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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 210, 215, 220 and 226

[FNS–2017–0021]

RIN 0584–AE53

Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements

AGENCY: Food and Nutrition Service, USDA.

ACTION: Interim final rule.

SUMMARY: This interim final rule extends through school year 2018–2019 three menu planning flexibilities currently available to many Child Nutrition Program operators, giving them near-term certainty about Program requirements and more local control to serve nutritious and appealing meals to millions of children nationwide. These flexibilities include: Providing operators the option to offer flavored, low-fat (1 percent fat) milk in the Child Nutrition Programs; extending the State agencies' option to allow individual school food authorities to include grains that are not whole grain-rich in the weekly menu offered under the National School Lunch Program (NSLP) and School Breakfast Program (SBP); and retaining Sodium Target 1 in the NSLP and SBP. This interim final rule addresses significant challenges faced by local operators regarding milk, whole grains and sodium requirements and their impact on food development and reformulation, menu planning, and school food service procurement and contract decisions. The comments from the public on the long-term availability of these three flexibilities will help inform the development of a final rule, which is expected to be published in fall 2018 and implemented in school year 2019–2020.

DATES: *Effective Date:* This interim final rule will become effective July 1, 2018.

Comment Date: To be considered, written comments on this interim final rule must be received on or before January 29, 2018.

ADDRESSES: The USDA, Food and Nutrition Service (FNS) invites interested persons to submit written comments on this interim final rule. Comments may be submitted in writing by one of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *Regular U.S. mail:* Send comments to School Programs Branch, Policy and Program Development Division, Food and Nutrition Service, P.O. Box 2885, Fairfax, VA 22031–0885.

- *Overnight, courier, or hand delivery:* School Programs Branch, Policy and Program Development Division, Food and Nutrition Service, 3101 Park Center Drive, 12th floor, Alexandria, Virginia 22302.

All written comments submitted in response to this interim final rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the written comments publicly available via <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Tina Namian, Chief, School Programs Branch, Policy and Program Development Division, Food and Nutrition Service, 703–305–2590.

SUPPLEMENTARY INFORMATION:

I. Background and Overview

The National School Lunch Program (NSLP) and School Breakfast Program (SBP) provide nutritious and well-balanced meals to millions of children daily. Section 9(a)(4) of the Richard B. Russell National School Lunch Act, 42 U.S.C. 1758(a)(4), requires that school meals reflect the latest Dietary Guidelines for Americans (Dietary Guidelines). On January 26, 2012, USDA published a final rule, *Nutrition Standards in the National School Lunch and School Breakfast Programs* (77 FR 4088), which updated the school meal requirements consistent with the Dietary Guidelines and the recommendations issued by the Health and Medicine Division of the National

Academies of Science, Engineering, and Medicine (formerly, Institute of Medicine) in the report *School Meals: Building Blocks for Healthy Children*.¹ In part, the 2012 regulatory requirements: (1) Allowed flavoring only in fat-free milk, effective school year (SY) 2012–2013; (2) established a requirement that, effective SY 2014–2015, all grains served in the NSLP and SBP must comply with the whole grain-rich requirement (meaning the grain product contains at least 50 percent whole grains and the remaining grain content of the product must be enriched); and (3) required schools to gradually reduce the sodium content of the average weekly school meals offered to each grade group in the NSLP and SBP by meeting progressively lower sodium targets over a period of 10 years.

USDA subsequently published two additional final rules making conforming amendments to the requirements for the service of milk in competitive foods sold outside of the school meal programs (*National School Lunch Program and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010*, on July 29, 2016, 81 FR 50132) and to the Child and Adult Care Food Program (CACFP) meal requirements and the Special Milk Program for Children (SMP) milk requirements (*Child and Adult Care Food Program: Meal Pattern Revisions Related to the Healthy, Hunger-Free Kids Act of 2010*, on April 25, 2016, 81 FR 24348).

Over the past five years, since the NSLP and SBP regulations were updated in 2012, some Program operators have experienced challenges with the whole grain-rich requirement and the sodium limits. To address these challenges, USDA took administrative steps, such as allowing enriched pasta exemptions for SYs 2014–2015 and 2015–2016, to provide flexibilities and ease the transition to the updated standards. Congress recognized the challenges as well, and, through Section 751 of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235), expanded the pasta flexibility to include other grain products.

Through successive legislative action, Congress directed the Secretary to allow

¹ See <https://www.fns.usda.gov/sites/default/files/SchoolMealsIOM.pdf>.

State agencies that administer the NSLP and the SBP to grant individual exemptions from the regulatory whole grain-rich requirement in those programs, and delay compliance with Sodium Target 2 (Section 743 of the Consolidated and Further Continuing Appropriations Act, 2012 (Pub. L. 112–55); Section 752 of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235); and Section 733 of the Consolidated Appropriations Act, 2016 (Pub. L. 114–113)). In addition, Section 747 of the Consolidated Appropriations Act, 2017 (Pub. L. 115–31) (2017 Appropriations Act) provided flexibilities related to flavored milk, whole grains, and sodium for SY 2017–2018. Most recently, Section 101(a)(1) of the Continuing Appropriations Act, 2018, Division D of the Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Public Law 115–56, enacted September 8, 2017, extends the flexibilities provided by section 747 of the Consolidated Appropriations Act, 2017 through December 8, 2017.

The 2017 Appropriations Act provides authority for exemptions for the whole grain-rich requirement through the end of SY 2017–2018, keeps Sodium Target 1 in place through the end of SY 2017–2018, and requires the Secretary to grant State agencies that administer the NSLP and SBP discretion to allow school food authorities (SFAs) that demonstrate a reduction in student milk consumption or an increase in milk waste to serve flavored, low-fat milk as part of a reimbursable meal or as a competitive beverage for sale (as specified in 7 CFR 210.11) through the end of SY 2017–2018.

This interim final rule provides optional flexibilities for SY 2018–2019 in a manner that is consistent with appropriations legislation in effect for SY 2017–2018 and previous administrative actions. In addition, this rule provides an opportunity for public comments that will inform USDA's development of a final rule on the long-term availability of the flexibilities. USDA intends to issue a final rule well in advance of school year 2019–2020, when the final regulations are expected to take effect.

In summary, the flexibilities provided by this interim final rule for SY 2018–2019 are the following:

- This rule allows Program operators in the NSLP, SBP, SMP, and CACFP (the Child Nutrition Programs (CNPs)) the option to offer flavored, low-fat (1 percent fat) milk as part of a reimbursable meal for students in grades K through 12, and for SMP and CACFP

participants 6 years of age and older. Schools may also offer flavored, low-fat milk as a competitive beverage for sale. This optional flexibility expands the variety of milk in the CNPs and may encourage children's consumption of fluid milk nationwide.

- This rule allows State agencies to continue granting an SFA's exemption request to use specific alternative grain products if the SFA can demonstrate hardship(s) in procuring, preparing, or serving specific products that are acceptable to students and compliant with the whole grain-rich requirement. This rule responds to challenges experienced by some SFAs with the purchase, preparation, or service of products that comply with the whole grain-rich requirement in the NSLP and SBP.

- This rule retains Sodium Target 1 as the regulatory limit in the NSLP and SBP through the end of SY 2018–2019. Currently, USDA anticipates retaining Target 1 in the final rule through at least the end of SY 2020–2021 to provide SFAs more time to procure and introduce lower sodium food products, allow food industry more time for product development and reformulation, and give students more time to adjust to school meals with lower sodium content. Also, USDA anticipates that the sodium requirement will continue to be reevaluated for consistency with the Dietary Guidelines, which are updated every five years, and in response to Congressional action, as appropriate. To help inform the final rule, USDA seeks public comments on the long-term availability of this flexibility and its impact on the sodium reduction timeline established in 2012 and, specifically, the impact on Sodium Target 2.

This rule also includes minor technical corrections that remove obsolete dates related to the phased-in implementation of the school meal patterns. These technical revisions do not affect the intent or content of the regulations.

II. Timeline and Instructions to Commenters

As noted earlier, Congress has provided mandates regarding flavored, low-fat milk, whole grains, and sodium effective for SY 2017–2018; therefore, this interim final rule is intended to address the optional flexibilities in effect for SY 2018–2019. No changes made under this interim final rule will extend beyond SY 2018–2019. Comments from State agencies, local Program operators, food industry, nutrition advocates, parents and other stakeholders on the day-to-day impact

of these flexibilities will be extremely helpful in the development of the final rule. USDA will carefully consider all relevant comments submitted during the 60-day comment period for this rule, and intends to issue a final rule in fall 2018. USDA is committed to publication of a final rule well before implementation in SY 2019–2020. This will ensure that stakeholders have ample opportunity to make any necessary operational changes.

III. Need for Action

Legislative action taken by Congress through the annual appropriations process, starting with the 2012 fiscal year, provides short-term assistance to Program operators facing challenges but does not allow enough lead time to have a significant beneficial impact on menu planning, procurement, and contract decisions made in advance of the school year. To implement recurring appropriations legislation, USDA must take additional steps such as developing and disseminating implementation memoranda for Program operators. This creates a time lag that reduces the potential impact of the flexibilities, and causes confusion for Program operators who must keep track of multiple memoranda. For example, USDA issued several memoranda in response to annual appropriations legislation addressing the whole grain-rich requirement. These include SP 20–2015, Requests for Exemption from the School Meals' Whole Grain-Rich Requirement for School Years 2014–2015 and 2015–2016; SP 33–2016, Extension Notice: Requests for Exemption from the School Meals' Whole Grain-Rich Requirement for School Year 2016–2017; and SP 32–2017, School Meal Flexibilities for School Year 2017–2018.

When the 114th Congress began, but did not complete, the reauthorization process for the CNPs, the House and Senate authorizing committees drafted bills granting flexibilities in the three areas addressed by this rule—milk, whole grains and sodium. These preliminary reauthorization efforts reflected Congress' interest in providing stakeholders with additional flexibility in these areas.²

Through this interim final rule, USDA is responding to Program operators' need for more flexibility to accommodate menu planning and procurement challenges, local operational differences, and community preferences. This rule also responds to

² The Child Nutrition Programs are generally reauthorized every five years. The last reauthorization resulted from the Healthy, Hunger-Free Kids Act of 2010 (Pub. L. 111–296).

the need for clarity and certainty regarding key requirements and flexibilities for the near term. USDA recognizes that all stakeholders have made significant efforts to implement the 2012 school meal regulations. This interim final rule does not undo their hard work. The intent of this rule is to assist Program operators with specific challenges that limit their ability to offer nutritious and appealing meals that reflect community preferences, and that students enjoy and consume.

This rule signals USDA's commitment to an expeditious rulemaking process that will result in a final rule that provides long-term certainty on the flexibilities for milk, whole grains, and sodium. As explained next, food manufacturers need clarity and certainty prior to committing resources for research and product development/reformulation. School districts also need clarity and certainty in order to make menu planning, procurement, and contract decisions in advance of the school year.

Product Development Challenges

USDA acknowledges that the flexibilities granted through annual appropriations do not provide food manufacturers the certainty they need to engage in product development and reformulation in support of the whole grain-rich and sodium requirements. Manufacturers must overcome numerous challenges before some of the school meal products are widely acceptable to children and schools or commercially available. As explained in the preamble to the 2012 final rule, *Nutrition Standards in the National School Lunch and School Breakfast Programs* (77 FR 4088, 4097–98), exceeding Target 1 requires product reformulation and innovation in the form of new technology and/or food products and can present significant challenges to school lunch providers.

Commenters advised USDA in 2012 that food providers need time for product development and testing, and schools need time for procurement changes, menu development, sampling, and fostering student acceptance. (See 77 FR 4097). Through informal conversations with 300 food manufacturers over the past three years at each of the annual National Restaurant Association Shows, FNS senior policy officials learned that product research and reformulation involves numerous steps over a period of several years. Food manufacturers

indicated that it takes at least two to three years to reformulate and develop food products that support new requirements. The process involves innovation of new products, product research and development, testing, commercialization, launch, and marketing of the new products. Food manufacturers have also noted several specific barriers to meeting the lower sodium targets, including a low level of demand for these products outside of the school audience, the cost and time involved in reformulating existing products, and challenges with replacing sodium in some foods given its functionality (e.g., adding flavor or preserving food). They have also indicated that a significant investment of time and resources is necessary to effect even marginal sodium reductions.

Regular interaction with food manufacturers at the National Restaurant Association Show and other events, such as the School Nutrition Association Annual Conference, reveals that innovations for grain products can also take several years and involve steps similar to those needed to reformulate products lower in sodium. The formulation and processing of foods made with whole grains differ from and can be more challenging to manufacture than those made with refined grains. Manufacturers are challenged with developing technologies to help overcome consumers' sensory barriers (taste and texture), while optimizing the flavor, color, and texture of foods made with whole grain ingredients. Manufacturers have indicated that in the past when companies reformulated products early, they incurred significantly more costs, such as research and development, product testing, and creating new labels, as opposed to those who took a "wait and see" approach. Therefore, because manufacturers perceive uncertainty about the whole grain-rich requirement and the possibility of further meal pattern changes resulting from legislative activity, USDA understands they are not currently investing time or resources to develop new whole grain-rich products.

While product-specific information is proprietary, the overwhelming and consistent message is that the food industry needs consistency and certainty of the regulatory requirements. In addition, ample lead time and predictability about the regulatory requirements must be promptly

provided to food manufacturers to enable them to offer products to schools that support the meal patterns and nutrition standards. While this interim final rule is intended to provide certainty for the near term, input from the food industry and school food service staff will be important to help USDA develop a final rule providing reasonable certainty regarding Program requirements and flexibilities.

Menu Planning and Procurement Cycles

SFAs also need ample lead time and certainty about regulatory requirements and flexibilities in order to make menu planning, procurement, and contract decisions in advance of the school year; therefore, it is urgent that USDA clarifies the regulatory requirements that impact these processes. The menu, which must reflect the meal patterns and nutrition standards established by Program regulations, drives the procurement process and must be completed first. The menu and standardized recipes help SFAs determine the types of food products to purchase. Menu planners must make many advance decisions involving, first, availability of USDA Foods entitlement commodities, and then soliciting, procuring, ordering, processing, and planning for the delivery of food. Planning in advance saves time, helps avoid repetitive tasks, reduces labor, and implements cost-effective inventory management, according to the Institute for Child Nutrition (ICN).³

Once menu planning is complete, SFAs need lead time to screen products, forecast food quantities needed, write product specifications, create solicitation documents, announce the solicitation, and award the contract. As shown in the following chart, due to the numerous steps involved, ICN estimates that the entire procurement process may take up to a year to complete, beginning in August of the previous school year. Public comments from local operators and their State agencies will enable USDA to develop a final rule that provides long-term certainty regarding Program requirements and flexibilities, which will help SFAs conduct procurement more efficiently.

³ The Institute for Child Nutrition, which is housed at the University of Mississippi, was authorized by Congress in 1989 to improve the operation of CNPs through research, education and training, and information dissemination pursuant to section 21 of the Richard B. Russell National School Lunch Act, 42 U.S.C. 1769b-1.

PROCUREMENT TIMELINE FOR SCHOOL FOOD SERVICE OPERATORS⁴

Month(s)	Task(s)
August–September	<ul style="list-style-type: none"> • Begin preparing for procuring items. Planning approximately one year in advance provides sufficient time for preparation for all parties in the food chain.
October–December	<ul style="list-style-type: none"> • Write specifications. • Project USDA Foods needs. • Conduct screen test. • Fall and winter breaks may impact timeline.
January	<ul style="list-style-type: none"> • Develop solicitation document. Include pertinent information about the district; date and time for pre-solicitation conference and solicitation submission; scope of work; time period for the solicitation; any common legalities; ability for price escalations; name brand items; substitutions; discounts, rebates, and applicable credits; communication instructions with the district prior to the closing date; solicitation evaluation criteria. • Plan accordingly to have solicitation document and agenda item at school board meeting. • Modify proposal based on legal counsel’s directives. Remember fall and winter breaks may impact the timeline.
February–March	<ul style="list-style-type: none"> • Propose solicitation document to school board. • Follow internal procedures. • Communicate to distributors and manufacturer and publicly announce the solicitation. • Publicize the solicitation document. • Conduct the solicitation meeting. • Allow a minimum of four weeks for vendors to respond. • Evaluate solicitations based on pre-established criteria and select vendors.
April–May	<ul style="list-style-type: none"> • Receive School Board approval for the selection of vendor. • Provide information to distributor and/or manufacturer. • Allow longer time for specialty items and name brand items.
June	<ul style="list-style-type: none"> • Communicate with stakeholders, determine delivery dates, and discuss school opening logistics.
July–August	<ul style="list-style-type: none"> • Receive product for upcoming school year.

Fluid milk is an integral part of the procurement cycle as it is ordered for millions of preschoolers and students nationwide through the CNPs. According to USDA’s Agriculture Marketing Service, fluid milk processors require certainty around school meal program milk needs at the beginning of the school procurement cycle to ensure that they can bid appropriately and successfully to supply schools with the desired types of milk in appropriate packaging. Specifically, schools must be in a position to specify fat content required for both flavored and unflavored milk so that processors can provide bids with accurate and appropriate pricing. The fat content of milk is a significant determinant of cost. In addition, providing flavored, low-fat milk requires processors to modify package labeling and, potentially, adjust other aspects of flavored milk formulation associated with the change in fat content. These changes require planning and adequate lead time to provide a product in a timely and cost-efficient manner.

Operational Challenges

This interim final rule seeks to address the operational challenges experienced by some Program operators regarding their ability to offer nutritious and appealing meals that are consistent

with the Dietary Guidelines and conform to local operational differences and community preferences. It provides schools with specific, optional flexibilities for SY 2018–2019 that will help children gradually adjust to and enjoy school meals that are aligned with science-based recommendations. This rule places more control in the hands of local Program operators to make specific menu and procurement decisions that reflect local tastes, preferences and circumstances, empowering them in ways that may increase both participation in the meal programs and food consumption by children. It is important to stress that the flexibilities are optional, intended as additional tools for schools across the country to provide meals that make sense for their communities. States and Program operators may opt to use some or all of these flexibilities and some schools may not use any.

During the initial years of implementation of the 2012 school meal regulations, nearly one third of SFAs reported challenges finding products to meet the updated nutrition standards.⁵ According to USDA administrative data,

the largest decrease in NSLP lunch participation (– 3 percent) occurred in school year 2012–2013, which was the first year of implementation. This decrease was primarily driven by a substantial decrease in the paid lunch participation category. While paid lunch participation had been decreasing since 2008, the drop in school year 2012–2013 was the largest decrease in over 20 years (– 10 percent). There were other changes implemented during this timeframe, most notably the requirement to incrementally increase paid lunch prices; however, some of the drop may have been due to students choosing not to participate due to the updated meal standards. Paid lunch participation continues to decline but at a slower rate in recent years. Total participation remained relatively stable for the past three years.⁶

USDA recognizes that many Program operators have had great success in implementing the updated meal patterns and nutrition standards. We applaud their efforts and encourage them to continue their successful school food service practices. For these Program operators, as well as those who continue to have challenges, publication of this interim final rule ensures that the flexibilities described above will be available for the near term. If there is continued Congressional action in these

⁴ See *Procurement in the 21st Century*, Institute of Child Nutrition, 2015, (<http://www.nfsmi.org/documentlibraryfiles/PDF/20151009032855.pdf>).

⁵ FNS SN–OPS report: <https://www.fns.usda.gov/special-nutrition-program-operations-study-school-year-2013-14>. J. Murdoch et al. (2016). Special Nutrition Program Operations Study, SY 2013–14 Report. Prepared by 2M Research Services, LLC. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service. Project Officers: Toija Riggins and John Endahl. Available online at: www.fns.usda.gov/research-and-analysis.

⁶ The annual change in total participation has been less than 1% for FY 2014, FY2015, and FY 2016.

areas, USDA will provide additional guidance. Public comments, operational experience, and any Congressional directives will help inform USDA's development of a final rule that will provide more certainty with regard to the milk, whole grain, and sodium requirements.

IV. Discussion of Meal Pattern Flexibilities

Milk Flexibility

The 2015–2020 *Dietary Guidelines* recommend consumption of fat-free (skim) and low-fat (1 percent fat) dairy products as an important source of beneficial nutrients. The current regulatory provisions on fluid milk for the affected CNPs (NSLP, SMP, SBP, and CACFP) require Program operators to offer fat-free or low-fat milk⁷ and restrict the use of flavored milk to fat-free milk.

This interim final rule will allow NSLP, SBP, SMP, and CACFP operators the option to serve flavored, low-fat milk, including as a competitive beverage for sale in schools, in SYs 2018–2019. Under this rule, NSLP and SBP operators that choose to exercise this option are not required to demonstrate a reduction in student milk consumption or an increase in milk waste, but are expected to incorporate this option into the weekly menu in a manner consistent with the dietary specifications for these programs. For consistency across CNPs, this interim final rule allows flavored, low-fat milk in the SMP and CACFP for participants six years of age and older, in SY 2018–2019. This flexibility is intended to encourage children's consumption of fluid milk in the CNPs and to ease administrative burden for Program operators participating in multiple CNPs. This flexibility is consistent with the flexibility regarding flavored, low-fat milk mandated by Congress for the SY 2017–2018.

This rule addresses concerns raised by Program operators and industry partners about declining daily milk consumption among Program participants. Declining milk consumption is a specific concern for children and adolescents because milk is a key source of calcium and vitamin D, which are nutrients necessary for optimizing bone health.⁸ Recent Centers

for Disease Control and Prevention (CDC) survey data show that among adolescents attending U.S. high schools, self-reported daily milk consumption did not change significantly during 2007–2011, then decreased significantly from 2011–2015.⁹

Additionally, FNS collected data on milk consumption during the school meals as part of the School Nutrition and Meal Cost Study conducted in SY 2014–2015. The study has not yet been released but a review of preliminary tables from this study compared to the same data from the previous study using comparable methodology in SY 2004–2005 suggests a decline in milk consumption during lunch among NSLP participants from SY 2004–2005 (from 75 percent to 66 percent). The decline was observed in elementary, middle, and high school students. We plan to release the updated data from School Nutrition Meal Cost Study in early 2018.

Fluid milk is a required component in all school meals, and also must be served in the SMP and CACFP. Some studies suggest that the availability of flavored milk products influences student decisions about, and consumption of, milk in school.¹⁰ The research on the impact of lowering the fat content of flavored milk is limited. Only one study looked at milk intake before and after the new standards and the focus was on the amount of milk consumed among those selecting milk, not whether there was a change in the percentage of children selecting milk.¹¹ However, prior to implementation of the 2012 final rule, *Nutrition Standards in the National School Lunch and School Breakfast Programs* (77 FR 4088), flavored, low-fat milk was the most frequently purchased milk by public school districts.¹² It was also among the most commonly offered varieties of milk in NSLP menus (63 percent).¹³ Based on

⁹ Miller et al., "Trends in Beverage Consumption Among High School Students—United States, 2007–2015." *Morbidity and Mortality Weekly Report*/February 3, 2017/Vol. 66/No. 4.

¹⁰ Patterson J, Saidel M. The removal of flavored milk in schools results in a reduction in total milk purchases in all grades, K–12. *J Am Diet Assoc*. 2009; 109(9): A97; Quann E, Adams D. Impact on Milk Consumption and Nutrient Intakes From Eliminating Flavored Milk in Elementary Schools. *Nutrition Today*. 2013; 48:127–134.

¹¹ Yon BA, Johnson RK. New School Meal Regulations and Consumption of Flavored Milk in Ten US Elementary Schools, 2010 and 2013. *Prev Chronic Dis* 2015.

¹² U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, School Food Purchase Study-III, by Nick Young et al. Project Officer: John R. Endahl, Alexandria, VA: March 2012, p. 175.

¹³ U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, *School and Nutrition Dietary Assessment Study IV*, Vols. I and II, by Mary Kay Fox and John Hall, et

this information, offering the additional variety of flavored, low-fat milk across the CNP may increase student milk consumption.

