wave at the required voltage and frequency suitable for powering sensitive equipment, such as computers. These additional components add to the manufacturing cost, resulting in significantly higher retail prices than units with similar power outputs. For example, our limited retail price survey found that the average retail prices of generators with power ratings of under 2 kW were $242 for units not identified as inverters and $710 for those identified as inverters.

Regarding retail price information by engine class and number of cylinders, staff's informal survey found that generators with handheld engines ranged in price from $133 to $799, with an average price of about $324. Generators with non-handheld Class I engines had a wide price range, from $190 to more than $2,000, with an average price of $534. Generators with one-cylinder Class II engines ranged in price from $329 to $3,999, with an average price of $1,009. Generators with two-cylinder Class II engines ranged in price from $1,600 to $4,999, and the average price of these units was $2,550.

Table 7 shows selected characteristics (displacement, power rating, price and weight) for generators found in an informal retail market survey of generators, by engine class and type.

Table 7.
Sample Characteristics of Portable Generators Recently Marketed, by Engine Class/Type

Product Characteristic		Handheld	Class I	One-Cylinder, Class II	Two-Cylinder, Class II
	Sample size (n)[1]	(43)	(261)	(412)	(35)
Engine Displacement (cc)	Range	31 to 80	87 to 224	250 to 459	530 to 992
	Average	67.7	185.6	389.2	703.9
	Median	79	206	389	680
Power Ratings (watts)	Range	450 to 1,700	1000 to 4,375	3,500 to 9,200	9,000 to 17,500
	Average	1,094	2,968	6,230	11,771
	Median	1,050	3,250	6,200	10,500
Retail Prices	Range	$133 to $799	$190 to $2,324	$329 to $3,999	$1,600 to $4,999
	Average	$324 (24)	$534 (151)	$1,009 (226)	$2,550 (20)
	Median	$225 (24)	$439 (151)	$899 (226)	$2,439 (20)
Weight (lbs.)	Range	19 to 62	45.6 to 140	115 to 320	278 to 471
	Average	44.6 (22)	101.8 (124)	204.3 (174)	333.8 (14)
	Median	46.0 (22)	105.5 (124)	204.0 (174)	330.0 (14)

Source: Directorate for Economic Analysis, CPSC, informal market survey of portable generators offered for sale by selected major retailers in 2015 and 2016 (price information limited to 2015).

[1] Sample size pertains to engine displacement and power rating. Smaller sample sizes for retail prices and weights are reported with the averages and medians for those product characteristics.

D. Portable Generators in Use

In this section, we estimate the population of portable generators in use, averaged over the period 2004 to 2012, analyzed by the Directorate for Epidemiology, Division of Hazard Analysis.[90] Estimates of the number of generators in use represent a measure of

[90] Tab A of staff's briefing package.

risk exposure and is the necessary first step in calculating product-related risks (*e.g.,* generator-related deaths and injuries divided by the population of generators in use), determining the per-unit societal costs of deaths and injuries that would be addressed by the proposed standard, and finally, estimating the possible benefits of the proposed rule.

We estimated the population of portable generators in use with the CPSC's Product Population Model (PPM), a computer model that projects the number of products in use, given estimates of annual product sales and their expected product life.[91] The expected useful life of generators, in years, is largely a function of engine size, loads placed upon the unit and hours of use. Portable generators primarily purchased for household backup power that are mainly used during occasional or rare power outages could have useful lives much longer than 10 years if they are maintained properly. An evaluation of data on historical sales in relation to surveys of product ownership suggests an expected useful product life of about 11 years. An assumption of a considerably shorter expected useful life using data on historical annual unit shipments would yield estimated numbers of units in use and saturation rates that are well below those indicated by Synovate survey data from 2005, as well as industry estimates of ownership in recent years.[92]

Table 8 presents the product population estimates for the years 2004 through 2012; estimated totals have increased from about 9.9 million in 2004, to about 12.5 million in 2012. The average for the years 2004 to 2012 was about 11 million units in use. Table 8 also presents estimates of the numbers of portable generators in use by ranges of kW ratings. These estimates were based on (1) portable generator shipment and purchase data provided by PSR and Synovate for the years 2004 through 2013, augmented by estimates of annual sales developed for some individual manufacturers; and (2) estimates of aggregate annual sales for prior years, in combination with Synovate estimates of market shares for the various power categories for previous years. The PPM was then used to estimate the product population for each power category, assuming an 11-year average product life. According to the population estimates, the largest power category was generators 5 to 6.49 kW, accounting for an average of 3.6 million units in use, or about 33 percent of the total, followed by generators 3.5 to 4.99 kW (averaging about 2 million units and 18.2% of the total).

Table 8. Estimated Units of Portable Generators in Use, by Generator kW Ratings, 2004 - 2012

Year	< 2 kW	%	2—3.49 kW	%	3.5—4.99 kW	%	5—6.49 kW	%	6.5—7.99 kW	%	8 kW +	%	Total
2004	1,164,937	11.8%	1,514,418	15.3%	2,003,691	20.2%	3,307,573	33.4%	1,125,797	11.4%	785,440	7.9%	9,901,855
2005	1,169,828	11.2%	1,507,610	14.5%	2,052,923	19.7%	3,620,229	34.8%	1,218,983	11.7%	843,880	8.1%	10,413,454
2006	1,138,111	10.9%	1,494,780	14.3%	2,026,543	19.4%	3,684,521	35.3%	1,234,027	11.8%	865,844	8.3%	10,443,826
2007	1,138,122	10.8%	1,507,516	14.3%	2,019,291	19.2%	3,721,225	35.3%	1,246,975	11.8%	908,152	8.6%	10,541,281
2008	1,225,495	11.2%	1,657,508	15.2%	2,029,573	18.6%	3,804,931	34.8%	1,246,355	11.4%	965,614	8.8%	10,929,475
2009	1,382,555	12.3%	1,945,110	17.3%	2,006,405	17.8%	3,755,195	33.4%	1,189,234	10.6%	966,810	8.6%	11,245,308
2010	1,565,789	13.5%	2,278,780	19.6%	2,001,427	17.2%	3,686,827	31.7%	1,133,894	9.8%	962,137	8.3%	11,628,854
2011	1,724,038	14.4%	2,579,743	21.6%	1,988,252	16.6%	3,641,605	30.4%	1,071,810	9.0%	961,550	8.0%	11,966,999
2012	1,906,637	15.3%	2,943,773	23.6%	2,001,557	16.1%	3,626,361	29.1%	1,012,496	8.1%	968,748	7.8%	12,459,571
9-Year Average	1,379,501	12.5%	1,936,582	17.5%	2,014,407	18.2%	3,649,830	33.0%	1,164,397	10.5%	914,242	8.3%	11,058,958

Source: CPSC Directorate for Economic Analysis, based on Product Population Model evaluation of estimated historical sales.

Note that the estimates provided in Table 8 assume uniform expected product lives across engine sizes and power ratings; that is, the generators with smaller engine sizes are assumed to last as long as the larger engine sizes. Larger engines usually are rated for more hours of operation than smaller engines. Assuming the hour ratings reflect the relative differences in total hours of actual use, our estimates imply fewer hours of use per year for smaller generators versus larger units over their useful lives. This issue is addressed in the sensitivity analysis, and information regarding product lives of units and average annual hours of operation

[91] Lahr, M.L. & Gordon, B.B. (1980). Product life model feasibility and development study. Contract CPSC–C–79–009, Task 6, Subtasks 6.01–6.06). Columbus, OH: Battelle Columbus Laboratories.

[92] For example, portable and stationary generator manufacturer, Generac, reportedly estimated that about 12 percent of households had portable generators in 2013, up from 10 percent in 2010 (Hill, 2013).

would be welcome from industry and the public.

The proposed rule specifies different requirements for CO emission rates depending on generator engine class and other objective characteristics, rather than engine or generator power ratings. The Directorate for Economic Analysis has estimated historical sales of generators by engine class from estimated sales by kW ratings using data from PSR reporting both generator power and engine displacement. Table 9 presents estimated units in use for 2004 to 2012, by engine class. Based on our analysis, the proportion of generators with smaller engines (handheld and Class I) has increased over the 9-year period. This is consistent with estimates of the increasing share of generators in use with power ratings of under 3.5 kW, shown in Table 8, which follows from the information presented regarding the apparent shift in the U.S. market towards smaller, less powerful units.

Table 9.
Estimated Units of Portable Generators in Use, by Generator Engine Class, 2004 – 2012

Year	Handheld Engines		Class I Engines		Class II Engines				All Units
					1-Cylinder		2-Cylinders		
	Units	Percent	Units	Percent	Units	Percent	Units	Percent	
2004	67,418	0.7%	3,317,468	33.5%	5,826,761	58.8%	690,209	7.0%	9,901,855
2005	67,701	0.7%	3,335,886	32.0%	6,266,611	60.2%	743,256	7.1%	10,413,454
2006	65,866	0.6%	3,283,911	31.4%	6,333,338	60.6%	760,711	7.3%	10,443,826
2007	65,866	0.6%	3,293,317	31.2%	6,390,317	60.6%	791,781	7.5%	10,541,281
2008	70,923	0.6%	3,521,657	32.2%	6,504,141	59.5%	832,755	7.6%	10,929,475
2009	80,012	0.7%	3,932,257	35.0%	6,405,261	57.0%	827,778	7.4%	11,245,308
2010	90,616	0.8%	4,418,072	38.0%	6,301,520	54.2%	818,646	7.0%	11,628,854
2011	99,775	0.8%	4,846,279	40.5%	6,208,911	51.9%	812,035	6.8%	11,966,999
2012	110,342	0.9%	5,367,384	43.1%	6,170,376	49.5%	811,468	6.5%	12,459,571
9-Year Average	79,835	0.7%	3,924,026	35.5%	6,267,471	56.7%	787,626	7.1%	11,058,958

Source: CPSC Directorate for Economic Analysis, based on Product Population Model evaluation of estimated historical sales.

E. Benefit—Cost Analysis

This section of the analysis consists of a comparison of the benefits and costs of the proposed rule. The analysis is conducted from a societal perspective, considering all of the significant costs and health outcomes. Benefits and costs are calculated on a per-product-in-use basis. The benefits are based on the reduced risk of fatal and nonfatal injury due to CO poisoning involving portable generators. The costs are defined as the added costs of making the portable generators comply with the proposed rule.

Our primary outcome measure is the expected net benefits (*i.e.,* benefits minus costs) of the proposed rule. As noted above, our primary analysis calculates the benefits and costs of the rule on a per-product-in-use basis. However, aggregated estimates of the benefits and cost on an annual basis can be readily calculated, given projections of annual generator sales.

1. Societal Costs of Portable Generator Deaths and Injuries

As discussed in Section III, the Directorate for Epidemiology, Division of Hazard Analysis (EPHA) reports that there were 659 deaths involving portable generators from 2004 to 2012, an average of about 73 annually.[93] The average annual societal costs of these CO deaths are estimated to be about $637 million in 2014 dollars, based on a value of a statistical life (VSL) of $8.7 million.[94]

[93] Tab A of staff's briefing package.

[94] The estimated value of a statistical life (VSL) of $8.7 million (in 2014 dollars) is a revision of the VSL estimated by the U.S. Environmental Protection Agency and is generally consistent with other estimates based on willingness-to-pay. Kneiser et al. (2012), suggested that a reasonable range of values for VSL was between $4 million and $10 million (in 2001 dollars), or about $5.3 million to $13.3 million in 2014 dollars (BLS 2015).

EPHA also provided an estimate of CO-related injuries involving portable generators, based on estimates from the National Electronic Injury Surveillance System (NEISS) during the years 2004 through 2012.[95] According to EP, there was a minimum of 8,703 nonfatal CO poisonings involving portable generators that were treated in hospital emergency departments from 2004 through 2012, or a minimum of about 967 annually.[96] This NEISS estimate is considered a minimum because the estimate only included injuries that were explicitly attributed to CO poisoning injuries in the NEISS narrative.

The NEISS injury estimates are limited to individuals initially treated in hospital emergency departments. However, the CPSC's Injury Cost Model (ICM) uses empirical relationships between the characteristics of injuries and victims in cases initially treated in hospital emergency departments and those initially treated in other medical settings (*e.g.,* physicians' offices, ambulatory care centers, emergency medical clinics), based primarily on data from the Medical Expenditure Panel Survey,[97] to estimate the number of medically attended injuries that were treated outside of hospital emergency departments. The ICM also analyzes data from the Nationwide Inpatient Sample of the Healthcare Cost and Utilization Project [98] to project the number of direct hospital admissions bypassing the hospital emergency departments. According to the ICM estimates, there were an additional 16,660 medically attended injuries during 2004 to 2012, or about 1,851 annually. Consequently, based on NEISS and ICM estimates, there was a minimum of about 2,818 medically attended injuries (967 ED + 1,851 non-ED) treated annually during the 9-year period.

The ICM is fully integrated with NEISS and provides estimates of the societal costs of injuries reported through NEISS, as well as the costs associated with the estimated medically attended injuries treated outside of hospital emergency departments. The major aggregated societal cost components provided by the ICM include medical costs, work losses, and the intangible costs associated with lost quality of life or pain and suffering.

Medical costs include three categories of expenditures: (1) Medical and hospital costs associated with treating the injury victim during the initial recovery period and in the long run; the costs associated with corrective surgery; the treatment of chronic injuries, and rehabilitation services; (2) ancillary costs, such as costs for prescriptions, medical equipment, and ambulance transport; and (3) costs of health insurance claims processing. Cost estimates for these expenditure categories were derived from a number of national and state databases, including the Medical Expenditure Panel Survey, the Nationwide Inpatient Sample of the Healthcare Cost and Utilization Project, the Nationwide Emergency Department Sample,[99] the National Nursing Home Survey,[100] MarketScan® [101] claims data, and a variety of other federal, state, and private data.

Work loss estimates are based on information from the Nationwide Inpatient Sample of the Healthcare Cost and Utilization Project, the Nationwide Emergency Department Sample, Detailed Claims Information (a workers' compensation database), the National Health Interview Survey, the U.S. Bureau of Labor Statistics and other sources. These estimates include: (1) Forgone earnings of the victim, including lost wage work and household work; (2) forgone earnings of parents and visitors, including lost wage work and household work; (3) imputed long-term work losses of the victim that would be associated with permanent impairment; and (4) employer productivity losses, such as the costs incurred when employers spend time juggling schedules or training replacement workers.

Intangible, or noneconomic, costs of injury reflect the physical and emotional trauma of injury, as well as the mental anguish of victims and caregivers. Intangible costs are difficult to quantify because they do not represent products or resources traded in the marketplace. Nevertheless, they typically represent the largest component of injury cost and need to be accounted for in any benefit-cost analysis involving health outcomes.[102] The ICM develops a monetary estimate of these intangible costs from jury awards for pain and suffering. Although these awards can vary widely on a case-by-case basis, studies have shown them to be systematically related to a number of factors, including economic losses, the type and severity of injury, and the age of the victim (Viscusi, 1988; Rodgers, 1993).[103] Estimates for the ICM were derived from regression analysis of jury awards compiled by Jury Verdicts Research, Inc., for nonfatal product liability cases involving consumer products.

According to the ICM, the estimated injury costs of the approximately 2,817 medically attended portable generator CO injuries annually amounted to about $184 million (in 2014 dollars), an estimated average of $65,400 per injury. Medical costs and work losses accounted for about 53 percent of the total, while the non-economic losses associated with pain and suffering accounted for about 47 percent. The societal costs of both fatal and nonfatal CO poisoning injuries involving portable generators amounted to about $821 million ($637 million for fatal

[95] Stephen Hanway, Division Director, Division of Hazard Analysis, Directorate for Epidemiology, CPSC. Memorandum to Gregory B. Rodgers, AED, Directorate for Economic Analysis, CPSC: ''Injuries associated with generators seen in emergency departments with narratives indicative of CO poisoning 2004–2012 for injury cost modeling,'' October 6, 2015.

[96] Tab H of staff's briefing package.

[97] The Medical Expenditure Panel Survey (MEPS) is a nationally representative survey of the civilian non-institutionalized population that quantifies individuals' use of health services and corresponding medical expenditures. The MEPS is administered by the Agency for Healthcare Research and Quality (AHRQ). The MEPS has been collected continuously since 1999 and is the principal data set used to monitor medical spending in the U.S.

[98] The National (Nationwide) Inpatient Sample (NIS) is part of a family of databases and software tools developed for the Healthcare Cost and Utilization Project (HCUP). The NIS is the largest publicly available all-payer inpatient health care database in the United States, yielding national estimates of hospital inpatient stays. HCUP is a family of health care databases and related software tools and products developed through a Federal-State-Industry partnership and sponsored by the Agency for Healthcare Research and Quality (U.S. Department of Health & Human Services).

[99] The Nationwide Emergency Department Sample (NEDS) is part of a family of databases and software tools developed for the Healthcare Cost and Utilization Project (HCUP). The NEDS is the largest all-payer emergency department (ED) database in the United States, yielding national estimates of hospital-based ED visits.

[100] The National Nursing Home Survey (NNHS) is a series of nationally representative sample surveys of United States nursing homes, their services, their staff, and their residents. The NNHS was first conducted in 1973–1974 and repeated in 1977, 1985, 1995, 1997, 1999, and most recently in 2004.

[101] The MarketScan® Commercial Claims and Encounters (MarketScan) Database from Truven Health Analytics contains de-identified, person-specific health data of reimbursed healthcare claims for employees, retirees, and their dependents of more than 250 medium and large employers and health plans.

[102] Rice, D., MacKenzie, E. & Associates (1989). Cost of injury in the United States: A report to Congress. San Francisco, CA: Institute for Health & Aging, University of California and Injury Prevention Center, The Johns Hopkins University.

[103] Viscusi, W.K. (1988). The determinants of the disposition of product liability cases: Systematic compensation or capricious awards? *International Review of Law and Economics,* 8, 203–220; Rodgers, G. (1993). Estimating jury compensation for pain and suffering in product liability cases involving nonfatal personal injury. *Journal of Forensic Economics* 6€, 251–262.

injuries + $184 million for nonfatal injuries) annually.

The average annual societal cost estimates for generators in use in 2004 through 2012, by engine class, are presented in more detail in Table 10. Row 1 provides the annual estimates of fatal CO poisoning injuries by engine class, and the estimated percent of all deaths involving each category. Note that information on engine class for generators involved in the deaths was available on only about 48 percent of the cases. The cases in which the engine classes were not known were distributed proportionally to the cases in which the classes were known.

Row 2 shows estimated annual nonfatal injuries by engine class; the nonfatal CO injuries were distributed proportionally to the deaths because very little information is available on the displacement of engines of generators involved in these injuries. Row 3 provides estimates of the aggregate annual societal costs of the deaths and injuries. Societal costs were based on a VSL of $8.7 million per death, and the nonfatal injury costs are from the ICM modeling. Row 4 provides the annual estimates of portable generators in use by engine class, as well as the estimated percent of all units in use for each category. Row 5 provides annual per-unit societal costs of deaths and injuries, which is based on the Row 3 estimates divided by the estimated numbers of portable generators in use (shown in Row 4).