With the implementation of the 2012 final rule on school meals, NSLP and SBP meal requirements limited flavor to fat-free milk to help schools meet weekly saturated fat and calorie limits, as flavored, fat-free milk contains no saturated fat and approximately 20–40 calories less per 8 fluid ounces than flavored, low-fat milk.¹⁴ The calorie difference is almost entirely due to a difference in fat content. Calories from added sugar vary by only 1–2 calories between the fat-free and low-fat flavored milk varieties.

Data from a recent survey of school food service professionals suggests that roughly a third of schools are well within the weekly calorie maximums for school meals and some are below the weekly calorie minimums.¹⁵ Given the experience of these schools, coupled with the marked decreases in daily milk consumption among high school students across the Nation and the nutritional value of milk for children and adolescents, USDA has determined that it is consistent with the objective of encouraging milk consumption to reduce potential limits on fluid milk by providing schools flexibility to offer flavored, low-fat milk in addition to flavored, fat-free milk. Comments on this interim final rule will help inform USDA's decision regarding the long-term availability of this milk flexibility.

Whole Grain-Rich Flexibility

The 2012 final rule *Nutrition Standards in the National School Lunch and School Breakfast Programs* (77 FR 4088) revised the NSLP and SBP meal patterns to require that, beginning SY 2014–2015, all grains in the school menu meet the FNS whole grain-rich criteria (a product must contain at least 50 percent whole grains and the remaining grain content of the product must be enriched). Due to reported limitations on the availability of certain products that met the whole grain-rich criteria at that time, FNS allowed State agencies the option to provide certain exemptions to this requirement in SY

al. Project Officer, Fred Lesnett. Alexandria, VA: November 2012. Download report at: www.fns.usda.gov/ora/https://www.fns.usda.gov/sites/default/files/SNDA-IV_Findings_0.pdf.

¹⁴ <https://supertracker.usda.gov>; data based on the Food and Nutrient Database for Dietary Studies (FNDDS), and the Food Patterns Equivalents Database (FPED).

¹⁵ J. Murdoch et al. (2016). Special Nutrition Program Operations Study, SY 2013–14 Report. Prepared by 2M Research Services, LLC. Alexandria, VA: U.S. Department of Agriculture, Food and Nutrition Service.

⁷ Program operators in the CACFP and SMP are required to serve unflavored milk to children through age five, whole milk for children age one, and low-fat or fat-free milk for children age two through five.

⁸ Golden NH, Abrams SA, and AAP Committee on Nutrition. Optimizing Bone Health in Children and Adolescents. *Pediatrics* 2014;134:e1229; originally published online September 29, 2014.

2014–2015. As noted earlier, successive legislative action in 2012, 2015, and 2016 has impacted full implementation of the whole grain-rich requirement. More recently, Congress extended through SY 2017–2018 the option allowing State agencies that administer the NSLP and SBP to grant whole grain-rich exemptions to SFAs that request them and demonstrate hardship in procuring or preparing specific products that meet the established criteria and are acceptable to students. This interim final rule allows State agencies to continue to grant whole grain-rich exemptions through SY 2018–2019, thus providing certainty about this flexibility for the near term.

Although this rule retains the whole grain-rich regulatory requirement, extending the exemptions for SY 2018–2019 will give Program operators that continue to experience challenges the opportunity to plan and serve meals that are economically feasible and acceptable to their students and communities. Since certain regional foods are not yet widely available in acceptable whole grain-rich varieties, granting more local control through the whole grain-rich exemption can help ensure that culturally appropriate foods are available to the student population. Pasta, bread, and tortillas are among the most common food items for which exemptions have been requested, and other regionally popular products, such as grits and breakfast biscuits, are also reported. For SY 2016–2017, 49 State agencies indicated that they are offering exemptions to SFAs for specific food items. Reports from State agencies indicated that approximately 2,500 SFAs were approved for such exemptions. This was an increase of approximately 10 percent in the number of approvals for exemptions over the previous school year, providing further indication of the need for continuing the option for State agencies to grant exemptions to local SFAs.

Given the challenges expressed by SFAs and the reported increase in exemption approvals, continued and consistent flexibility in meeting the whole grain-rich requirement is necessary. Therefore, this rule extends through SY 2018–2019 the State agency's discretion to grant an exemption from the whole grain-rich requirements if requested by SFAs that demonstrate hardship in providing specific products that meet the whole grain-rich criteria and as long as at least 50 percent of the grains served are whole grain-rich. Hardships may include those caused by lack of availability in the market, financial

concerns, an increase in plate waste, lack of student acceptability, and others.

USDA believes the food industry will continue efforts to develop more acceptable, affordable products that are appealing to students. Through interaction with industry at multiple food shows, including the National Restaurant Association's Annual Show, USDA has learned that manufacturers are continuing their efforts to expand their product lines for schools. For instance, whole grain-rich pizza crust and different types of breads, such as whole grain-rich pita and flatbread, are now available to schools. Continuing the State agency's option to offer whole grain-rich flexibility will enable SFAs experiencing challenges to more effectively develop menus and procure foods that are acceptable to students. It also provides manufacturers additional time to develop whole grain-rich food products that are suitable for reheating and hot holding in the food service facility and result in more acceptable meals for students. This will assist schools in sustaining student participation, encouraging meal consumption, and limiting food waste. USDA will evaluate school and food industry progress over time and consider public comments in order to develop a final rule that address the whole grain-rich exemptions.

As a reminder, State agencies that elect to consider whole grain-rich exemption requests by SFAs for specific items are required to develop procedures for accepting and evaluating SFA requests for such exemptions. Because this exemption has been available for several years, many State agencies have already developed such procedures based on FNS guidance (SP 32–2017, School Meal Flexibilities for SY 2017–18; May 22, 2017). Therefore, most State approval procedures are already in place and no changes to those procedures are required by this rule. Additional guidance will be provided to State agencies that have not already developed such procedures.

Sodium Flexibility

The 2012 final rule *Nutrition Standards in the National School Lunch and School Breakfast Programs* (77 FR 4088) also established average weekly sodium limits for school meals. In order to reduce the sodium content of meals consistent with the report by the Health and Medicine Division of the National Academies of Science, Engineering, and Medicine and the Dietary Guidelines recommendations, the 2012 final rule established two intermediate sodium targets and a final target that were

recommended from the 2010 Dietary Guidelines, which were subsequently reinforced by the 2015–2020 Dietary Guidelines.

To facilitate sodium reduction over a 10-year period, the current regulations, established in 2012, require compliance with Sodium Target 1 beginning July 1, 2014 (SY 2014–2015), Target 2 beginning July 1, 2017 (SY 2017–2018), and the Final Target beginning July 1, 2022 (SY 2022–2023). Based on Program operators' certification of compliance with the 2012 updated meal pattern requirements, USDA anticipates that nearly all schools have begun the process of reducing the sodium content of school meals. To facilitate this change, USDA makes a wide variety of low-sodium food products available to Program operators through USDA Foods. However, USDA understands that sodium reduction in school meals must be consistent with broader, overall reductions in the food supply and reductions in children's consumption patterns outside of school. The most recent available data from the CDC indicates that, in 2009–2012, approximately 92 percent of school-age children in the United States exceeded the 2015–2020 Dietary Guidelines upper intake level for dietary sodium.¹⁶

While USDA recognizes the importance of reducing the sodium content of school meals, reaching this objective will likely require a more gradual process than the planned 10 years to accommodate the individual challenges of SFAs and their access to new products lower in sodium. Factors such as sodium preferences and consumption patterns suggest that retaining Target 1 is appropriate and necessary to ensure student consumption of school meals and adequate nutrient intake.

Therefore, this interim final rule retains Sodium Target 1 for an additional school year—from July 1, 2018, through June 30, 2019 (SY 2018–2019)—which has an impact on the overall sodium reduction timeline established in current regulations. However, this sodium flexibility is consistent with previous Congressional actions directing USDA to maintain Sodium Target 1 for the near term. While USDA anticipates retaining Sodium Target 1 as the regulatory limit in the final rule through at least the end of SY 2020–2021, the Department seeks public comments on the long-term availability of this flexibility and suggestions on how to best address the overall sodium requirement in school

¹⁶ See <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6452a1.htm>.

meals. In the future, USDA will also reevaluate the sodium and other school meal requirements in light of the 2020 Dietary Guidelines. Section 9(a)(4) of the Richard B. Russell National School Lunch Act, 42 U.S.C. 1758(a)(4), requires that school meals reflect the latest Dietary Guidelines.

USDA will continue to engage with the public, health advocates, nutrition professionals, schools, and the food industry to gather ongoing input on needs and challenges associated with managing sodium levels in school meals. In addition, USDA will continue to expand the availability of low-sodium products offered through USDA Foods; develop recipes that assist with sodium reduction; and provide menu planning resources, technical assistance, and information to schools through the FNS *What's Shaking?* sodium reduction initiative and the FNS *Team Up for School Nutrition Success* initiative.

V. Summary

This interim final rule provides continued flexibility in SY 2018–2019 in three specific menu planning areas—milk, whole grains, and sodium. Implementation of this interim final rule will allow all CNP operators the discretion to offer flavored, low-fat milk as an allowable milk type in the reimbursable meal or as a competitive beverage for sale in schools in SY 2018–2019. It also will provide State agencies with the authority to continue granting exemptions to the whole grain-rich requirement in SY 2018–2019 for schools demonstrating hardship. Finally, by retaining Sodium Target 1 as the regulatory limit through SY 2018–2019 and inviting public comments, this interim final rule will allow children more time to adjust to school meals with less sodium content. Additionally, this interim rule will provide schools and manufacturers with additional time and predictability to make appropriate menu and product changes. Throughout, USDA will continue to encourage steady progress on sodium reduction in school meals and provide technical assistance to Program operators.

USDA will conduct a thorough review of all public comments on the three flexibilities addressed in this interim final rule and submitted within the comment period. Stakeholders and the public are encouraged to provide comments that will assist USDA in developing a final rule on the long-term availability of the milk, whole grains, and sodium flexibilities.

Issuance of an Interim Final Rule and Effective Date

USDA, under the provisions of the Administrative Procedure Act at 5 U.S.C. 553(b)(B), is issuing this as an interim final rule and finds for good cause that, in this limited instance, use of prior notice and comment procedures for issuing this time-limited interim final rule is impracticable.

Following enactment of the Healthy, Hunger-Free Kids Act of 2010, Public Law 111–296, and USDA's codification of effecting regulations beginning in 2012, Program operators have experienced hardships due to persistent uncertainties regarding nutrition requirements as a result of repeated short-term Congressional legislative directives and responsive USDA implementation. As noted in the preamble to this rulemaking, for each of the five intervening school years, Congress has directed USDA to provide exemptions and flexibilities for codified nutrition standards relative to whole grain-rich products, sodium levels, and most recently, flavored fluid milk, consistent with specific legislative provisions. See Consolidated and Further Continuing Appropriations Act, 2012 (Pub. L. 112–55) enacted November 18, 2011, Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235) enacted December 16, 2014, Consolidated and Further Continuing Appropriations Act, 2016 (Pub. L. 114–113) enacted December 18, 2015, and Consolidated Appropriations Act, 2017 (Pub. L. 115–31) enacted May 5, 2017. Most recently, Section 101(a)(1) of the Continuing Appropriations Act, 2018, Division D of the Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Public Law 115–56, enacted September 8, 2017, extends the flexibilities provided by section 747 of the Consolidated Appropriations Act, 2017. Following each legislative directive, USDA timely authored implementing memoranda, notifying affected stakeholders of the availability of exemptions and flexibilities and facilitating utilization despite the inopportune timing.¹⁷ This repetitive legislative action manifests a clear Congressional message to USDA: The current regulatory provisions limiting fluid milk, whole grain-rich, and sodium options in the CNPs are causing

operational challenges and need further consideration.

Recently, USDA has come to understand that the cumulative impact of the unpredictable legislative mandates on Program operators has substantially harmed their ability to accomplish fundamental administrative responsibilities ranging from advance menu planning, to school district budgeting and competitive procurement of allowable foods. As noted elsewhere in this rulemaking, Program operators begin procurement for a school year as early as the previous autumn, after assessing the availability of USDA Foods entitlement commodities and respecting the time and labor required for a fulsome procurement process. Perhaps most importantly, procurement process timing for school meal products is locally determined so as to meet the administrative and planning needs of Program operators.

The successive legislative exemptions and flexibilities for whole grain-rich products and sodium targets significantly impaired Program operators' timely completion of competitive procurements of affected products. Most recently, USDA understands that the exemptions and flexibilities provided by Public Law 115–31, enacted May 5, 2017, could not be effectively incorporated into Program operators' regular procurement processes and menu planning for the 2017–2018 school year, which began July 1, 2017. It is likely that some Program operators were thus deprived of the intended legislated opportunities. Similarly, at this time, many Program operators have already initiated menu-planning for SY 2018–2019, which begins July 1, 2018, with these exemptions and flexibilities in place. Expediting the availability of the three flexibilities for the entire 2018–2019 school year by way of this interim final rule, then, is essential insofar as it provides local Program operators timely notice of the opportunity to utilize the flexibilities in menu-planning for the upcoming school year. Consistent with USDA's understanding, use of an interim final rule to provide sufficient notice of the flexibilities available during SY 2018–2019, rather than a proposed rulemaking, is essential in meeting the needs of local Program operators.

With that in mind, USDA has determined that schools and other local Program operators need reliable nutrition standards in place in order to procure compliant products in the near term through SY 2018–2019 and beyond. Given the realities and time sensitivity of the local procurement

¹⁷ Because the three flexibilities provided for in the Consolidated Appropriations Act, 2017 remain in effect through June 30, 2018, at this time it is not necessary for FNS to promulgate an implementing memorandum.

process, this interim final rule, with a final rule planned for publication in fall 2018, is the most effective method for securing that reliability. Current flexibilities affecting nutrition standards for fluid milk, whole grain-rich, and sodium have been accomplished administratively and are legislatively driven. Without that legislative directive, the Secretary would not have the authority to extend or waive regulatory nutrition standards in the affected programs. See 42 U.S.C. 1760(l). The sole method for USDA to relieve the hardship, providing certainty prior to the local-level decision-making for SY 2018–2019, is by amending these regulatory standards through issuance of this interim final rule. USDA intends to provide reliable and conclusive regulatory support for local procurement decision-makers at schools and other Program operators prior to the beginning of the local procurement process for SY 2019–20.

The interim final rule reflects Congressional direction and provides Program operators certainty in local-level procurement and menu planning operations during SY 2018–19. To that end, this interim final rule aims to maintain the whole grain-rich and sodium standards that Congress has consistently enunciated, continue the fluid milk options legislatively directed for the current school year with slight modifications, and provide the urgent relief stakeholders need. Finally, this interim final rule presents a framework which will benefit from public comments received. In turn, those comments will advise the framework of the final rule, which USDA plans to publish in fall 2018.

Also, based on its ongoing engagement with industry partners USDA believes the critical clarity provided by this interim final rule is necessary for manufacturers, producers, and vendors to develop and produce the products needed by Program operators to meet CNP objectives. Legislative and regulatory uncertainty has reduced research and development of CNP-compliant food and beverage products. Implementation of this interim final rule, with the intent to publish a final rule in fall 2018, provides the certainty needed to stimulate research and development of cost-effective, CNP-compliant products so Program operators can meet the need of America's children. Finally, this interim final rule affords food industry stakeholders an opportunity to comment and aid the Department in developing a final rule that will address these flexibilities for future school years.

Consequently, this interim final rule providing for the three menu planning flexibilities discussed above, will enable Program operators, including schools, day care centers, and family day care homes, to exercise the increased options provided in this de-regulatory rulemaking, increase integrity and accuracy of their local procurement processes and menu planning in the near term. In addition, the interim final rule will provide food suppliers with additional clarity needed to encourage research and develop cost-effective, customized products compliant with CNP standards and responsive to the unique needs of Program operators and America's children. Similarly, the interim rule affords the public, including program operators, food suppliers, and other engaged stakeholders, an opportunity to provide meaningful comments aiding the Department during the development of a final rule which we intend to publish in fall 2018.

Procedural Matters

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, distributive 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 interim final rule has been determined to be significant and was reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866.

Regulatory Impact Analysis

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects (\$100 million or more in any one year). USDA does not anticipate that this interim final rule is likely to have an economic impact of \$100 million or more in any one year, and therefore, does not meet the definition of “economically significant” under Executive Order 12866. The RIA for the 2012 final rule, *Nutrition Standards in the National School Lunch and School Breakfast Programs*, (77 FR 4088), underscores the importance of recognizing the linkage between poor diets and health problems such as childhood obesity. In addition to the impacts on the health of children,

the RIA also cites information regarding the social costs of obesity and the additional economic costs associated with direct medical expenses of obesity. The RIA for the 2012 rule did not estimate individual health benefits that could be directly attributed to the change in the final rule: “Because of the complexity of factors that contribute both to overall food consumption and to obesity, we are not able to define a level of disease or cost reduction that is attributable to the changes in meals expected to result from implementation of the rule. As the rule is projected to make substantial improvements in meals served to more than half of all school-aged children on an average school day, we judge that the likelihood is reasonable that the benefits of the rule exceed the costs, and that the final rule thus represents a cost-effective means of conforming NSLP and SBP regulations to the statutory requirements for school meals.”¹⁸

To the extent in which the specific flexibilities in this interim final rule allow Program operators still facing challenges to more efficiently operate within the meal patterns established in 2012, we expect the health benefits in this rule to be similar to the overall benefits of improving the diets of children cited in the RIA for the final meal standard rule. An analysis assessing the costs and benefits of this action is presented below.

As explained above, this interim final rule provides optional flexibilities to the meal patterns established in 2012 by allowing for a more gradual implementation of the whole grain-rich and sodium requirements, as well as offering an additional low-fat milk option. USDA anticipates minimal if any costs associated with the changes to the school meal standards due to the discretionary nature of the additional flexibilities. The overall meal components, macro nutrient, and calorie requirements remain unchanged and Program operators may choose to utilize the additional flexibilities offered in this interim final rule within these constraints. Further, we do not anticipate this interim final rule will deter the significant progress made to date¹⁹ by State and local operators, USDA, and industry manufacturers to achieve healthy palatable meals for students.

These changes are also promulgated in the context of significant progress

¹⁸ See <https://www.gpo.gov/fdsys/pkg/FR-2012-01-26/pdf/2012-1010.pdf>.

¹⁹ FNS National Data Bank Administrative Data: 99.7% of lunches served in FY2016 received the performance based reimbursement for compliance with the meal standards.

made to date by State and local operators, USDA, and industry manufacturers to achieve healthy appealing meals for students. The USDA Special Nutrition Program Operations Studies for SYs 2012–2013 and 2013–2014 suggest that, as with any major change, there were some challenges. For example, food costs, student acceptance, and the availability of product meeting the standards were the primary challenges anticipated in implementing the whole grain-rich requirement in full. As industry has increased the variety and quality of their offerings, SFAs are finding this requirement has become easier to fulfil, so these early studies may not be representative of current status.²⁰ That said, there are still some Program operators struggling with certain requirements, and regional differences sometimes result in less acceptance of some foods. Based on current exemption data, SFAs in 49 States have requested a waiver for exemption of products not meeting the whole grain-rich criteria. For these reasons, we expect that the flexibilities extended in this interim final rule will be needed and used primarily by the schools still facing challenges to planning and offering healthy meals that students will eat and make sense for their communities.

Local operators struggling with one or all of these requirements may choose to adopt any of the options to balance current and future resources in preparing healthy meals. The flexibilities for flavored milk and the whole grain-rich requirement, and the additional time to implement sodium reduction provide certainty for Program operators for the near term to effectively procure food for appealing and healthy menus. The public comments on this interim final rule will be particularly critical in assisting the process to establish a long-term approach to these flexibilities.

Flexibility to offer flavored, low-fat (1 percent fat) milk: The regulatory impact analyses for the 2012 final rule, *Nutrition Standards in the National School Lunch and School Breakfast Programs* (77 FR 4088), did not estimate the separate costs of including specifically flavored, low-fat milk as an option to meet the milk variety requirement. Nonfat, flavored milk is currently an allowable option and the addition of flavored, low-fat at local discretion should not impact overall costs. Local operators may choose to

incorporate the new options of milk into their current menus as they deem appropriate for their calorie ranges and available resources. There may be some cases in which flavored, low-fat milk is slightly more expensive and for some it might be slightly less expensive than the varieties currently permitted by regulations established in 2012, but any overall difference in cost is likely to be minimal.

Flexibility to exempt certain schools from the whole grain-rich requirements: The 2012 final rule, *Nutrition Standards in the National School Lunch and School Breakfast Programs* (77 FR 4088), revised the meal patterns of both the NSLP and the SBP to require that all grains provided in the programs meet FNS whole grain-rich criteria by SY 2014–2015. Due to limitations on the availability of products that meet the whole grain-rich criteria at that time, State agencies were allowed to provide certain exemptions to this requirement in SY 2014–2015. Congress directed the Secretary through successive legislative action²¹ to continue to allow State agencies that administer the NSLP and the SBP to grant an exemption from the regulatory whole grain-rich requirement in the meal programs through SY 2017–2018. SFAs must demonstrate hardship in procuring specific products that meet the whole grain-rich criteria, which are acceptable to students and compliant with the whole grain-rich requirements. State agencies have developed procedures for accepting and evaluating exemption requests based on FNS guidance (SP 33–2016, Extension Notice: Requests for Exemption from the School Meals' Whole Grain-Rich Requirement for School Year 2016–2017, April 29, 2016). As specified in this guidance, the exemptions must be based on demonstrated hardship, such as financial hardship, limited product availability, unacceptable product quality, and/or poor student acceptability.

Currently, less than 15 percent of SFAs (2,868/19,530) request the whole grain-rich exemption. Aside from the administrative costs of requesting and recording exemptions, we do not estimate any costs associated with extending the whole grain-rich exemption option, given that this is a discretionary provision. The extent to which SFAs will continue to utilize this option will vary greatly; individual Program operators will need to balance

resources, product availability, and student acceptability.

The RIA for the 2012 final rule, *Nutrition Standards in the National School Lunch and School Breakfast Programs* (77 FR 4088), estimated an overall small net cost savings when factoring in the whole grain-rich requirement and the overall reduction in total refined grains offered. The net savings was the result of the overall reduction in refined grains served due to the restrictions on the maximum number of weekly grain servings offered and limits on calories and sodium.²² The final rule RIA estimated that after “FY 2014, when the rule’s 100 percent whole grain-rich requirement takes effect, the added cost of serving higher priced whole grain products about equals the savings from a reduction in grains products served.”²³

Forty-nine States indicated to USDA that they are offering whole grain-rich exemptions to approximately 2,500 SFAs for SY 2016–2017. This was an increase of approximately 10 percent. That said, the individual costs/savings to the SFAs are estimated to be minimal with the extension of the exemption options. Any additional costs associated with a whole grain-rich product would be offset with the overall reduction in refined grain offerings. We also expect that as more products become available, any differential costs associated with whole grain-rich products will normalize in the market. The availability of whole grain-rich products through USDA Foods and the commercial market has increased significantly since the implementation of the meal standards and continues to progress, providing new and affordable options for local operators to integrate into menus.

Extending Sodium Target 1 through SY 2018–2019: In the RIA for the 2012 final rule, *Nutrition Standards in the National School Lunch and School Breakfast Programs* (77 FR 4088), meeting the first sodium target was not estimated as a separate cost due to the fact that the first target was meant to be met using food currently available when

²² Flexibilities for the weekly restriction of grains and meat/meat alternate servings were made permanent in the final rule, “Certification of Compliance With Meal Requirements for the National School Lunch Program Under the Healthy, Hunger-Free Kids Act of 2010” (79 FR 325), published on January 3, 2014. There were no costs associated with the additional flexibilities on the weekly grain and meat/meat alternate servings due to the fact program operators still needed to comply with the calorie and sodium requirements, which provide limited flexibility for SFAs to greatly exceed the maximum recommendations.