Table 10.
Estimated Units of Portable Generators in Use and Expected Societal Costs of CO Poisoning, by Generator Engine Class, 2004 – 2012

	Handheld Engines	Class I Engines	Class II Engines		All Units
			1-Cylinder	2-Cylinder	
Estimated Deaths / Year (Percent)	0.5 0.7%	25.6 35.0%	46.2 63.0%	0.9 1.2%	73.2 100.0%
Estimated Nonfatal Injuries / Year	21	986	1,776	34	2,818
Aggregate Annual Societal Costs of Deaths and Injuries (million $)	$6.0	$287.6	$517.8	$10.0	$821.3
Estimated Number of Units in Use (Average, 2004 – 2012) (Percent)	79,835 0.7%	3,924,026 35.5%	6,267,471 56.7%	787,626 7.1%	11,058,958 100.0%
Annual Societal Costs of CO Poisonings / Unit	$74.90	$73.29	$82.62	$12.66	$74.27
Total Present Value of Expected Societal Costs of Deaths and Injuries / Unit	$687	$672	$758	$116	$682

Finally, Row 6 provides per-unit estimates of the present value of the expected societal costs (at a 3% discount rate) over the expected product life of a generator. This figure is useful in benefit-cost analysis because it represents the maximum per-unit benefits that might be derived from a product safety standard, if the standard prevented all deaths and injuries. The present value of expected societal costs is $687 per unit for portable generators with handheld engines (which are estimated to have accounted for less than 1% of units in use during the period 2004 through 2012); $672 per unit for generators with Class I engines (35.5% of units in use); $758 per unit for generators with one-cylinder Class II engines (56.7% of units in use); and $116 per unit for generators with two-cylinder Class II engines (7.1% of units in use). The societal costs associated with the two-cylinder Class II generators are substantially lower than for the other generator categories because of the small relative risk for the two-cylinder models. Because the two-cylinder models accounted for about 7.1 percent of generators in use, but only about 1.2 percent of the deaths, the risk of death with two-cylinder generators was only about 16 percent of the risk associated with generators with one-cylinder engines (*i.e.,* handheld, Class I, and one-cylinder Class II generators). The average expected present value of societal costs of CO poisoning deaths and injuries for all portable generators is $682 per unit. These calculations also represent baseline estimates of the societal costs associated with portable generators, by engine class and other characteristics: Estimates of what per-unit societal costs would be in the absence of regulatory action. Benefits of the proposed rule can, therefore, be estimated as the expected reduction in the baseline societal costs.

2. Estimated Benefits of the Proposed Rule

As described in Section IX, the requirements of the proposed performance standard require portable generators powered by handheld engines and Class I engines to emit CO at a weighted rate that is no more than 75 grams per hour (g/hr); generators powered by one-cylinder Class II engines to emit CO at a weighted rate that is no more than 150 g/hr; and generators powered by two-cylinder Class II engines to emit CO at a weighted rate that is no more than 300 g/hr. As noted in CPSC staff's analysis that provides the rationale for the performance requirements, considering expected manufacturing variability of ±50 percent, based on limited testing of pairs of generators, as described in the staff's briefing package, these emission requirements reflect a factor of 1.5 over the expected technically feasible emission rates for each engine classification: 50 g/h for those with handheld and Class I engines; 100 g/h for those with one-cylinder Class II engines; and 200 g/h for those with two-cylinder Class II engines.[104] Comments and additional data on expected manufacturing variability would be welcome, given the limited data available to staff to evaluate variability.

To estimate the expected reduction in societal costs, and hence, the benefits from the proposed rule for portable generators, an interdisciplinary analysis by CPSC staff provided estimates of generator-related consumer CO poisoning deaths reported in the agency's databases that could have been avoided as a result of reduced CO emission rates from generators. An important part of the analysis was indoor air quality modeling by NIST under an interagency agreement to estimate the transport of CO emitted from generators and predicted health effects for scenarios and house characteristics found in CPSC's incident data. CPSC staff then compared the health effects resulting from emission rates from current generators to a range of lower CO emission rates to estimate deaths that could have been avoided for each emission rate.[105]

The NIST modeling and CPSC staff analysis considered scenarios associated with 503 CO poisoning deaths over 2004 to 2012, or about 76 percent of the 659 CO poisoning deaths in CPSC records over the 9-year period. These deaths occurred at various fixed-structure residential settings, including traditional houses, mobile homes, townhomes, and structures attached to a home, in addition to residential sites where generators were operated in separate structures, such as sheds cabins used for temporary (non-residential) shelter and detached garages. For the purposes of this analysis, deaths and injuries occurring in these settings are considered to be those that would be which would be addressable by the proposed rule. However, we note that an unquantified number of the 156 deaths not modeled by NIST might be addressed and prevented by the proposed rule.[106]

Chart 3 presents the results of CPSC staff analyses of estimated reductions in CO poisoning fatalities that would result from lower-weighted emission rates for modeled scenarios under various weighted CO emission rates. At each reduced emission rate, the estimated percentage reduction in fatalities is greater for generators powered with larger engines because of their higher average estimated base rate for CO emissions (4700 g/h for one-cylinder and 9100 g/h for two-cylinder Class II engines vs 1800 g/h for Class I non-handheld engines and 900 g/h for handheld engines).[107] In CPSC engineering staff's judgment, the technically feasible weighted CO emission rates are 50 g/h for generators powered by handheld and Class I engines, 100 g/h for generators powered by one-cylinder Class II engines, and 200 g/h for generators with two-cylinder Class II engines.[108]

Emission rates from generators meeting the proposed performance requirements are expected to be higher while operating indoors (at reduced oxygen levels of approximately 17%) than the feasible rates under conditions of approximately 20.9% oxygen: Perhaps 150 g/h for generators with handheld engines and Class I engines, 300 g/h for generators with one-cylinder Class II engines and 600 g/h for generators with two-cylinder Class II engines (three times the technically feasible rate for each generator category).[109] Based on staff's analysis of 503 deaths (76 percent of all deaths) modeled by NIST (and generally deemed to be addressable by the proposed standard), these emission rates are expected to result in about a 47 percent reduction in (addressable) fatalities involving generators with handheld engines; about a 49 percent reduction in fatalities involving generators with Class I engines; a 37 percent reduction for those with one-cylinder Class II engines: And a reduction of about 17 percent for generators with two-cylinder Class II engines. The average expected reduction in CO poisoning fatalities across generators of all engine types is about 44 percent of the addressable deaths and injuries, or about 33 percent of all generator-related deaths and injuries (44% × 76%).

[104] Tab I of staff's briefing package.

[105] See Tab K of staff's briefing package.

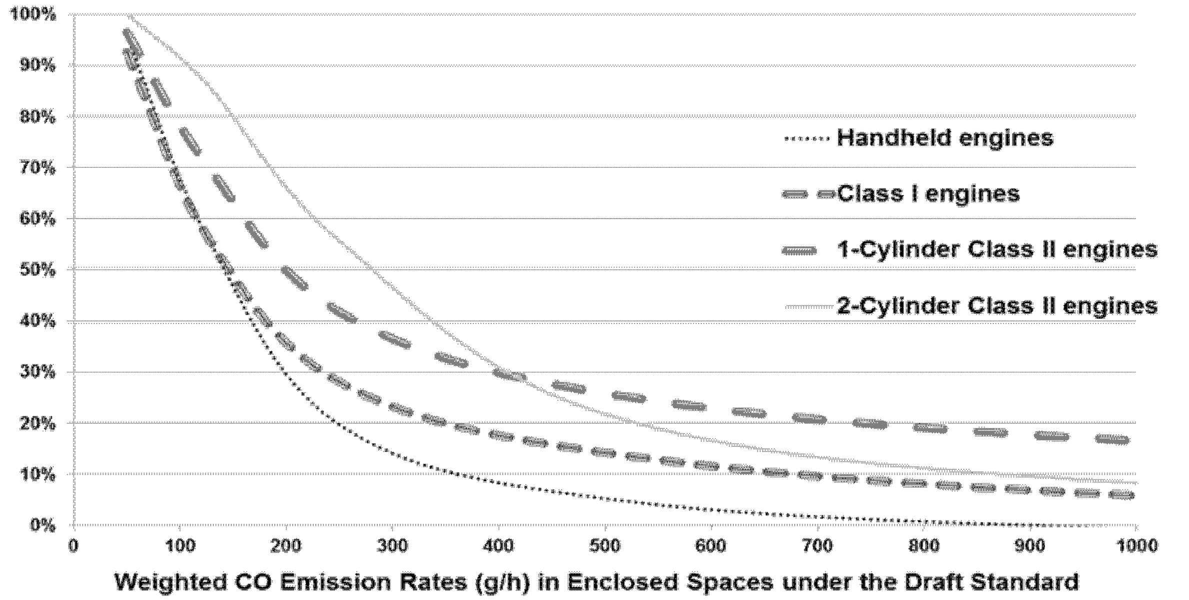
[106] *IBID.*

[107] These rates assume a factor of 3 in the increase in CO emission rate of a generator operating in an enclosed space compared to operation outdoors in normal oxygen. This factor of 3 is based on testing of carbureted generators conducted by NIST (Emmerich, Polidoro & Dols, *op. cit.*) and CPSC staff (Brookman, 2016, TAB J of the NPR Briefing Package).

[108] See Tab I of staff's briefing package.

[109] Based on CPSC's testing of three generators with fuel-injected engines having different degrees of closed-loop operation (see TAB J of staff's briefing package), CPSC believes the factor of increase when the oxygen is 17 percent may be less than 3 for some generators that use closed-loop EFI. Furthermore, test results from NIST (Buyer, 2012) indicate the prototype EFI generator depleted the oxygen significantly less than the carbureted generator, when tested in each of four matched-pair identical test scenarios. Nevertheless, CPSC assumes in the benefits analysis a conservative factor of 3 for the increase in CO emissions for low-emission generators when operating at reduce oxygen levels of 17 percent. Therefore, the factor of 3 likely overstates the weighted CO emission rates for EFI generators when operated indoors, and understates the reduction in deaths and injuries resulting from the draft standard.

Chart 3.
Estimated Reduction (%) in CO Poisoning Fatalities for Scenarios Modeled by NIST, Depending on CO g/h Resulting from the Standard*



* Estimated base CO emission rates at reduced O_2 average about 900 g/h for generators with handheld engines; 1800 g/h for generators with non-handheld Class I engines; 4700 g/h for generators with one-cylinder Class II engines and 9100 g/h for generators with two-cylinder Class II engines.

Table 11 presents estimated reductions in societal costs, and hence, benefits of the reduced CO emissions predicted to result from the proposed standard. The per-unit societal costs per generator, from Table 10, are included at row 1. However, as noted above, not all of these costs would be addressed by the proposed standard or were not included among the major residential scenarios modeled by NIST.[110] The present value of expected societal costs of CO poisoning that would be addressed by an emission standard are shown in row 2 and average about $514 for generators with Class I engines and about $586 for generators with one-cylinder Class II engines—engine categories that combine for an estimated 92 percent of portable generators in use. Generators with handheld engines, estimated to account for less than 1 percent of units in use, are estimated to average $525 in societal costs. Generators with two-cylinder Class II engines are estimated to average $26 in societal costs of CO poisoning over their useful lives. These larger generators are estimated to account for about 7 percent of all units in use.

Row 3 shows the staff's estimates of weighted CO emissions from complying generators of the different engine categories that would result from operation in conditions of reduced oxygen. Row 4 shows the estimated reduction in addressable societal costs resulting from the weighted emission rates, based on CPSC staff's estimate of the reduction in CO poisoning deaths.[111] Our estimate of reduction in societal costs of CO poisoning deaths and injuries assumes that projected injury costs from annual production of generators will fall in proportion to estimated death reduction, with a minor adjustment to account for the possibility that deaths avoided by reduced CO emissions would still occur as injuries.[112] With projected reductions in deaths and injuries under the proposed standard, the present value of benefits (shown in row 5 of Table 10) is estimated to average about $243 for generators with handheld engines; $254 per unit for generators with Class I engines; $214 per unit for generators with one-cylinder Class II engines; and $4 for generators with two-cylinder Class II engines. Average projected present value of benefits for all portable generators is about $227 per unit.

Multiplying the present value of expected benefits per unit by estimated annual unit sales (in row 6) yields the estimated aggregate present value of benefits from annual sales of portable generators that would comply with the proposed standard. The estimated present value of benefits of reduced CO poisoning from complying portable generators sold in a year totals about $315 million. Nearly 99 percent of the total benefits are attributable to expected sales of generators with Class I engines and one-cylinder Class II engines. These two types of engines are expected to comprise about 94 percent of annual unit sales under the proposed standard.

[110] About 76 percent of all CO poisoning deaths from 2004 to 2012 involved scenarios that were modeled by NIST. Among the scenarios that were not modeled are those involving CO poisoning deaths in apartments, vehicles and trailers (non-mobile homes), and other structures, such as a church, a sea-land container, and tents.

[111] Tab K of the staff's briefing package.

[112] We have assumed that avoided deaths under the proposed rule would still occur as nonfatal CO injuries of average severity and cost.

Table 11.
Estimated Present Value of Societal Costs from CO Poisoning Involving Portable Generators and Expected Benefits Under the Proposed Standard, by Generator Engine Class & Characteristics

	Handheld Engines	Class I Engines	Class II Engines		All Units
			1-Cylinder	2-Cylinders	
Total Present Value of Expected Societal Costs of Deaths and Injuries / Unit	$687	$672	$758	$116	$682
Estimated Present Value of Societal Costs per Unit Addressed by The Draft Standard	$525	$514	$586	$26	$520
Estimated Weighted CO Emission Rate Under the Draft Standard in Conditions of Reduced Oxygen	150	150	300	600	
Estimated Reduction in Addressable Societal Costs of CO Poisoning*	47%	50%	37%	17%	44%
Expected Benefits per Unit: Present Value of Expected Reduction in Societal Costs	$243	$254	$214	$4	$227
Estimated Annual Unit Sales (Percent)	15,000 1.1%	800,502 57.8%	503,576 36.4%	64,818 4.7%	1,383,896 100.0%
Present Value of Expected Reduction in Societal Costs from Units Sold Annually (Millions $)	$3.6	$203.1	$107.5	$0.3	$314.5

* Based on estimated reduction in CO poisoning deaths by CPSC staff (Hnatov, Inkster & Buyer, 2016)

Projections of benefits of the proposed rule should account for recent changes, and reasonably expected changes, in the market that will affect societal costs and the costs of compliance by manufacturers. One consideration that would be expected to reduce the addressable societal costs of the rule from those estimated for the period of 2004 to 2012 is the relatively recent introduction of units with EFI. Increased use of EFI would also reduce the costs of compliance with a standard based on reduced CO emissions. However, portable generators with EFI have not yet gained a significant share of the consumer market for portable generators, and we have little basis for incorporating projected sales of EFI units into the analysis. Regarding the introduction of EFI on expected hazard costs, most of the EFI-equipped portable generators have reportedly not targeted reductions in CO emissions, specifically. Therefore, a relatively small share of the generator market would not be expected to contribute to substantial reduction in the overall hazard. However, costs of compliance with a mandatory standard would be greatly reduced for units with EFI systems.

In addition to reducing societal costs related to CO poisoning deaths and injuries, product modifications to achieve greatly reduced CO emissions could also result in improved fuel efficiency and other benefits, including easier starting, altitude compensation, fuel adaptability, improved power, better reliability and longer useful product life.

3. Estimated Costs of Compliance With the Proposed Rule

a. Costs of Compliance per Unit

Based on the judgment of CPSC engineering sciences staff, the most likely technical means of compliance with the requirements of the proposed rule would be the use of closed-loop electronic fuel-injection systems to achieve and maintain the needed air-to-fuel ratios under different loads and ambient conditions.[113] Another element expected to be part of the industry's technical response to the proposed standard is the addition of 3-way catalysts in the muffler systems of portable generator engines. Besides achieving further reductions in CO emissions, these catalysts would likely serve to reduce HC and NO_X emissions for continued compliance with EPA emission standards for small spark-ignition engines.

More detailed discussions of the expected product modifications, and other factors leading to cost increases, appear in the following discussion. All cost estimates are expressed in 2014 dollars, for comparison with estimated benefits of the proposed rule.[114]

(1.) Electronic Fuel Injection (EFI)

The likely industry switch from engines with carburetors as the means of fuel delivery to closed-loop EFI is expected to be the most significant factor in determining cost increases under the proposed rule. This technology has been used for a number of years on the small spark-ignition engines in small motorcycles and scooters, as well as in more recent years in a variety of other product applications, including lawnmowers/tractors and golf carts. Although some firms have introduced portable generators with EFI for the consumer market in the last couple of years, generators with this fuel delivery system currently account for a very small fraction of sales. Associated components for closed-loop EFI could include the electronic control unit, fuel pump, injector(s), pressure regulator, throttle body, and a variety of sensors, such as

[113] Janet L. Buyer, Technology Demonstration of a Prototype Low Carbon Monoxide Emission Portable Generator. U.S. Consumer Product Safety Commission, Bethesda, MD. September 2012.

[114] Cost estimates are adjusted to 2014 dollars by applying changes in the producer price index for riding lawn & garden equipment, a product group with similarities to portable generators.

manifold air pressure sensor or throttle position sensor, intake air temperature sensor, oil temperature sensor, crank position sensor, and related wiring and hardware, and an oxygen sensor for closed-loop feedback. According to the EPA, the combined costs of these elements for one-cylinder engines (which dominate the market for residential generators) are estimated to be about $90 per unit in 2014 dollars.[115] Cost savings of about $20 per unit are estimated for elimination of the carburetor, yielding estimated net costs of about $70 for the EFI components.

The effectiveness of EFI in controlling the air-fuel ratio with resulting improved engine combustion efficiency and reduced CO emissions was demonstrated by CPSC staff's technology demonstration project,[116] as well as by the EPA.[117] The EPA's demonstration work, which formed the basis of their 2008 analysis of more stringent requirements for HC and NO_X emissions of small non-road spark-ignition engines, provides a basis for our evaluation of this technology, specific to portable generators. The EPA estimates are largely consistent with other confidential estimates of costs provided by manufacturers of generators, as well as by a manufacturer of fuel-control components during discussions with CPSC staff.

Most CO poisoning deaths from portable generators occur when generators are used in enclosed spaces, such as in a closed garage, basement, or room in the living space of a house, or in a partially enclosed space, such as in a garage with the garage door opened part way.[118] In such scenarios, the spark-ignition engines are likely to be operating in conditions of decreasing oxygen concentrations in the ambient air. As noted previously, these conditions can make combustion less efficient, thereby increasing CO emission rates as the generators continue to operate, unless the reduced oxygen level is taken into account. CPSC's benefits analysis takes this into consideration by noting that both carbureted and closed-loop fuel-injected generators' CO emission rates increase as the oxygen in the intake air to the generator decreases.[119] In CPSC staff's view, compliance with these performance requirements would likely require the use of an oxygen sensor placed in the engine's exhaust stream to provide closed-loop feedback to the fuel-control system. The oxygen sensor sends a voltage signal to the electronic control unit that varies with the amount of oxygen in the engine exhaust. The ECU uses this signal to check that the correct amount of fuel is being metered through the fuel injector to maintain the air/fuel ratio at or near stoichiometry, which is the theoretical point for near-complete combustion and minimized CO emissions. The ECU uses the other sensors to determine how much fuel to provide, and the oxygen sensor provides feedback on whether or not the fuel mixture is correct. In this closed-loop operation, the ECU would continually adjust the fuel mixture to maintain complying CO emission rates. Based on information developed for EPA when its staff considered more stringent requirements for HC and NO_X emissions, engine manufacturers that incorporate oxygen sensors in the exhaust streams of portable generator engines could incur variable costs of about $10 per engine (adjusted to 2014 dollars).[120]

In its assessment of costs of this feature for small spark-ignition engines, the EPA (2006) also projected that Class I engines would also require batteries and alternators/regulators at estimated additional costs totaling about $17 (including original equipment manufacturer and warranty markups). As previously noted, data on shipments of portable generators for 2010 through 2014 show that portable generators with Class I engines comprised about 59 percent of units shipped, and those with Class II engines accounted for about 41 percent of units. Therefore, the estimated cost increase per unit for the EFI-related components identified in this section would be about $94 for generators with Class I engines (55% of units); about $79 for generators with one-cylinder Class II engines (about 36%); and about $85 for generators with two-cylinder Class II engines.[121]

We note that it may be technically feasible, and perhaps eventually less costly for manufacturers to incorporate EFI systems that power-up the fuel pump and electronic components by magnets when starter cords are pulled. Battery-less EFI systems have been available in consumer products for several years, including snowmobiles, outboard motors, and motorcycles. However, we are not aware of the current use of this technology in applications with Class I engines. Comments on prospective use (*e.g.,* costs, applicability and challenges) of battery-less EFI for portable generators would be welcome.

(2.) Catalysts in Mufflers

Generator manufacturers also are likely to include three-way catalysts[122] in the mufflers of generator engines to achieve the low CO emission rates that would be required by the proposed standard, and still allow compliance with EPA Phase 3 emissions standards for other pollutants in ES staff's judgment.[123] Catalysts assist in chemical reactions to convert harmful components of the engine's exhaust stream (Hydrocarbons [HC] and oxides of nitrogen [NO_X] in addition to CO) to harmless gases. According to the Manufacturers of Emission Controls Association (MECA), the catalysts perform this function without being changed or consumed by the reactions that take place. In particular, when installed in the exhaust stream, the catalyst promotes the reaction of HC and CO with oxygen to form carbon dioxide and water, and the chemical reduction of NO_X to nitrogen is caused by reaction with CO over a suitable catalyst.[124]

In its assessment of the costs of the Phase 3 emission standards for small SI engines, EPA estimated that 3-way catalysts in mufflers of one-cylinder engines of portable generators could add about $10 to $20 in additional hardware costs to the manufacturing costs per engine, depending on capacity, power, and useful life.[125] These estimates were

[115] U.S. Environmental Protection Agency (EPA), (2006, July). Small SI engine technologies and costs, final report. Prepared by Louis Browning and Seth Hartley, ICF International, for the Assessment and Standards Division, Office of Transportation and Air Quality, EPA. Washington, DC. These cost estimates include original equipment manufacturer markups and warranty markups totaling an estimated 34 percent; such markups were also included in EPA's cost estimates.

[116] Janet L. Buyer, Technology Demonstration of a Prototype Low Carbon Monoxide Emission Portable Generator. U.S. Consumer Product Safety Commission, Bethesda, MD. September 2012.

[117] McDonald, Joseph, Olson B, and Murawski M, Demonstration of Advanced Emission Controls for Nonroad SI Class II Engines, SAE paper 2009–01–1899.

[118] Tab A of the staff's briefing package.

[119] See Tabs I and K of the staff's briefing package.

[120] U.S. Environmental Protection Agency (EPA) (2008, September). Control of emissions from marine SI and small SI engines, vessels, and equipment: Final regulatory impact analysis. Assessment and Standards Division, Office of Transportation and Air Quality. Washington, DC. Page 6–22; As with EFI cost estimates, this per-unit cost estimate related to oxygen sensors includes original equipment manufacturer and warranty markups totaling 34 percent.

[121] Two-cylinder engines would require two fuel injectors, which increases costs versus one-cylinder Class II engines.

[122] Three-way catalysts are designed to simultaneously convert three pollutants to harmless emissions: Carbon Monoxide → Carbon Dioxide; Hydrocarbons → Water, and; Oxides of Nitrogen → Nitrogen.

[123] Tab I of staff's briefing package.

[124] Manufacturers of Emission Controls Association (MECA) (2009, January). White Paper: Emission control of small spark-ignited off-road engines and equipment. Washington, DC. Retrieved from: *http://www.meca.org/galleries/files/sore_white_paper_0109_final.pdf.*

[125] EPA, *op. cit.*

based on assumptions regarding use of precious metals (principally platinum and rhodium), which were not formulated to oxidize CO, and their prices in 2005. Based on our analysis of costs, including heat shields or double-walled mufflers that could be necessary, catalytic mufflers could add about $14 to the manufacturing cost of a Class I engine and about $19 to the cost of a Class II engine. These costs could vary, depending on choices and assumed loadings of precious metals. Recent evaluations of nonprecious metal catalysts by MECA have found that these less-costly catalysts perform well in the oxidization of CO.[126] Application of this technology could lead to a reduction in costs of compliance related to catalytic after-treatment.

Although EPA assumed that Class I and Class II engines would include catalytic mufflers under Phase 3 emission requirements, a majority of small SI engines submitted for EPA certification in recent years has not included after-treatment devices, such as catalysts. Current engines produced with catalytic after-treatment would incur smaller costs for this feature. In the view of CPSC engineering staff, portable generators powered by 4-stroke handheld engines might not require catalysts to comply with the proposed rule since the catalyst in both CPSC's and EPA's demonstration programs was primarily for NO_X reduction, and handheld engines have less stringent NO_X emission requirements under EPA emission standards.[127] For purposes of estimating costs, we assume that catalyst-related costs for generators with handheld engines would average 50 percent of estimated costs for units with Class I engines, or about $7 per generator.

(3.) Design and Development/Other Reengineering

In an analysis of small SI engine technologies and costs, ICF International estimated that costs of conversion to EFI from carburetors would require 4 months of design time (engineers) and 6 months for development (by engineers and technicians) for Class I engines and 2 months for design and 2 months for development for Class II engines).[128] Based on estimated labor costs for engineering/technical staff, EPA estimated that these design and development costs totaled about $175,000 for Class I engines and about $64,000 for Class II engines, for each engine family. Design and development costs for three-way catalysts in mufflers were estimated by EPA to be about $135,000 per engine line for 2 months of design time (engineers) and 5 months of development time (engineers and technicians). Adjusting for changes in an appropriate producer price index, the total design and development costs for engines to incorporate EFI and catalysts are estimated to be about $316,000 for a Class I engine family and $203,000 for a Class II engine family. We assume (as EPA did) that these costs are recovered over 5 years. If average annual production per-engine family ranges from 10,000 to 50,000 units, per-unit design and development costs could range from about $1 to $6 for Class I engines and under $1 to about $4 for Class II engines.

These estimated costs could be applicable for portable generator manufacturers that supply their own engines. Engine manufacturers that supply engines to independent generator manufacturers might successfully pass along research and development costs with markups. EPA estimated that manufacturing and warranty markups by suppliers of EFI and catalytic components total 34 percent. Similar markups of design and development costs by suppliers of complying engines could increase generator manufacturing costs by about $2 to $8 for generators with Class I engines and by about $3 to $5 for generators with Class II engines. Manufacturers of approximately 80 percent of generators supply their own engines. Therefore, average generator manufacturing costs for design and development could be about $4.05 for generators with Class I engines and $2.60 for generators with Class II engines.[129]

Costs of design and development for generators powered by handheld engines were not specifically addressed by EPA. For the purposes of this preliminary analysis, we assume that these costs will be similar to those estimated for units with Class I engines. However, we assume that costs per engine family would be apportioned over perhaps 5,000 to 10,000 units annually. This assumption leads to average generator manufacturing costs for design and development of about $10 per unit for generators with handheld engines. We also acknowledge that models with handheld engines often are valued and promoted for their compactness and light weight. Accommodating new features that might be necessary for compliance with the proposed rule and still provide these desired product characteristics could present greater challenges and costs for product engineers and firms. The Commission welcomes comments on this issue, as well as on components and technologies that might be available to meet these challenges and moderate the impacts of the proposed rule on these models.

Costs of new designs and tooling may also be required for generator frames and housings to accommodate additional components, such as batteries for generators with Class I engines, and to address reported concerns with heat dissipation. Modifications could be minimal for many larger generators with open-frame designs; but some smaller units with housings that enclose engines and other components could require larger, redesigned housings, at greater cost. We have assumed that per-unit tooling costs for generators with handheld engines would be twice that of other generators, but costs may be underestimated for small generators. The Commission welcomes comments on this issue from firms that would be affected by the rule.

The modifications to small SI engines to comply with the CO emission requirements of the CPSC standard would likely require engine manufacturers to seek certifications (as new engine families) under EPA requirements for $HC+NO_X$ and CO, with the attendant costs for fees and testing, which could be passed on to generator manufacturers that purchase the engines to power their products. Some of the larger manufacturers of portable generators are vertically integrated firms that also manufacture the engines that power their products. It is possible that engine modifications by engine manufacturers (including firms that also manufacture generators) to comply with the CPSC emission standards for CO could result in emissions of $HC+NO_X$ that are consistently lower than the EPA emission requirements. This potential effect of the use of EFI and catalysts was shown by demonstration programs sponsored by CPSC (conducted by the University of Alabama) and EPA, as detailed in the CPSC staff's technical rationale for the proposed standard.[130] Consistently lower emission rates for $HC+NO_X$ could result in ''engine credits'' for engine families under EPA's

[126] Kevin Hallstrom. ''Catalyst control of CO from portable generators.'' Presentation on behalf of Manufacturers of Emission Controls Association (MECA) at the PGMA Technical Summit, March 17, 2016. Available online (pp. 125–141) at: *http://www.cpsc.gov//Global/Newsroom/FOIA/Meeting%20Logs/2016/MeetingLogPGMA31716.pdf.*

[127] Tab I of staff's briefing package.

[128] EPA (2006), *op. cit.*

[129] Midpoint estimates for annual engine family production ranging from 10,000 to 50,000 units.

[130] Tab I of the staff's briefing package.

program for averaging, banking and trading (ABT) of emission credits. If manufacturers of engines participate in the ABT program, they could partially offset increased manufacturing costs of compliance with the proposed CPSC standard, and some of these savings could moderate the engine cost increases incurred by generator manufacturers that do not make their own engines.

(4.) Testing and Certification

The proposed rule does not prescribe a particular test that manufacturers must use to assess compliance with the performance requirements. Instead, the proposed rule includes the test procedure and equipment that CPSC would use to assess compliance with the applicable performance requirements of the standard.[131] Manufacturers need not use the particular test referenced by the proposed rule, although whatever test is used must effectively assess compliance with the standard. We have assigned minor costs per unit for this element in Table 12, but we welcome comments on this issue.

b. Other Potential Costs

Evaluation of more stringent emission standards by the EPA found that pressurized oil lubrication systems for engines would be among the engine design changes. EPA's assessment of this engine feature is that it results in ''enhanced performance and decreased emissions'' because it allows better calibrations and improved cooling potential.[132] Based on estimates made for EPA, variable costs for a pressurized oil system would be about $19 for small spark-ignition engines that now lack this feature. In the view of the Directorate for Engineering Sciences, pressurized lubrication systems would not be necessary to comply with the draft standard. We welcome comments on this issue.

c. Total Costs,per Unit

Aggregate estimated compliance costs to manufacturers of portable generators average approximately $113 per unit for engine and muffler modifications necessary to comply with the CO emission requirements of the proposed standard. Cost elements by engine class and characteristics are shown in Table 12.

Table 12.

Net Estimated Manufacturing Costs[1] per Unit to Comply with the Proposed Standard CO Emission Requirements[2]

Cost Elements	Handheld Engines	Class I Engines	Class II Engines	
			1-Cylinder	2-Cylinder
EFI-Related Costs[3]	$67	$67	$69	$75
Oxygen Sensor for Closed-Loop	$10	$10	$10	$10
Battery and Alternator/Regulator[4]	$17	$17	n/a	n/a
Catalyst-Related Costs	$7	$14	$27	$49
Research and Development	$10	$4	$3	$3
Tooling Costs	$4	$2	$2	$2
Testing and Certification	< $1	< $1	< $1	< $1
Combined Compliance Costs	$114	$113	$110	$138

[1] Costs expressed in 2014 dollars, rounded to the nearest dollar.
[2] Estimates are for overhead valve (OHV) engines, which comprise nearly all engines used in the manufacture of portable generators
[3] Net, less costs related to carburetors.
[4] For those generators with handheld and Class I engines which currently do not have batteries.

(1.) Implications for Retail Prices and Consumer Demand

In addition to the direct costs of the rule, increases in the retail price of portable generators (as costs are passed forward to consumers) are likely to reduce sales. Additionally, consumers who no longer purchase portable generators because of the higher prices will experience a loss in utility that is referred to as consumer surplus, but is not included in the direct cost estimates described in the last section. These impacts are illustrated conceptually in Chart 4 below. For purposes of this analysis, we assume that cost increases are pushed forward to consumers.

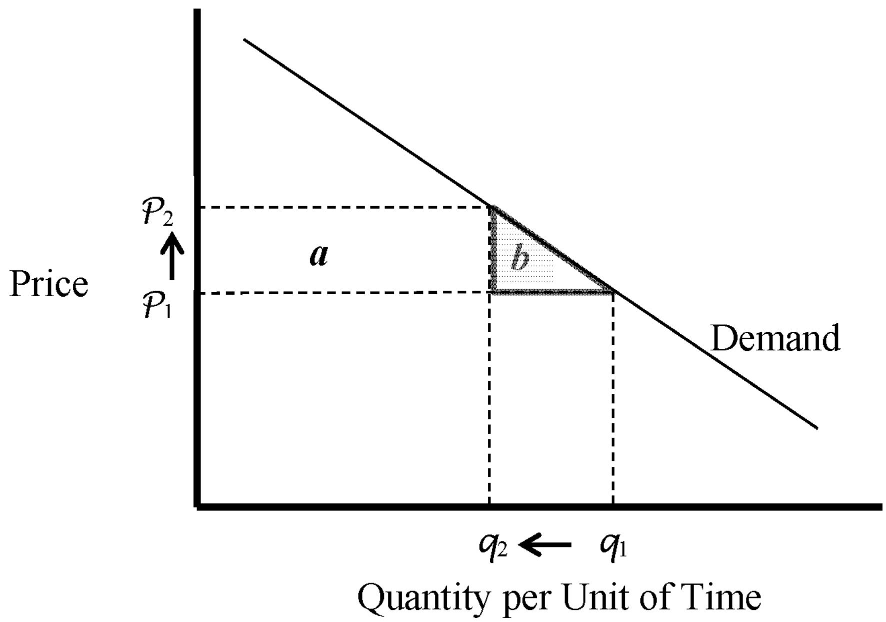
The downward sloping curve in Chart 4 represents the demand for generators; p_1 and q_1 represent the preregulatory price and quantity of generators demanded. After the regulation becomes effective, generator prices rise to p_2, and

[131] *i.e.,* Weighted CO emission rates emitted from the generator when operating in normal oxygen: 75 g/h for generators with handheld and Class I engines; 150 g/h for generators powered by one-cylinder Class II engines; and 300 g/h for generators powered by two-cylinder Class II engines.

[132] EPA (2006), *op. cit.*

the quantity of generators demanded declines to q_2. The value of $p_2 - p_1$ represents the direct costs of the rule per generator (*e.g.,* $113 for those with Class I engines and $138 for two-cylinder Class II generators). The area given by the rectangle *a* represents the aggregate annual direct costs of the rule, which is equal to the product of the increase in portable generator price ($p_2 - p_1$) and the post-regulatory quantity demanded (*i.e.,* q_2). The triangle *b* represents additional costs of the rule in the form of a loss in consumer surplus: A value over and above what consumers paid for the product prior to the regulation, but that is lost to the consumers who do not purchase a generator at the higher price, p_2.

Chart 4.
Demand for Portable Generators



Given information on the pre-regulatory price (p_1) and quantity demanded (q_1), the impact of the rule on product prices, and information on the elasticity of demand for portable generators (*i.e.,* the percentage change in quantity demanded given a percentage change in price), we can make an estimate of the expected reduction in sales ($q_1 - q_2$), and the lost consumer surplus represented by triangle *b* in Chart 4. Based on information presented earlier, estimated preregulatory (current) sales (*i.e.,* q_1) consist of about 15,000 generators with handheld engines; about 801,000 generators with non-handheld Class I engines; about 504,000 generators with one-cylinder Class II engines; and about 65,000 generators with two-cylinder Class II engines. Preregulatory retail prices of portable generators (p_1) average about $324 for generators with handheld engines; $534 for generators with non-handheld Class I engines; $1,009 for generators with one-cylinder Class II engines; and $2,550 for generators with two-cylinder Class II engines.[133]

We are not aware of precise estimates of the price elasticity of demand for portable generators; however, the nature of the product could argue for a relatively inelastic demand: Sales of the product often peak when consumers need or anticipate the need for backup power for small and major appliances (*e.g.,* during weather-related outages, anticipated Y2K outages). In these circumstances price may not be a significant determinant for many purchasing decisions. Based on available estimates of the price elasticity of demand for household appliances (for example: −0.23, by Houthakker & Taylor,[134] and −0.35, for refrigerators, clothes washers and dishwashers, by Dale & Fujita, 2008 [135]), the price elasticity for portable generators could be approximately −0.3. If this relationship between price increase and consumer demand holds true for complying portable generators marketed under the proposed rule, a 1.0 percent increase in price for generators would result in a 0.3 percent reduction in unit demand.

Given these parameters, the quantity demanded might decline by about 11 percent ($114/$324 × −0.3), on average, for generators with handheld engines (reducing sales from about 15,000 to about 13,400 annually); by an average of about 6 percent ($113/$534 × −0.3) for generators with non-handheld Class I engines (projected to reduce sales from about 801,000 to about 750,000 annually); by about 3 percent ($110/$1,009 × −0.3) for generators with one-cylinder Class II engines (projected to reduce sales from about 504,000 to about 487,000); and by about 1 percent ($138/$2,550 × −0.3) for generators with two-cylinder Class II engines

133 Based on an October 2015 survey of retail prices of more than 350 portable generators as reported on Internet sites of six retailers.