²³ <https://www.gpo.gov/fdsys/pkg/FR-2012-01-26/pdf/2012-1010.pdf>.

²⁰ See <https://www.fns.usda.gov/school-nutrition-program-operations-study-school-year-2012-13> and see <https://www.fns.usda.gov/special-nutrition-program-operations-study-school-year-2013-14>.

²¹ Section 752 of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235), Section 733 of the Consolidated Appropriations Act, 2016 (Pub. L. 114–113), and Section 747 of the Consolidated Appropriations Act, 2017 (Pub. L. 115–31).

the target went into effect in SY 2014–2015 (or by making minimal changes to the foods offered). While the regulatory impact analyses did not estimate a separate cost to implement Sodium Target 1, it did factor in higher labor costs for producing meals that meet all the meal standards at full implementation to factor in the costs of schools replacing packaged goods to food prepared from scratch. Over 5 years, the final rule estimated that total SFAs costs would increase by \$1.6 billion to meet all standards. The cost estimate extended only through FY 2016, two years before the final rule's second sodium target would have taken effect. The second sodium target was designed to be able to be met with the help of industry changing food processing technology.

This interim final rule retains Sodium Target 1 as the regulatory limit through June 30, 2019 (SY 2018–2019) and seeks public comments on the long-term sodium requirement. We do not anticipate any additional costs associated with this change as it is simply allowing for additional time for Program operators and industry to reduce sodium levels.

Executive Order 13771

This interim final rule is an E.O. 13771 deregulatory action. It provides regulatory flexibilities in the meal pattern and nutrition requirements that are consistent with those currently available as a result only of appropriation legislation in effect for SY 2017–2018 and administrative actions.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Because Program operators would have discretion to exercise the provisions of this rule and the flexibilities in this rule are only a small part of the overall changes in 7 CFR parts 210, 215, 220, and 226, it has been determined that the rule would not have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost

benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures by State, local or Tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This interim final rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and Tribal governments or the private sector of \$100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

The NSLP, SMP, SBP, and the CACFP are listed in the Catalog of Federal Domestic Assistance under NSLP No. 10.555, SMP No. 10.556, SBP No. 10.553, and CACFP No. 10.558, respectively, and are subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. Since the Child Nutrition Programs are State-administered, USDA's Food and Nutrition Service (FNS) Regional Offices have formal and informal discussions with State and local officials, including representatives of Indian Tribal Organizations, on an ongoing basis regarding program requirements and operation. This provides FNS with the opportunity to receive regular input from program administrators which contributes to the development of feasible program requirements.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section (6)(b)(2)(B) of Executive Order 13132.

The Department has considered the impact of this rule on State and local governments and has determined that this rule does not have federalism implications. Therefore, under section 6(b) of the Executive Order, a federalism summary is not required.

Executive Order 12988, Civil Justice Reform

This interim final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule is not intended to have retroactive effect. Prior to any judicial challenge to the provisions of the interim final rule, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed this interim rule in accordance with USDA Regulation 4300–4, “Civil Rights Impact Analysis,” to identify any major civil rights impacts the rule might have on program participants on the basis of age, race, color, national origin, sex or disability. After a careful review of the rule's intent and provisions, FNS has determined that this rule is not expected to limit or reduce the ability of protected classes of individuals to participate in the NSLP, SMP, SBP, and CACFP.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects 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.

The Food and Nutrition Service (FNS) has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under E.O. 13175. If a Tribe requests consultation, FNS will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; 5 CFR part 1320) requires the Office of Management and Budget (OMB) to approve all collections

of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. The provisions of this rule do not impose new information collection requirements subject to approval by the OMB under the Paperwork Reduction Act of 1994.

E-Government Act Compliance

The Department is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects

7 CFR Part 210

Grant programs—education, Grant programs—health, Infants and children, Nutrition, Penalties, Reporting and

recordkeeping requirements, School breakfast and lunch programs, Surplus agricultural commodities.

7 CFR Part 215

Food assistance programs, Grant programs—education, Grant program—health, Infants and children, Milk, Reporting and recordkeeping requirements.

7 CFR Part 220

Grant programs—education, Grant programs—health, Infants and children, Nutrition, Reporting and recordkeeping requirements, School breakfast and lunch programs.

7 CFR Part 226

Accounting, Aged, Day care, Food assistance programs, Grant programs, Grant programs—health, American Indians, Individuals with disabilities, Infants and children, Intergovernmental relations, Loan programs, Reporting and recordkeeping requirements, Surplus agricultural commodities.

Accordingly, 7 CFR parts 210, 215, 220 and 226 are amended as follows:

PART 210—NATIONAL SCHOOL LUNCH PROGRAM

■ 1. The authority citation for 7 CFR part 210 continues to read as follows:

Authority: 42 U.S.C. 1751–1760, 1779.

■ 2. In § 210.10:

■ a. In paragraph (c) introductory text, revise the table;

■ b. In paragraph (c)(2)(iv)(A), add a sentence at the end of the paragraph; and

■ c. Revise paragraphs (c)(2)(iv)(B), (d)(1)(i), and (f)(3).

The revisions and addition read as follows:

§ 210.10 Meal requirements for lunches and requirements for afterschool snacks.

* * * * *
(c) * * *

Food components	Lunch meal pattern		
	Grades K–5	Grades 6–8	Grades 9–12
	Amount of food ^a per week (minimum per day)		
Fruits (cups) ^b	2½ (½)	2½ (½)	5 (1)
Vegetables (cups) ^b	3¾ (¾)	3¾ (¾)	5 (1)
Dark green ^c	½	½	½
Red/Orange ^c	¾	¾	1¼
Beans and peas (legumes) ^c	½	½	½
Starchy ^c	½	½	½
Other ^{c,d}	½	½	¾
Additional Vegetables to Reach Total ^e	e 1	e 1	e 1½
Grains (oz eq) ^f	8–9 (1)	8–10 (1)	10–12 (2)
Meats/Meat Alternates (oz eq)	8–10 (1)	9–10 (1)	10–12 (2)
Fluid milk (cups) ^g	5 (1)	5 (1)	5 (1)
Other Specifications: Daily Amount Based on the Average for a 5-Day Week			
Min-max calories (kcal) ^h	550–650	600–700	750–850
Saturated fat (% of total calories) ^h	<10	<10	<10
Sodium Target 1 (mg) ^e	≤1,230	≤1,360	≤1,420
<i>Trans fat</i> ^{h,i,j}	Nutrition label or manufacturer specifications must indicate zero grams of <i>trans fat</i> per serving.		

^a Food items included in each group and subgroup and amount equivalents. Minimum creditable serving is 1/8 cup.
^b One quarter-cup of dried fruit counts as 1/2 cup of fruit; 1 cup of leafy greens counts as 1/2 cup of vegetables. No more than half of the fruit or vegetable offerings may be in the form of juice. All juice must be 100% full-strength.
^c Larger amounts of these vegetables may be served.
^d This category consists of “Other vegetables” as defined in paragraph (c)(2)(iii)(E) of this section. For the purposes of the NSLP, the “Other vegetables” requirement may be met with any additional amounts from the dark green, red/orange, and beans/peas (legumes) vegetable subgroups as defined in paragraph (c)(2)(iii) of this section.
^e Any vegetable subgroup may be offered to meet the total weekly vegetable requirement.
^f All grains must be whole grain-rich. Exemptions are allowed as specified in paragraph (c)(2)(iv)(B) of this section.
^g All fluid milk must be fat-free (skim) or low-fat (1 percent fat or less). Milk may be unflavored or flavored as specified in paragraph (d)(1)(i) of this section.
^h Discretionary sources of calories (solid fats and added sugars) may be added to the meal pattern if within the specifications for calories, saturated fat, *trans fat*, and sodium. Foods of minimal nutritional value and fluid milk with fat content greater than 1 percent are not allowed.
ⁱ Sodium Target 1 (shown) is effective from July 1, 2014 (SY 2014–2015) through June 30, 2019 (SY 2018–2019). For sodium targets due to take effect beyond SY 2018–2019, see paragraph (f)(3) of this section.
^j Food products and ingredients must contain zero grams of *trans fat* (less than 0.5 grams) per serving.

* * * * *
 (2) * * *
 (iv) * * *
 (A) * * * The whole grain-rich criteria included in FNS guidance may be updated to reflect additional information provided by industry on the

food label or a whole grains definition by the Food and Drug Administration.

(B) *Daily and weekly servings.* The grains component is based on minimum daily servings plus total servings over a 5-day school week. Schools serving lunch 6 or 7 days per week must increase the weekly grains quantity by approximately 20 percent (1/5) for each additional day. When schools operate less than 5 days per week, they may decrease the weekly quantity by approximately 20 percent (1/5) for each day less than 5. The servings for biscuits, rolls, muffins, and other grain/bread varieties are specified in FNS guidance. All grains offered must meet the whole grain-rich criteria specified in

FNS guidance. Exemptions are allowed at the discretion of the State agency from July 1, 2018 through June 30, 2019 (school year 2018–2019). If allowed by the State agency, a school food authority may submit an exemption request for one or more products. The exemption request must demonstrate hardship in meeting the requirement, address the criteria established in FNS guidance, and be submitted through the process established by the State agency. School food authorities granted an exemption from the whole grain-rich requirement, at a minimum, must offer half of the weekly grains as whole grain-rich.

(d) * * *

(1) * * *

(i) Schools must offer students a variety (at least two different options) of fluid milk. All milk must be fat-free (skim) or low-fat (1 percent fat or less). Milk with higher fat content is not allowed. Low-fat or fat-free lactose-free and reduced-lactose fluid milk may also be offered. All milk may be unflavored or flavored from July 1, 2018 through June 30, 2019 (school year 2018–2019).

* * * * *

(f) * * *

(3) *Sodium.* School lunches offered to each age/grade group must meet, on average over the school week, the levels of sodium specified in the following table within the established deadlines:

NATIONAL SCHOOL LUNCH PROGRAM SODIUM TIMELINE & LIMITS

Age/grade group	Target 1: July 1, 2014 SY 2014–2015 (mg)	Target 2: July 1, 2019 SY 2019–2020 (mg)	Final target: July 1, 2022 SY 2022–2023 (mg)
K–5	≤1,230	≤935	≤640
6–8	≤1,360	≤1,035	≤710
9–12	≤1,420	≤1,080	≤740

* * * * *

§ 210.11 [Amended]

■ 3. In § 210.11(m)(1)(ii), (m)(2)(ii), and (m)(3)(ii):

- a. Add the words “or flavored” after the word “unflavored”; and
- b. Add the words “from July 1, 2018 through June 30, 2019, school year 2018–2019” before the semicolon.

PART 215—SPECIAL MILK PROGRAM FOR CHILDREN

■ 4. The authority for 7 CFR part 215 continues to read as follows:

Authority: 42 U.S.C. 1772 and 1779.

■ 5. In § 215.7a, revise paragraph (a)(3) to read as follows:

§ 215.7a Fluid milk and non-dairy milk substitute requirements.

* * * * *

(a) * * *

(3) *Children 6 years old and older.*

Children six years old and older must be served low-fat (1 percent fat or less) or fat-free (skim) milk. Milk may be unflavored or flavored from July 1, 2018 through June 30, 2019 (school year 2018–2019).

* * * * *

PART 220—SCHOOL BREAKFAST PROGRAM

■ 6. The authority citation for 7 CFR part 220 continues to read as follows:

Authority: 42 U.S.C. 1773, 1779, unless otherwise noted.

■ 7. In § 220.8:

- a. In paragraph (a) introductory text, remove the second and third sentences;
- b. In paragraph (b) introductory text, remove the words “, once fully implemented as specified in paragraphs (c), (d), (e), (f), (h), (i), and (j) of this section,”;
- c. In paragraph (c) introductory text, revise the table;
- d. In paragraphs (c)(1) and (c)(2)(i), remove the words “Effective July 1, 2013 (SY 2013–2014), schools” and add the word “Schools” in their place;
- e. In paragraph (c)(2)(ii), remove the words “Effective July 1, 2014 (SY 2014–2015), schools” and add the word “Schools” in their place;
- f. In paragraph (c)(2)(iii), remove the words “, effective July 1, 2014 (SY 2014–2015),”;
- g. In paragraph (c)(2)(iv)(A), add a sentence after the second sentence and remove the words “Effective July 1,

2013 (SY 2013–2014), schools” and add the word “Schools” in their place;

■ h. Revise paragraphs (c)(2)(iv)(B) and (d);

■ i. In paragraph (e), remove the words “beginning July 1, 2014 (SY 2014–2015)”;

■ j. In paragraph (f)(1), remove the words “Effective July 1, 2013 (SY 2013–2014), school” and add the word “School” in their place and remove the words “—Effective SY 2013–2014” from the table heading;

■ k. In paragraph (f)(2), remove the words “Effective July 1, 2012 (SY 2012–2013), school” and add the word “School” in their place;

■ l. Revise paragraph (f)(3);

■ m. In paragraph (f)(4), remove the words “Effective July 1, 2013 (SY 2013–2014), food” and add the word “Food” in their place; and

■ n. In paragraph (h)(2), remove the words “Effective SY 2013–2014,”.

The revisions and addition read as follows:

§ 220.8 Meal requirements for breakfasts.

* * * * *

(c) * * *

Food components	Breakfast meal pattern		
	Grades K–5	Grades 6–8	Grades 9–12
	Amount of food ^a per week (minimum per day)		
Fruits (cups) ^{b,c}	5 (1)	5 (1)	5 (1)

Food components	Breakfast meal pattern		
	Grades K–5	Grades 6–8	Grades 9–12
	Amount of food ^a per week (minimum per day)		
Vegetables (cups) ^c	0	0	0
Dark green	0	0	0
Red/Orange	0	0	0
Beans and peas (legumes)	0	0	0
Starchy	0	0	0
Other	0	0	0
Grains (oz eq) ^d	7–10 (1)	8–10 (1)	9–10 (1)
Meats/Meat Alternates (oz eq) ^e	0	0	0
Fluid milk ^f (cups)	5 (1)	5 (1)	5 (1)

Other Specifications: Daily Amount Based on the Average for a 5-Day Week

Min-max calories (kcal) ^{g h}	350–500	400–550	450–600
Saturated fat (% of total calories) ^h	<10	<10	<10
Sodium Target 1 (mg) ^{h i}	≤540	≤600	≤640
<i>Trans</i> fat ^{h j}	Nutrition label or manufacturer specifications must indicate zero grams of <i>trans</i> fat per serving.		

^a Food items included in each group and subgroup and amount equivalents. Minimum creditable serving is 1/8 cup.

^b One quarter cup of dried fruit counts as 1/2 cup of fruit; 1 cup of leafy greens counts as 1/2 cup of vegetables. No more than half of the fruit or vegetable offerings may be in the form of juice. All juice must be 100% full-strength.

^c Schools must offer 1 cup of fruit daily and 5 cups of fruit weekly. Vegetables may be substituted for fruits, but the first two cups per week of any such substitution must be from the dark green, red/orange, beans and peas (legumes) or “Other vegetables” subgroups, as defined in §210.10(c)(2)(iii) of this chapter.

^d All grains must be whole-grain-rich. Exemptions are allowed as specified in paragraph (c)(2)(iv)(B) of this section. Schools may substitute 1 oz. eq. of meat/meat alternate for 1 oz. eq. of grains after the minimum daily grains requirement is met.

^e There is no meat/meat alternate requirement.

^f All fluid milk must be fat-free (skim) or low-fat (1 percent fat or less). Milk may be unflavored or flavored as specified in paragraph (d) of this section.

^g The average daily calories for a 5-day school week must be within the range (at least the minimum and no more than the maximum values).

^h Discretionary sources of calories (solid fats and added sugars) may be added to the meal pattern if within the specifications for calories, saturated fat, *trans* fat, and sodium. Foods of minimal nutritional value and fluid milk with fat content greater than 1 percent milk fat are not allowed.

ⁱ Sodium Target 1 (shown) is effective from July 1, 2014 (SY 2014–2015) through June 30, 2019 (SY 2018–2019). For sodium targets due to take effect beyond SY 2018–2019, see paragraph (f)(3) of this section.

^j Food products and ingredients must contain zero grams of *trans* fat (less than 0.5 grams) per serving.

* * * * *

(2) * * *

(iv) * * *

(A) * * * The whole grain-rich criteria included in FNS guidance may be updated to reflect additional information provided by industry on the food label or a whole grains definition by the Food and Drug Administration.

(B) *Daily and weekly servings.* The grains component is based on minimum daily servings plus total servings over a 5-day school week. Schools serving breakfast 6 or 7 days per week must increase the weekly grains quantity by approximately 20 percent (1/5) for each additional day. When schools operate less than 5 days per week, they may decrease the weekly quantity by approximately 20 percent (1/5) for each day less than 5. The servings for biscuits, rolls, muffins, and other grain/

bread varieties are specified in FNS guidance. All grains offered must meet the whole grain-rich criteria specified in FNS guidance. Exemptions are allowed at the discretion of the State agency from July 1, 2018 through June 30, 2019 (school year 2018–2019). If allowed by the State agency, a school food authority may submit an exemption request for one or more products. The exemption requests must demonstrate hardship in meeting the requirement, address the criteria established in FNS guidance, and be submitted through the process established by the State agency. School food authorities that are granted an exemption from the current whole grain-rich requirement, at a minimum, must offer half of the weekly grains as whole grain-rich.

(d) *Fluid milk requirement.* A serving of fluid milk as a beverage or on cereal

or used in part for each purpose must be offered for breakfasts. Schools must offer students a variety (at least two different options) of fluid milk. All fluid milk must be fat-free (skim) or low-fat (1 percent fat or less). Milk with higher fat content is not allowed. Low-fat or fat-free lactose-free and reduced-lactose fluid milk may also be offered. Milk may be unflavored or flavored from July 1, 2018 through June 30, 2019 (school year 2018–2019). Schools must also comply with other applicable fluid milk requirements in §210.10(d)(1) through (4) of this chapter.

* * * * *

(f) * * *

(3) *Sodium.* School breakfasts offered to each age/grade group must meet, on average over the school week, the levels of sodium specified in the following table within the established deadlines:

SCHOOL BREAKFAST PROGRAM SODIUM TIMELINE & LIMITS

Age/grade group	Target 1: July 1, 2014 SY 2014–2015 (mg)	Target 2: July 1, 2019 SY 2019–2020 (mg)	Final target: July 1, 2022 SY 2022–2023 (mg)
K–5	≤540	≤485	≤430

SCHOOL BREAKFAST PROGRAM SODIUM TIMELINE & LIMITS—Continued

Age/grade group	Target 1: July 1, 2014 SY 2014–2015 (mg)	Target 2: July 1, 2019 SY 2019–2020 (mg)	Final target: July 1, 2022 SY 2022–2023 (mg)
6–8	≤600	≤535	≤470
9–12	≤640	≤570	≤500

* * * * *

PART 226—CHILD AND ADULT CARE FOOD PROGRAM

■ 8. The authority citation for 7 CFR part 226 continues to read as follows:

Authority: Secs. 9, 11, 14, 16, and 17, Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1758, 1759a, 1762a, 1765 and 1766).

■ 9. In § 226.20:

■ a. Revise paragraphs (a)(1)(iii) and (iv); and

■ b. Revise the tables in paragraphs (c)(1), (2), and (3).

The revisions read as follows:

§ 226.20 Requirements for meals.

(a) * * *

(1) * * *

(iii) *Children 6 years old and older.*

Children six years old and older must be served milk that is low-fat (1 percent fat or less) or fat-free (skim). Milk may be unflavored or flavored from July 1, 2018, through June 30, 2019 (school year 2018–2019).

(iv) *Adults.* Adults must be served milk that is low-fat (1 percent fat or less) or fat-free (skim). Milk may be

unflavored or flavored from July 1, 2018, through June 30, 2019 (school year 2018–2019). Six ounces (weight) or ¾ cup (volume) of yogurt may be used to fulfill the equivalent of 8 ounces of fluid milk once per day. Yogurt may be counted as either a fluid milk substitute or as a meat alternate, but not as both in the same meal.

* * * * *

(c) * * *

(1) * * *

BILLING CODE 3410–30–P

BREAKFAST MEAL PATTERN FOR CHILDREN AND ADULTS

	Ages 1-2	Ages 3-5	Ages 6-12	Ages 13-18 ¹ (at-risk afterschool programs and emergency shelters)	Adult
Food Components and Food Items ²	Minimum Quantities				
Fluid milk ³	4 fl oz	6 fl oz	8 fl oz	8 fl oz	8 fl oz
Vegetables, fruits, or portions of both ⁴	¼ cup	½ cup	½ cup	½ cup	½ cup
Grains (oz eq) ^{5,6,7}					
Whole grain-rich or enriched bread	½ slice	½ slice	1 slice	1 slice	2 slices
Whole grain-rich or enriched bread product, such as biscuit, roll, muffin	½ serving	½ serving	1 serving	1 serving	2 servings
Whole grain-rich, enriched or fortified cooked breakfast cereal ⁸ , cereal grain, and/or pasta	¼ cup	¼ cup	½ cup	½ cup	1 cup
Whole grain-rich, enriched or fortified ready-to-eat breakfast cereal (dry, cold) ^{8,9}					
Flakes or rounds	½ cup	½ cup	1 cup	1 cup	2 cups
Puffed cereal	¾ cup	¾ cup	1 ¼ cups	1 ¼ cups	2 ½ cups
Granola	⅛ cup	⅛ cup	¼ cup	¼ cup	½ cup

¹ Larger portion sizes than specified may need to be served to children 13 through 18 years old to meet their nutritional needs.

² Must serve all three components for a reimbursable meal. Offer versus serve is an option for only adult and at-risk afterschool participants.

³ Must be unflavored whole milk for children age one. Must be unflavored low-fat (1 percent fat or less) or unflavored fat-free (skim) milk for children two through five years old. Must be low-fat (1 percent fat or less) or fat-free (skim) milk for children six years old and older and adults, and may be unflavored or flavored from July 1, 2018 through June 30, 2019 (school year 2018-2019). For adult participants, 6 ounces (weight) or ¾ cup (volume) of yogurt may be used to meet the equivalent of 8 ounces of fluid milk once per day when yogurt is not served as a meat alternate in the same meal.

⁴ Pasteurized full-strength juice may only be used to meet the vegetable or fruit requirement at one meal, including snack, per day.

⁵ At least one serving per day, across all eating occasions, must be whole grain-rich. Grain-based desserts do not count towards meeting the grains requirement.

⁶ Meat and meat alternates may be used to meet the entire grains requirement a maximum of three times a week. One ounce of meat and meat alternates is equal to one ounce equivalent of grains.

⁷ Beginning October 1, 2019, ounce equivalents are used to determine the quantity of creditable grains.

⁸ Breakfast cereals must contain no more than 6 grams of sugar per dry ounce (no more than 21.2 grams sucrose and other sugars per 100 grams of dry cereal).

⁹ Beginning October 1, 2019, the minimum serving size specified in this section for ready-to-eat breakfast cereals must be served. Until October 1, 2019, the minimum serving size for any type of ready-to-eat breakfast cereals is ¼ cup for children ages 1-2; 1/3 cup for children ages 3-5; ¾ cup for children ages 6-12 and ages 13-18; and 1½ cups for adults.