134 Houthakker, H.S. and Taylor, L. (2010). Consumer demand in the United States: Analyses and projections, 2nd edition. Cambridge, MA: Harvard University Press.

135 Dale, L. and Fugita, K.S. (2008, February). An analysis of the price elasticity of demand for household appliances. Energy Analysis Department, Environmental Energy Technologies Division, Lawrence Berkeley National Laboratory, University of California. Berkeley, CA.

(projected to reduce sales from about 65,000 to 64,000). As noted in our discussion of retail price information, factors other than engine capacity or generator power affect retail prices; and lower-priced generators with each engine class/category would be expected to face a relatively greater price increase under the proposed rule, and correspondingly, a greater decrease in consumer demand. In general, we would anticipate that generators without features that increase price, such as inverter technology, would realize a more significant percentage impact on manufacturing costs, retail prices and consumer demand, at least initially. Price increases for new generators that would comply with the standard could lead more consumers to repair their older units or to purchase used units on the secondary market. Additionally, price increases for larger portable generators could lead more consumers to purchase stationary, standby generators for use during power outages.

The value of lost consumer surplus resulting from increased prices under the proposed rule (represented by the area of triangle *b* in Chart 4) could be about $4 million annually; comprised of about $90,000 for generators with handheld engines; $2.9 million for generators with Class I engines; about $910,000 for generators with one-cylinder Class II engines; and about $70,000 for generators with two-cylinder Class II engines.

(2.) Combined Direct Costs and Lost Consumer Surplus per Unit

If the estimate of lost consumer surplus is spread over the remaining units sold, the estimated costs, per product sold, might average about $6.78 for generators with handheld engines ($91,000 ÷ 13,400 units); $3.85 for generators with Class I engines ($2,889,000 ÷ 750,000 units); $1.88 for generators with one-cylinder Class II engines ($914,000 ÷ 487,000 units); and $1.14 for generators with two-cylinder Class II engines ($73,000 ÷ 64,000 units). If these per-unit costs of lost consumer surplus are combined with the direct manufacturing costs estimated previously in this section, the total estimated per-unit costs would amount to about $121 for generators with handheld engines; $117 for generators with Class I engines; $112 for generators with one-cylinder Class II engines; and about $139 for generators with two-cylinder Class II engines. These are the cost figures that will be compared to the expected benefits of the rule.

It is possible, however, that some consumers might perceive greater value for complying generators, in terms of fuel efficiency, greater ease of starting, product quality and safety. These perceptions could moderate the adverse impact on demand (*i.e.,* reduced sales) resulting from price increases.

1. Comparison of Benefits and Costs

Table 13 presents both the estimated benefits (Row 1) and the estimated costs (Row 2) of the proposed rule. The expected per-unit benefits were derived in Table 5; they average about $243 for generators with handheld engines; $254 for generators with Class I engines; $214 per unit for generators with one-cylinder Class II engines, and; $4 for generators with two-cylinder Class II engines. The estimated $4 in benefits for the two-cylinder Class II engines reflects the fact that very few consumer deaths have involved these generators in the scenarios modeled by NIST and analyzed by CPSC staff, perhaps because they are less likely to be brought indoors because of their size and weight or loudness during operation. Additionally, given the limits on CO emissions for those generators, only about 17 percent of the addressable societal costs are projected to be prevented by the proposed rule.

The costs, including both manufacturing compliance costs (from Table 12), and the costs associated with lost consumer surplus (from the previous section), amount to $121 for generators with handheld engines; $117 for generators with Class I engines; $112 for generators with one-cylinder Class II engines; and about $139 for generators with two-cylinder Class II engines.

As shown in Row 3, the proposed CO emission standard is estimated to result in net benefits (*i.e.,* benefits minus costs) of about $122 per unit for generators with handheld engines ($243–$121); $137 per unit for generators with Class I engines ($254–$117); about $101 for generators with one-cylinder Class II engines ($214–$112); and approximately −$135 for generators with two-cylinder Class II engines ($4–$139).

Projected annual unit sales under the proposed standard are shown in Row 4. Finally, Row 5 shows aggregate net benefits based on the product of net benefits per unit (Row 3) and product unit sales (Row 4).

An examination of Row 5 indicates that aggregate net benefits would be maximized at about $153 million annually, if only handheld engines, Class I engines, and one-cylinder Class II engines are covered by the proposed rule. Including the two-cylinder Class II engines under the standard would reduce aggregate net benefits to about $145 million. Rather, under the CPSA, the benefits of the rule must bear a reasonable relationship to its costs, and the rule must impose the least burdensome requirement that prevents or adequately reduces the risk of injury. 15 U.S.C. 2058(f)(3)(E) and (F).

Hence, the preliminary regulatory economic analysis suggests that excluding the portable generators with two-cylinder Class II engines from the rule would maximize net benefits, an outcome that would be consistent with OMB direction but not required under the CPSA. Generators with these larger and more powerful engines accounted for just 0.4 percent of the 503 consumer CO poisoning deaths addressed by the simulation analysis performed by NIST and the benefits analysis performed by CPSC staff (Hnatov, Inkster & Buyer, 2016). Portable generators with two-cylinder engines are estimated to have comprised about 7 percent of units in use over 2004 to 2012 (as shown in Tables 9 & 10) and about 5 percent of unit sales in recent years (Table 11).

Table 13.
Aggregate Estimated Present Value of Benefits and Expected Costs Resulting from the Proposed Standard, for Annual Unit Shipments, by Generator Engine Class

	Handheld Engines	Class I Engines	Class II Engines		All Units
			1-Cylinder	2-Cylinders	
Present Value of Expected Benefits / Unit	$243	$254	$214	$4	$227
Costs to Manufacturers + Lost Consumer Surplus / Unit	$121	$117	$112	$139	$116
Net Benefits / Unit	$122	$137	$101	-$135	$110
Projected Annual Unit Sales Under the Standard	13,410	749,504	487,026	63,765	1,313,705
Aggregate Net Benefits from Annual Sales (Million $)	$1.6	$102.3	$49.3	-$8.6	$144.6

As discussed previously, the analysis was limited to the 503 out of 659 CO poisoning deaths during the period 2004 through 2012. Commission staff reports that there could be some unquantified benefits associated with 156 deaths not modeled by NIST.[136] However, this would not change the main findings of our analysis. If there were some additional deaths involving generators with handheld, Class I, or one-cylinder Class II engines that would have been prevented, our estimated net benefits for these generator classes would increase somewhat. On the other hand, even if all of the deaths involving generators with two-cylinder Class II engines would have been prevented, the costs for this class of generators would have exceeded the benefits.

Additionally, one underlying assumption for the benefits estimate is that there would be no behavioral adaptations by consumers in response to the reduced rate of CO emissions from portable generators. Knowledge about reduced CO emissions from generators produced under the proposed rule could reduce consumers' perceptions of injury likelihood and susceptibility, which, in turn, could affect consumer behavior.[137] In economic terms, the proposed rule could reduce what we might call the cost or risk-price of unsafe behavior, and implicitly provide an incentive for consumers to increase that behavior. If consumers are aware of the reduced CO poisoning risk, and the rule does not make it more difficult to operate generators indoors, it seems likely that there would be some increase in warned-against practices. For example, some consumers might reduce the distance between their house and the generator because they think closer proximity of the generator to the house will reduce the likelihood that the generator will be stolen. Similarly, to keep the generator out of the elements, some consumers who had run their generator outside might decide to bring it into the garage. Additionally, some consumers might even decide to run the generator inside their home. Behavioral adaptation as a potential effect of the rule is discussed by CPSC's Division of Human Factors (HF) (Smith, T., 2016). We cannot quantify this impact, and for reasons cited by HF, it could be small. However, while the proposed rule will significantly increase the safety of generators from an engineering standpoint, it seems likely that the increased technical safety predicted by modeling under the assumption of no behavioral adaptation will be partially be offset by the behavioral adaptations of some users.

F. Sensitivity Analysis

The benefit-cost analysis presented above compares benefits and costs of our base-case analysis. In this section, we present a sensitivity analysis to evaluate the impact of variations in some of the important parameters and assumptions used in the base-case analysis. Alternative inputs for the sensitivity analysis included:

- Shorter (8 years) and longer (15 years) expected product-life estimates than the 11 years used in the base analysis;
- A discount rate of 7 percent, rather than 3 percent, to express societal costs and benefits in their present value;
- Compliance costs and lost consumer surplus per-unit that are 25 percent higher than the base analysis;
- Lower ($5.3 million) and higher ($13.3 million) values of a statistical life (VSL) than the $8.7 million value for the base analysis; and
- Lower (by 25%) and higher (by 25%) effectiveness for each engine class and characteristic at reducing societal costs of CO poisoning.

The results of the sensitivity analysis are presented in Table 14, with Part A showing estimated net benefits per unit for generators in our base-case analysis (from Table 13) for each engine class and type, and Part B presenting the estimated net benefits per unit, using the alternative input values.

Variations in the expected product life had a relatively small impact on net benefits; a reduced expected product life decreased expected net benefits slightly, while an increased expected product life increased net benefits (rows a and b).

OMB (2003) recommends conducting a regulatory analysis using a 3 percent and 7 percent discount rate.[138] Because

[136] See Tab K of the staff's briefing package.

[137] This potential effect of knowledge about improvements in safety has been addressed in human factors literature, such as the article by Leonard Evans in "Human Behavior Feedback and Traffic Safety," published in Human Factors: The Journal of the Human Factors and Ergonomics Society, 27(5), 555–576. January 1985.

[138] Our base analysis discount rate is consistent with research suggesting that a real rate of 3 percent is an appropriate discount rate for interventions involving public health (see Gold, M., Siegel, J.,

Continued

of the relatively long product life of generators, using a 7 percent discount rate substantially reduced estimates of net benefits for the first three generator categories, but they remained positive (row c). However, because benefits were so small for the units with 2-cylinder Class II engines, the impact of the 7 percent discount rate on this category was negligible.

Variations in cost estimates would directly impact our estimates of net benefits. Discussions with generator and engine manufacturers suggest that the EPA cost estimates, upon which our analysis was based, may have led to underestimates of the incremental costs of EFI and other components that would be needed for the proposed rule. However, the results of this sensitivity analysis show that even if we had systematically underestimated the costs of the proposed rule by 50 percent, the findings of the analysis would have remained unaltered: Generators with handheld, Class I, and one-cylinder Class II engines would continue to exhibit positive net benefits.

Finally, we considered the impact of variations in the value of statistical life (VSL) on the results of the analysis. Kniesner, Viscusi, Wook and Ziliak (2012) suggested that a reasonable range of values for VSL was between $4 and $10 million (in 2001 dollars),[139] or about $5.3 million to $13.3 million in 2014 dollars. Consequently, we evaluated the sensitivity of our results to variations in the VSL by applying these alternative VSLs (rows e and f). This variation had a substantial impact on the estimated net benefits (as would be expected given deaths account for the great majority of generator-related societal costs). Nevertheless, the variations in VSL did not affect the results of the analysis.

In summary, for each variation analyzed, the overall estimated net benefits of the proposed standard were found to remain positive for the first three categories of generators. However, as with the base-case analysis, the sensitivity analysis showed that generators with two-cylinder Class II engines had estimated costs that remained substantially greater than the present value of projected benefits.

Table 14. Sensitivity Analysis: Expected Net Benefits Associated with Variations in Inputs
Part A: Base-Case Results.*

Row	Input Value	Net Benefits per Generator, by Portable Generator Engine Class/Type			
		Handheld	Class I	1-cylinder Class II	2-cylinder class II
A	**Base Case Analysis**	**$122**	**$137**	**$101**	**−$135**

* Base-Case Inputs:

- 3% discount rate;
- Portable Generators in Use: 10.3 million.
- VSL = $8.7 million per statistical life
- Expected product life: (years), 11 years
- Compliance Costs & Lost Consumer Surplus per unit ranging from $112 – $139
- Estimated reduction in addressable deaths (and injuries) ranging from ≈ 17% for 2-cylinder Class II engines to ≈ 49% for Class I engines

Russell, L. and Weinstein, M., eds. (1996). *Cost-effectiveness in health and medicine.* New York: Oxford University Press); a 3 percent discount rate (along with a 7 percent discount rate) is also recommended for regulatory analyses by the Office of Management and Budget (OMB, 2003).

[139] Kneiser, Viscusi, Wook & Ziliak (2012). The value of a statistical life: Evidence from panel data. *The Review of Economics and Statistics, 94*(1), 74–87.

Table 14. Part B: Alternative Inputs for Sensitivity Analysis

Row	Input Variable and Value(s) Used in Sensitivity Analysis	Net Benefits per Generator, by Portable Generator Engine Class/Type			
		Handheld	Class I	1-cylinder Class II	2-cylinder Class II
	Base Case Analysis:	**$122**	**$137**	**$101**	**−$135**
	Expected Product Life				
A	Shorter Expected Product Life: 8 years	$107	$121	$88	−$135
B	Longer Expected Product Life: 15 years	$144	$161	$124	−$134
	Discount Rate				
C	7% discount rate	$66	$78	$52	−$136
	Costs Estimates				
D	50% higher than base-case for each engine class/type	$61	$78	$45	−$204
	Value of a Statistical Life				
E	Lower VSL: $5.3 million	$48	$60	$36	−$136
F	Higher VSL: $13.3 million	$221	$241	$189	−$133
	Effectiveness at Reducing Deaths & Injuries				
G	Lower Effectiveness: 25% lower than estimated	$62	$75	$49	−$136
H	Higher Effectiveness: 25% higher than estimated	$185	$202	$157	−$134

G. Regulatory Alternatives

In accordance with OMB (2003) guidelines to federal agencies on preparation of regulatory impact analyses, the Commission considered several regulatory alternatives available to the Commission that could address the risks of CO poisoning from consumer use of portable generators. The alternatives considered included: (1) Establishing less-stringent (higher allowable) CO emission rates; (2) excluding generators with Class II, two-cylinder engines from the scope of the rule; (3) an option for reducing consumer exposure to CO by using an automatic shutoff; (4) establishing later compliance dates; (5) relying upon informational measures only; and (6) taking no action.

1. Less Stringent (Higher Allowable) CO Emission Rates

Cost savings from higher allowable CO emission rates might result from lower costs associated with catalysts (if they would not be required, or if less costly materials could suffice), less extensive engine modifications (other than EFI-related costs) and less extensive generator-housing modifications (if housing enlargement and other retooling would be minimized). For example, CPSC staff's report presenting the technical rationale for the proposed standard speculates that 4-stroke handheld engines might not need a catalyst,[140] and in our base-case estimate of catalyst-related costs for generators with handheld engines, we assumed an average of 50 percent of the estimated costs for units with Class I engines, or about $7 per unit. A less stringent emission standard could allow more units with handheld engines, and perhaps some with smaller Class I engines, to comply without catalytic after-treatment.

Expected reductions in societal costs from CO poisoning in scenarios analyzed by the Commission could be about 30 percent for units with handheld engines; about 36 percent for units with Class I engines; about 30 percent for generators with 1-cylinder Class II engines; and about 11 percent for generators with 2-cylinder Class II engines. We estimate that these reductions in societal costs would be reflected in decreased present value of benefits per unit of nearly $90 for generators with handheld engines (a decrease of 36%); about $70 for generators with Class I engines (−28%); and about $40 for units with 1-cylinder Class II engines (− 18%). It seems likely that cost savings from less stringent CO emission requirements would be less than expected reductions in benefits. Therefore, net benefits of the rule would probably decrease under this regulatory alternative.

The Commission did not consider a more stringent alternative because CPSC engineering staff believes that the rates in the proposed rule are based on the lowest rates that are technically feasible. Comments providing information on the benefits and costs that would be associated with different CO emission rates would be welcome.

2. Alternative Scope: Limiting Coverage to One-Cylinder Engines, Exempting Portable Generators With Two-Cylinder, Class II Engines From the Proposed Rule

The Commission could exempt portable generators with two-cylinder Class II engines from the requirements of the proposed rule. As shown in the base-case analysis, the gross benefits that would be derived from including this class of portable generators within the requirements of the standard would only amount to about $4 per unit. There are two reasons for the small per-unit benefit estimate. First, while generators with two-cylinder Class II engines accounted for 7.1 percent of generators in use during the 2004 through 2012 study period, they accounted for only about 1.2 percent of deaths. Consequently, the relative risk for generators with two-cylinder Class II engines was only about 16 percent of the risk for the handheld and one-cylinder models. Second, the analysis of benefits of the proposed emission limits for generators with two-cylinder Class II engines (300 g/hr at unreduced ambient oxygen levels) suggests that the proposed rule would only prevent about 17 percent of the addressable deaths for this class of generators (Hnatov, Inkster & Buyer, 2016).[141]

The costs of the proposed rule are estimated to amount to $139 per two-cylinder, Class II generator, yielding *negative* net benefits of about $135 ($4 in benefits—$139 in costs) per unit. Given annual sales of about 64,000 units, the aggregate net benefits associated with this class of generators would amount to about −$8.6 million (64,000 generators × $135 per generator) annually. In other words, excluding this class of generators from the requirements of the proposed rule would increase the net benefits of the rule by about $8.6 million annually, to approximately $153 million. We also note that the total estimated value of expected societal costs of CO poisoning deaths and injuries per unit, including those *not* addressed by the staff's epidemiological benefits analysis, is $116 per unit (as shown in Tables 5 & 6); hence, even if all of the deaths attributed to generators with two-cylinder Class II engines were to be prevented by the proposed rule standard, the costs would exceed the benefits for these generators.

Exclusion of generators with two-cylinder engines from the scope of the rule could create an economic incentive for manufacturers of generators with larger one-cylinder engines to either switch to two-cylinder engines for those models, or if they already have two-cylinder models in their product lines, they could be more likely to drop larger one-cylinder models from their product lines. The precise impacts of such business decisions on aggregate net benefits of the rule are not known at this time, but it would likely be of marginal significance. We have no evidence that such substitution would occur or, even if it did, that the impact would be significant. Moreover, the higher cost of manufacturing the two-cylinder generators could offset any cost advantage that would result by avoiding the requirements of the proposed rule.

If it would be technologically feasible and cost-effective for manufacturers to use smaller two-cylinder engines for generators in lower power ratings that are associated with greater per-unit societal costs, the reduction in scope of the rule might also specify a minimum engine displacement. For example, if this issue were a concern to the Commission, it could exempt generators with two-cylinder engines, but only if the two-cylinder models had a displacement above a specified value of total engine displacement.

The Commission is including class 2 twin-cylinder generators in the scope of the proposed rule and seeks comments and input on whether class 2 twin-cylinder generators should be excluded from the scope and input on possible shifts in the market of generators powered by two-cylinder engines, such as those discussed above, that might result if two-cylinder generators were excluded from the scope of the rule. The Commission seeks comments on what an appropriate limit on displacement would be if generators with two-cylinder engines above a certain displacement were excluded from the scope, to avoid creating a market incentive for small twin-cylinder generators that avoid the scope of the proposed rule.

3. Alternate Means of Limiting Consumer Exposure: Automatic Shutoff Systems

CPSC staff considered options for reducing the risk of CO poisoning that would require portable generators to shut off automatically if they sensed that a potentially hazardous situation was developing, or if they were used in locations that are more likely to result in elevated COHb levels in users. CPSC engineering staff evaluated four shutoff strategies/technologies: (1) A generator-mounted CO-sensing system, which would (ideally) sense higher CO levels during operation indoors and shut off the engine before dangerous levels build up; (2) a CO-sensing system located away from the generator (*e.g.,* inside the dwelling) that relies on the user to properly place the sensing unit in a location where it can communicate with the generator and send a signal remotely, causing the engine to shut down; (3) a generator-mounted global-positioning (GPS) system intended to infer operation of the generator indoors (from detection of reduced satellite signal strength) and automatically shut down the engine; and (4) applicable to generators equipped with EFI, an

[140] See Tab I of the staff's briefing package.

[141] See Tab K of the staff's briefing package.

algorithm programmed into the engine control unit (ECU) that relies on system sensors to infer indoor operation, signaling the ECU to shut down the engine. The findings of the CPSC engineering evaluation reports on each of the shutoff strategies are summarized in detail in the briefing memorandum for the proposed rule.

As alternative means of limiting exposure to CO, automatic shutoff systems could be incorporated into a standard that limits CO production per hour (such as the draft proposed standard), or they could enable compliance with an alternative standard that requires generators to shut off automatically if they are used in conditions that could lead to accumulation of hazardous levels of CO. Allowing the use of automatic shutoff systems, as either a supplement to limits on CO production per hour or under an alternative shutoff standard could potentially be less costly for manufacturers, and result in greater reductions in CO poisoning for consumers.

However, CPSC staff does not believe that an automatic shutoff standard or option is sufficiently proven to be feasible at this time. As noted, CPSC engineering staff investigated four different approaches for an automatic shutoff system, and was not able to demonstrate how any of the shutoff systems could be implemented satisfactorily. Unresolved concerns with the automatic shutoff technologies studied by CPSC staff include: (1) Possibly creating a false sense of safety, which could lead to increased use of portable generators indoors; (2) alternatives that require CO sensors falsely could identify hazards, which would detrimentally affect the utility of the generator when used in proper locations, and could lead to consumers overriding the mechanism; (3) the system would have to be shown to be durable and capable of functioning after being stored for long periods and being used under widely different conditions; and (4) use of algorithms to shut off engines with ECUs would have to be engine-specific and tailored to each engine function, requiring a significant amount of additional testing on this system. These concerns would have to be resolved before a standard incorporating an automatic shutoff option could be developed.

4. Different (Longer) Compliance Dates

As noted in the technical rationale for the proposed rule, staff believes that 1 year is sufficient lead time for manufacturers to implement the necessary modifications on both one-cylinder and two-cylinder Class II engines powering generators.[142] This assessment is partly based on greater industry experience in manufacturing small engines with closed-loop EFI for a variety of applications, including portable generators, since 2006, when the EPA estimated that manufacturers would need 3 years to 5 years to implement closed-loop EFI and make necessary engine improvements, if EPA were to adopt more stringent requirements for its $HC+NO_X$ emission standard for small SI engines. Because of the experience gained by engine manufacturers in recent years, the Commission thinks 1 year from the date of publication of the final rule would provide an appropriate lead-time for generators powered by Class II engines. The Commission is proposing a later compliance date that would take effect 3 years from the date of publication of the final rule for generators powered by smaller engines (handheld and Class I engines). This longer period addresses manufacturers' concerns that there may be different challenges associated with accommodating the necessary emission control technologies on these smaller engines (even though industry has also gained some limited experience with incorporating fuel-injection on handheld and Class I engines).

The Commission could decide that the recent industry experience in manufacturing small engines with EFI, cited in the staff's technical rationale (Buyer, 2016), while facilitating compliance for some manufacturers of engines and generators, might not shorten the time needed by other manufacturers that have not gained relevant experience in application of EFI technology to their products. Based on recent discussions with generator manufacturers, a longer time frame before compliance is required would allow firms more time to design and build parts in-house, which could be more cost-effective than outsourcing. Lack of relevant recent experience with incorporating EFI in engine manufacturing could be more common for small manufacturers of generators. As noted in the staff's initial regulatory flexibility analysis, a longer period before the rule becomes effective (or before compliance is required for generators with smaller engines) would provide small engine manufacturers more time to develop engines that would meet the requirements of the proposed rule, and in the case of small manufacturers of generators that do not also manufacture their own engines, ''it would provide them with additional time to find a supplier for compliant engines so that their production of generators would not be interrupted [and . . .] for small importers, a later effective date would provide them with additional time to locate a supplier of compliant generators.'' [143]

5. Informational Measures

OMB (2003) notes that informational measures often will be preferable when agencies are considering regulatory action to address a market failure arising from inadequate information. As discussed previously, although labels for generators were improved in 2007, with the introduction of mandatory labels, deaths and injuries from the improper placement of newly purchased generators suggest that at least some consumers poorly understand and process the information contained in the operating instructions and warning labels and consequently, these consumers continue to put themselves and others at risk through the improper placement of generators in enclosed areas. Additionally, a review of injury and market data since improved warning labels have been required finds that there is not sufficient evidence to conclude that the label required in the current labeling standard has reduced the CO fatality risks associated with portable generators. Moreover, findings of other general studies on the effectiveness of labels ''make it seem unlikely that any major reductions in fatalities should be anticipated due to the introduction of these labels.'' [144]

Other informational measures that the Commission could take include increased provision of information through means such as government publications, telephone hotlines, or public interest broadcast announcements. CPSC has previously taken actions to alert consumers to the dangers of CO poisoning by portable generators, and the Commission believes that continued involvement in these activities is warranted. However, evidence of problems in processing information, and continued occurrence of deaths and injuries from improper use of portable generators, indicate that informational measures do not adequately address the risks presented by these products.

6. Taking No Action To Establish a Mandatory Standard

The Commission could take no further regulatory action to establish a mandatory standard on portable

[142] Briefing memorandum for staff's briefing package.

[143] Tab M of the staff's briefing package.

[144] Tab H of the staff's briefing package.

generators. Given that some generator manufacturers have demonstrated that it is technologically feasible to produce generators that emit significantly lower levels of CO, taking no regulatory action to establish a mandatory standard would allow manufacturers to market low CO-emitting generators if they believe that there would be a market for such products. In addition, it would allow fully informed consumers to purchase low CO-emitting generators if they value the reduced risk. However, the Commission does not expect that a significant number of generators with CO emission rates proposed by the standard would be marketed voluntarily, at least in the short run.

H. Conclusions From Preliminary Regulatory Analysis

During 2004 to 2012, there was an average of about 73 portable generator-related deaths and at least 2,800 generator-related nonfatal injuries annually. The societal costs of these injuries, as described above, totaled about $820 million annually. During the same period, there was an average of about 11.1 million portable generators in use, suggesting about 0.66 deaths and at least 25.2 nonfatal CO poisonings per 100,000 portable generators in use. Based on indoor air quality modeling by NIST, and a staff technical evaluation of the predicted health effects for scenarios and housing characteristics found in the CPSC incident data, CPSC estimated that the proposed rule would prevent about one-third of these deaths and injuries.[145]

The preliminary regulatory analysis evaluated the benefits and costs of the proposed rule. It distinguished between four categories of portable generators by engine class and type: (1) Those with handheld engines with displacement of 80 cc or less; (2) generators with Class I engines with engine displacement of less than 225 cc; (3) generators with one-cylinder Class II engines with engine displacement of 225 cc or more; and (4) two-cylinder class II generators with engine displacement of 225 cc or more.

Generators with Class I and one-cylinder Class II engines accounted for about 92.2 percent of portable generators in use over the period 2004 through 2012. Generators with handheld engines (with engine displacement of 80 cc or less) and two-cylinder Class II engines (with displacement of 225 cc or more) accounted for 0.7 percent and 7.1 percent of portable generators in use, respectively, over 2004–2012.

The preliminary regulatory analysis suggests that the proposed rule could have substantial benefits for most generators. The estimated gross benefits per generator (over its expected product life) ranged from about $215 to $255 for models with hand-held, Class I, and one-cylinder Class II engines. However, gross benefits for the units with two-cylinder Class II engines amounted to only about $4 per unit.

The estimated costs of the proposed rule were generally similar across generator types, ranging from about $110 to $120 per generator for the models with handheld, Class I, and one-cylinder Class II engines, to about $140 for the models with two-cylinder Class I engines. The retail price increases likely to result from these higher costs could reduce portable generator sales by roughly 50,000 units annually, an overall sales reduction of about 3 to 4 percent. The relative impact on handheld generator sales could be greater because of the lower base price of these models.

Given these benefit and cost estimates, net benefits (*i.e.,* benefits minus costs) ranged from about $100 to about $140 per generator for the models with *handheld, Class I, and one-cylinder Class II engines.* However, net benefits were a *negative $135 for the models with two-cylinder Class II engines* (*i.e.,* benefits of $4 per generator minus costs of $139 per generator). Consequently, net benefits for portable generators as a group would be maximized by excluding the models with two-cylinder Class II engines from the rule.

Estimated net benefits can be converted to aggregate annual estimates, given estimates of the annual sales of portable generators. The estimated aggregate net benefits, based on 1 year's sales of the generators with handheld, Class I, and one-cylinder Class II engines amounted to $153 million. Including the models with two-cylinder Class II engines (which account for only about 5 percent of portable generators sold in recent years) under the requirements of the standard would reduce aggregate net benefits to about $145 million annually.

The sensitivity analysis supported the findings of the base analysis. None of the inputs used in the sensitivity analysis altered the main findings that there would be positive net benefits for the generators with handheld, Class I, and one-cylinder Class II engines, but negative net benefits for the generators with two-cylinder Class II engines.

Additionally, we note that benefits of the proposed rule were estimated based on an assumption that consumer behavior would not change in response to knowledge of the reductions in CO emissions from generators. However, a perceived reduction in the risk associated with using the generators in unsafe environments may increase the likelihood that some consumers will use their generators in the house, in the garage, or in outside locations that are near openings to the house—behaviors the CPSC recommends against. Although such a response could offset the expected benefits from the proposed rule, staff anticipates that any impact would be minimal. On the other hand, the benefits estimates were based on 503 of the 659 CO-related deaths during 2004 through 2012. These were the deaths occurring in fixed-residential or similar structures (*e.g.,* detached and attached houses, and fixed mobile homes) that could be modeled by NIST. CPSC staff believes that some unquantified proportion of the remaining 156 deaths that were not modeled by NIST, because they occurred at non-fixed home locations (*e.g.,* temporary structures such as trailers, horse trailers, recreational vehicles, or tents), and some that occurred when portable carbureted generators were operated outdoors, would have been prevented.[146] If so, the benefits estimates would have been somewhat higher than presented in this analysis.

XI. Initial Regulatory Flexibility Analysis

This section provides an analysis of the impact on small businesses of a proposed rule that would establish a mandatory safety standard for portable generators. Whenever an agency is required to publish a proposed rule, section 603 of the Regulatory Flexibility Act (5 U.S.C. 601–612) requires that the agency prepare an initial regulatory flexibility analysis (IRFA) that describes the impact that the rule would have on small businesses and other entities. An IRFA is not required if the head of an agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605. The IRFA must contain:

(1) A description of why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

[145] See Tab K of the staff's briefing package.

[146] Tab K of the staff's briefing package.

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

(5) identification to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

An IRFA must also contain a description of any significant alternatives that would accomplish the stated objectives of the applicable statutes and that would minimize any significant economic impact of the proposed rule on small entities. Alternatives could include: (1) Establishment of differing compliance or reporting requirements that take into account the resources available to small businesses; (2) clarification, consolidation, or simplification of compliance and reporting requirements for small entities; (3) use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part of the rule thereof, for small entities.

A. Reason for Agency Action

The proposed rule would limit the rate of CO emitted by portable generators and is intended to reduce the risk of death or injury resulting from the use of a portable generator in or near an enclosed space. The Directorate for Epidemiology, Division of Hazard Analysis (EPHA) reports that there were 659 deaths involving portable generators from 2004 to 2012, an average of about 73 annually.[147] Furthermore, there was a minimum of 8,703 nonfatal CO poisonings involving portable generators that were treated in hospital emergency departments from 2004 through 2012, or a minimum of about 967 annually (Hanway, 2015); and, as discussed in the preliminary regulatory analysis, there were an additional 16,600 medically attended injuries treated in other settings, or an estimated 1,851 per year. The societal costs of both fatal and nonfatal CO poisoning injuries involving portable generators amounted to about $821 million ($637 million for fatal injuries + $184 million for nonfatal injuries) on an annual basis. The proposed standard is expected to significantly reduce generator-related injuries and deaths and the associated societal costs.

[147] Tab A of the staff's briefing package.

B. Objectives of and Legal Basis for the Rule

The objective of the proposed rule is to reduce deaths and injuries resulting from exposure to CO associated with portable electric generators being used in or near confined spaces. The Commission published an ANPR in December 2006, which initiated this proceeding to evaluate regulatory options and potentially develop a mandatory standard to address the risks of CO poisoning associated with the use of portable generators. The proposed rule is being promulgated under the authority of the Consumer Product Safety Act (CPSA).

C. Small Entities to Which the Rule Will Apply

The proposed rule would apply to small entities that manufacture or import SI portable generators. Based on data collected by Power Systems Research, Trade IQ, and general market research, the Commission has identified more than 70 manufacturers of generators that have at some time supplied portable generators to the U.S. market. However, most of these manufacturers were based in other countries. The Commission has identified 20 domestic manufacturers of gasoline-powered portable generators, of which 13 would be considered small based on the Small Business Administration (SBA) size guidelines for North American Industry Classification System (NAICS) category 335312 (Motor and Generator Manufacturing), which categorizes manufacturers as small if they have fewer than 1,250 employees. Four of the small manufacturers are engaged primarily in the manufacture or supply of larger, commercial, industrial, or backup generators, or other products, such as electric motors, which would not be subject to the draft standard. For the other nine small manufacturers, portable generators could account for a significant portion of the firms' total sales. Of these nine small, domestic manufacturers, six have fewer than 99 employees; one has between 100 and 199 employees; another firm has between 200 and 299 employees; and one has between 300 and 399 employees, based on firm size data from Hoovers, Inc., and interviews with several manufacturers.

In some cases, a small manufacturer may be responsible for designing its own brand of generators but outsource the actual production of the generators to other manufacturers, which are often based in China. Other small manufacturers may assemble using components (including engines) purchased from other suppliers. There may be some small manufacturers that manufacture or fabricate some components of the generators, in addition to assembling them.

Using the same sources of data described above, the Commission identified more than 50 firms that have imported gasoline-powered portable generators. However, in some cases, the firms have not imported generators regularly, and generators appear to account for an insignificant portion of these firm's sales. Of these firms, the Commission believes that 20 may be small importers of gasoline-powered portable generators that could be affected by the proposed rule. Importers were considered to be a small business if they had fewer than 200 employees, based on the SBA guidelines for NAICS category 423610 (Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers) or $11.0 million in average annual receipts, based on the SBA guidelines for NAICS category 443141 (Household Appliance Stores). Of the 20 small, potential importers staff identified, all have 50 or fewer employees, based on firm size data from Hoovers, Inc.

D. Compliance, Reporting, and Record Keeping Requirements of Proposed Rule

The proposed rule would establish a performance standard that would limit the rate of CO that could be produced by portable generators that are typically used by consumers for electrical power in emergencies or other circumstances in which the electrical power has been shut off or is not available. The performance standard would be based on the generator's weighted CO emissions rate, and stated in terms of grams/hour (g/hr), depending upon the class [148] of the engine powering the generator. Generators powered by handheld engines and Class I engines would be required to emit CO at a

[148] Because most of the generators that were associated with fatal CO poisoning incidents reported to CPSC were gasoline-fueled, staff has chosen to set the performance standard based on the U.S. Environmental Protection Agency's (EPA) classification of the small SI engine powering the generator and the number of cylinders the engine has. The EPA broadly categorizes small SI engines as either non-handheld or handheld, and within each of those categories, further distinguishes them into different classes, which are based upon engine displacement. Nonhandheld engines are divided into Class I and Class II, with Class I engines having displacement above 80 cc up to 225 cc and Class II having displacement at or above 225 cc but maximum power of 19 kilowatts (kW). Handheld engines, which are divided into Classes III, IV, and V, are all at or below 80 cc. Staff chose to divide non-handheld Class II engines based on whether the engine had a single cylinder or twin cylinders.

weighted rate that is no more than 75 grams per hour (g/hr). Generators powered by Class II engines with a single cylinder would be required to emit CO at a weighted rate that is no more than 150 g/hr. Generators powered by Class II engines with two (or twin) cylinders, which are generally larger than others in the class, and are believed to comprise a very small share of the consumer market, would be required to emit CO at a weighted rate of no more than 300 g/hr.

Section 14 of the CPSA requires that manufacturers, importers, or private labelers of a consumer product subject to a consumer product safety rule to certify, based on a test of each product or a reasonable testing program that the product complies with all rules, bans or standards applicable to the product. The proposed rule details the test procedure that the Commission would use to determine compliance with the standard, but also provides that any test procedure may be used that will accurately determine the emission level of the portable generator. However, for certification purposes, manufacturers must certify that the product conforms to the standard, based on either a test of each product, or any reasonable alternative method to demonstrate compliance with the requirements of the standard. For products that manufacturers certify, manufacturers would issue a general certificate of conformity (GCC).

The requirements for GCCs are in Section 14 of the CPSA. Among other requirements, each certificate must identify the manufacturer or private labeler issuing the certificate and any third party conformity assessment body, on whose testing the certificate depends, the place of manufacture, the date and place where the product was tested, each party's name, full mailing address, telephone number, and contact information for the individual responsible for maintaining records of test results. The certificates must be in English. The certificates must be furnished to each distributor or retailer of the product and to the CPSC, if requested.

1. Costs of Proposed Rule That Would Be Incurred by Small Manufacturers

The most likely method for manufacturers of portable generators to comply with the proposed CO emissions requirement is converting to the use of closed-loop electronic fuel-injection (EFI) systems instead of conventional carburetors, to control the delivery of gasoline to the pistons of generator engines. Manufacturers also are likely to use catalytic converters in the mufflers of the generator engines. As discussed in the preliminary regulatory analysis in Section X, the cost to manufacturers for complying with the proposed rule is expected to be, on average, about $114 per unit for generators with handheld engines (1.1% of unit sales between 2010 and 2014), $113 per unit for generators with Class I engines (57.8% of unit sales between 2010 and 2014); $110 for those with single cylinder Class II engines (36.4% of unit sales between 2010 and 2014); and $138 for those with twin cylinder Class II engines (4.7% of unit sales between 2010 and 2014).