(2) * * *

LUNCH AND SUPPER MEAL PATTERN FOR CHILDREN AND ADULTS

	Ages 1-2	Ages 3-5	Ages 6-12	Ages 13-18 ¹ (at-risk afterschool programs and emergency shelters)	Adult
Food Components and Food Items ²	Minimum Quantities				
Fluid milk ³	4 fl oz	6 fl oz	8 fl oz	8 fl oz	8 fl oz ⁴
Meat/meat alternates Edible portion as served:					
Lean meat, poultry, or fish	1 ounce	1½ ounces	2 ounces	2 ounces	2 ounces
Tofu, soy products, or alternate protein products ⁵	1 ounce	1½ ounces	2 ounces	2 ounces	2 ounces
Cheese	1 ounce	1½ ounces	2 ounces	2 ounces	2 ounces
Large egg	½	¾	1	1	1
Cooked dry beans or peas	¼ cup	⅜ cup	½ cup	½ cup	½ cup
Peanut butter or soy nut butter or other nut or seed butters	2 Tbsp	3 Tbsp	4 Tbsp	4 Tbsp	4 Tbsp
Yogurt, plain or flavored unsweetened or sweetened ⁶	4 ounces or ½ cup	6 ounces or ¾ cup	8 ounces or 1 cup	8 ounces or 1 cup	8 ounces or 1 cup
The following may be used to meet no more than 50 percent of the requirement: Peanuts, soy nuts, tree nuts, or seeds, as listed in program guidance, or an equivalent quantity of any combination of the above meat/meat alternates (1 ounce of nuts/seeds = 1 ounce of cooked lean meat, poultry or fish)	½ ounce = 50%	¾ ounce = 50%	1 ounce = 50%	1 ounce = 50%	1 ounce = 50%
Vegetables ⁷	⅛ cup	¼ cup	½ cup	½ cup	½ cup
Fruits ^{7,8}	⅛ cup	¼ cup	¼ cup	¼ cup	½ cup
Grains (oz eq) ^{9,10}					
Whole grain-rich or enriched bread	½ slice	½ slice	1 slice	1 slice	2 slices
Whole grain-rich or enriched bread product, such as biscuit, roll, muffin	½ serving	½ serving	1 serving	1 serving	2 servings
Whole grain-rich, enriched or fortified cooked breakfast cereal ¹¹ , cereal grain, and/or pasta	¼ cup	¼ cup	½ cup	½ cup	1 cup

¹ Larger portion sizes than specified may need to be served to children 13 through 18 years old to meet their nutritional needs.

² Must serve all five components for a reimbursable meal. Offer versus serve is an option for only adult and at-risk afterschool participants.

³ Must be unflavored whole milk for children age one. Must be unflavored low-fat (1 percent fat or less) or unflavored fat-free (skim) milk for children two through five years old. Must be low-fat (1 percent fat or less) or fat-free (skim) milk for children six years old and older and adults, and may be unflavored or flavored from July 1, 2018 through June 30, 2019 (school year 2018-2019). For adult participants, 6 ounces (weight) or $\frac{3}{4}$ cup (volume) of yogurt may be used to meet the equivalent of 8 ounces of fluid milk once per day when yogurt is not served as a meat alternate in the same meal.

⁴ A serving of fluid milk is optional for suppers served to adult participants.

⁵ Alternate protein products must meet the requirements in appendix A to part 226 of this chapter.

⁶ Yogurt must contain no more than 23 grams of total sugars per 6 ounces.

⁷ Pasteurized full-strength juice may only be used to meet the vegetable or fruit requirement at one meal, including snack, per day.

⁸ A vegetable may be used to meet the entire fruit requirement. When two vegetables are served at lunch or supper, two different kinds of vegetables must be served.

⁹ At least one serving per day, across all eating occasions, must be whole grain-rich. Grain-based desserts do not count towards the grains requirement.

¹⁰ Beginning October 1, 2019, ounce equivalents are used to determine the quantity of the creditable grain.

¹¹ Breakfast cereals must contain no more than 6 grams of sugar per dry ounce (no more than 21.2 grams sucrose and other sugars per 100 grams of dry cereal).

SNACK MEAL PATTERN FOR CHILDREN AND ADULTS

	Ages 1-2	Ages 3-5	Ages 6-12	Ages 13-18 ¹ (at-risk afterschool programs and emergency shelters)	Adult
Food Components and Food Items ²	Minimum Quantities				
Fluid milk ³	4 fl oz	4 fl oz	8 fl oz	8 fl oz	8 fl oz
Meats/meat alternates Edible portion as served ²					
Lean meat, poultry, or fish	½ ounce	½ ounce	1 ounce	1 ounce	1 ounce
Tofu, soy products, or alternate protein products ⁴	½ ounce	½ ounce	1 ounce	1 ounce	1 ounce
Cheese	½ ounce	½ ounce	1 ounce	1 ounce	1 ounce
Large egg	½	½	½	½	½
Cooked dry beans or peas	⅛ cup	⅛ cup	¼ cup	¼ cup	¼ cup
Peanut butter or soy nut butter or other nut or seed butters	1 Tbsp	1 Tbsp	2 Tbsp	2 Tbsp	2 Tbsp
Yogurt, plain or flavored unsweetened or sweetened ⁵	2 ounces or ¼ cup	2 ounces or ¼ cup	4 ounces or ½ cup	4 ounces or ½ cup	4 ounces or ½ cup
Peanuts, soy nuts, tree nuts, or seeds	½ ounce	½ ounce	1 ounce	1 ounce	1 ounce
Vegetables ⁶	½ cup	½ cup	¾ cup	¾ cup	½ cup
Fruits ⁶	½ cup	½ cup	¾ cup	¾ cup	½ cup
Grains (oz eq) ^{7,8}					
Whole grain-rich or enriched bread	½ slice	½ slice	1 slice	1 slice	1 slice
Whole grain-rich or enriched bread product, such as biscuit, roll, muffin	½ serving	½ serving	1 serving	1 serving	1 serving
Whole grain-rich, enriched or fortified cooked breakfast cereal ⁹ , cereal grain, and/or pasta	¼ cup	¼ cup	½ cup	½ cup	½ cup
Whole grain-rich, enriched or fortified ready-to-eat breakfast cereal (dry, cold) ^{9,10}					
Flakes or rounds	½ cup	½ cup	1 cup	1 cup	1 cup
Puffed cereal	¾ cup	¾ cup	1 ¼ cup	1 ¼ cups	1 ¼ cups
Granola	⅛ cup	⅛ cup	¼ cup	¼ cup	¼ cup

¹ Larger portion sizes than specified may need to be served to children 13 through 18 years old to meet their nutritional needs.

² Select two of the five components for a reimbursable snack. Only one of the two components may be a beverage.

³ Must be unflavored whole milk for children age one. Must be unflavored low-fat (1 percent fat or less) or unflavored fat-free (skim) milk for children two through five years old. Must be low-

fat (1 percent fat or less) or fat-free (skim) milk for children six years old and older and adults, and may be unflavored or flavored from July 1, 2018 through June 30, 2019 (school year 2018-2019). For adult participants, 6 ounces (weight) or $\frac{3}{4}$ cup (volume) of yogurt may be used to meet the equivalent of 8 ounces of fluid milk once per day when yogurt is not served as a meat alternate in the same meal.

⁴ Alternate protein products must meet the requirements in appendix A to part 226 of this chapter.

⁵ Yogurt must contain no more than 23 grams of total sugars per 6 ounces.

⁶ Pasteurized full-strength juice may only be used to meet the vegetable or fruit requirement at one meal, including snack, per day.

⁷ At least one serving per day, across all eating occasions, must be whole grain-rich. Grain-based desserts do not count towards meeting the grains requirement.

⁸ Beginning October 1, 2019, ounce equivalents are used to determine the quantity of creditable grains.

⁹ Breakfast cereals must contain no more than 6 grams of sugar per dry ounce (no more than 21.2 grams sucrose and other sugars per 100 grams of dry cereal).

¹⁰ Beginning October 1, 2019, the minimum serving sizes specified in this section for ready-to-eat breakfast cereals must be served. Until October 1, 2019, the minimum serving size for any type of ready-to-eat breakfast cereals is $\frac{1}{4}$ cup for children ages 1-2; $\frac{1}{3}$ cup for children ages 3-5; $\frac{3}{4}$ cup for children ages 6-12, children ages 13-18, and adults.

* * * * *

Dated: November 22, 2017.

Brandon Lipps,*Acting Deputy Under Secretary, Food, Nutrition, and Consumer Services.*

[FR Doc. 2017-25799 Filed 11-29-17; 8:45 am]

BILLING CODE 3410-30-C

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39****[Docket No. FAA-2017-1044; Product Identifier 2017-NE-38-AD; Amendment 39-19110; AD 2017-24-06]**

RIN 2120-AA64

Airworthiness Directives; CFM International S.A. Turbofan Engines**AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain CFM International S.A. (CFM) LEAP-1A turbofan engines. This AD requires removal, inspection, rework, and re-identification of the high-pressure turbine (HPT) stage 2 disk, part number (P/N) 2466M52G03. This AD was prompted by a quality escape at the manufacturer that resulted in cracks appearing during forging of the HPT stage 2 disks. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective December 15, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 15, 2017.

We must receive comments on this AD by January 16, 2018.

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:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE.,

Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this final rule, contact CFM International Inc., Aviation Operations Center, 1 Neumann Way, M/D Room 285, Cincinnati, OH 45125; phone: 877-432-3272; fax: 877-432-3329; email: aviation.fleetsupport@ge.com. You may view this service information at the FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA. For information on the availability of this material at the FAA, call 781-238-7125.

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-2017-1044; 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 final rule, 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:

Christopher McGuire, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781-238-7120; fax: 781-238-7199; email: chris.mcguire@faa.gov.

SUPPLEMENTARY INFORMATION:**Discussion**

We learned from CFM that there was a quality escape at the manufacturer that resulted in cracks appearing during forging of CFM LEAP-1A HPT stage 2 disks. This condition, if not corrected, could result in failure of the HPT stage 2 disk, uncontained release of the disk, damage to the engine, and damage to the airplane. We are issuing this AD to correct the unsafe condition on these products.

Related Service Information Under 14 CFR Part 51

We reviewed CFM Service Bulletin (SB) LEAP-1A-72-00-0167-01A-930A-D, Issue 001, dated September 28, 2017. The SB describes procedures for removal, inspection, rework, and re-identification of HPT stage 2 disk, P/N 2466M52G03. 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 issuing 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.

AD Requirements

This AD requires removal, inspection, rework, and re-identification of the HPT stage 2 disk, P/N 2466M52G03.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because the compliance time for the required action is shorter than the time necessary for the public to comment and for us to publish the final rule. Therefore, we find good cause that notice and opportunity for prior public comment are impracticable. In addition, for the reason stated above, we find that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, we invite you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA 2017-1044 and Product Identifier 2017-NE-38-AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this final rule. We will consider all comments received by the closing date and may amend this final rule 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 final rule.

Costs of Compliance

We estimate that this AD affects 7 engines installed on airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Remove, inspect, rework, and re-identify HPT stage 2 disk.	560 work-hours × \$85 per hour = \$47,600	\$0	\$47,600	\$333,200

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.

This AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to engines, propellers, and associated appliances to the Manager, Engine and Propeller Standards Branch, Policy and Innovation Division.

Regulatory Findings

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

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

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Is not a “significant rule” under 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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2017–24–06 CFM International S.A.:
Amendment 39–19110; Docket No. FAA–2017–1044; Product Identifier 2017–NE–38–AD.

(a) Effective Date

This AD is effective December 15, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to CFM International S.A. (CFM) LEAP–1A23, LEAP–1A24, LEAP–1A24E1, LEAP–1A26, LEAP–1A26E1, LEAP–1A30, LEAP–1A32, LEAP–1A33, LEAP–1A33B2 and LEAP–1A35A engines with a high-pressure turbine (HPT) stage 2 disk, with a part number (P/N) 2466M52G03 and serial number (S/N) listed in Table 1 of CFM Service Bulletin (SB) LEAP–1A SB 72–0167–01A–930A–D, Issue 001, dated September 28, 2017, installed.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 7250, Turbine Section.

(e) Unsafe Condition

This AD was prompted by a quality escape at the manufacturer that resulted in cracks appearing during forging of the HPT stage 2 disks. We are issuing this AD to prevent failure of the HPT stage 2 disks. The unsafe condition, if not corrected, could result in uncontained release of the HPT stage 2 disks,

damage to the engine, and damage to the airplane.

(f) Compliance

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

(g) Required Actions

Prior to accumulating 1,200 engine cycles since new after the effective date of this AD, remove, inspect, rework, and re-identify the HPT stage 2 disk, P/N 2466M52G03, in accordance with the Accomplishment Instructions, paragraph 5.B.(2), in CFM SB LEAP–1A–72–00–0167–01A–930A–D, Issue 001, dated September 28, 2017.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, ECO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (i) of this AD. You may email your request to: ANE-AD-AMOC@faa.gov.

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

(i) Related Information

For more information about this AD, contact Chris McGuire, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7120; fax: 781–238–7199; email: chris.mcguire@faa.gov.

(j) Material Incorporated by Reference

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

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

(i) CFM Service Bulletin LEAP–1A–72–00–0167–01A–930A–D, Issue 001, dated September 28, 2017.

(ii) Reserved.

(3) For CFM service information identified in this AD, contact CFM International Inc., Aviation Operations Center, 1 Neumann Way, M/D Room 285, Cincinnati, OH 45125; phone: 877–432–3272; fax: 877–432–3329; email: aviation.fleetssupport@ge.com.

(4) You may view this service information at FAA, Engine and Propeller Standards

Branch, 1200 District Avenue, Burlington, MA. For information on the availability of this material at the FAA, call 781-238-7125.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Burlington, Massachusetts, on November 21, 2017.

Robert J. Ganley,

Manager, Engine and Propeller Standards Branch, Aircraft Certification Service.

[FR Doc. 2017-25719 Filed 11-29-17; 8:45 am]

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LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 382

[Docket No. 2006-1 CRB DSTRA (2007-2012)]

Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services

AGENCY: Copyright Royalty Board (CRB), Library of Congress.

ACTION: Ruling on regulatory interpretation.

SUMMARY: The Copyright Royalty Judges publish their ruling on regulatory interpretation that was referred to them by the United States District Court for the District Of Columbia. The regulation at issue is about gross revenue exclusions that a satellite digital audio radio service may use when calculating royalty payments owed to SoundExchange, a collective for copyright owners, for digital transmissions of sound recordings pursuant to a statutory license. The Judges find that Sirius XM properly interpreted the regulation to apply to pre-'72 sound recordings and that it improperly excluded certain revenues from its Gross Revenues royalty base.

DATES: November 30, 2017.

ADDRESSES: *Docket:* For access to the docket to read background documents, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at <https://app.crb.gov/> and search for docket number 2006-1 CRB DSTRA (2007-2012). For documents not yet uploaded to eCRB (because it is a new system), go to the agency Web site at <https://www.crb.gov/> or contact the CRB Program Specialist.

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Specialist, by telephone at (202) 707-7658 or email at crb@loc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

SoundExchange, Inc. (SoundExchange) is the Collective designated by the Copyright Royalty Judges (Judges) to receive, administer, and distribute royalty funds due from entities making digital transmissions of sound recordings under the statutory licenses described at 17 U.S.C. 114.¹ Sirius XM Radio, Inc. (Sirius XM)² is a licensee, transmitting sound recordings digitally over its satellite radio network.³ In 2007, after considering oral and written evidence and arguments of counsel, the Copyright Royalty Judges (Judges) determined that Sirius XM's royalty obligations for its satellite radio business would be determined as a percentage of Gross Revenues. See *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services (SDARS I)*, Docket No. 2006-1 CRB DSTRA (Determination), 73 FR 4080, 4084 (Jan. 24, 2008). Gross Revenues are defined in the regulations the Judges adopted as part of the Determination and codified as 37 CFR 382.11 (2008).

A. Procedural Setting

In 2013, SoundExchange filed a complaint in the United States District Court for the District of Columbia (District Court) against Sirius XM seeking additional royalty payments for the period 2007-2012. See *SoundExchange, Inc. v. Sirius XM Radio, Inc.* 65 F. Supp. 3d 150 (D.D.C. 2014) (DC Action). On January 10, 2017, the Judges issued a Ruling (Initial Ruling) on two questions referred by the District Court under the doctrine of primary jurisdiction. See *id.* at 157. The issues referred by the District Court arose from the CRB's 2008 regulations. The District Court Judge concluded that in the promulgated regulations "the gross revenue exclusions are ambiguous." *Id.* at 155.

¹ The Judges determine rates and terms for the section 112 license (ephemeral recordings to facilitate digital transmissions of sound recordings) concurrently with their determination of rates and terms for the section 114 license. The section 112 license is not at issue here.

² Sirius XM Radio, Inc. is the entity resulting from the merger of Sirius Satellite Radio Inc. and XM Satellite Radio Inc.

³ Section 114 authorizes and describes licenses available to several transmitting and streaming media. The standards the Judges are to apply in setting rates for the various section 114 licenses are detailed in 17 U.S.C. 114 and 801.

After seeking an opinion from the Register of Copyrights (Register) under 17 U.S.C. 802(f)(1)(B) regarding their authority to render the interpretation required by the District Court referral, the Judges proceeded with the analysis that resulted in the Initial Ruling. The Judges transmitted the Initial Ruling to the Register for the legal review required by the Copyright Act. See 17 U.S.C. 802(f)(1)(D).

In March 2017, upon further reflection, the Judges withdrew the Initial Ruling from the parties and from the Register's statutorily required review for legal error. See *Order Withdrawing Ruling and Soliciting Briefing on Unresolved Issues* (Mar. 9, 2017) at 2. The Judges solicited briefs from the parties to address specifically the breadth of the District Court referral. The Judges sought memoranda of law from the parties to the District Court controversy to address:

(1) Whether section (V)(C)(1)(b) of the Initial Ruling (at pp. 14-16 therein) constituted an *interpretation* of the 2008 regulations or an *application* of the Judges' interpretation of those regulations;

(2) Whether the District Court referral to the Judges under the doctrine of primary jurisdiction included not only a referral of questions of *interpretation* of the 2008 regulations, but also a referral of questions relating to the *application* of the 2008 regulations;

(3) Whether, regardless of the District Court's intent, the Judges have jurisdiction under the Copyright Act to *apply* their *interpretations* of the regulations to the facts in the record and reach binding conclusions regarding the parties' compliance with the interpreted regulations;

(4) Whether question (3) poses a material question of substantive law under the Copyright Act that the Judges may refer to the Register of Copyrights under 17 U.S.C. 802(f)(1)(A) or a novel material question of substantive law under the Copyright Act that the Judges must refer to the Register of Copyrights under 17 U.S.C. 802(f)(1)(B); and

(5) Whether, under the doctrine of primary jurisdiction, the Judges may recommend to the District Court *applications* of their *interpretations* of the regulations to the facts in the record before the District Court regarding the parties' compliance with the interpreted regulations.

B. Parties' Analyses

In its briefing, SoundExchange asserted that (1) the language the Judges are reconsidering constituted an allowable interpretation of the CRB regulations; (2) even if the subject

portions of the Initial Ruling conducted or required an application of the Judges' interpretation, that application was responsive to the District Court's inquiries in the referral; (3) the Judges have jurisdiction to interpret and apply their regulations; (4) this aspect of the Judges' authority need not be referred to the Register as a material or novel material question of law requiring the Register's input; and (5) the Judges may not make nonbinding recommendations to the District Court regarding application of the CRB regulations. See SoundExchange's Brief in Response to the Judges' Order Dated March 9, 2017 (*SoundExchange Initial Brief*) at 1–2. SoundExchange took the position that the Judges' Initial Ruling was appropriately broad in offering interpretation of the subject regulation. In fact, SoundExchange asserted that it would be inappropriate to distinguish between interpretation and application of the regulations in this context. *Id.* at 5–7. SoundExchange asserted that the Judges' conclusions should be binding on the parties, thus its opposition to the Judges making nonbinding recommendations to the District Court. *Id.* at 12–14.

Sirius XM countered that (1) the section about which the Judges inquired constitutes both an interpretation and application of the CRB regulations, that “goes beyond the limited interpretive guidance appropriate for a primary jurisdiction referral;” (2) the District Court's referral was limited to a request for regulatory interpretation; (3) the Judges' continuing jurisdiction to interpret their regulations does not extend to a detailed review of the facts of the parties' application of the regulation; (4) the question regarding the limits of the Judges' jurisdiction is a material question the Judges may refer to the Register, but not a novel question that the Judges must refer to the Register; and (5) the Judges are not authorized to make findings or recommendations regarding specific rulings regarding a party's compliance with the regulations. See Sirius XM Radio Inc.'s Memorandum of Law . . . on Unresolved Issues (*Sirius XM Initial Brief*) at 1–2. Sirius XM reinforced its position by noting that, in presenting the referred issues for the Judges' ruling, the parties engaged in limited discovery. Regardless of resolution of the interpretation vs. application question,⁴

⁴ Sirius XM did not agree with SoundExchange that a distinction between interpretation and application would be inappropriate, but did acknowledge that the distinction between those two acts “is not a bright-line rule that separates what the Judges have the authority to do from what they do not.” *Sirius XM Initial Brief* at 7, footnote omitted.

Sirius XM argued that the limits on discovery left the Judges insufficiently informed to apply their interpretation of the subject regulation in this instance. See *id.* at 6.

C. Judges' Conclusions

In its Reply Brief, Sirius XM summarized the points at which it perceived agreement between the parties regarding the Initial Ruling. See Sirius XM Radio Inc.'s Reply Memorandum of Law . . . on Unresolved Issues (*Sirius XM Reply Brief*) at 1–2. The Judges agree with Sirius XM's statement of the parties' points of agreement. The Judges disagree with SoundExchange's argument that it is inappropriate to draw a distinction between interpretation and application in this circumstance. The distinction might not always be a bright-line, but it is not a distinction totally without difference in the present circumstance.

After consideration of the arguments of both parties, the Judges conclude: (1) Section V(C)(1)(b) of the Initial Ruling applies the Judges' interpretive conclusions to facts the parties presented in their merits presentations; (2) the District Court referral was ambiguous in the task referred to the Judges; (3) regardless of the scope or intended scope of the District Court's referral, in this particular circumstance, the Judges' application of their interpretations of the regulations was inappropriate; (4) the question of interpretation vs application in this instance is not a material or novel question of law referable to the Register; and (5) the application of the Judges' interpretations is more appropriately carried out by the District Court, so it is unnecessary for the Judges to recommend proposed findings or conclusions.

1. Application of the Regulatory Interpretation in the Initial Ruling

In the Initial Ruling, the Judges concluded that GAAP standards did not offer guidance for interpreting the subject regulations. The Judges concluded, therefore, that a standard of reasonableness should prevail. To the extent the Judges observed what actions might meet the reasonableness standard, they were appropriately offering interpretation relating to the regulations. Going beyond that guidance, the Judges' ruling was an application of the regulations to the present dispute pending in the District Court. Application of the Judges' interpretation is better done by the District Court, after a review of the complete factual record.

2. Scope of District Court Referral

The District Court referred this issue of regulatory interpretation to the Judges under the doctrine of primary jurisdiction. The doctrine provides that a court may defer to an administrative agency when, based on its special competency, the agency “is best suited to make the initial decision on the issues in dispute.” See *SoundExchange*, 65 F. Supp. 3d at 154 (citations omitted). Whatever the interpretation of the language of the District Court's Memorandum Opinion,⁵ the District Court could not have referred to the Judges resolution of the ultimate issues of fact presented by the SoundExchange litigation. The District Court is the forum in which resolution of the factual dispute lies. That factual dispute requires full discovery. The issues presented to the CRB were not the subject of full discovery nor were the factual issues fully developed, briefed, or argued for the Judges' determination. Notwithstanding language or rhetoric regarding the application of the CRB regulations to the facts of the District Court matter, the narrow question referable to the Judges was one of interpretation.⁶

3. Regulatory or Inherent Authority To Apply Interpretation to These Facts

Sirius XM argued to the District Court that the CRB bore or should bear the task of both interpretation and application of the 2008 regulations. See, e.g., *SoundExchange*, 65 F.Supp.3d at 154 (both disputes best suited to CRB resolution as they involve interpreting and applying regulations). In response to the Judges' request for additional briefing after withdrawing the Initial Ruling, Sirius XM argued forcefully the other side of the coin. See *Sirius XM Initial Brief* at 11–14. SoundExchange,

⁵ In seeking referral to the CRB, Sirius XM argued that the primary disputes involved both interpreting and applying the CRB regulations. See 65 F. Supp. 3d at 154. The District Court concluded, and the Register accepted, that “the meaning of the relevant [regulations], and the application of those provisions to the particular fact pattern presented here, is [sic] uncertain.” See Memorandum Opinion on a Novel Question of Law at 6, citation omitted. The District Court's referral posed two questions: (1) Whether Sirius XM's attribution of revenues to pre-'72 recordings and the exclusion of those attributed revenues from the royalty base were permissible and (2) whether Sirius XM's Premier service was excludable from Gross Revenues for purposes of calculating the royalty. See 65 F. Supp. 3d at 154–55.