These estimates include the variable costs related to EFI, including an oxygen sensor for a closed-loop system, a battery and alternator or regulator; and 3-way catalysts. The estimates also include the fixed costs associated with the research and development required to redesign the generators, tooling costs, and the costs associated with testing and certification that the redesigned engines comply with the EPA requirements for exhaust constituents they regulate, $HC+NO_X$ and CO emissions.[149]

Manufacturers likely would incur some additional costs to certify that their portable generators meet the requirements of the proposed rule, as required by Section 14 of the CPSA. The certification must be based on a test of each product or a reasonable testing program. Manufacturers may use any testing method that they believe is reasonable and are not required to use the same test method that would be used by CPSC to test for compliance. Based on information from a testing laboratory, the cost of the testing might be more than $6,000 per generator model, although it may be possible to use the results from other tests that manufacturers already may be conducting, such as testing to ensure that the engines comply with EPA requirements, per 40 CFR part 1054, for $HC+NO_X$ and CO emissions to certify that the generator meets the requirements of the proposed rule. Manufacturers and importers also may rely upon testing completed by other parties, such as their foreign suppliers, in the case of importers, or the engine suppliers in the case of manufacturers, if those tests provide sufficient information for the manufacturers or importers to certify that the generators comply with the proposed rule.

The Commission welcomes comments from the public regarding the cost or other impacts of the certification requirements under Section 14 of the CPSA and whether it would be feasible to use the results of tests conducted for certifying compliance with EPA requirements to certify compliance with the proposed rule.

2. Impacts on Small Businesses

Manufacturers

To comply with the proposed rule, small manufacturers would incur the costs described above to redesign and manufacture generators that comply with the CO emissions requirements and to certify that they comply. However, to the extent that the volume of generators produced by small manufacturers is lower than that of the larger manufacturers, the costs incurred by smaller manufacturers may be higher than the average costs reported above. One reason to expect that costs for lower-volume manufacturers could be higher than average is that some of the costs are fixed. For example, research and development costs were estimated to be about $203,000, on average, for Class II engines and about $316,000 for Class I engines. On a per-unit basis, the preliminary regulatory analysis estimated that these costs would average about $4 for Class I engines and $3 for Class II engines, but for manufacturers with a production volume only one-half the average production volume, the per-unit costs would be twice the average.

For lower-volume producers, the per-unit costs of the components necessary to modify their engines might also be higher than those for higher-volume producers. As discussed in the preliminary regulatory analysis, generators that meet the requirements of the proposed rule would probably use closed-loop electronic fuel-injection instead of conventional carburetors. Therefore, manufacturers would incur the costs of adding components associated with EFI to the generator, including injectors, pressure regulators, sensors, fuel pumps, and batteries. Based on information obtained from a generator manufacturer, the cost of these components might be as much as 35 percent higher for a manufacturer that purchased only a few thousand units at a time, as opposed to more than 100,000 units.

[149] The modifications to small SI engines to comply with the CO emission requirements would likely require engine manufacturers to seek certifications (as new engine families) under EPA requirements for $HC+NO_X$ and CO, with the attendant costs for fees and testing, which could be passed on to generator manufacturers that purchase the engines to power their products. Some of the larger manufacturers of portable generators are vertically-integrated firms that also manufacture the engines that power their products. These testing and certification requirements are to meet EPA requirements and are in addition to the testing and certification requirements of Section 14 of the CPSA.

While the cost for small, low-volume manufacturers that manufacture their own engines might be higher than for high-volume manufacturers, small portable generator manufacturers often do not manufacture the engines used in their generators, but obtain them from engine manufacturers such as Honda, Briggs and Stratton, and Kohler, as well as several engine manufacturers based in China. These engine manufacturers often supply the same engines to other generator or engine-driven tool manufacturers. Because these engine manufacturers would be expected to have higher production volumes and can spread the fixed research and development and tooling costs over a higher volume of production, the potential disproportionate impact on lower-volume generator producers might be mitigated to some extent.

As discussed in the preliminary regulatory analysis, the retail prices CPSC observed for portable generators from manufacturers and importers of all sizes ranged from a low of $133 to $4,399, depending upon the characteristics of the generator. On a per-unit basis, the proposed rule is expected to increase the costs of generators by an average of $110 to $140. Generally, impacts that exceed 1 percent of a firm's revenue are considered to be potentially significant. Because the estimated average cost per generator would be between about 3 percent and 80 percent of the retail prices (or average revenue) of generators, the proposed rule could have a significant impact on manufacturers and importers that receive a significant portion of their revenue from the sale of portable generators.

Based on a conversation with a small manufacturer, CPSC staff believes that the proposed rule may have a disproportionate impact on generator manufacturers that compete largely on the basis of price, rather than brand name or reputation. Currently, CPSC cannot identify how many of the nine domestic small manufacturers of engines compete on the basis of price. One reason for the disproportionate impact is that consumers of the lower priced generators are probably more price sensitive than consumers of the brand name generators and may be more likely to reduce or delay their purchases of generators in response to the cost increases that would be expected to result from the proposed rule. A second reason that manufacturers that compete largely on the basis of price could be disproportionately impacted is that brand name generator manufacturers might have more options for absorbing the cost increases that result from the proposed rule. For example a high-end generator manufacturer might be able to substitute a less expensive, but still adequate engine for a name brand engine that they currently might be using. On the other hand, manufacturers that have been competing primarily on the basis of price are more likely to have already made such substitutions and will have fewer options for absorbing any cost increases. As a result, the price differential between generators aimed at the low-end or price-conscious market segments and the name brand generators will be reduced, which could affect the ability of the manufacturers of generators aimed at the price conscious market to compete with the name-brand manufacturers.

Importers

For many small importers, the impact of the proposed rule would be expected to be similar to the impact on small manufacturers. One would expect that the foreign suppliers would pass much of the costs of redesigning and manufacturing portable generators that comply with the proposed rule to their domestic distributors. Therefore, the cost increases experienced by small importers would be similar to those experienced by small manufacturers. As with small manufacturers, the impact of the proposed rule might be greater for those importers that primarily compete on the basis of price. Currently, CPSC cannot identify how many of the 20 domestic, small importers of engines compete on the basis of price.

In some cases, the foreign suppliers might opt to withdraw from the U.S. market, rather than incur the costs of redesigning their generators to comply with the proposed rule. If this occurs, the domestic importers would have to find other suppliers of portable generators or exit the portable generator market. Exiting the portable generator market could be considered a significant impact, if portable generators accounted for a significant percentage of the firm's revenue.

Small importers will be responsible for issuing a GCC certifying that their portable generators comply with the proposed rule should it become final. However, importers may rely upon testing performed and GCCs issued by their suppliers in complying with this requirement.

E. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

The Commission has not identified any federal rules that duplicate or conflict with the proposed rule. The EPA promulgated a standard in 2008 for small spark-ignited engines that set a maximum rate for CO emissions. However, the maximum level set by the EPA is higher than the proposed CPSC standard for portable generators.

F. Alternatives Considered To Reduce the Burden on Small Entities

Under section 603(c) of the Regulatory Flexibility Act, an initial regulatory flexibility analysis should ''contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of the applicable statutes and which minimize any significant impact of the proposed rule on small entities.'' CPSC examined several alternatives to the proposed rule that could reduce the impact on small entities. These include: (1) Less stringent CO emission rates; (2) limit coverage to one-cylinder engines; (3) an option for reducing consumer exposure to CO by using an automatic shutoff; (4) establishing alternative compliance dates; (5) informational measures; or (6) taking no action. These alternatives are discussed in more detail in Section X.G.

G. Summary and Request for Comments Regarding Potential Impact on Small Business

The Commission has identified about nine small generator manufacturers and about 20 small generator importers that would be impacted by the proposed rule.

The most likely means of complying with the proposed rule would be to use closed-loop electronic fuel-injection (EFI) systems, instead of conventional carburetors, to control the delivery of gasoline to the pistons of generator engines and to use catalytic converters in the mufflers of the generator engines to be able to meet the EPA's $HC+NO_X$ emission standards. The Commission estimates that, on average, the requirements will increase the costs of generator manufacturers by about $110 and $140, depending upon engine type. The costs might be higher than average for lower-volume manufacturers.

Manufacturers and suppliers that serve the low-end of the market and compete mostly on the basis of price might be more severely impacted by the proposed rule because their customers may be more price sensitive; and compared with larger manufacturers, they may not have the same options of reducing other costs to mitigate the impact of the proposed rule on the price of generators. Suppliers of name-brand generators or ones that compete on basis other than price might be able to make other adjustments, such as using less expensive engines to mitigate the impact of the proposed rule on the price of their generators. CPSC currently cannot identify how many of the nine domestic, small manufacturers or the 20 domestic, small importers of engines compete on the basis of price.

Generator manufacturers and importers will be responsible for certifying that their products comply with the requirements of the proposed rule. Testing and certification costs can have a disproportionate impact on small manufacturers, depending upon the cost of the tests and volume of production, relative to larger manufacturers. However, some of these testing costs might be mitigated, if manufacturers could use the results of testing already being conducted (such as, for example, testing to certify compliance with EPA requirements), to offset some of the testing costs required for certification with the proposed rule.

The Commission invites comments on this IRFA and the potential impact of the proposed rule on small entities, especially small businesses. Small businesses that believe they will be affected by the proposed rule are especially encouraged to submit comments. The comments should be specific and describe the potential impact, magnitude, and alternatives that could reduce the impact of the proposed rule on small businesses.

In particular, the Commission seeks comment on:

- The types and magnitude of manufacturing costs that might disproportionately impact small businesses or that were not considered in this analysis;
- the costs of the testing and certification requirements of the proposed rule, including whether EPA testing can be used to meet the certification requirements for the proposed rule;
- whether other factors not considered in this analysis could be significant, such as EPA's Averaging, Banking and Trading (ABT) program that could allow manufacturers of engine families that do have low CO emissions to meet the proposed rule and that also have very low $HC+NO_X$ emissions to ''buy credits'' in the ABT program, thus allowing their other engine families to exceed $HC+NO_X$ limits;
- differential impacts of the proposed rule on small manufacturers or suppliers that compete in different segments of the portable generator market; and finally,
- CPSC would be interested in any comments that provide alternatives that would minimize the impact on small businesses but would still reduce the risk of CO poisoning associated with generators.

XII. Environmental Considerations

The Commission's regulations address whether CPSC is required to prepare an environmental assessment (EA) or an environmental impact statement (EIS). 16 CFR 1021.5. Those regulations state CPSC's actions that ordinarily have ''little or no potential for affecting the human environment,'' and therefore, are categorically excluded from the need to prepare an EA or EIS. Among those actions are rules, such as the portable generator NPR, which provide performance standards for products. *Id.* 1021.5(c)(1).

XIII. Executive Order 12988 (Preemption)

In accordance with Executive Order 12988 (February 5, 1996), the CPSC states the preemptive effect of the proposed rule, as follows:

The regulation for portable generators is proposed under authority of the CPSA. 15 U.S.C. 2051–2089. Section 26 of the CPSA provides: ''whenever a consumer product safety standard under this Act is in effect and applies to a risk of injury associated with a consumer product, no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the Federal Standard''. 15 U.S.C. 2075(a). Upon application to the Commission, a state or local standard may be excepted from this preemptive effect if the state or local standard: (1) Provides a higher degree of protection from the risk of injury or illness than the CPSA standard, and (2) does not unduly burden interstate commerce. In addition, the federal government, or a state or local government, may establish or continue in effect a non-identical requirement for its own use that is designed to protect against the same risk of injury as the CPSC standard if the federal, state, or local requirement provides a higher degree of protection than the CPSA requirement. 15 U.S.C. 2075(b).

Thus, the portable generator requirements proposed in this **Federal Register** would (if finalized) preempt non-identical state or local requirements for portable generators designed to protect against the same risk of injury and prescribing requirements regarding the performance, composition, contents, design, finish, construction, packaging or labeling of portable generators.

XIV. Certification

Section 14(a) of the CPSA requires that products subject to a consumer product safety rule under the CPSA, or to a similar rule, ban, standard or regulation under any other act enforced by the Commission, must be certified as complying with all applicable CPSC-enforced requirements. 15 U.S.C. 2063(a). A final rule on portable generators would subject portable generators to this certification requirement.

XV. Effective Date

The CPSA requires that consumer product safety rules take effect not later than 180 days from their promulgation unless the Commission finds there is good cause for a later date. 15 U.S.C. 2058(g)(1). The Commission proposes that the rule would take effect 1 year from the date of publication of the final rule for generators powered by Class II engines and three years from the date of publication of the final rule for generators powered by handheld and Class I engines.

Because of the experience gained by engine manufacturers in recent years in designing and building EFI small SI engines, the Commission believes one year from the date of publication of the final rule would provide an appropriate lead-time for generators powered by one and two cylinder Class II engines. The Commission is proposing an effective date of three years from the date of publication of the final rule for generators powered by handheld and Class I engines. This longer period to become compliant addresses manufacturers' concerns that there may be different challenges associated with accommodating the necessary emission control technologies on these smaller engines. In addition, later compliance dates could potentially reduce the impact on manufacturers of generators, including small manufacturers, by providing them with more time to develop engines that would meet the requirements of the proposed rule, or, in the case of small manufacturers that do not manufacture the engines used in their generators, by providing them with additional time to find a supplier for compliant engines so that their production of generators would not be interrupted.

XVI. Proposed Findings

The CPSA requires the Commission to make certain findings when issuing a consumer product safety standard. Specifically, the CPSA requires that the Commission consider and make findings about the degree and nature of the risk of injury; the number of consumer products subject to the rule; the need of the public for the product and the probable effect on utility, cost, and availability of the product; and other means to achieve the objective of the rule, while minimizing the impact on competition, manufacturing, and commercial practices. The CPSA also requires that the Commission find that the rule is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product and issuing the rule must be in the public interest. 15 U.S.C. 2058(f)(3).

In addition, the Commission must find that: (1) If an applicable voluntary standard has been adopted and implemented, that compliance with the voluntary standard is not likely to reduce adequately the risk of injury, or compliance with the voluntary standard is not likely to be substantial; (2) that benefits expected from the regulation bear a reasonable relationship to its costs; and (3) that the regulation imposes the least burdensome requirement that would prevent or adequately reduce the risk of injury. *Id.* These findings are discussed below.

Degree and nature of the risk of injury.

Carbon monoxide is a colorless, odorless, poisonous gas formed during incomplete combustion of fossil fuels, such as the fuels used in engines that power portable generators. Mild CO poisoning symptoms include headaches, lightheadedness, nausea, and fatigue. More severe CO poisoning can result in progressively worsening symptoms of vomiting, confusion, loss of consciousness, coma, and ultimately, death. The high CO emission rate of current generators can result in situations in which the COHb levels of exposed individuals rise suddenly and steeply, causing them to experience rapid onset of confusion, loss of muscular coordination, and loss of consciousness.

As of May 21, 2015, CPSC databases contained reports of at least 751 generator-related consumer CO poisoning deaths resulting from 562 incidents, which occurred from 2004 through 2014. Due to incident reporting delays, statistics for the two most recent years, 2013 and 2014, are incomplete, because data collection is still ongoing, and the death count most likely will increase in future reports.

Based on NEISS, the Commission estimates that for the 9-year period of 2004 through 2012, there were 8,703 CO injuries seen in emergency departments (EDs) associated with portable generators. The Commission considers this number to represent a lower bound on the true number of generator-related CO injuries treated in EDs from 2004–2012. According to Injury Cost Model (ICM) estimates, there were an additional 16,660 medically-attended CO injuries involving generators during 2004–2012.

Number of consumer products subject to the rule.

For the U.S. market for the years 2010 through 2014, about 6.9 million gasoline-powered portable generators were shipped for consumer use, or an average of about 1.4 million units per year. Shipments of nearly 1.6 million units in 2013 made it the peak year for estimated sales during this period. Consumer demand for portable generators from year-to-year fluctuates with major power outages, such as those caused by tropical or winter storms. Portable generators purchased by consumers and in household use generally range from under 1 kW of rated power up to perhaps 15 kW of rated power. In the last 10 to 15 years, the U.S. market has shifted towards smaller, less powerful units.

The need of the public for portable generators and the effects of the rule on their utility, cost, and availability.

Portable generators that are the subject of the proposed standard commonly are purchased by consumers to provide electrical power during emergencies (such as during outages caused by storms), during other times when electrical power to the home has been shut off, when power is needed at locations around the home without access to electricity, and for recreational activities (such as during camping or recreational vehicle trips).

The proposed rule is based on technically feasible CO emission rates, so that the function of portable generators is unlikely to be adversely affected by the rule. Moreover, there may be a positive change in utility in terms of fuel efficiency, greater ease of starting, product quality, and safety of portable generators. There may be a negative effect on the utility of portable generators, however, to the extent consumers are unable to purchase generators due to increased retail prices.

In terms of retail price information, the Commission's review found that generators with handheld engines ranged in price from $133 to $799, with an average price of about $324. Generators with non-handheld Class I engines had a wide price range, from $190 to over $2,000, with an average price of $534. Generators with one-cylinder Class II engines ranged in price from $329 to $3,999, with an average price of $1,009. Generators with two-cylinder Class II engines ranged in price from $1,600 to $4,999, and the average price of these units was $2,550.

Aggregate estimated compliance costs to manufacturers of portable generators average approximately $113 per unit for engine and muffler modifications necessary to comply with the CO emission requirements of the proposed standard. The net estimated manufacturing costs per unit to comply with the proposed standard is $114 for handheld engines, $113 for Class I engines, $110 for Class II, one cylinder engines, and $138 for Class II, two cylinder engines.

The expected product modifications to produce complying generators (EFI & catalysts) are available to manufacturers, and the Commission does not have any indication that firms would exit the market because of the rule. Therefore, the availability of portable generators would not likely be affected by the rule.

Other means to achieve the objective of the rule, while minimizing the impact on competition and manufacturing.

The Commission considered alternatives to achieving the objective of the rule of reducing unreasonable risks of injury and death associated with portable generators. For example, the Commission considered less stringent CO emission rates for portable generators; however, cost savings from less-stringent CO emission requirements likely would be less than expected reductions in the benefits, so that the net benefits of the rule probably would decrease under this regulatory alternative. The Commission also considered including an option for reducing CO emissions through use of automatic shutoff systems, which could potentially reduce the impact of the proposed rule by providing an additional option for complying with the proposed rule; however, because of unresolved issues concerning an automatic shutoff, the Commission does not believe that a regulatory alternative based on automatic shutoff technology instead of reduced emissions is feasible for hazard reduction at this time.

Unreasonable risk.

As of May 21, 2015, CPSC databases contained reports of at least 751 generator-related consumer CO poisoning deaths resulting from 562 incidents, which occurred from 2004 through 2014. Due to incident reporting delays, statistics for the two most recent years, 2013 and 2014, are incomplete, because data collection is still ongoing, and the death count most likely will increase in future reports.

Based on NEISS, the Commission estimates that for the 9-year period of 2004 through 2012, there were 8,703 CO injuries seen in emergency departments (EDs) associated with portable generators. The Commission considers this number to represent a lower bound on the true number of generator-related CO injuries treated in EDs from 2004–2012. According to Injury Cost Model (ICM) estimates, there were an additional 16,660 medically-attended CO injuries involving generators during 2004–2012.

The Commission estimates that the rule would result in aggregate net benefits of about $145 million annually. On a per-unit basis, the Commission estimates the present value of the expected benefits per unit for all units to be $227; the expected costs to manufacturers plus the lost consumer surplus per unit to be $116; and the net benefits per unit to be $110. The Commission concludes preliminarily portable generators pose an unreasonable risk of injury and finds that the proposed rule is reasonably necessary to reduce that unreasonable risk of injury.

Public interest.

This proposed rule is intended to address an unreasonable risk of injury and death posed by portable generators. The Commission believes that adherence to the requirements of the proposed rule will reduce portable generator deaths and injuries in the future; thus, the rule is in the public interest.

Voluntary standards.

The Commission is aware of two U.S. voluntary standards that are applicable to portable generators, UL 2201—*Safety Standard for Portable Generator Assemblies,* and ANSI/PGMA G300–2015—*Safety and Performance of Portable Generators.* These standards include the same requirements set forth in the mandatory CPSC portable generator label but do not otherwise address the risks related to CO poisoning. The Commission does not believe the standards are adequate because they fail to address the risk of CO hazard beyond the CPSC mandatory labeling requirement. The Commission is unaware of any portable generator that has been certified to either of the standards, and as such it is unlikely whether there would be substantial compliance with it if CO emissions requirements were incorporated.

Relationship of benefits to costs.

The aggregate annual benefits and costs of the rule are estimated to be about $298 million and $153 million, respectively. Aggregate net benefits from the rule, therefore, are estimated to be about $145 million annually. On a per unit basis, the Commission estimates the present value of the expected benefits per unit for all units to be $227. The Commission estimates the expected costs to manufacturers plus the lost consumer surplus per unit to be $116. Based on this analysis, the Commission preliminarily finds that the benefits expected from the rule bear a reasonable relationship to the anticipated costs of the rule.

Least burdensome requirement that would adequately reduce the risk of injury.

The Commission considered less-burdensome alternatives to the proposed rule on portable generators, but preliminarily concluded that none of these alternatives would adequately reduce the risk of injury.

(1) The Commission considered not issuing a mandatory rule, but instead relying upon voluntary standards. As discussed previously, the Commission does not believe that either voluntary standard adequately addresses the CO risk of injury and death associated with portable generators. Furthermore, in the absence of any indication that a portable generator has been certified to either standard, the Commission cannot determine that there would be substantial compliance by industry.

(2) The Commission considered excluding portable generators with two cylinder Class II engines from the scope of the rule. The Commission estimates that net benefits of the proposed rule range from about $100 to about $140 per generator for the models with handheld, Class I and one-cylinder Class II engines. However, the Commission estimates net benefits of negative $135 for the models with two-cylinder Class II engines. Consequently, excluding portable generators with two cylinder Class II engines would result in a less burdensome alternative. However, it is possible that exclusion of generators with two-cylinder Class II engines from the scope of the rule could create an economic incentive for manufacturers of generators with larger one-cylinder engines to either switch to two-cylinder engines for those models, or if they already have two-cylinder models in their product lines, they could be more likely to drop larger one-cylinder models from their product lines. Because the Commission lacks more specific information on the generators with Class II twin cylinder engines, the Commission is proposing this rule with the broader scope of including these generators. The Commission welcomes comments on inclusion of portable generators with Class II twin cylinder engines, or Class 2 twin cylinder generators, in the scope of the rule.

(3) The Commission considered higher allowable CO emission rates, which might result in costs savings from lower costs associated with catalysts (if they would not be required, or if less-costly materials could suffice), less-extensive engine modifications (other than EFI-related costs) and less-extensive generator housing modifications (if housing enlargement and other retooling would be minimized). However, based on Commission estimates, it seems likely that cost savings from less-stringent CO emission requirements would be less than expected reductions in benefits. Therefore, the Commission is not proposing this alternative.

XVII. Ex Ante Retrospective Review

As set forth in the Commission's Plan for Retrospective Review of Existing Rules (Retrospective Review Plan) (*http://www.cpsc.gov/Global/Regulations-Laws-and-Standards/Rulemaking/DraftrulereviewplanSeptember2015Final.pdf*) and consistent with the Regulatory Flexibility Act, as applicable, the Commission has established certain methods and processes for identifying and reconsidering certain rules that warrant repeal or modification, including rules that would benefit from strengthening, complementing, or modernizing. Consistent with the Retrospective Review Plan's methods and procedures, which permit the Commission to include retrospective review provisions in new rulemakings, the Commission is requesting comments on whether to develop ex ante criteria for the retrospective review of this proposed rule.

XVIII. Request for Comments

We invite all interested persons to submit comments on any aspect of the proposed rule. More specifically, the Commission seeks comments on the following:

- The cost or other impacts of the certification requirements under Section 14 of the CPSA and whether it would be feasible to use the results of tests conducted for certifying compliance with EPA requirements to certify compliance with the proposed rule;
- The product manufacture or import limits and the base period in the proposed anti-stockpiling provision;

• Prospective use (*e.g.,* costs, applicability and challenges) of batteryless EFI for portable generators;

• Costs of new designs and tooling that may be required for generator frames and housings to accommodate additional components, such as batteries for generators with handheld or Class I engines, and to address reported concerns with heat dissipation.

• Information on potential challenges in accommodating new features in handheld and Class I engines to comply with the proposed rule, as well as on components and technologies that might be available to meet these challenges and moderate the impacts of the proposed rule on handheld and Class I engines.

• Costs per unit element for testing and certification, including what additional costs per unit element might be if the Commission required specific testing requirements;

• Costs firms experience with testing and certification of engines for EPA emissions testing;

• Advantages and disadvantages of setting performance requirements at 17 percent oxygen instead of normal oxygen as well as comments on the technically feasible CO emission rates for generators operating at 17 percent oxygen, for each of the generator categories.

• Based on estimates made for EPA, estimated variable costs for a pressurized oil system would be about $19 for small spark-ignition engines that that now lack this feature. In the view of the Directorate for Engineering Sciences, pressurized lubrication systems would not be necessary to comply with the draft standard. We welcome comments on this issue.

• Whether to exclude portable generators with two-cylinder Class II engines from the final rule, and if two-cylinder Class II engines were to be excluded, whether a limit on displacement should be included to avoid developing a market for small two-cylinder engines for portable generators that would be exempt from the rule;

• Information on the benefits and costs that would be associated with different CO emission rates;

• Information and data about the expected range of manufacturing variability for CO emissions from EFI equipped small spark ignited engines, including data on emissions variability from production target values and expected manufacturing tolerances.

• Information about the benefits and costs associated with altering the performance requirements for CO emissions such that an alternate performance requirement could be based on limits on those emissions when the generator is operating in air with reduced oxygen content of 17 percent oxygen (or a different reduced level) rather than normal atmospheric oxygen (approximately 20.9 percent), as proposed; if so, what that performance requirement should be and how should CPSC should test to verify compliance.

• Test methods staff use for determining CO emissions from generators in normal atmospheric oxygen levels (approximately 20.9 percent) and at reduced oxygen levels (as described in staff's briefing package), as well information on benefits and costs that could be associated with requiring those specific methods for evaluation and the benefits and costs of not requiring a specific test method.

• The appropriateness of compliance dates that are one year from the date of publication of the final rule for portable generators with Class II engines, or class 2 generators, and three years from the date of publication of the final rule for generators with handheld and Class I engines, or handheld generators and class 1 generators.

• Whether the Commission should instead adopt a compliance date that is 18 months from the date of publication of the final rule for generators with handheld and Class I engines, or handheld generators and class 1 generators.

• Possible alternative technologies that would address the carbon monoxide hazard associated with portable generators other than or in addition to reduced carbon monoxide generation, such as, but not limited to, viable shut-off technology. For any proposed alternate technology, please provide a description of how its performance would be characterized, any challenges to implementation, data showing the viability of the technology in this application and any other information that would help evaluate the efficacy and cost of the alternate approach.

• The feasibility of continuing to lower in the future the CO rate requirements for portable generators as technology advances and whether the Commission can make related findings that CO emission rates lower than those set forth in the proposed rule will further reduce the risk of death and injury associated with this hazard. Provide information on a timetable or other automatic mechanism that would trigger a review of the emission rates for purposes of evaluating the feasibility of establishing lower rates as well as any metrics that would be used to evaluate the state of the technology for the purpose of lowering the CO rates in the rule.

• Potential increase in fuel economy resulting from this proposed performance standard and quantification of costs or benefits associated with such increase.

• Potential impact of this proposed performance standard on the market for handheld generators and costs or benefits associated with such impact.

• Potential impact noise emissions associated with this proposed performance standard and any advantages or disadvantages of such impact.

• The need for retrospective review of this proposed rule, including the need for development of ex ante criteria, pursuant to the selection criteria set forth in the Commission's Retrospective Review Plan. Examples of potential criteria for any future retrospective review of this proposed rule include, but are not limited to: The appropriate data points necessary to evaluate such measures, the appropriate interval for such retrospective review, and the appropriate goals to define success in each measure.

• Additional information on portable generator sales and use.

Comments should be submitted in accordance with the instructions in the **ADDRESSES** section at the beginning of this document.

XIX. Conclusion

For the reasons stated in this preamble, the Commission proposes requirements for portable generators to address an unreasonable risk of injury associated with portable generators.

List of Subjects in 16 CFR Part 1241

Consumer protection, Imports, Information, Safety.

For the reasons discussed in the preamble, the Commission proposes to amend Title 16 of the Code of Federal Regulations as follows:

■ 1. Add part 1241 to read as follows:

PART 1241—SAFETY STANDARD FOR PORTABLE GENERATORS

Sec.

Authority: 15 U.S.C. 2056, 2058 and 2076.

§ 1241.1 Scope, purpose and compliance dates.

(a) This part 1241, a consumer product safety standard, establishes requirements for portable generators, as defined in § 1241.2(b). The standard includes requirements for carbon monoxide emission rates for categories of portable generators. These requirements are intended to reduce an unreasonable risk of injury and death associated with portable generators.

(b) For purposes of this rule, portable generators include single phase; 300 V or lower; 60 hertz; portable generators driven by small handheld and non-handheld (as defined by the Environmental Protection Agency) spark-ignited utility engines intended for multiple use which are provided only with receptacle outlets for the AC output circuits and intended to be moved, though not necessarily with wheels. For purposes of this rule, portable generators do not include:

(1) Permanently installed generators;

(2) 50 hertz generators;

(3) Marine generators;

(4) Trailer mounted generators;

(5) Generators installed in recreational vehicles;

(6) Generators intended to be pulled by vehicles;

(7) Generators that are part of welding machines;

(8) Generators powered by compression-ignition engines fueled by diesel.

(c) Class 2 single cylinder and two cylinder generators, as defined in § 1241.2(c) and (d) manufactured or imported on or after [date that is 365 days after publication of a final rule] shall comply with the requirements stated in § 1241.3(b)(2) and (3). Handheld generators and Class 1 generators, as defined in § 1241.2(a) and (b), manufactured or imported on or after [date that is 3 years after publication of a final rule], shall comply with the requirements stated in § 1241.3(b)(1).

§ 1241.2 Definitions.

In addition to the definitions in section 3 of the Consumer Product Safety Act (15 U.S.C. 2051), the following definitions apply for purposes of this part 1241.

(a) *Handheld generator* means a generator powered by a spark ignited (SI) engine with displacement of 80 cc or less.

(b) *Class 1 generator* means a generator powered by an SI engine with displacement greater than 80 cc but less than 225 cc.

(c) *Class 2 single cylinder generator* means a generator powered by an SI engine with one cylinder having displacement of 225 cc or greater, up to a maximum engine power of 25 kW.

(d) *Class 2 two cylinder generator* means a generator powered by an SI engine with two cylinders having a total displacement of 225 cc or greater, up to a maximum engine power of 25 kW.

§ 1241.3 Requirements.

(a) When tested in accordance with the test procedures stated in § 1241.4 (or similar test procedures), all portable generators covered by this standard shall meet the requirements stated in paragraph (b) of this section.

(b) Emission rate requirements.

(1) Handheld generators and Class 1 generators must not exceed a weighted CO emission rate of 75 grams per hour (g/hr).

(2) Class 2 single cylinder generators must not exceed a weighted CO emission rate of 150 g/hr.

(3) Class 2 two cylinder generators must not exceed a weighted CO emission rate of 300 g/hr.

§ 1241.4 Test procedures.

(a) Any test procedure that will accurately determine the carbon monoxide emission rate of the portable generator may be used. CPSC uses the test procedure stated in this section to determine compliance with the standard.

(b) *Definitions.*

(1) *Load bank and power meter* means an AC electric resistor load bank used to simulate steady electric loads on the generator. The load bank shall be capable of adjustment to within 5 percent of each required load condition. A power meter is used to measure the actual electrical load delivered by the generator with an accuracy of ±5 percent.

(2) *Fuel and lubricants* means fuel and lubricants that meet manufacturer's specifications for the generator being tested.

(3) Emission measurement system means the constant volume sampling (CVS) emission measurement system described in 40 CFR parts 1054 and 1065.

(4) Maximum *generator load* means the maximum output power capability of the generator assembly as determined by the maximum generator load determination procedures. The maximum generator load is used to establish the 6-mode load profile.

(c) Determining maximum generator load.

(1) *Power saturation method for conventional (non-inverter) generator assemblies.*

(i) Ensure test facility is at ambient conditions 15–30 °C (60–85 °F) and approximately 20.9 percent oxygen.

(ii) Apply a load greater than 60 percent of the manufacturer's rated continuous power for a minimum of 20 minutes to warm the generator to operating temperature.

(iii) Monitoring voltage and frequency, increase the load applied to the generator to the maximum observed power output without causing the voltage or frequency to deviate from the following tolerances:

(A) Voltage Tolerance: ±10 percent of the nameplate rated voltage.

(B) Frequency Tolerance: ±5 percent of the nameplate rated frequency.

(iv) Maintain the maximum observed power output until the operating temperature of the engine stabilizes. The generator is at stable operating temperature when the oil temperature varies by less than 2 °C (4 °F) over three consecutive readings taken 15 minutes apart. For the purpose of determining maximum generator load, if an overload protection device is present, it shall not activate for a period of 45 minutes from the initial operating temperature stability reading. The load may need to be adjusted to maintain the maximum observed power output while the generator temperatures are stabilizing. Record voltage, frequency, amperage, power, and oil and ambient air temperature.

(v) The maximum generator load is the power supplied by the generator assembly that satisfies the tolerances in paragraph (c)(1)(iii) of this section when the generator is at stable operating temperature as defined in paragraph (c)(iv) of this section. Record the maximum generator load.

(2) *Power saturation method for inverter generator assemblies.*

(i) Ensure test facility is at ambient conditions 15–30 °C (60–85 °F) and approximately 20.9 percent oxygen.

(ii) Apply a load greater than 60 percent of the manufacturer's rated continuous power for a minimum of 20 minutes to warm the generator to operating temperature.

(iii) Increase the load applied to the generator to the maximum observed power output.

(iv) Maintain the maximum observed power output until the operating temperature of the engine stabilizes. The generator is at stable operating temperature when the oil temperature varies by less than 2 °C (4 °F) over three consecutive readings taken 15 minutes apart. For the purpose of determining maximum generator load, if an overload protection device is present, it shall not activate for a period of 45 minutes from the initial operating temperature stability reading. The load may need to be adjusted to maintain the maximum observed power output while the generator temperatures are stabilizing. Record voltage, frequency, amperage, power, and oil and ambient air temperature.

(v) Maximum generator load is the maximum observed power output that satisfies the criteria defined in paragraph (c)(2)(iv) of this section. Record the maximum generator load.

(d) *Test method to determine the modal CO emission rates of a portable generator.* To determine the weighted CO emission rate of a portable generator assembly, determine the modal CO emission rates at six discrete generator loads based on maximum generator load using a CVS emissions tunnel described in 40 CFR parts 1054 and 1065, and calculate the weighted CO emission rate. All tests shall be performed under typical operating conditions at an ambient air temperature of 15–30 °C (60–85 °F) and approximately 20.9 percent oxygen. Testing shall be performed on a complete generator assembly and load shall be applied through the generators receptacle panel. If a generator is equipped with a system that provides different engine operating modes such as a fuel economy mode, the generator shall be tested to this Section in all available modes. CO emission performance shall be determined by the highest weighted CO emission rate calculated in paragraph (e) of this section.

(1) Place the generator assembly in front of the CVS tunnel with the exhaust facing towards the collector. Connect the load bank and apply a load greater than 60 percent of the manufacturer's rated continuous power for a minimum of 20 minutes to warm the generator to operating temperature.

(2) Adjust the load bank to apply the appropriate mode calculated from the maximum generator load. Modal testing shall be performed in order from mode 1 to mode 6. Mode points are determined by a percentage of the maximum generator load:

(i) Mode 1: 100 percent of maximum generator load
(ii) Mode 2: 75 percent of maximum generator load
(iii) Mode 3: 50 percent of maximum generator load
(iv) Mode 4: 25 percent of maximum generator load
(v) Mode 5: 10 percent of maximum generator load
(vi) Mode 6: 0 percent of maximum generator load

(3) Stabilize oil and head temperatures by operating at mode for 5 minutes. After the 5 minute stabilization period, record emissions for at least 2 minutes at a minimum rate of 0.1 Hz with the prescribed mode applied. Record the mean CO emission value for that mode during the data acquisition period.

(4) Repeat steps in paragraphs (d)(2) to (d)(4) for the successive modes listed in paragraph (d)(2).

(5) When all modal mean CO emission rates have been determined, calculate and report the weighted CO emission rate using guidance in paragraph (e).