⁶ The District Court “agreed with Sirius XM” that the disputes at issue involve “interpreting and applying” the CRB's regulations. *SoundExchange*, 65 F. Supp. 3d at 154. In framing the issues referred, however, the District Court did not ask the CRB to complete a factual analysis. See *id.* at 154–55 (issues are revenue exclusion for pre-'72 recordings and for Premier package upcharges).

which initially challenged the Judges' authority to interpret their regulations, argued in their reply papers that the Judges have the authority to both interpret and apply their regulations. *SoundExchange Initial Brief* at 9 (Register's confirmation of continuing jurisdiction to resolve ambiguity equivalent to conclusion of jurisdiction to apply interpretation).

The Judges accept the scope of their "continuing jurisdiction" under 17 U.S.C. 803(c)(4) as described by the Register. The Judges do not agree with SoundExchange, however, that the continuing jurisdiction to interpret, or their ability to provide "interpretive guidance," somehow endows them with jurisdiction to resolve factual disputes relating to application of those regulations. As Sirius XM represented, the parties agree that the Judges "lack enforcement jurisdiction and, therefore, can neither order compliance nor fix penalties." Sirius XM Reply Memorandum . . . on Unresolved Issues (*Sirius XM Reply*) at 2. Lacking those enforcement and remedial powers necessarily leads to the conclusion that the Judges' jurisdiction does not extend to application and factual dispute resolution regarding application of the regulations.

4. No Material or Novel Question of Substantive Law Remains

The parties agree that the question of the Judges' jurisdiction to apply their regulatory interpretations is not a novel question requiring referral to the Register. *Id.* The Register reviewed and analyzed the question of the Judges' continuing jurisdiction in her April 2015 opinion.

5. The Judges May Not Make Recommendations to the District Court

The parties agree, as do the Judges, that nothing in the doctrine of primary jurisdiction or in the Judges' authority would suggest that the Judges could or should make recommendations to the District Court regarding its determination of the factual questions properly before the Court.

In light of the foregoing conclusions, the Judges hereby reissue the Initial Ruling as an Amended Ruling, the text of which follows.

II. Introduction and Summary of Amended Decision

The issues before the Judges arose in the context of SoundExchange's action against Sirius XM in District Court. SoundExchange sued to recover additional sound recording royalties from Sirius XM for licenses used during the period 2007 to 2012. The alleged

underpayment occurred, according to SoundExchange, because Sirius XM improperly excluded two categories of revenue when calculating "Gross Revenues," before it determined the royalties due to SoundExchange. 65 F. Supp. 3d at 153. Because the royalties in *SDARS I* were set as a percentage of Sirius XM's "Gross Revenues" (rather than on a per-performance basis), exclusions of revenue by Sirius XM had the effect of reducing the royalties paid to SoundExchange. *See* 73 FR at 4084. Sirius XM controverted the SoundExchange complaint and moved the District Court to stay or dismiss the DC Action in favor of a resolution by the Judges. In August 2014, the District Court stayed the DC Action and referred this matter to the Judges citing the doctrine of primary jurisdiction.

In the DC Action, SoundExchange alleged that Sirius XM had misinterpreted and misapplied the Judges' 2008 regulations regarding exclusions from Gross Revenues for (1) sound recordings made before 1972 (and therefore exempt from the federal statutory license) and (2) a portion of subscription revenues that Sirius XM allocated to "premier" channels with primarily talk content that use only incidental performances of sound recordings. With regard to these allegations, the District Court referred two questions to the Judges for resolution. 65 F. Supp. 3d at 154–55. Specifically, the District Court described two "open" questions for the Judges: (1) Whether Sirius XM improperly applied the Judges' regulations in calculating the amount of royalties it paid to SoundExchange "such that it owes SoundExchange additional [royalties] for times past" and (2) whether the Judges consider the Sirius XM Premier channels to be "offered for a separate charge" permitting Sirius XM to exclude Premier subscription revenues from Gross Revenues. *Id.* at 156.

In response to the District Court Judge's Memorandum Opinion (*Referral Opinion*), and on motion of SoundExchange, the Judges reopened the *SDARS I* proceeding. *Order Reopening Proceeding for Limited Purpose* (Dec. 9, 2014). In their Order, the Judges requested briefing by the participants regarding the existence and scope of the Judges' jurisdiction and authority to entertain the issues raised in the DC Action. On March 9, 2015, after considering the participants' briefs, the Judges referred three legal questions to the Register of Copyrights (Register) pursuant to 17 U.S.C. 802(f)(1)(B):

(1) Do the Judges have jurisdiction under title 17, or authority otherwise, to

interpret the regulations adopted in the captioned proceeding?

(2) If the Judges have authority to interpret regulations adopted in the course of a rate determination, is that authority time-limited?

(3) Would the answer regarding the Judges' jurisdiction or authority be different if the terms at issue regulated a current, as opposed to a lapsed, rate period?

The Register opined that the Judges have jurisdiction under 17 U.S.C. 803(c)(4) to clarify the regulations adopted in *SDARS I*. The Register added that the Judges' jurisdiction is not time-limited and the Judges do not lose their jurisdiction and authority when the issues relate to a lapsed rate period. *Register's Memorandum Opinion on a Novel Question of Law* at 4–5 (Apr. 8, 2015) (*Register's Opinion*).⁷ Based on the language of the *Referral Opinion* and the *Register's Opinion*, the Judges hereby address the issues presented to them in the *Referral Opinion*.⁸

To address the revenue-exclusion issues, the Judges have engaged in a thorough review of the *SDARS I* record. Additionally, the Judges ordered the participants to supplement the extant record by engaging in discovery, exchanging expert reports and filing Opening (Initial) and Rebuttal Submissions. *See Case Scheduling Order* (Oct. 6, 2015). The participants appended to their Initial and Rebuttal Submissions discovery and expert materials on which they rely.

As detailed in this Ruling, the Judges conclude that Generally Accepted Accounting Principles (GAAP) apply broadly to the definition of Gross Revenues in 37 CFR 382.11 (2008). GAAP does not, however, address specifically the two revenue exclusions at issue in this referral; consequently, the Judges must look beyond the specific words of the regulation to answer the questions posed by the District Court. For the reasons explicated in this Ruling, the Judges conclude that a reasonableness standard

⁷ The Register declined to opine as to whether the Gross Revenues definitional provisions at issue constituted a regulatory "term," as to which, by statute, the Judges may issue a "clarification." According to the Register, the Judges' separate statutory power to "correct any technical . . . errors" provides a sufficient basis for the Judges to issue an Order clarifying a prior Determination. *Id.* at n.3.

⁸ The Copyright Act and the Judges' regulations do not prescribe a procedure for administering a District Court referral pursuant to the primary jurisdiction doctrine. Accordingly, the Judges have established the procedures to address this referral pursuant to their inherent jurisdiction and pursuant to their *general* authority under 17 U.S.C. 803(c) "to make any necessary procedural or evidentiary rulings in any proceedings under this chapter."

must apply to both inclusions and exclusions from Gross Revenues. Based on the following reasoning, the Judges conclude that Sirius XM employed different methodologies with regard to excluding revenues attributable to pre-1972 sound recordings. A determination of reasonableness of either methodology, or both, will require closer examination.⁹ Further, because Sirius XM did not offer the channels included for subscribers to the Premier package for a separate charge, it could not reasonably exclude from Gross Revenues revenue attributable to the Premier subscription price differential.

III. Procedural History

On January 9, 2006, the Judges commenced the original *SDARS I* proceeding to determine “reasonable rates and terms of royalty payments for . . . transmissions by preexisting satellite digital audio radio services [SDARS]” 17 U.S.C. 114(f)(1)(A).¹⁰ See *Notice Announcing Commencement of Proceeding with Request for Petitions to Participate*, 71 FR 1455 (Jan. 9, 2006). Three parties: SoundExchange, on behalf of the licensors, and two licensees, Sirius and XM (Sirius XM’s pre-merger predecessors) participated in the rate determination hearing. *Id.*¹¹

Following a twenty-six day hearing,¹² and the participants’ submission of *Proposed Findings of Fact (PFF)* and *Conclusions of Law (COL)* and replies thereto, the Judges issued their *Initial Determination* on December 3, 2007. See *SDARS I*, 73 FR at 4080, 4081 (Jan. 24, 2008) (*SDARS I Determination*). Thereafter, SoundExchange filed a Motion for Rehearing. Upon the Judges’ request, Sirius XM responded to the Motion for Rehearing. *Id.* On January 8, 2008, the Judges issued an Order Denying Motion for Rehearing (*Rehearing Order*).¹³

⁹ Application of the methodologies relating to pre-’72 recordings is a fact determination for the District Court and is not before the Judges.

¹⁰ The proceeding was originally commenced also to establish rates and terms for preexisting subscription services, pursuant to the same statutory section. The participants in that aspect of the hearing settled prior to the hearing. *SDARS I*, 73 FR at 4081.

¹¹ On July 29, 2008, Sirius and XM completed a merger, and the successor-by-merger was named Sirius XM Radio Inc. <http://investor.siriusxm.com/investor-overview/press-releases/press-release-details/2008/SIRIUS-and-XM-Complete-Merger/default.aspx> (last visited January 3, 2017).

¹² The oral testimony comprised 7,700 pages of transcripts, more than 230 exhibits were admitted and the docket contained over 400 pleadings, motions and orders. *Id.*

¹³ Although the Judges styled their January 8, 2008, Rehearing Order as one “denying” the Motion for Rehearing, the Judges expressly clarified and

SoundExchange appealed the Judges’ *SDARS I Determination* and the U.S. Court of Appeals for the D.C. Circuit affirmed all aspects of the Judges’ *SDARS I Determination* relating to the rates and terms established for the section 114 licensing of sound recordings. *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220 (D.C. Cir. 2009).¹⁴

IV. The Parties’ Dispute

SoundExchange commenced the *D.C. Action* in 2013, seeking additional royalties from Sirius XM for the period 2007–2012. SoundExchange alleged that, in order to reduce its royalty payments during that period Sirius XM improperly

(1) Reduced Gross Revenues by an amount it estimated was attributable to pre-1972 sound recordings;¹⁵ [and]

(2) excluded from Gross Revenues the revenue received from the price difference between its standard [Basic] package and its premium [Premier] package, the latter of which includes additional talk channels, but no additional music channels. . . .¹⁶

65 F. Supp. 3d at 153 (citations omitted); see also *Sirius XM’s Initial Submission* at 2.¹⁷ SoundExchange contends that the actions by Sirius XM resulted in significant royalty shortfalls.

During the *SDARS I* rate period, the regulations stated “Gross Revenues shall mean revenue recognized by the Licensee in accordance with GAAP from the operation of an SDARS, and shall be comprised of . . . [s]ubscription revenue recognized by Licensee directly from residential U.S. subscribers for Licensee’s SDARS” 37 CFR 382.11 (2008) (definition of *Gross Revenues*). The regulations permitted a number of exclusions from Gross Revenues, two of which are relevant to the present dispute, namely, those

amended a portion of their Initial Determination in a manner that bears on the present proceeding.

¹⁴ The D.C. Circuit vacated and remanded the Judges’ *SDARS I Determination* for reconsideration of an issue unrelated to the section 114 issues presently before the Judges. 571 F.3d at 1225–26.

¹⁵ Pursuant to 17 U.S.C. 301(c), “no sound recording fixed before February 15, 1972, shall be subject to copyright under this title” For ease of expression, commercial actors, jurists and attorneys commonly describe the time before February 15, 1972 as the “pre-’72” period.

¹⁶ For ease of reference, Sirius XM’s subscription offering that included its base channels is referred to herein as the Basic package, and the offering that bundled the base channels and the additional channels is referred to herein as the Premier package, (regardless of any previous names used by Sirius XM or its predecessors, unless the context requires reference to the names of predecessor subscription offerings).

¹⁷ Other claims made by SoundExchange in the Complaint are not germane to the issues referred to the Judges.

recognized by Licensee (1) for the provision of “[c]hannels, programming, products and/or other services offered for a separate charge where such channels use only incidental performances of sound recordings” and (2) for the provisions of “[c]hannels, programming, products and/or other services for which performance of sound recordings and/or the making of ephemeral recordings is exempt from any license requirement or is separately licensed, including by a statutory license” 37 CFR 382.11(2008).

SoundExchange asserts that the Sirius XM interpretation of the regulation is contrary to the standards of GAAP.¹⁸ SoundExchange focuses on (1) the term “recognized” revenue, (2) the methodology employed by Sirius XM to exclude revenues it attributes to pre-’72 sound recordings, and (3) Sirius XM’s exclusion from Gross Revenues of the subscription revenue differential between its Basic package of channels and the Premier package Sirius XM offers for an increased subscription fee.¹⁹ Sirius XM contends the pre-’72 recordings satisfied the requirement in paragraph (3)(vi)(D) of the Gross Revenues definition that, for the revenue exclusion to apply, performances must be “exempt from any license requirement.” According to Sirius XM the exclusion of the “additional charge” (Upcharge) paid for Premier channels satisfied the requirement in paragraph (3)(vi)(B) of the definition that channels be offered for a “separate charge.” *Id.*

V. Issues for the Judges Under the Primary Jurisdiction Referral

In invoking the doctrine of primary jurisdiction, the District Court tasked the Judges with interpreting the Gross Revenues regulation and, to the extent appropriate, providing “interpretive guidance.” The District Court concluded that the “gross revenue exclusions are *ambiguous* and do not, on their face, make clear whether Sirius XM’s approaches were permissible under the regulations.” 65 F. Supp. 3d at 155. The District Court instructed the Judges, in interpreting the Gross Revenues regulation, to utilize their “technical and policy expertise.” *Id.* The District Court specifically noted that the “technical and policy expertise” to which it referred were in the domains

¹⁸ GAAP stands for Generally Accepted Accounting Principles.

¹⁹ SoundExchange does not dispute that the channels added to the basic package to comprise the Premium package are stations that make only incidental use of sound recordings. *SoundExchange Initial Submission* ¶¶ 54–59.

of “copyright law” and “economics.” *Id.* at 155–56.

Based on its application of the principles of primary jurisdiction, the District Court identified two broad questions for the Judges to answer:

(1) Were Sirius XM’s attribution of revenues to performances of pre-’72 recordings and its exclusion of those attributed revenues from the Gross Revenues royalty base permissible under the *SDARS I* regulations?

(2) Were the additional talk channels on Sirius XM’s Premier service “offered for a separate charge,” and therefore excludable from Gross Revenues?

See *id.* at 154–55. The District Court concluded that the Judges have the statutory authority to answer these questions pursuant to their continuing jurisdiction to “issue an amendment to a written determination to correct any technical . . . errors in the determination or to modify the terms, but not the rates, of royalty payments in response to unforeseen circumstances that would frustrate the proper implementation of such determination.” *Id.* at 156 (quoting 17 U.S.C. 803(c)(4)). The Register echoed the District Court’s assessment of the Judges’ task in this referred proceeding, accepting “the district court’s conclusion that both the meaning of the relevant regulatory provisions, and the application of those provisions to the particular fact pattern presented here, are uncertain.” *Register’s Opinion* at 6.

VI. Analysis

To address the issues presented in the *Referral Opinion*, the Judges answer the following specific questions.

(1) Does the Gross Revenues definition require that the revenue exclusions satisfy applicable GAAP?

(2) If so, what GAAP principles, if any, apply to the two exclusions?

A. (3) If no GAAP principles are applicable, what is the standard, if any, that the two exclusions must satisfy?

A. Application of GAAP to Gross Revenues Definition

The parties and their experts disagree regarding the application of the regulatory phrase “recognized in accordance with GAAP.”²⁰ Section 382.11, in paragraph (1) of the definition of “Gross Revenues,” defines “Gross Revenues” as “revenue recognized by the Licensee in accordance with GAAP from the operation of an *SDARS*.”³⁷

²⁰ GAAP is defined in the applicable regulation as “generally accepted accounting principles in effect from time to time in the United States.”³⁷ CFR 382.11. “GAAP refers to the set of standards, conventions, and rules that define accepted accounting practices.” Lys Report ¶ 26.

CFR 382.11, paragraph (1) of the definition of “Gross Revenues.”

SoundExchange argues that GAAP applies in full and equal measure to the regulatory *exclusions* as to the *inclusions* that comprise the definition of “Gross Revenues.” *SoundExchange Memorandum of Law* at 9–10. In support of this point, SoundExchange and its expert, Dr. Thomas Lys, rely on paragraph (3)(vi) of the definition of “Gross Revenues” in § 382.11, which limits the categorical revenue exclusions at issue in this proceeding to “[r]evenues recognized by Licensee. . . .” *Id.*; see also *SoundExchange Initial Submission*, App. Ex. 1 at A.131, (Deposition of Professor Lys) at 129 (Lys Dep.) SoundExchange notes that “GAAP is the only accounting standard mentioned in the definition of “Gross Revenues” and argues that it would be “implausible” to suppose that the Judges “actually meant to incorporate *sub silentio* some other accounting standard elsewhere in the definition . . . or for that matter, that the Judges meant to divorce portions of the definition from any accounting standard at all. . . .” *SoundExchange Memorandum of Law* at 10.

Sirius XM does not disagree with these broad points. Rather, it contends that its treatment of revenue from pre-’72 recordings is fully consistent with GAAP, stating:

Sirius XM’s exclusion of revenue for its transmissions of pre-1972 sound recordings and its separately charged premium non-music channels during the *Satellite I* period was consistent with the plain language and purpose of the regulations. Sirius XM implemented the regulations in a clear and straightforward manner in line with . . . GAAP.

Written Merits Rebuttal Submission of Sirius XM . . . (*Sirius Merits Rebuttal*) at 2.

The Judges find and conclude that the applicable regulations require that Sirius XM’s inclusions and exclusions of revenue in the Gross Revenues definition *must not be inconsistent with GAAP*. The Judges utilize the double negative intentionally, because an issue exists as to whether GAAP in fact provides rules or guidance regarding the method by which the pre-’72 exclusions may be taken. That is, if GAAP does not address a particular issue, then a party’s treatment of that issue cannot be “inconsistent” with GAAP, and, equally so, it would be senseless to consider whether such treatment was “consistent” with GAAP.

Sirius XM makes two arguments regarding the applicability of GAAP to its calculation and exclusions of

revenue. First, Sirius XM asserts that *all* its revenues were recognized pursuant to GAAP. With regard to pre-’72 recordings, Sirius XM’s financial and accounting expert, John W. Wills states “there is no doubt that *all* of its subscription revenue—including that earned for performing pre-1972 recordings—is ‘recognized’ consistent with GAAP” since “the subscriber revenue recognized by Sirius XM on its financial statements includes the entirety of its entertainment and information content delivered during the period at issue.” Expert Report of John W. Wills, at 7 (May 9, 2016) (Wills Report). Mr. Wills employs the same reasoning to reach the same conclusion regarding the Upcharge revenue. See Wills Rebuttal Report at 11.

Based on that 100% recognition argument, Sirius XM contends that it had no obligation, under the regulations or the authority of GAAP, to *separately recognize* the excluded revenue it attributed to pre-’72 recordings or to the Upcharge. See Wills Report at 8 (“[T]here is no requirement in GAAP to record revenue separately for pre-1972 recordings (or any other type of content), and no support for the idea that it is not recognized if *not* separately reported.”); Wills Rebuttal Report at 11 (“GAAP is irrelevant . . . to the further question of how much of Sirius XM’s recognized subscription revenue is attributable to non-music content offered for a separate charge. . . .”).

SoundExchange does not dispute the first point, tacitly acknowledging that all of the subscription revenue—including any revenue that allegedly could be attributable to pre-’72 sound recording performances—was recognized pursuant to GAAP as part of an undifferentiated sum. See, e.g., *SoundExchange Rebuttal Submission* at 10 (“It is . . . irrelevant whether Sirius XM recognized all of its subscription revenue at the most aggregated level. . . .”). However, SoundExchange strongly disputes the second point, *viz.*, Sirius XM’s assertion that the latter need not separately comply with GAAP in quantifying an excludable sub-set of that revenue as attributable to the performance of pre-’72 sound recordings. *Id.* (“The regulation actually provides that excludable revenue must be ‘recognized by Licensee. . . .’”).

The Judges find that Sirius XM cannot rely on the fact that 100% of its undifferentiated subscription revenue was “recognized” as a sufficient basis to support its assertion that an excluded sub-set of that revenue was independently “recognized” in accordance with GAAP. The repetition of the word “recognized” in the

exclusionary language clearly indicates that in *SDARS I* the Judges did not intend to supersede or disregard GAAP as it might pertain to the standards applicable to potentially excludable revenue.²¹

The Judges agree with SoundExchange that “[t]he only reasonable reading of the Gross Revenues definition is that [GAAP] flows through its entirety.” *SoundExchange Memorandum of Law at 10*. Accordingly, if there are GAAP provisions that required Sirius XM to recognize pre-’72 revenue separately, it would have been obliged to follow them.²² Thus, in order for the Judges to decide whether Sirius XM ran afoul of GAAP—and therefore the regulations—the Judges must determine whether any GAAP provisions in fact apply to this pre-’72 exclusion.

B. GAAP Principles, if Any, That Apply to Exclusions at Issue

SoundExchange argues at length that Sirius XM failed to abide by GAAP in identifying and quantifying revenues supposedly attributable to the performance of pre-’72 sound recordings, *SoundExchange Initial Submission* ¶¶ 25–38, and to the Upcharge. *Id.* at ¶¶ 60–66. According to SoundExchange, “GAAP sets forth clear rules on how a company should recognize revenue for bundles or packages . . . which GAAP sometimes calls ‘multiple element arrangements’ or ‘MEAs.’” *Id.* ¶ 24. The entirety of SoundExchange’s GAAP-based argument is conditioned on the categorization of (i) the pre-’72 recordings; and (ii) the premium nonmusic channels, respectively, as MEAs.

However, SoundExchange’s accounting and economic expert, Professor Lys, expressly declined to opine that the MEA concept is even applicable to the two exclusions.

One question relevant to this lawsuit is whether GAAP’s multiple element arrangement (“MEA”) rules²³ can be used to

justify Sirius XM’s exclusions of pre-1972 recordings. . . . GAAP does not define the term “element” For the purposes of my subsequent analysis, I treat Sirius XM subscription arrangements as if they fall within the scope of GAAP for multiple element arrangements. . . . I note, however, that details of Sirius XM’s subscription agreement suggest that the provision of pre-1972 recordings and the incremental premium programming would not be seen as separate deliverables or elements. Specifically, the Sirius XM subscription agreement does not list specific programming as an obligation of Sirius XM. Furthermore, Sirius XM reserves the right to change, rearrange, add or delete programming.

Lys Report ¶¶ 34, 36 and n.39 (emphasis added); see also EITF–0021 ([MEA rule] applies “to all deliverables (that is, products, services, or rights to use assets) within contractually binding arrangements. . . .”) (emphasis added).

Professor Lys’s candid refusal to answer his own question in the affirmative, *i.e.*, “whether GAAP’s . . . MEA rules can be used to justify Sirius XM’s exclusions,” leaves the Judges with no basis to conclude that such an MEA-based approach is mandated in these circumstances. Rather, the Judges agree with Mr. Wills that SoundExchange has misapplied GAAP’s MEA rules to the issues in this proceeding. As Mr. Wills stated, the key point is that “while ASC 605–25 may serve as a mandate as to recognition where an MEA and separate units of accounting exist, it is not a block or limit on recognition where such conditions do not exist.” *Wills Rebuttal Report at 6* (emphasis added).