(e) *Weighted CO emission rate calculation and reporting.*

(1) Calculate the weighted CO emission rate using the mean CO emission rates determined in paragraph (d).

$$\dot{m}_w = 0.09 \times \dot{m}_1 + 0.20 \times \dot{m}_2 + 0.29 \times \dot{m}_3 + 0.30 \times \dot{m}_4 + 0.07 \times \dot{m}_5 + 0.05 \times \dot{m}_6$$

Where,

$\dot{m}_w$ = Weighted CO emission Rate (g/hr)
$\dot{m}_1$ = Mean CO emission Rate at Mode 1 (g/hr)
$\dot{m}_2$ = Mean CO emission Rate at Mode 2 (g/hr)
$\dot{m}_3$ = Mean CO emission Rate at Mode 3 (g/hr)
$\dot{m}_4$ = Mean CO emission Rate at Mode 4 (g/hr)
$\dot{m}_5$ = Mean CO emission Rate at Mode 5 (g/hr)
$\dot{m}_6$ = Mean CO emission Rate at Mode 6 (g/hr)

(2) Report the following results for the generator:

(i) Weighted CO emission rate in grams per hour.

(ii) Modal information including the mean CO emission, and head and oil temperature.

(iii) Maximum generator load information as determined in paragraph (c). Include maximum generator load, voltage, amperage, and frequency.

§ 1241.5 Prohibited stockpiling.

(a) *Base period.* The base period for portable generators is any period of 365 consecutive days, chosen by the manufacturer or importer, in the 5-year period immediately preceding the promulgation of the final rule.

(b) *Prohibited acts.* Manufacturers and importers of portable generators shall not manufacture or import portable generators that do not comply with the requirements of this part in any 12-month period between (date of promulgation of the rule) and (effective/compliance date of the rule) at a rate that is greater than 125% of the rate at which they manufactured or imported portable generators with engines of the same class during the base period for the manufacturer.

§ 1241.6 Findings.

(b) *General.* In order to issue a consumer product safety standard under the Consumer Product Safety Act, the Commission must make certain findings and include them in the rule. 15 U.S.C. 2058(f)(3). These findings are discussed in this section.

(c) *Degree and nature of the risk of injury.* Carbon monoxide is a colorless, odorless, poisonous gas formed during incomplete combustion of fossil fuels, such as the fuels used in engines that power portable generators. Mild CO poisoning symptoms include headaches, lightheadedness, nausea, and fatigue. More severe CO poisoning can result in progressively worsening symptoms of vomiting, confusion, loss of consciousness, coma, and ultimately, death. The high CO emission rate of current generators can result in situations in which the COHb levels of exposed individuals rise suddenly and steeply, causing them to experience rapid onset of confusion, loss of muscular coordination, and loss of consciousness.

(1) As of May 21, 2015, CPSC databases contained reports of at least 751 generator-related consumer CO poisoning deaths resulting from 562 incidents, which occurred from 2004 through 2014. Due to incident reporting delays, statistics for the two most recent years, 2013 and 2014, are incomplete, because data collection is still ongoing, and the death count most likely will increase in future reports.

(2) Based on NEISS, the Commission estimates that for the 9-year period of 2004 through 2012, there were 8,703 CO injuries seen in emergency departments (EDs) associated with portable generators. The Commission considers this number to represent a lower bound on the true number of generator-related CO injuries treated in EDs from 2004–2012. According to Injury Cost Model (ICM) estimates, there were an additional 16,660 medically-attended CO injuries involving generators during 2004–2012.

(d) *Number of consumer products subject to the rule.* For the U.S. market for the years 2010 through 2014, about 6.9 million gasoline-powered portable generators were shipped for consumer use, or an average of about 1.4 million units per year. Shipments of nearly 1.6 million units in 2013 made it the peak year for estimated sales during this period. Consumer demand for portable generators from year-to-year fluctuates with major power outages, such as those caused by tropical or winter storms. Portable generators purchased by consumers and in household use generally range from under 1 kW of rated power up to perhaps 15 kW of rated power. In the last 10 to 15 years, the U.S. market has shifted towards smaller, less powerful units.

(e) The *need of the public for portable generators and the effects of the rule on their utility, cost, and availability.* Portable generators that are the subject of the proposed standard commonly are purchased by household consumers to provide electrical power during emergencies (such as during outages caused by storms), during other times when electrical power to the home has been shut off, when power is needed at locations around the home without access to electricity, and for recreational activities (such as during camping or recreational vehicle trips).

(1) The proposed rule is based on technically feasible CO emission rates, so that the function of portable generators is unlikely to be adversely affected by the rule. There may be an effect on the utility of portable generators to the extent consumers are unable to purchase generators due to increased retail prices. There may be a positive change in utility in terms of fuel efficiency, greater ease of starting, product quality, and safety of portable generators.

(2) In terms of retail price information, the Commission's review found that generators with handheld engines ranged in price from $133 to $799, with an average price of about $324. Generators with non-handheld Class I engines had a wide price range, from $190 to over $2,000, with an average price of $534. Generators with one-cylinder Class II engines ranged in price from $329 to $3,999 with an average price of $1,009. Generators with two-cylinder Class II engines ranged in price from $1,600 to $4,999 and the average price of these units was $2,550.

(3) Aggregate estimated compliance costs to manufacturers of portable generators average approximately $113 per unit for engine and muffler modifications necessary to comply with the CO emission requirements of the proposed standard. The net estimated manufacturing costs per unit to comply with the proposed standard is $114 for handheld engines, $113 for Class I engines, $110 for Class II, one cylinder engines, and $138 for Class II, two cylinder engines.

(4) The expected product modifications to produce complying generators (EFI & catalysts) are available to manufacturers, and the Commission does not have any indication that firms would exit the market because of the rule. Therefore, the availability of portable generators would not likely be affected by the rule.

(f) *Other means to achieve the objective of the rule, while minimizing the impact on competition and manufacturing.* The Commission considered alternatives to achieving the objective of the rule of reducing unreasonable risks of injury and death associated with portable generators. For example, the Commission considered less stringent CO emission rates for portable generators; however, the Commission found that cost savings from less-stringent CO emission requirements likely would be less than expected reductions in the benefits, so that the net benefits of the rule probably would decrease under this regulatory alternative. The Commission also considered including an option for reducing CO emissions through use of automatic shutoff systems, which could potentially reduce the impact of the proposed rule by providing an additional option for complying with the proposed rule; however, because of unresolved issues concerning an automatic shutoff, the Commission does not believe that a regulatory alternative based on automatic shutoff technology instead of reduced emissions is feasible for hazard reduction at this time.

(g) *Unreasonable risk.*

(1) As of May 21, 2015, CPSC databases contained reports of at least 751 generator-related consumer CO poisoning deaths resulting from 562 incidents, which occurred from 2004 through 2014. Due to incident reporting delays, statistics for the two most recent years, 2013 and 2014, are incomplete, because data collection is still ongoing, and the death count most likely will increase in future reports.

(2) Based on NEISS, the Commission estimates that for the 9-year period of 2004 through 2012, there were 8,703 CO injuries seen in emergency departments (EDs) associated with portable generators. The Commission considers this number to represent a lower bound on the true number of generator-related CO injuries treated in EDs from 2004–2012. According to Injury Cost Model (ICM) estimates, there were an additional 16,660 medically-attended CO injuries involving generators during 2004–2012.

(3) The Commission estimates that the rule would result in aggregate net benefits of about $145 million annually. On a per-unit basis, the Commission estimates the present value of the expected benefits per unit for all units to be $227; the expected costs to manufacturers plus the lost consumer surplus per unit to be $116; and the net benefits per unit to be $110. The Commission concludes preliminarily portable generators pose an unreasonable risk of injury and finds that the proposed rule is reasonably necessary to reduce that unreasonable risk of injury.

(g) *Public interest.* This proposed rule is intended to address an unreasonable risk of injury and death posed by portable generators. The Commission believes that adherence to the requirements of the proposed rule will reduce portable generator deaths and injuries in the future; thus, the rule is in the public interest.

(h) *Voluntary standards.* The Commission is aware of two U.S. voluntary standards that are applicable to portable generators, UL 2201—*Safety Standard for Portable Generator Assemblies,* and ANSI/PGMA G300–2015—*Safety and Performance of Portable Generators.* These standards include the same requirements set forth mandatory CPSC portable generator label but do not otherwise address the risks related to CO poisoning. The Commission does not believe the standards are adequate because they fail to address the risk of CO hazard beyond the CPSC mandatory labeling requirement. The Commission is unaware of any portable generator that has been certified to either of the standards, and as such it is unlikely whether there would be substantial compliance with it if CO emissions requirements were incorporated.

(i) *Relationship of benefits to costs.* The aggregate annual benefits and costs of the rule are estimated to be about $298 million and $153 million, respectively. Aggregate net benefits from the rule, therefore, are estimated to be about $145 million annually. On a per unit basis, the Commission estimates the present value of the expected benefits per unit for all units to be $227. The Commission estimates the expected costs to manufacturers plus the lost consumer surplus per unit to be $116. Based on this analysis, the Commission finds preliminary that the benefits expected from the rule bear a reasonable relationship to the anticipated costs of the rule.

(j) *Least burdensome requirement that would adequately reduce the risk of injury.* (1) The Commission considered less-burdensome alternatives to the proposed rule on portable generators, but concluded preliminary that none of these alternatives would adequately reduce the risk of injury.

(2) The Commission considered not issuing a mandatory rule, but instead relying upon voluntary standards. As discussed previously, the Commission does not believe that either voluntary standard adequately addresses the CO risk of injury and death associated with portable generators. Furthermore, the Commission doubts that either of the

voluntary standards would have substantial compliance by industry.

(3) Excluding portable generators with two cylinder, Class II engines from the scope of the rule. The Commission estimates that net benefits of the proposed rule range from about $100 to about $140 per generator for the models with handheld, Class I and one-cylinder Class II engines. However, net benefits were negative $135 for the models with two-cylinder class II engines. Consequently, excluding portable generators with two cylinder Class II engines would result in a less burdensome alternative. However, it is possible that exclusion of generators with two-cylinder Class II engines from the scope of the rule could create an economic incentive for manufacturers of generators with larger one-cylinder engines to either switch to two-cylinder engines for those models, or if they already have two-cylinder models in their product lines, they could be more likely to drop larger one-cylinder models from their product lines. Because the Commission lacks more specific information on the generators with Class II twin cylinder engines, the Commission is proposing this rule with the broader scope of including these generators.

(4) The Commission considered higher allowable CO emission rates, which might result in costs savings from lower costs associated with catalysts (if they would not be required, or if less-costly materials could suffice), less-extensive engine modifications (other than EFI-related costs) and less-extensive generator housing modifications (if housing enlargement and other retooling would be minimized). However, based on Commission estimates, it seems likely that cost savings from less-stringent CO emission requirements would be less than expected reductions in benefits. Therefore, the Commission is not proposing this less burdensome alternative.

Dated: November 3, 2016.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

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FEDERAL REGISTER

Vol. 81 Monday,

No. 224 November 21, 2016

Part VI

The President

Executive Order 13748—Establishing a Community Solutions Council

Federal Register
Vol. 81, No. 224
Monday, November 21, 2016

Presidential Documents

Title 3—

The President

Executive Order 13748 of November 16, 2016

Establishing a Community Solutions Council

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* Place is a strong determinant of opportunity and well-being. Research shows that the neighborhood in which a child grows up impacts his or her odds of going to college, enjoying good health, and obtaining a lifetime of economic opportunities. Even after 73 consecutive months of total job growth since 2009, communities of persistent poverty remain and for far too many, the odds are stacked against opportunity and achieving the American dream. In addition, between now and 2050, growing our economy, expected population growth, climate change, and demographic shifts will require major new investments in physical, social, and technological infrastructure.

Specific challenges in communities—including crime, access to care, opportunities to pursue quality education, lack of housing options, unemployment, and deteriorating infrastructure—can be met by leveraging Federal assistance and resources. While the Federal Government provides rural, suburban, urban, and tribal communities with significant investments in aid annually, coordinating these investments, as appropriate, across agencies based on locally led visions can more effectively reach communities of greatest need to maximize impact. In recent years, the Federal Government has deepened its engagement with communities, recognizing the critical role of these partnerships in enabling Americans to live healthier and more prosperous lives. Since 2015, the Community Solutions Task Force, comprising executive departments, offices, and agencies (agencies) across the Federal Government, has served as the primary interagency coordinator of agency work to engage with communities to deliver improved outcomes. This order builds on recent work to facilitate inter-agency and community-level collaboration to meet the unique needs of communities in a way that reflects these communities' local assets, economies, geography, size, history, strengths, talent networks, and visions for the future.

Sec. 2. *Principles.* Our effort to modernize the Federal Government's work with communities is rooted in the following principles:

(a) A community-driven, locally led vision and long-term plan for clear outcomes should guide individual projects.

(b) The Federal Government should coordinate its efforts at the Federal, regional, State, local, tribal, and community level, and with cross-sector partners, to offer a more seamless process for communities to access needed support and ensure equitable investments.

(c) The Federal Government should help communities identify, develop, and share local solutions, rely on data to determine what does and does not work, and harness technology and modern collaboration and engagement methods to help share these solutions and help communities meet their local goals.

Sec. 3. *Community Solutions Council.*

(a) *Establishment.* There is hereby established a Council for Community Solutions (Council), led by two Co-Chairs. One Co-Chair will be an Assistant to the President or the Director of the Office of Management and Budget, as designated by the President. The second Co-Chair will be rotated every

4 years and designated by the President from among the heads of the Departments of Justice, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, and Education, and the Environmental Protection Agency (Agency Co-Chair).

(b) *Membership.* The Council shall consist of the following members:

(i) the Secretary of State;

(ii) the Secretary of the Treasury;

(iii) the Secretary of Defense;

(iv) the Attorney General;

(v) the Secretary of the Interior;

(vi) the Secretary of Agriculture;

(vii) the Secretary of Commerce;

(viii) the Secretary of Labor;

(ix) the Secretary of Health and Human Services;

(x) the Secretary of Housing and Urban Development;

(xi) the Secretary of Transportation;

(xii) the Secretary of Energy;

(xiii) the Secretary of Education;

(xiv) the Secretary of Veterans Affairs;

(xv) the Secretary of Homeland Security;

(xvi) the Administrator of the Environmental Protection Agency;

(xvii) the Administrator of General Services;

(xviii) the Administrator of the Small Business Administration;

(xix) the Chief Executive Officer of the Corporation for National and Community Service;

(xx) the Chairperson of the National Endowment for the Arts;

(xxi) the Director of the Institute for Museum and Library Services;

(xxii) the Federal Co-Chair of the Delta Regional Authority;

(xxiii) the Federal Co-Chair of the Appalachian Regional Commission;

(xxiv) the Director of the Office of Personnel Management;

(xxv) the Director of the Office of Management and Budget;

(xxvi) the Chair of the Council of Economic Advisers;

(xxvii) the Assistant to the President for Intergovernmental Affairs and Public Engagement;

(xxviii) the Assistant to the President and Cabinet Secretary;

(xxix) the Assistant to the President for Economic Policy and Director of the National Economic Council;

(xxx) the Chair of the Council on Environmental Quality;

(xxxi) the Director of the Office of Science and Technology Policy;

(xxxii) the Assistant to the President and Chief Technology Officer;

(xxxiii) the Administrator of the United States Digital Service; and

(xxxiv) other officials, as the Co-Chairs may designate or invite to participate.

(c) *Administration.*

(i) The President will designate one of the Co-Chairs to appoint or designate, as appropriate, an Executive Director, who shall coordinate the

Council's activities. The department, agency, or component within the Executive Office of the President in which the Executive Director is appointed or designated, as appropriate, (funding entity) shall provide funding and administrative support for the Council to the extent permitted by law and within existing appropriations as may be necessary for the performance of its functions.

(ii) To the extent permitted by law, including the Economy Act, and within existing appropriations, participating agencies may detail staff to the funding entity to support the Council's coordination and implementation efforts.

(iii) The Co-Chairs shall convene regular meetings of the Council, determine its agenda, and direct its work. At the direction of the Co-Chairs, the Council may establish subgroups consisting exclusively of Council members or their designees, as appropriate.

(iv) A member of the Council may designate a senior-level official who is part of the member's department, agency, or office to perform the Council functions of the member.

Sec. 4. *Mission and Priorities of the Council.* (a) The Council shall foster collaboration across agencies, policy councils, and offices to coordinate actions, identify working solutions to share broadly, and develop and implement policy recommendations that put the community-driven, locally led vision at the center of policymaking. The Council shall:

(i) Work across agencies to coordinate investments in initiatives and practices that align the work of the Federal Government to have the greatest impact on the lives of individuals and communities.

(ii) Use evidence-based practices in policymaking, including identifying existing solutions, scaling up practices that are working, and designing solutions with regular input of the individuals and communities to be served.

(iii) Invest in recruiting, training, and retaining talent to further the effective delivery of services to individuals and communities and empower them with best-practice community engagement options, open government transparency methods, equitable policy approaches, technical assistance and capacity building tools, and data-driven practice.

(b) Consistent with the principles set forth in this order and in accordance with applicable law, including the Federal Advisory Committee Act, the Council should conduct outreach to representatives of nonprofit organizations, civil rights organizations, businesses, labor and professional organizations, start-up and entrepreneurial communities, State, local, and tribal government agencies, school districts, youth, elected officials, seniors, faith and other community-based organizations, philanthropies, technologists, other institutions of local importance, and other interested or affected persons with relevant expertise in the expansion and improvement of efforts to build local capacity, ensure equity, and address economic, social, environmental, and other issues in communities or regions.

Sec. 5. *Executive Orders 13560 and 13602, and Building Upon Other Efforts.* This order supersedes Executive Order 13560 of December 14, 2010 (White House Council for Community Solutions), and Executive Order 13602 of March 15, 2012 (Establishing a White House Council on Strong Cities, Strong Communities), which are hereby revoked.

This Council builds on existing efforts involving Federal working groups, task forces, memoranda of agreement, and initiatives, including the Community Solutions Task Force, the Federal Working Groups dedicated to supporting the needs and priorities of local leadership in Detroit, Baltimore, and Pine Ridge; the Interagency Working Group on Environmental Justice; the Partnership for Sustainable Communities; Local Foods, Local Places; Performance Partnership Pilots for Disconnected Youth; Empowerment

Zones; StrikeForce; Partnerships for Opportunity and Workforce and Economic Revitalization; the Neighborhood Revitalization Initiative; Climate Action Champions; Better Communities Alliance; Investing in Manufacturing Communities Partnership; Promise Zones; and the 2016 Memorandum of Agreement on Interagency Technical Assistance. The Council shall also coordinate with existing Chief Officer Councils across the government with oversight responsibility for human capital, performance improvement, and financial assistance.

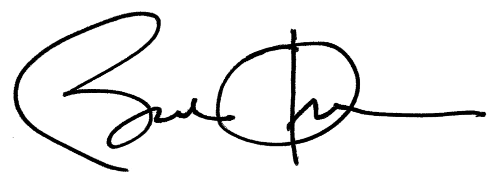
Sec. 6. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof, or the status of that department or agency within the Federal Government; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
November 16, 2016.

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FEDERAL REGISTER PAGES AND DATE, NOVEMBER

CFR PARTS AFFECTED DURING NOVEMBER

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LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List October 19, 2016

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