Thus, the Judges decline to adopt Dr. Lys’s decision to analyze Sirius XM’s treatment of either pre-’72 recordings or the Premier Upcharges “as if” the product/service delivered by Sirius XM to its customers would constitute an MEA.²⁴ Rather, the Judges conclude that the record fails to identify particular provisions of GAAP that apply to the

accounting treatment of the two exclusions at issue.

The Judges reject the application of the MEA approach for an additional reason. Even assuming the MEA approach is not inapplicable for the foregoing reasons, the MEA approach would still be inapplicable because it is only relevant in a context in which several elements are deliverable *over time*. That is, GAAP’s “separate unit of accounting” principles do not apply to the allocation of revenue between or among products or services that are provided *simultaneously* to the customer.

As Mr. Wills stated in his report, GAAP is completely irrelevant to the question in this dispute. The issue addressed by [GAAP] is how to deal with multiple deliverables within a package that may occur at *different points in time*, such that revenue for certain items may need to be allocated, and its recognition deferred, until later periods when the item is actually earned. In other words, it deals with the *timing* of recognition. . . . That simply is not an issue here. Sirius XM delivers all elements of its monthly subscription package—performances of pre-’72 recordings and other content alike—during the same monthly period, and all revenue from such a package rightly is recognized as earned on a monthly basis. It therefore is not the kind of “arrangement with multiple deliverables” addressed by [GAAP], which envisions a mix of delivered and “undelivered” items.

Wills Report at 12–13. Referring to relevant source materials, the Judges note that the language in EITF 00–21 relied upon by both Mr. Wills and Professor Lys states at the outset that the issue it addresses “involve[s] the delivery or performance of multiple products, services, or rights to use assets, and performances [that] may occur at *different points in time or over different periods of time*.” EITF 00–21 at 2, ¶ 1 (emphasis added). Similarly, ASC 605–25, which codifies EITF 00–21, provides that the standard it codifies is for situations in which “deliverables often are provided at *different points in time or over different time periods*.” ASC 605–25 at 1 (emphasis added).

Neither SoundExchange nor its expert, Professor Lys, point to any language within either EITF 00–21 or ASC 605–25 that expressly applies the MEA process to simultaneous deliverables. Professor Lys also relies on SEC Staff Accounting Bulletin No. 13, which he understands to provide that entities “*first* evaluate whether an element is a separate unit of accounting and *then* evaluate whether each unit of accounting has been delivered and therefore whether revenue for that element has been earned.” *Lys Rebuttal Report ¶ 28*. However, the SEC

²¹ The regulations also separately reference revenue “recognized” by the Licensee with regard to *included* revenue, without redundantly reiterating there that the “recognition” must satisfy GAAP. 37 CFR 382.11 (paragraph (1)(i) of “Gross Revenues” definition).

²² The record reflects that in the *SDARS I* proceeding the participants did not identify and analyze specific GAAP provisions. Rather, they selected GAAP as a comprehensive default set of standards to be utilized as the regulatory standard to resolve accounting issues.

²³ When referring to the applicable GAAP, the Judges are referring to EITF–0021 and ASC 605–25, which are the GAAP provisions relating to MEAs relied on by Professor Lys. As he explained, GAAP at present is set forth in the Financial Accounting Standards Board (FASB) Accounting Standards

Codification (ASC). Prior to 2009 (and during the *SDARS I* period), official guidance on the implementation of GAAP was provided by the Emerging Issues Task Force (EITF). Lys Report ¶ 30. Professor Lys notes that there is no difference between EITF–0021 and ASC 605–25 as they relate to the MEA argument he advances in this proceeding. *Id.* 39, n.40. *Accord*, Wills Expert Report at 11 (“ASC 605–25 . . . incorporates . . . the guidance from EITF 00–21 [on] ‘Revenue Recognition Multiple-Element Arrangements.’”).

²⁴ To be clear, the Judges do not concur with a broader assertion made by Sirius XM (see *Sirius XM Rebuttal Submission at 4*) that the MEA analysis (or any test derived from it) is inapposite merely because that specific accounting principle is “stated nowhere in the Gross Revenues definition.” As noted *supra*, the Judges conclude that the regulations regarding Gross Revenues do incorporate GAAP in all of GAAP’s particulars, *but only to the extent those GAAP particulars apply*.

document, like the other documents upon which Professor Lys relies, does not indicate that the “separate unit of accounting” approach applies to elements that are delivered *simultaneously*.

At any rate, in the present case, the timing of deliverables is irrelevant. SoundExchange is not concerned with the *timing* of revenue recognition. SoundExchange does not contest that any Sirius XM revenue properly within the definition of Gross Revenues (and not excluded by that definition) will be subject to royalties at the applicable rate. Therefore, SoundExchange’s reliance on the *timing* rationale behind revenue recognition principles is not applicable in the present case.

SoundExchange conducted two audits of Sirius XM relating to the 2007–2012 rate period.²⁵ Importantly, the results of those audits confirm the inapplicability of GAAP in evaluating Sirius XM’s application of the two exclusions at issue here. SoundExchange engaged two auditing firms, PricewaterhouseCoopers, d/b/a PwC (PwC) and EisnerAmper LLP (EisnerAmper), to audit Sirius XM’s books and records for the *SDARS I* period. Sirius XM asserts that the results of the audits confirm the inapplicability of GAAP in determining the appropriate manner in which to evaluate Sirius XM’s application of the two exclusions. Further, according to Sirius XM, neither of the firms concluded that its exclusions violated GAAP or were otherwise improper. See Written Merits Opening Submission of Sirius XM . . . (*Sirius XM Merits Submission*) at 13–14. Rather, as Sirius XM points out, EisnerAmper concluded that the dispute regarding the two exclusions was a “legal issue.” *Id.*

SoundExchange attempts to minimize the importance of the auditing firms’ conclusions, arguing that the auditors simply “declined to take sides on how the regulations should be interpreted” because they were told by Sirius XM “that this matter is a legal issue.” SoundExchange Written Merits Rebuttal Submission (*SoundExchange Rebuttal Submission*) at 7 n.5.

The Judges find SoundExchange’s point unresponsive of its position. The gravamen of SoundExchange’s argument is that GAAP applies to the propriety of Sirius XM’s two categorical revenue exclusions. That is, SoundExchange asserts that the *legal* interpretation of the Gross Revenues definition must be determined by applying GAAP. Indeed, that it is precisely what

SoundExchange’s expert, Professor Lys, purported to do in this proceeding. Thus, SoundExchange argues that if GAAP applies, the proper *legal result* is wholly dependent upon the proper *accounting treatment under GAAP*. In fact, the Judges agree with that line of reasoning, *but only to the extent GAAP actually addresses the issues in dispute*.

SoundExchange offers no explanation for why neither of its auditing firms opined that Sirius XM’s exclusions of revenue for performances of pre-’72 recordings and for the subscription price differential for the Premier package (the Upcharge) were inconsistent with GAAP. If the auditors had so concluded, SoundExchange could have perhaps bootstrapped such a conclusion into its legal argument. The fact that neither auditing firm reached the conclusion proffered by SoundExchange supports the Judges’ conclusion that the revenue exclusion issues in this proceeding are not addressed by GAAP.

For these reasons, the Judges find no record evidence indicating that GAAP provides a particular method for quantifying the two exclusions at issue in this proceeding.²⁶ Given the absence of any applicable GAAP, the Judges seek to answer the District Court’s inquiries by analyzing the applicable standard to interpret and apply the two revenue exclusions at issue.

C. Determination of Appropriate Standard in Absence of Applicable GAAP Guidance

Without specifically applicable GAAP principles, the Judges must construe and interpret their regulation using legal principles. The Judges consider both the language and the purposes of the regulations to determine those standards.²⁷ The non-applicability of

²⁶ The Judges recognize that in the *SDARS II Determination*, the judges held that “[r]evenue exclusion is not the proper means of addressing pre-’72 recordings [as] there is no revenue recognition for the performance of pre-1972 works.” *SDARS II*, 78 FR at 23073 (emphasis added). The District Court found this statement to be dicta because “the construction and application of the [*SDARS I*] rates were not before the CRB in the [*SDARS II*] proceeding.” 65 F. Supp. 3d at 156. Further, as the *SDARS II Determination* does not contain any record citations that would support this finding, the Judges do not now view it as persuasive authority and decline to follow it.

²⁷ SoundExchange argues that, when construing the revenue exclusion regulations, the Judges should apply the interpretative doctrine of *contra proferentem*. That is, because the revenue exclusions were proposed and initially drafted by Sirius XM, they should be interpreted against Sirius XM. *SoundExchange Memorandum of Law* at 17–18. The Judges agree with Sirius XM, however, that the law on which SoundExchange relies applies to contracts, not regulations. See *Sirius XM Rebuttal Submission* at 10 n.10 (and cases cited therein).

specific GAAP principles did not and does not afford Sirius XM unfettered discretion regarding its application of the two revenue exclusions at issue.²⁸

Absent guidance from the participants, the Judges look first to the authority by which they are bound: The Copyright Act. In *SDARS* proceedings under section 114(f)(1)(B), the Copyright Act contains a core requirement that the Judges set terms (and rates) that are “reasonable.” 17 U.S.C. 801(b)(1). The obligation to set reasonable rates and terms imposes upon the Judges a requirement to assure that the rates and terms they codify are neither vague nor ambiguous, but rather are subject to reasonable interpretation. In its referral, the District Court has termed ambiguous the provisions of the regulations at issue here. 65 F. Supp. 3d at 155.

Further, assuming the Judges’ regulations are reasonable or may be reasonably interpreted,²⁹ the Judges’ clarification must likewise be reasonable and aimed at reasonable interpretation going forward. Ultimately, licensors and licensees should be confident of compliance when attempting a reasonable interpretation and application of those regulations. Even though the Judges find no specific GAAP guideline applicable to the interpretation of the regulation at issue, they nonetheless look to the standard established by the overarching concepts within GAAP. GAAP requires that an entity provide a “faithful representation” of the facts in its financial reporting, *i.e.*, a presentation that is “complete” and “free of error

Therefore, the doctrine of *contra proferentem* is inapplicable.

More broadly, the Judges note that a review of the *SDARS I* record of proceeding shows that the participants presented fairly cursory arguments regarding treatment of pre-’72 recordings. The *SDARS I* participants did not address directly the issue of how to quantify or estimate the monetary value of a pre-’72 exclusion. Thus, the evidence and arguments proffered by the *SDARS I* participants are of limited value in the present proceeding.

²⁸ Sirius XM itself recognizes that, even though GAAP is inapplicable, it could not exclude revenue in an unconstrained manner.

This is not to say—as SoundExchange misleadingly suggests—that Sirius XM could “slice and dice” its revenue however it saw fit without accounting controls. . . . While Mr. Wills testified that GAAP does not direct (or limit) how a company subdivides already recognized revenue for internal or regulatory purposes, such attribution is still governed by *principles of managerial and cost accounting* and subject to audit.

Sirius XM’s Rebuttal Submission at 5 n.2 (emphasis added). Unfortunately, Mr. Wills fails to identify any “*principles of managerial and cost accounting*” that Sirius XM *did* apply to these exclusion issues, nor does he even identify any such principles that *should* be applied.

²⁹ As the parties agreed, they proposed the text of the regulation at issue, which the Judges adopted as reasonable.

²⁵ SoundExchange conducted these audits pursuant to its verification rights under 37 CFR 382.15.

. . . to the extent possible.” *FASB Statement of Financial Accounting Concepts No. 8* at 27 (Quality Characteristic (QC) 12) (September 2010). This overarching GAAP standard guides the Judges’ regulatory interpretation notwithstanding the absence of any GAAP principle specifically applicable to the regulations at issue.

Moreover, QC 30 in *FASB Statement of Financial Accounting Concepts No. 8* also requires that financial reporting be “understandable.” That GAAP pronouncement notes that “understandability” embodies “transparency.” *Id.* at 21, 31 (QC 30; Basis for Conclusion (BC) 3.44) (“transparency, high quality, internal consistency, true and fair view or fair presentation are *different words to describe information that has the qualitative characteristic* [] of . . . *understandability.*”) emphasis added).

These GAAP standards are consonant with the Judges’ application of the pre-’72 exclusion in *SDARS II*. There, the Judges concluded that the statutory requirement for reasonable terms is satisfied when those terms are “precise” (*i.e.*, “reasonably accurate”) and “methodologically transparent.” 78 FR at 23073.³⁰ The Judges thus apply the GAAP standards of understandability (embodying transparency), faithfulness, accuracy, and transparency, in shorthand, “reasonableness,” in the circumstances at issue.

1. The Pre-’72 Sound Recordings

(a) Paragraph (3)(vi)(D) Exclusion for “Exempt” Performances

Paragraph (3)(vi)(D) of the definition of Gross Revenues, relating to exclusions, does not *explicitly* identify pre-’72 sound recordings as excludable from Gross Revenues. Rather, Sirius XM deemed such pre-’72 performances excludable pursuant to the broader exclusion for revenues recognized for the provision of “[c]hannels, programming, products and/or other services for which the performance of sound recordings and/or the making of Ephemeral Recordings is *exempt from any license requirement.* . . .” 37 CFR 382.11 (2008) (emphasis added); *see Sirius XM Initial Submission* at 18

³⁰ In *SDARS II* the Judges articulated this standard in connection with exclusion of royalties attributed to performances of pre-’72 sound recordings. The Judges conclude that the *SDARS II* determination is not precedential or binding on the Judges’ interpretation of regulations that preceded that determination. *See* 78 FR 23054 (Apr. 17, 2013). Nonetheless, the Judges accept as instructive the language in *SDARS II* relating to revenues or exclusion of royalties attributed to performances of pre-’72 recordings.

(describing “core precept” that Sirius XM should not pay for non-statutory activities).

SoundExchange disagrees, arguing that as Sirius XM never packaged or marketed separately performances of pre-’72 recordings, revenues generated on account of those performances do not fall within the regulatory exclusions from Gross Revenues. *SoundExchange Memorandum of Law* at 4–5.

Additionally, SoundExchange points to the “the avoidance of doubt” clause noting it does not identify pre-’72 recordings as excludable. Finally, SoundExchange asserts that it would be absurd to construe the regulatory word “programming,” or any of the other excluded categories, as embracing the “performance of sound recordings,” as the regulation at issue already uses the phrase “performance of sound recordings.” *Id.* at 5.

Addressing SoundExchange’s first and last assertions, the Judges find that the language of the paragraph (3)(vi)(D) exclusion clearly embraces revenue properly attributable to the performance of pre-’72 recordings. Contrary to SoundExchange’s argument, the word “programming” is not redundant of the phrase “performance of sound recordings.” In ordinary parlance, broadcast music programming consists of the aggregation of sound recordings played pursuant to a sequence selected by the broadcaster. In the 2006 *SDARS I* proceeding, XM’s Executive Vice President for programming, Eric Logan, testified that the “fundamental value proposition” for XM was that it aggregated a “diverse variety of programming” into a single “170-channel platform. . . .” Sirius XM Ex. 20 (Direct Testimony of Eric Logan on behalf of XM Satellite Radio Inc., *SDARS I* ¶¶ 2, 12, 14 (Jan. 17, 2007)). The word “programming” as used in the regulations should be read to include programming across a satellite platform and within or across channels, consisting of both older music, such as pre-’72 recordings, and relatively more contemporary music, *i.e.*, music that falls within the collection of post-’72 recordings.

The Judges reject SoundExchange’s assertion that the final words of the regulation, “for the avoidance of doubt”, preclude an exclusion of revenue from pre-’72 recordings. In paragraph (3)(vi)(D) of the Gross Revenues definition, the phrase “for the avoidance of doubt” follows immediately after the phrase “is separately licensed, including by a statutory license. . . .” The string of four items that follows is comprised of “separately licensed uses.” Thus, the syntax of the paragraph

makes it clear that the “for the avoidance of doubt” clause does not address, and therefore does not prohibit exclusions for, performances that are “exempt from any license requirement,” such as performances of pre-’72 recordings.³¹

The Judges also discount SoundExchange’s argument that an interpretation of “programming, products, and/or other services” as embracing “the performance of sound recordings” would yield a result that is linguistically “nonsensical.” *SoundExchange Memorandum of Law* at 5. Quite the contrary, substituting “the performance of sound recordings” for “programming, products, and/or other services” in this manner would cause the regulation to be understood as excluding revenue from “the performance of sound recordings . . . for which the performance of sound recordings and/or the making of ephemeral recordings is exempt from any license requirement. . . .” That interpretation plainly is not “nonsensical.”

Finally, the Judges conclude that it would be anomalous to require Sirius XM to pay for pre-’72 recordings under a federal compulsory license when, by the unambiguous statutory language in section 301 of the Copyright Act, those recordings are not subject to federal copyright protection. Further, it seems implausible to the Judges that the parties did not understand, or that they could reasonably have failed to understand, that the language “exempt from any license requirement” included pre-’72 sound recordings. Indeed, it is not clear exactly what other sound recordings that phrase would cover *except* for pre-’72 sound recordings.

(b) Sirius XM’s Estimate of Revenue Attributable to Pre-’72 Recordings

During the course of the *SDARS I* rate period, Sirius XM appears to have used two different methods to estimate revenue attributable to its performance of pre-’72 recordings. According to the evidence before the Judges relating to the referred questions, [REDACTED]³² Declaration of Catherine Brooker ¶ 23 (Brooker Decl.).³³ [REDACTED] *Id.* ¶ 24.

³¹ The Judges interpret “exempt from any license requirement” in this regulation to refer to licensing under the federal Copyright Act. The Judges do not assume that this regulation refers to any “license requirement” that may exist under any other body of law.

³² All redactions in this publication were proposed by the participants and approved by the Judges. None were made by the Office of the Federal Register.

³³ Ms. Brooker is Vice President of Corporate Finance for Sirius XM. It is unclear to the Judges whether Ms. Brooker’s reference to the period

SoundExchange does not dispute Ms. Brooker's description of the two ways in which Sirius XM applied the pre-'72 exclusion. See *SoundExchange Initial Submission* ¶¶ 12–13.

2. The Upcharge for Premier Service: Paragraph (3)(vi)(B) Revenue Exclusion

During the *SDARS I* period, Sirius XM offered (under different names before and after the merger of Sirius and XM) both a Base subscription package that included channels performing broadcasts of sound recordings covered by the statutory license, and a Premier subscription package that included the Basic package plus premium channels that did not make use of sound recordings subject to the statutory license.³⁴ Brooker Decl. ¶ 13; see Declaration of Brian S. Wood ¶¶ 8–10 (Wood Decl.).³⁵ At all times, Sirius XM offered the Basic package as a stand-alone product. The parties acknowledge that subscription revenue paid for the Basic package is part of the Gross Revenues royalty base.

Sirius XM did not offer the additional channels included in the Premier package as a separate, standalone product. Rather, Sirius XM customers could obtain those Premier additional talk and other non-music channels as part of a package that included all channels in the Basic package. Sirius XM treated the Premier package as a service “offered for a separate charge” and thus excludable under paragraph (3)(vi)(B) of the regulatory definition of Gross Revenues.³⁶

SoundExchange challenges Sirius XM's exclusion asserting it is not supported by the text of the regulation, in that Sirius XM did not offer the Premier channels “for a separate charge” as required by the regulation. *SoundExchange Memorandum of Law* at 18–19. SoundExchange also notes that Sirius XM regularly invoiced and billed customers a combined price rather than a separate price for the basic and premium components of the Premier package. *Id.* at 21 (and record citations

therein). Further, SoundExchange points out that, when marketing the premium package, Sirius XM did not “give recipients the opportunity to purchase just the premium channels,” nor did it “identify a price for the premium channels.” *Id.* (and record citations therein).

Sirius XM does not deny that it did not consistently call out the “additional upcharge” on marketing materials or customer bills. However, Sirius XM contends that its communications with customers “left no doubt that all subscribers whether existing subscribers looking to upgrade or new subscribers deciding which combination of content they preferred” were presented with information making it clear that “for \$4.04 more,” they could “obtain[] the additional premium channels.” *Sirius XM Rebuttal Submission* at 13. As explained by Brian Wood, Sirius XM's consultant and former employee, it was perfectly plain that the premium package represented a charge for the basic package, plus the additional charge for the additional premium channels. Wood Decl. ¶¶ 13–18; see *Sirius XM Initial Submission* at 9–11, 16.

The Judges find and conclude that the language in the revenue exclusion described in paragraph (3)(vi)(B) did *not* permit Sirius XM to exclude from the Gross Revenues royalty base the price difference, *i.e.*, the Upcharge, between the Premier package and the Basic package.

Construction of a regulation “must begin with the words in the regulation and their plain meaning.” *Pfizer v. Heckler*, 735 F.2d 1502, 1507 (D.C. Cir. 1984); see also *Freeman v. Dep't of the Interior*, 37 F. Supp. 3d 313, 331 (D.D.C. 2014). In the present case, the plain language of the regulation disallows this revenue exclusion. Sirius XM did not offer the premium channels “for a separate charge.” Sirius XM's use of a bundled price is inconsistent with the regulatory requirement that premium channels must be priced at a “separate charge.” In ordinary usage, the adjective “separate” is defined as: “detached, disconnected, or disjointed; unconnected; distinct; unique; being or standing apart; distant or dispersed; existing or maintained independently; individual or particular.” <http://www.dictionary.com/browse/separate> (last visited January 3, 2017). The Judges can find no portion of this definition that applies to the bundled subscription charge at which Sirius XM priced its Premier package. Indeed, a “bundled” charge is the *antithesis* of a separate charge. See <http://www.thesaurus.com/browse/bundled?s=t> (classifying

“separate” as an antonym of “bundle”) (last visited January 3, 2017). Thesaurus entries, like dictionary definitions, are valuable sources for the ascertainment of the meaning of statutory and regulatory words and phrases. See, e.g., *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (relying on thesaurus as aid in statutory interpretation).

The Judges recognize that dictionary definitions and thesaurus entries are not necessarily dispositive as to the meaning of statutory (or regulatory) language. See, e.g., *Yates v. U.S.*, ___ U.S. ___, 135 S. Ct. 1074, 1081–82 (2015) (“the plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole.”) (citation omitted). Accordingly, in ascertaining the meaning of the “separate charge” requirement, the Judges also look to the context in which the “separate charge” provision was adopted. That contextual analysis explains why the *SDARS I* regulations distinguish a “separate charge” from other charges when classifying revenue to be included in or excluded from the royalty base.

First, the Judges consider the express language in the *SDARS I Determination* regarding this “separate charge” issue as it relates to a premium service—the precise issue here.

[T]he *SDARS* definition of “gross revenues” excludes monies attributable to premium channels of nonmusic programming that are offered for a charge separate from the general subscription charge for the service. The separate fee generated for such nonmusic premium channels is not closely related to the value of the sound recording performance rights at issue in this proceeding. Therefore, this proposed exclusion serves to more clearly delineate the revenues related to the value of the sound recording performance rights at issue in this proceeding.

SDARS I, 73 FR at 4087 (emphasis added).

Second, the *SDARS I Determination* also noted that the “separate charge” exclusion from Gross Revenues was designed to “enhance business flexibility” in a manner that offset the flexibility foregone by the Judges' rejection of a “per play metric.” *Id.* at 4086. In reaching this conclusion, the Judges again made reference to use of a separate charge for a premium nonmusic service:

The *SDARS* argue that a “per play” rate provides the *SDARS* with more business flexibility because it allows them to respond to any substantial increases in fees by

[REDACTED] includes the entire 2007–08 pre-merger period.

³⁴ The Basic package also includes non-music programming, but the value of those non-music channels is not relevant to the present issues.

³⁵ Mr. Wood is a Sirius XM Consultant and former Senior Advisor for Sales and Operations to Sirius XM's President.

³⁶ The regulatory language on which Sirius XM relies to justify this Upcharge exclusion states that “Gross Revenues” shall exclude “revenues recognized by licensee for the provision of . . . channels, programming, products and/or other services offered for a separate charge where such channels use only incidental performances of sound recordings.” 37 CFR 382.11, paragraph (3)(vi)(B) of the definition of “Gross Revenues” (emphasis added).

economizing on the plays of sound recordings so as to reduce their royalty costs. While the general proposition of enhancing business flexibility is usually advantageous (at least to the party obtaining such flexibility) . . . the same flexibility may be achieved by other means. . . .

For example, in light of the definition of “gross revenues” herein below in this determination, the *SDARS* could offer wholly nonmusic programming as an additional, separately priced premium channel/service without having the revenues from such a premium channel/service become subject to the royalty rate and, thereby, achieve the desired flexibility of offering more lucrative nonmusic programming without sharing the revenues from that programming with the suppliers of sound recording inputs.

Id. at 4086 and n.20 (emphasis added; citations omitted). The Judges thus deemed the “separate charge” to be necessary in order for the revenue-based royalty structure to offer the analogous flexibility benefit of a per-play metric—specifically with regard to a nonmusic premium package.

The Sirius XM interpretation of the “separate charge” requirement to include its Upcharge for the Premier subscription package does not relate to the benign and appropriate “flexibility” benefit of permitting Sirius XM to perform fewer royalty-bearing sound recordings in order to minimize royalty costs. Rather, the bundle of royalty-bearing and premium non-royalty-bearing channels in a single price introduces an economically indeterminate and self-serving “flexibility” that simply confuses the issue as to which portion of the entire subscription price reflects which type of channel.

Sirius XM’s Upcharge methodology is “economically indeterminate” because it ignores the fundamental economic reason why downstream sellers such as Sirius XM decide to bundle products within one offering price—to maximize revenue from the sale of both products.³⁷ As SoundExchange notes, in the record Sirius XM candidly acknowledged that the opportunity to increase total revenues was the *raison d’être* for offering the Premier channels only in a bundle with the Basic channels. See *SoundExchange Initial Submission* ¶¶ 56–57, 65 (and record

citations therein).³⁸ When this pricing/revenue bundling phenomenon exists, a seller who owes revenue-based royalties to the provider of only one of the bundled inputs has created an *indeterminate revenue base*, absent some additional data or information from which to identify or reasonably estimate the revenues attributable to each item in the bundle. The price difference between the bundle and an unbundled item fails to reflect the revenue attributable to each item. Rather, that price difference is necessarily severed from the calculation of revenue attributable to each item.

SoundExchange’s expert, Dr. Lys, cogently explained why the bundled price fails to satisfy the economic purpose of the regulatory “separate charge” requirement:

First, [e]stimating the standalone value of incremental products as the difference between the bundled price and the standalone price . . . inappropriately assigns all of that premium or discount to the incremental products.

Second, there would be no reason to bundle the incremental content of the premium package if in fact [its] value . . . was [merely] the difference between the selling price of the [Premier] and [Basic] [packages]. In other words, if that were the case, Sirius XM could simply offer the incremental content as a standalone subscription. The fact that [it] did not do so is prima facie evidence that the value of the incremental content is not simply the difference between the [Premier] and [Basic] packages.

Third, the implied value of the same incremental good can vary dramatically depending upon which offered bundle is used determine the incremental value.

Lys Expert Report ¶ 82. In short “[t]he price differential between two bundles set by a profit-maximizing firm . . . need not equate to the price that the incremental goods would command on a standalone basis.” *Id.* at ¶ 85.³⁹

Sirius XM made no attempt to rebut Professor Lys’s economic point regarding bundling and the concomitant indeterminacy in allocating revenue as between or among the bundled items. Rather, its expert, Mr. Wills, attempted to present an analogy which only served to underscore Dr. Lys’s analysis.

Specifically, Mr. Wills focused instead on a *singular* “reasonable buyer.” *Wills Expert Rebuttal Report* at 13. However, the essence of the bundling process is to segregate buyers into heterogeneous sub-classes of buyers, each of which is comprised of “reasonable” buyers with a *different—not singular—WTP*.

Moreover, Mr. Wills’s point that “when additional features are available at additional cost . . . the reasonable buyer can do the simple math to compute the cost differential, and decide whether the additional features are worth the additional cost” *misses the economic point. Id.* In any market transaction (and regardless of whether the market is monopolized, competitive or somewhere in-between), some consumers have a WTP greater than the market price for a bundle of products or a bundle of product characteristics, as compared with their WTP if the products were offered separately. If the seller cannot engage in bundling (or some other form of price discrimination) consumers with a WTP above the market-clearing price realize the benefit of the “consumer surplus” described *supra*. The consumer surplus is value foregone by the seller. By bundling, the seller captures some of that consumer surplus. See, e.g., W. Adams and J. Yellen, “Commodity Bundling and the Burden of Monopoly,” 90 Q.J. Econ. 475, 476 (1976) (profitability of bundling stems “from its ability to sort customers into groups with different reservation price characteristics, and hence to extract consumer surplus.”).⁴⁰

Third, the Judges find guidance in the *Rehearing Order* in *SDARS I*. In their *Initial Determination*, the Judges approved a Gross Revenues exclusion that covered revenues attributable to “data services.” SoundExchange moved for rehearing on this issue, arguing “there is no way to determine the value [data services] contribute to the overall subscription price” and thus “how much revenue should be deducted from the revenue base” because data services “are not separately priced,” and

⁴⁰ Mr. Wills also pays lip service to the correct accounting principle of “faithful representation,” that links accounting form to economic substance: “Faithful representation means that financial information represents the substance of an economic phenomenon rather than merely represent its legal form. Representing a legal form that differs from the economic substance of the underlying economic phenomenon could not result in faithful representation.” *Wills Rebuttal Report* at 14 and n.27 (quoting *FASB Statement of Financial Accounting Concepts No. 8, September 2010*). However, by ignoring the economic substance of bundled pricing, Mr. Wills’s analysis essentially does the opposite—placing form over economic substance—allowing accounting principles to obscure the principles relating to the economics of bundling.

³⁷ More precisely, Sirius XM engaged in “mixed bundling,” by which “consumers get to buy the bundle or instead purchase one or more of the products separately.” C. Thomas and S. C. Maurice, *Managerial Economics: Foundations of Business Analysis and Strategy* at 609 (11th ed. 2013). In contrast to “pure bundling,” by which products are only available for purchase as a bundle, economists believe that “mixed bundling” is the more profitable method of bundling products. See H. Varian, *Price Discrimination*, § 2.6 (in R. Schmalensee and R. Willig, 1 *Handbook of Industrial Organization*, Ch. 10 (Elsevier 1989).

³⁸ Despite admitting that it does not know how consumers would react to “unbundling,” Sirius XM asserts self-servingly and without evidentiary support that separate pricing of the premium package for \$4 would diminish subscriptions to and revenues from the basic package. See *SoundExchange Initial Submission* ¶ 56; *SoundExchange Ex. A.204* (citing *Frear Dep. 12:10–22*).

³⁹ A party that relies on a bundle of values to support or oppose a proposed statutory rate should introduce competent and persuasive evidence of the separate values of the constituent parts of the bundle.

predicting that “[t]he parties almost certainly will not agree on the value of such services.” SoundExchange Motion for Rehearing at 7 (Dec. 18, 2007) (emphasis added). In response, Sirius XM asserted that SoundExchange offered nothing but “speculation” that Sirius XM “will not properly recognize revenues for the provision of data services” Response . . . to SoundExchange Motion for Rehearing at 10 n. 8 (Jan. 4, 2008).

Although the Judges styled their decision as an “*Order Denying Motion for Rehearing*,” they in fact modified their Initial Determination to clarify that only data services offered for a “separate charge” could be excluded from the revenue base. The Judges accomplished this by adding the “separate charge” language that they had included in the paragraph (3)(vi)(B) exclusion, the language on which Sirius XM relies now to justify its single, bundled charge for its Premier package (*i.e.*, Basic + additional channels). Citing that language in paragraph (3)(vi)(B) of the Gross Revenues definition, the Judges stated that “to avoid any doubt as might be suggested by SoundExchange’s arguments, we hereby clarify that subsection (3)(vi)(A) of the definition of Gross Revenues at § 382.11 Definitions, dealing with data services also does not contemplate an exclusion of revenues from such data services, where such data services are not offered for a separate charge from the basic subscription product’s revenues. . . . The phrase ‘offered for a separate charge’ will be added to the regulatory language of subsection (3)(vi)(A)” *Rehearing Order* at 4–5 and n.5. Thus, the *SDARS I* Judges clearly understood that a failure by Sirius XM to set separate charges for bundled services that included services both in the royalty base and outside the royalty base would be contrary to the regulatory scheme, rendering the royalty base indeterminate.

Consistent with the Judges’ reliance on the “separate charge” language in the paragraph (3)(vi)(B) exclusion to clarify and amend the paragraph (3)(vi)(A) exclusion, the Judges now conclude that Sirius XM’s combined charge for the Premier package is inconsistent with the plain meaning of the paragraph (3)(vi)(B) exclusion and with the purpose of the “separate charge” requirement, *viz.*, to clearly distinguish between revenue *included in* the royalty base and revenue *excluded from* the royalty base.⁴¹

⁴¹ By contrast, the absence of a “separate charge” requirement for pre-’72 sound recordings was reasonable. The Sirius XM business model without

The Judges thus conclude that the Sirius XM Premier package is not a service offered for a separate charge. Consequently any revenues Sirius XM excluded from its Gross Revenues royalty base attributable to the incremental Upcharge for the channels in the Premier package were improper.

Conclusion

Based on the foregoing findings and reasoning, the Judges answer the District Court by concluding that Sirius XM properly interpreted the revenue exclusion to apply to pre-’72 sound recordings. Given the limitations on the Judges’ jurisdiction, they defer to the District Court to determine whether Sirius XM developed a consistent, transparent, reasonable methodology for valuing those exclusions. The Judges also conclude that Sirius XM was incorrect to claim a revenue exclusion based upon its Premier package upcharge, as that Premier package was not a service offered for a separate charge. The Judges’ responses to the District Court are based upon that reasoning.

The Judges issued the Amended Decision to the parties in interest on September 11, 2017. This published Amended Decision redacts confidential information that is subject to a protective order in the proceeding. The Register of Copyrights reviewed this ruling and found no legal error.

So ordered.

Dated: November 8, 2017.

Suzanne M. Barnett,
Chief Copyright Royalty Judge.

Jesse M. Feder,
Copyright Royalty Judge.

David R. Strickler,
Copyright Royalty Judge.

Approved by:

Carla D. Hayden,
Librarian of Congress.

[FR Doc. 2017–25816 Filed 11–29–17; 8:45 am]

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dispute had always integrated pre-’72 recordings with other recordings across its channel lineup for a single Basic subscription price. Thus, it would be impractical and unreasonable to require Sirius XM to parse out a “separate charge” for pre-’72 recordings. Rather, Sirius XM attempted to fashion a reasonable alternative approach to estimating the pre-’72 revenue exclusion [REDACTED].

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2016–0600; FRL–9968–95]

Boscalid; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for residues of boscalid in or on vegetable, legume, edible-podded subgroup 6A. BASF Corporation requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 30, 2017. Objections and requests for hearings must be received on or before January 29, 2018, 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–2016–0600, 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 L. 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: RDfRNNotices@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers

determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 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-2016-0600 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 29, 2018. 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-2016-0600, 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 July 26, 2017 (82 FR 34664) (FRL-9963-50), 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 6E8503) by BASF Corporation, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, NC 27709. The petition requested that 40 CFR 180.589 be amended by increasing the existing tolerance for residues of the fungicide boscalid, 3-pyridinecarboxamide,2-chloro-N-(4'-chloro[1,1'-biphenyl]-2-yl), in or on vegetable, legume, edible podded subgroup 6A at from 1.6 parts per million (ppm) to 5.0 ppm. This document referenced a summary of the petition prepared by BASF Corporation, the registrant, which is available in the docket, <http://www.regulations.gov>. There were no comments received in response to the notice of filing.

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 boscalid including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with boscalid follows.

A. Toxicological Profile and Points of Departure

In the **Federal Register** of March 18, 2015 (80 FR 14009) (FRL-9921-01), EPA published a final rule concerning tolerances for residues of boscalid. The preamble to that rule contains a summary of the toxicological profile and endpoints for assessing risk that EPA is incorporating by reference here, as those elements have not changed.

B. Exposure Assessment

The petitioned-for tolerance increase is intended to facilitate imports of commodities in subgroup 6A, rather than accommodate residues resulting from changes in domestic uses; therefore, the only potential impact on the Agency's previous exposure assessment is through consumption of imported food containing boscalid residues. To assess the new dietary exposure levels, EPA considered exposure under the petitioned-for tolerances as well as all existing boscalid tolerances in 40 CFR 180.589. EPA assessed dietary exposures from boscalid in food as follows:

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 boscalid; therefore, a quantitative acute dietary exposure assessment is unnecessary.

Chronic exposure. In conducting the chronic dietary exposure assessment EPA used food consumption information from the 2003-2008 food consumption data from the U.S. Department of Agriculture's (USDA's) National Health and Nutrition Examination Survey, What We Eat in America, (NHANES/WWEIA). As to residue levels in food, EPA assumed tolerance-level residues and used some percent crop treated (PCT) information as described below.

Cancer. As discussed in Unit III.A. of the March 18, 2015 **Federal Register**, EPA has concluded that the chronic endpoint will be protective of potential cancer effects. EPA's estimate of chronic exposure as described above is relied upon to evaluate whether any exposure could exceed the chronic population

adjusted doses (cPAD) and thus pose a cancer risk.

Anticipated residue and percent crop treated (PCT) information. 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 used the following chronic PCT for existing uses:

Almonds 45%; apples 15%; apricots 30%; green beans 5%; blueberries 35%; broccoli 2.5%; brussels sprouts 2.5%; cabbage 5%; caneberrries 45%; cantaloupes 5%; carrots 20%; cauliflower 2.5%; celery 10%; cherries 50%; chicory 5%; cucumbers 5%; dry beans/dry peas 5%; garlic 5%; grapes 30%; hazelnuts 5%; lemons 2.5%; lettuce 30%; nectarines 15%; onions 25%; oranges 1%; peaches 25%; peanuts 1%; pears 20%; green peas 1%; peppers 2.5%; pistachios 30%; plums/prunes 5%; potatoes 25%; pumpkins 10%; squash 5%; strawberries 60%; sweet corn 1%; tomatoes 2.5%; walnuts 5%; and watermelons 25%.

In most cases, EPA uses available data from the 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 six years. EPA uses an average PCT for chronic dietary risk analysis and a maximum PCT for acute 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 2.5%. The maximum PCT figure is the highest observed maximum value reported within the most recent 6 years of available public and private market survey data for the

existing use and rounded up to the nearest multiple of 5%, except for situations in which the maximum PCT is less than 2.5%. In cases where the estimated value is less than 2.5% but greater than 1%, the average and maximum PCT used are 2.5%. If the estimated value is less than 1%, 1% is used as the average PCT and 2.5% is used as the maximum PCT.

The Agency believes that the three conditions discussed above 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 may be applied in a particular area.

Because this tolerance increase does not impact drinking water or residential exposures, the drinking water and non-dietary exposure discussions from the March 18, 2015 **Federal Register** continue to be valid. Those assumptions were used to assess aggregate exposure for this tolerance action, and EPA incorporates them here by reference. Moreover, the current action does not impact the Agency's previous conclusions on cumulative effects; therefore, EPA incorporates the cumulative effects section from the March 18, 2015 **Federal Register** as well.

C. 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 Food Quality Protection Act (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. *Conclusion.* The finding for the FQPA SF in the March 18, 2015 rule remains valid for this action. Therefore, for the reasons stated in the March 18, 2015 **Federal Register**, 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 residential handler inhalation exposure.

D. 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, boscalid 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 boscalid from food and water will utilize 12% of the cPAD for the general U.S. population and 27% of the cPAD for all infants (less than 1 year old), 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 boscalid is not expected.

3. *Short-term and intermediate-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).

Boscalid is currently registered for uses that could result in short-term residential exposure, which the Agency

previously assessed and discussed in the March 18, 2015 **Federal Register**. The preamble to the March 18, 2015 rule concluded that there were no short-term risks of concern. Because the chronic dietary exposure has only increased potential chronic risk 1% of the cPAD to 27% of the cPAD, which is still well below EPA's level of concern for chronic risk, and there is no change to the domestic use pattern to impact the non-occupational exposure, EPA concludes that the increase in dietary exposure will not meaningfully impact the aggregate risk and the short-term risk will continue to be below the Agency's levels 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).

An intermediate-term adverse effect was identified; however, boscalid is not registered for any use patterns that would result in intermediate-term residential exposure. 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 boscalid.

5. *Aggregate cancer risk for U.S. population.* As discussed in Unit III.A. of the March 18, 2015 **Federal Register**, EPA has concluded that the cPAD is protective of possible cancer effects. Given the results of the chronic risk assessment, cancer risk resulting from exposure to boscalid is not of concern.

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 boscalid residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

An adequate gas chromatography/mass spectrometric detection (GC/MS) method (Method D0008) using selected ion monitoring (SIM) of major ions is available for enforcing boscalid tolerances in plant commodities, and an adequate GC/electron capture detection method (ECD) (Method DFG S19) is

available for enforcing the tolerances in livestock commodities. The validated limit of quantitation (LOQ) for boscalid residues in most plant matrices is 0.05 ppm. These methods have been found adequate by the Analytical Chemistry Branch (ACB) of BEAD. Residues of boscalid and its metabolite M510F01 were not adequately recovered using the multiresidue methods.

The method 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 established MRLs for boscalid in or on vegetable, legume, edible-podded subgroup 6A at 3.0 ppm. These MRLs are different than the tolerances established for boscalid in the United States. The registrant has petitioned the EPA to increase the existing tolerance level for edible-podded legume vegetable subgroup 6A from 1.6 ppm to 5.0 ppm in order to harmonize with MRL established by the European Union of 5.0 ppm. This is not anticipated to cause a trade irritant since the CODEX MRL will be lower than the U.S. tolerance, and CODEX countries will still be able to export to the U.S. For these reasons, EPA has determined it is appropriate to amend the tolerance for residues of boscalid on edible podded legume vegetable subgroup 6A as petitioned from 1.6 ppm to 5.0 ppm.

V. Conclusion

Therefore, a tolerance is established for residues of boscalid, boscalid, 3-pyridinecarboxamide,2-chloro-N-(4'-

chloro[1,1'-biphenyl]-2-yl), in or on vegetable, legume, edible podded subgroup 6A at 5.0 ppm.

VI. Statutory and Executive Order Reviews

This action amends a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, 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), Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), or Executive Order 13771, entitled "Reducing Regulations and Controlling Regulatory Costs" (82 FR 9339, February 3, 2017). 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 5, 2017.

Daniel Kenny,

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. In § 180.589, revise the entry for "Vegetable, legume, edible podded subgroup 6A" in the table in paragraph (a)(1) to read as follows:

§ 180.589 Boscalid; tolerances for residues.

- (a) * * *
- (1) * * *

Commodity	Parts per million
* * * *	*
Vegetable, legume, edible podded subgroup 6A	5.0
* * * *	*

* * * * *

[FR Doc. 2017-25832 Filed 11-29-17; 8:45 am]
BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA-HQ-OPP-2016-0295; FRL-9967-73]

Nitrapyrin; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of nitrapyrin in or on almond hulls and the tree nut group 14-12. Dow AgroSciences requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 30, 2017. Objections and requests for hearings must be received on or before January 29, 2018, 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-2016-0295, 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: RDfRNNotices@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following

list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 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-2016-0295 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 29, 2018. 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-2016-0295, 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 July 20, 2016 (81 FR 47150) (FRL-9948-45), 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 6F8470) by Dow AgroSciences, 9330 Zionsville Road, Indianapolis, IN 46268. The petition requested that 40 CFR 180.350 be amended by establishing tolerances for residues of the herbicide, nitrapyrin [2-chloro-6-(trichloromethyl) pyridine] and its metabolite, 6-chloropicolinic acid (6-CPA), in or on nut, tree group 14-12 at 0.02 parts per million (ppm) and almond, hulls at 0.07 ppm. That document referenced a summary of the petition prepared by Dow AgroSciences, 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 modified the level at which the tolerance is being established for almond hulls. 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 nitrapyrin including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with nitrapyrin 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.

The liver is the major target organ of nitrapyrin in both subchronic and chronic studies via the oral route; no toxicity was seen in the subchronic dermal study. Effects in the oral studies were generally consistent among the species tested (rat, mouse, rabbit, and dog), progressed with time, and typically included increased liver weights, enlarged livers, and/or hepatocellular hypertrophy. Only increased liver weights in the absence of other toxic effects in the liver were noted in the rabbit; however, by study design no other liver parameters were measured. Although some of the observed liver effects (*i.e.*, increased liver weights and hypertrophy) suggest an adaptive response, pronounced decreases in body weight were evident in mice at higher doses and clear signs of hepatotoxicity (*i.e.*, marked changes in clinical chemistry, indicative of liver toxicity and histopathology, leading to malignant tumor formation in mice) are seen only after prolonged exposure. In the chronic dog study, liver toxicity was indicated by marked changes in clinical chemistry parameters (alkaline phosphatase and cholesterol), increased liver weight, and hypertrophy. In rats, increased liver weights were also associated with clinical chemistry changes and histopathology (vacuolation consistent with fatty changes). By contrast to the other species, liver toxicity in mice progressed from liver weight alterations (associated with histopathological findings of hypertrophy, mitotic figures and necrosis) to significantly increased liver adenomas and non-significantly

increased liver carcinomas at ≥ 250 mg/kg/day.

Kidney effects (increased kidney weights accompanied by intratubular mineralization and multifocal necrosis of the intratubular epithelium) were observed in male rats only, in both the two generation reproduction study and the chronic toxicity study. These kidney effects are indicative of α -2u-globulin accumulation with eventual progression to renal tumors. This finding of α -2u-globulin was confirmed by immunoperoxidase stain in the rat chronic study. The response, which only occurs in male rats, is not relevant to humans.

Nitrapyrin did not show qualitative or quantitative susceptibility in the rabbit or rat developmental studies. In the developmental toxicity in the rabbit, an increased incidence of crooked hyoid bones was seen at the highest dose tested (HDT). This effect is considered to be treatment-related but not adverse because it does not affect the health of the animal. In the rat developmental study, delayed ossification and decreased fetal body weight occurred at the same dose as maternal toxicity (reduced body weight/weight gain and reduced food consumption) and are not considered more severe than the maternal effects. Toxic effects in the two generation reproduction study occurred at the same dose in both parental animals and the offspring and included increased liver weights (parental M and F; both generations), enlarged livers in F2 pups (M and F), and hepatic vacuolation consistent with fatty changes in parental and offspring animals (both sexes and both generations).

In the acute neurotoxicity study, following a single oral dose of 400 mg/kg nitrapyrin, male and female rats showed slight tremors; females also showed gait incoordination, palpebral closure, and perineal fecal staining accompanied by decreased total motor activity ($\approx 40\%$ M & F) and an effect on distribution of motor activity (*i.e.*, characterized as a more rapid decline activity than control in both sexes) on Day 1 only. In the subchronic neurotoxicity study, increased landing foot splay in males and females, and increased motor activity in females (equivocal in males) were observed at the same Lowest Observed Adverse Effect Level (LOAEL) (120 mg/kg/day) as systemic effects (increased liver weights, pale livers and increased liver size) in rats. However, there was no evidence of gross pathology or neuropathology in these studies or in any other study throughout the database.

There is also no evidence of immunotoxicity or mutagenicity.

The available data on carcinogenicity of nitrapyrin includes reports of multiple tumor types that were reported (renal tumors in male rats, stomach, epididymis, or Harderian gland neoplasms in either male or female mice). Following five peer review meetings to evaluate the carcinogenic potential of nitrapyrin as a nitration inhibitor, EPA concluded that the reported tumors were either not treatment-related or not relevant for the human risk assessment, with the exception of the mouse liver tumors. At that time, the Agency classified nitrapyrin as “suggestive evidence of carcinogenic potential”. Following this classification, mode of action (MOA) studies were submitted that suggest that nitrapyrin is a mitogen that induces the male mouse liver tumors through activation of the constitutive androstane receptor (CAR), a nuclear receptor. Since the MOA data were not considered complete (no MOA data on female mice), a final decision on the MOA has not been made. The weight of evidence remains as suggestive of carcinogenicity for the following reasons:

1. Liver tumors were not seen in the 2-year carcinogenicity study in rats.
2. The response is driven by benign adenomas.

3. Mutagenicity was ruled out as a MOA.

4. There are adequate data supporting the MOA of mitogenesis through activation CAR nuclear receptors in male mice.

Based on the available information and the fact that the chronic reference dose (0.03 mg/kg/day) is approximately 4000X lower than the dose at which tumors are seen in the female mouse, the Agency concludes that quantification of cancer risk using a non-linear Reference Dose (RfD) approach will be protective of all chronic toxicity.

Specific information on the studies received and the nature of the adverse effects caused by nitrapyrin 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 the document titled “Nitrapyrin. Human Health Risk Assessment for Registration Review and New Use on Tree Nuts (Crop Group 14–12)” in docket ID number EPA–HQ–OPP–2016–0295.

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://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/assessing-human-health-risk-pesticides>.

A summary of the toxicological endpoints for nitrapyrin used for human risk assessment is shown in Table 1 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR NITRAPYRIN 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 (General population including infants and children).	NOAEL = 16 mg/kg/day. UF _A = 10x UF _H = 10x FQPA SF = 1x	Acute RfD = 0.16 mg/kg/day. aPAD = 0.16 mg/kg/day	Acute neurotoxicity rat study. LOAEL = 80 mg/kg, based on decreased total motor activity on Day 1 in females.
Chronic dietary (All populations)	NOAEL = 3 mg/kg/day. UF _A = 10x UF _H = 10x FQPA SF = 1x	Chronic RfD = 0.03 mg/kg/day. cPAD = 0.03 mg/kg/day	1-year chronic dog study. LOAEL = 15 mg/kg/day, based on increased absolute and relative liver weights, increased clinical chemistry (alkaline phosphatase & cholesterol) and liver hypertrophy in both sexes.
Cancer (Oral, dermal, inhalation).	Nitrapyrin is classified as “suggestive evidence of carcinogenic potential”. EPA has determined that using the chronic RfD to assess carcinogenic potential will be protective of any potential cancer risk.		

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).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to nitrapyrin, EPA considered exposure under the petitioned-for tolerances as well as all existing

nitrapyrin tolerances in 40 CFR 180.350. EPA assessed dietary exposures from nitrapyrin 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.

Such effects were identified for nitrapyrin. In estimating acute dietary

exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 2003–2008 National Health and Nutrition Examination Survey, What We Eat in America, (NHANES/WWEIA). As to residue levels in food, EPA assumed tolerance-level residues and 100 percent crop treated (PCT).

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 2003–2008 NHANES/WWEIA. As to residue levels in food, EPA assumed tolerance-level residues and 100 PCT.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that quantification of cancer risk using a non-linear Reference Dose (RfD) approach adequately accounts for all chronic toxicity, including carcinogenicity that could result from exposure to nitrapyrin.

iv. *Anticipated residue and PCT information.* EPA did not use anticipated residue or PCT information in the dietary assessment for nitrapyrin. Tolerance-level residues and 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used water exposure models in the dietary exposure analysis and risk assessment for nitrapyrin in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of nitrapyrin. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at <http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/about-water-exposure-models-used-pesticide>.

Based on the Tier II pesticide water calculator (PWC), the estimated drinking water concentrations (EDWCs) of nitrapyrin residues of concern for acute exposures are estimated to be 51 parts per billion (ppb) for surface water and 76 ppb for ground water, and for chronic exposures are estimated to be 15 ppb for surface water and 67 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 76 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment, the water concentration of value 67 ppb was used to assess the contribution to drinking water.

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). Nitrapyrin is not registered for any specific use patterns that would result in residential exposure.

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 nitrapyrin to share a common mechanism of toxicity with any other substances, and nitrapyrin does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that nitrapyrin 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://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/cumulative-assessment-risk-pesticides>.

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.* Neither quantitative nor qualitative susceptibility was seen in either the rabbit or rat developmental studies or in the two generation reproduction study. In the developmental toxicity in the rabbit, an increased incidence of crooked hyoid bones was seen at the highest dose tested (HDT). This effect is considered to be treatment-related but not adverse. In the rat developmental study, delayed ossification and decreased fetal body weight occurred at the same dose as maternal toxicity.

Toxic effects in the two generation reproduction study also occurred at the same dose in both parental animals and the offspring and included increased liver weights (parental M and F; both generations), enlarged livers in F2 pups (M and F), and hepatic vacuolation consistent with fatty changes in parental and offspring animals (both sexes and both generations). Similarly, gross pathological or neuropathological findings in the neurotoxicity studies were negative.

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. This decision is based on the following findings:

i. The toxicity database for nitrapyrin is complete.

ii. In an acute neurotoxicity study, nitrapyrin induced tremors and other functional observation battery effects, (i.e., slight gait incoordination, palpebral closure and perineal fecal staining) at the high dose (400 mg/kg) only. Decreased motor activity was seen in both sexes at 400 mg/kg and in females at 80 mg/kg. In contrast, increased motor activity was observed in the subchronic neurotoxicity study in female rats but only at high doses (≥ 500 mg/kg/day). Because (1) there are clear NOAELs/LOAELs in the available studies for these effects and the selected endpoints are protective of the observed effects; (2) there is no corroborating gross pathological or neuropathological findings; and (3) there was no evidence of neurotoxicity in other studies in the database, the Agency’s concern for potential neurotoxicity is low. Accordingly, and due to the lack of concerns for increased susceptibility in infants and children, there is no need to require a developmental neurotoxicity to further assess the potential for neurotoxicity in infants and children.

iii. There is no evidence that nitrapyrin results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study. Effects on the offspring were not adverse or occurred only at the same parental dose.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground and surface water modeling to assess exposure to nitrapyrin in drinking water. The EPA believes that these assessments will not underestimate the exposure and risks posed by nitrapyrin.

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, drinking water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to nitropryrin will utilize 8.5% of the aPAD for all infants less than 1-year-old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to nitropryrin from food and drinking water will utilize 15% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure. There are no residential uses for nitropryrin.

3. *Short- and intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account short- and intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). However, nitropryrin is not registered for, or proposed for, any residential uses. Therefore, because there is no short- or intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD, no further assessment of short- or intermediate-term risk is necessary for nitropryrin.

4. *Aggregate cancer risk for U.S. population.* Based on the discussion in Unit III.A., EPA considers the chronic aggregate risk assessment to be protective of any aggregate cancer risk. As there is no chronic risk of concern, EPA does not expect any cancer risk to the U.S. population from aggregate exposure to nitropryrin.

5. *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 nitropryrin residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Seven analytical methods are available in Volume II of the Pesticide Analytical Manual (PAM II—Pesticide Reg. Sec. 180.350) for tolerance enforcement for nitropryrin and/or for metabolite 6–CPA.

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 any MRLs for nitropryrin.

C. Revisions to Petitioned-For Tolerances

The tolerance being established for almond hulls is different than that proposed by the registrant. This difference is due to EPA using the Organization for Economic Cooperation and Development (OECD) Maximum Residue Limits (MRL) calculation procedures to determine appropriate tolerance levels. The results from the spreadsheet calculator supports a tolerance of 0.06 ppm for almond hulls, rather than 0.07 ppm as proposed.

Also, EPA has revised the tolerance expression to clarify (1) that as provided in FFDCA section 408(a)(3), the tolerance covers metabolites and degradates of nitropryrin not specifically mentioned; and (2) that compliance with the specified tolerance levels is to be determined by measuring only the specific compounds mentioned in the tolerance expression.

V. Conclusion

Therefore, tolerances are established for residues of nitropryrin, including its metabolites and degradates, in or on almond, hulls at 0.06 ppm and the nut, tree, group 14–12 at 0.02 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 27, 2017.

Daniel Kenny,

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. In § 180.350, paragraph (a):
 - a. Revise the introductory text.
 - b. Add alphabetically entries to the table for “Almond, hulls”; and “Nut, tree, group 14–12”.

The revision and additions read as follows:

§ 180.350 Nitrapyrin; tolerances for residues.

(a) *General.* Tolerances are established for residues of the insecticide nitrapyrin, including its metabolites and degradates, in or on the commodities below. Compliance with the tolerance levels specified below is to be determined by measuring only the sum of nitrapyrin (2-chloro-6-(trichloromethyl) pyridine) and its 6-CPA (6-chloropicolinic acid) metabolite, calculated as the stoichiometric equivalent of nitrapyrin, in or on the commodity:

Commodity	Parts per million
Almond, hulls	0.06
* * * *	*
Nut, tree, group 14–12	0.02
* * * *	*

[FR Doc. 2017–25829 Filed 11–29–17; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 270

[Docket No. FRA–2011–0060, Notice No. 7]

RIN 2130–AC71

System Safety Program

AGENCY: Federal Railroad Administration (FRA), Department of Transportation.

ACTION: Final rule; stay of regulations.

SUMMARY: On August 12, 2016, FRA published a final rule requiring commuter and intercity passenger railroads to develop and implement a system safety program (SSP) to improve the safety of their operations. On February 10, 2017, FRA stayed the SSP final rule’s requirements until March 21, 2017, and extended the stay until May 22, 2017, June 5, 2017, and then December 4, 2017. FRA is issuing this final rule to extend that stay until December 4, 2018.

DATES: Effective November 29, 2017, the stay of 49 CFR part 270 is extended until December 4, 2018. Petitions for reconsideration must be received on or before January 19, 2018. Comments in response to petitions for reconsideration must be received on or before March 5, 2018.

ADDRESSES: *Petitions for reconsideration and comments on petitions for reconsideration:* Any petitions for reconsideration or comments on petitions for reconsideration related to this Docket No. FRA–2011–0060, Notice No. 7, may be submitted by any of the following methods:

- **Web site:** The Federal eRulemaking Portal, www.regulations.gov. Follow the Web site’s online instructions for submitting comments.
- **Fax:** 202–493–2251.
- **Mail:** Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590.

• **Hand Delivery:** Docket Management Facility, Room W12–140 on the ground level of the West Building, U.S.

Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC, 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 or Regulatory Identification Number (RIN) for this rulemaking (2130–AC71). Note that all petitions and comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act heading in the

SUPPLEMENTARY INFORMATION section of this document for Privacy Act information related to any submitted petitions, comments or materials.

Docket: For access to the docket to read background documents, petitions for reconsideration, or comments received, go to <http://www.regulations.gov> at any time or visit the Docket Management Facility, U.S.

Department of Transportation, 1200 New Jersey Avenue SE., Room W12–140 on the Ground level of the West Building, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Gross, Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel; telephone: 202–493–1342; email: Elizabeth.Gross@dot.gov.

SUPPLEMENTARY INFORMATION: On August 12, 2016, FRA published a final rule requiring commuter and intercity passenger railroads to develop and implement an SSP to improve the safety of their operations. See 81 FR 53850. On February 10, 2017, FRA stayed the SSP final rule’s requirements until March 21, 2017, consistent with the new Administration’s guidance issued January 20, 2017, intended to provide the Administration an adequate opportunity to review new and pending regulations. See 82 FR 10443 (Feb. 13, 2017). To provide additional time for that review, FRA extended the stay until May 22, 2017, June 5, 2017, and then December 4, 2017. See 82 FR 14476 (Mar. 21, 2017), 82 FR 23150 (May 22, 2017), and 82 FR 26359 (June 7, 2017). These stays of the rule’s requirements did not affect the SSP final rule’s information protection provisions in 49 CFR 270.105, which took effect for information a railroad compiles or collects solely for SSP purposes on August 14, 2017.

FRA’s review included petitions for reconsideration of the SSP final rule

(Petitions). Various rail labor organizations (Labor Organizations) filed a single joint petition.¹ State and local transportation departments and authorities (States) filed the three other petitions, one of which was a joint petition (State Joint Petition).² The State Joint Petition requested that FRA stay the SSP final rule, and NCDOT specifically requested that FRA stay the rule while FRA was considering the petitions. All Petitions were available for public comment in the docket for the SSP rulemaking. On November 15, 2016, the Massachusetts Department of Transportation (MassDOT) submitted a comment supporting the State Joint Petition, also asking FRA to stay the SSP final rule. FRA did not receive any public comments opposing the States' requests for a stay.

On October 30, 2017, FRA met with the Passenger Safety Working Group and the System Safety Task Group of the Railroad Safety Advisory Committee (RSAC) to discuss the Petitions and comments received in response to the Petitions.³ FRA specifically invited its state partners to this meeting, which was also open to the public. This meeting was necessary for FRA to receive input from industry and the public, and to discuss potential paths forward to respond to the Petitions prior to FRA taking final action. During the

meeting, a representative from the Oregon Department of Transportation asked whether the SSP final rule would be further stayed pending FRA's development of a response to the Petitions and public input received at the meeting. An FRA representative indicated that he anticipated a further stay of the rule to provide time to resolve the issues raised by the petitions. None of the meeting participants expressed opposition to a further stay.⁴

Given the multiple requests for a continued stay of the rule, the comment received supporting a stay, the lack of opposition to a stay in either the comments or at the public RSAC meeting, and FRA's interest in addressing the issues raised in the State petitions prior to requiring full compliance with the SSP final rule, FRA is issuing this final rule extending the stay until December 4, 2018.

Regulatory Impact and Notices

Executive Orders 12866, 13563, and 13771 and DOT Regulatory Policies and Procedures

This final rule is a non-significant regulatory action within the meaning of Executive Order 12866 and DOT policies and procedures. See 44 FR 11034 (Feb. 26, 1979). The final rule follows the direction of Executive Order 13563 "Improving Regulation and Regulatory Review", which emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Finally, the final rule also follows the guidance of Executive Order 13771 "Reducing Regulation and Controlling Regulatory Costs" (E.O. 13771), which directs agencies that "for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process." FRA identified this final rule as a deregulatory effort to comply with E.O. 13771. For more information on E.O. 13771, refer to Office of Management and Budget's April 5, 2017 publication "Memorandum: Implementing Executive Order 13771, titled 'Reducing Regulation and Controlling Regulatory Costs.'"

In July 2016, FRA issued the System Safety Program final rule (2016 Final Rule) as part of its efforts to continuously improve rail safety and to satisfy the statutory mandate in sections

103 and 109 of Rail Safety Improvement Act of 2008. The 2016 Final Rule requires passenger railroads to establish a program that systematically evaluates railroad safety risks and manages those risks with the goal of reducing the numbers and rates of railroad accidents, incidents, injuries, and fatalities. Paperwork requirements are the largest burden of the 2016 Final Rule.

FRA believes that the final rule, which will stay the requirements of the 2016 Final Rule until December 4, 2018, will reduce regulatory burden on the railroad industry. By staying the requirements of the 2016 Final Rule, railroads will realize a cost savings. Railroads will not sustain any costs during the first year of this analysis. In addition, because the analysis discounts future costs and the final rule will move forward all costs by one-year, the present value cost of the final rule is lower as compared to the present value cost of the 2016 Final Rule. FRA estimates this cost savings to be approximately \$164,480, at a 3% discount rate, and \$76,788, at a 7% discount rate. The following table shows 2016 Final Rule total cost, delayed one-year implementation date total costs (final rule total cost), and the cost savings from a one-year implementation date delay.

	Present value (7%)	Present value (3%)
2016 Final rule, total cost	\$2,327,223	\$3,412,649
Final rule, total cost	2,250,435	3,248,169
Cost savings from one-year delay	76,788	164,480

Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, and E.O. 13272, 67 FR 53461 (Aug. 16, 2002), require agency review of proposed and final rules to assess their impact on small entities. An agency must prepare an initial regulatory flexibility analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant impact on a substantial number of small entities. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the FRA Administrator certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

This final rule will affect passenger railroads, but will have a beneficial effect, lessening the burden on small railroads.

"Small entity" is defined in 5 U.S.C. 601 as including a small business

¹ The labor organizations that filed the joint petition are: The American Train Dispatchers Association (ATDA), Brotherhood of Locomotive Engineers and Trainmen (BLET), Brotherhood of Maintenance of Way Employees Division (BMWED), the Brotherhood of Railroad Signalmen (BRS), Brotherhood Railway Carmen Division (TCU/IAM), and Transport Workers Union of America (TWU).

² The Capitol Corridor Joint Powers Authority (CCJPA), Indiana Department of Transportation (INDOT), Northern New England Passenger Rail Authority (NNEPRA), and San Joaquin Joint Powers Authority (SJJPA) filed a joint petition (Joint Petition). The North Carolina Department of Transportation (NCDOT) and State of Vermont Agency of Transportations (VTrans) each filed separate petitions.

³ Attendees at the October 30, 2017, meeting included representatives from the following organizations: ADS System Safety Consulting, LLC; American Association of State Highway and Transportation Officials (AASHTO); American Public Transportation Association (APTA); American Short Line and Regional Railroad Association (ASLRRRA); ATDA; Association of American Railroads (AAR); BLET; BMWED; BRS; CCJPA; The Fertilizer Institute; Gannett Fleming Transit and Rail Systems; International Brotherhood of Electrical Workers; Metropolitan Transportation Authority (MTA); National Railroad Passenger Corporation (Amtrak); National Transportation Safety Board (NTSB); NCDOT; NNEPRA; Politico; San Joaquin Regional Rail Commission/Altamont Corridor Express; Sheet Metal, Air, Rail, and Transportation Workers (SMART); United States Department of Transportation—Transportation Safety Institute. During the meeting, an attorney from Kaplan Kirsch & Rockwell, LLP representing AASHTO indicated he was authorized to speak on behalf of all the State petitioners.

⁴ Once the RSAC meeting notes are finalized, FRA will place them in Docket ID FRA-2011-0060 at www.regulations.gov.

concern that is independently owned and operated, and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a “small entity” in the railroad industry is a for profit “linehaul railroad” that has fewer than 1,500 employees, a “short line railroad” with fewer than 1,500 employees, or a “commuter rail system” with annual receipts of less than \$15.0 million dollars. See “Size Eligibility Provisions and Standards,” 13 CFR part 121, subpart A. Additionally, 5 U.S.C. 601(5) defines as “small entities” governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000. Federal agencies may adopt their own size standards for small entities, in consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final statement of agency policy that formally establishes “small entities” or “small businesses” as being railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1–1, which is \$20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. See 68 FR 24891 (May 9, 2003), codified at Appendix C to 49 CFR part 209. The \$20-million limit is based on the Surface Transportation Board’s revenue threshold for a Class III railroad. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1–1. FRA is using this definition for this rulemaking.

This final rule will apply to passenger railroads. Based on the definition of “small entity,” only two passenger railroads are considered small entities: Saratoga & North Creek Railway (SNC), and the Hawkeye Express (operated by the Iowa Northern Railway Company (IANR)). As the final rule is not significant, if it did impact these two small entities, this final rule would merely provide these entities with additional compliance time without introducing any additional burden.

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601(b), the Administrator of the FRA hereby certifies that this final rule will not have a significant impact on a substantial number of small entities. A substantial number of small entities may be impacted by this regulation; however, any impact on these entities will be minimal and positive.

Paperwork Reduction Act

There are no new collection of information requirements contained in this final rule and, in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, an information collection submission to the Office of Management and Budget is not required. The record keeping and reporting requirements already contained in the SSP final rule were approved by the Office of Management and Budget on October 5, 2016. The information collection requirements thereby became effective when they were approved by OMB. The OMB approval number is OMB No. 2130–0599, and OMB approval expires on October 31, 2019.

Federalism Implications

Executive Order 13132, “Federalism” (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” are defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that this rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that this rule does not impose substantial direct compliance costs on State and local governments. Therefore, the

consultation and funding requirements of Executive Order 13132 do not apply.

International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. This rulemaking is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

Environmental Assessment

FRA has evaluated this rule in accordance with its “Procedures for Considering Environmental Impacts” (FRA’s Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA’s Procedures, which concern the promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation. See 64 FR 28547, May 26, 1999.

In accordance with section 4(c) and (e) of FRA’s Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this rule is not a major Federal action significantly affecting the quality of the human environment.

Unfunded Mandates Reform Act of 1995

Pursuant to section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate

requirements specifically set forth in law).

Section 202 of the Act (2 U.S.C. 1532) further requires that before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement.

This written statement must detail the effect on State, local, and tribal governments and the private sector. For the year 2017, this monetary amount of \$100,000,000 has been adjusted to \$156,000,000 to account for inflation. This final rule would not result in such an expenditure, and thus preparation of such a statement is not required.

Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” 66 FR 28355, May 22, 2001. Under the Executive Order, a “significant energy action” is defined as any action by an agency (normally published in the **Federal Register**) that promulgates, or is expected to lead to the promulgation of, a final rule or regulation (including a notice of inquiry, advance notice of proposed rulemaking, and notice of proposed rulemaking) that (1)(i) is a significant regulatory action under Executive Order 12866 or any successor order and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this rule in accordance with Executive Order 13211. FRA has determined that this rule will not have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a “significant energy action” within the meaning of Executive Order 13211.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-

14 FDMS), which can be reviewed at www.dot.gov/privacy.

List of Subjects in 49 CFR Part 270

Penalties, Railroad safety, Reporting and recordkeeping requirements, System safety.

The Rule

■ In consideration of the foregoing, FRA extends the stay of the SSP final rule published August 12, 2016 (81 FR 53850) until December 4, 2018.

Authority: 49 U.S.C. 20103, 20106–20107, 20118–20119, 20156, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.89.

Issued in Washington, DC, on November 27, 2017.

Juan D. Reyes III,
Chief Counsel.

[FR Doc. 2017–25821 Filed 11–29–17; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 170109046–7933–02]

RIN 0648–XF156

Pacific Island Pelagic Fisheries; 2017 Commonwealth of the Northern Mariana Islands Bigeye Tuna Fishery; Closure

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is closing the U.S. pelagic longline fishery for bigeye tuna in the western and central Pacific Ocean because the fishery will reach the 2017 allocation limit for the Commonwealth of the Northern Mariana Islands (CNMI). This action is necessary to comply with regulations managing this fish stock.

DATES: Effective 12:01 a.m. local time December 6, 2017, through December 31, 2017.

FOR FURTHER INFORMATION CONTACT: Jarad Makaiau, NMFS PIRO Sustainable Fisheries, 808–725–5176.

SUPPLEMENTARY INFORMATION: On September 1, 2017, NMFS restricted the retention, transshipment and landing of bigeye tuna captured by longline gear in the western and central Pacific Ocean (WCPO) because the U.S. longline fishery reached 2017 U.S. bigeye tuna limit of 3,554 mt (82 FR 47642, October 13, 2017). Regulations at 50 CFR

300.224(d) provide an exception to this closure for bigeye tuna caught by U.S. longline vessels identified in a valid specified fishing agreement under 50 CFR 665.819(c). Further, 50 CFR 665.819(c)(9) authorized NMFS to attribute catches of bigeye tuna made by U.S. longline vessels identified in a valid specified fishing agreement to the U.S. territory to which the agreement applies.

Effective on October 10, 2017, NMFS specified a 2017 catch limit of 2,000 mt of longline-caught bigeye tuna for the U.S. territories of American Samoa, Guam and the Commonwealth of the Northern Mariana Islands or CNMI (82 FR 49143, October 24, 2017). NMFS also authorized each territory to allocate up to 1,000 mt of its 2,000 mt bigeye tuna limit to U.S. longline fishing vessels permitted to fish under the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific (FEP).

On October 6, 2017, the Western Pacific Fishery Management Council, through its Executive Director, transmitted to NMFS a specified fishing agreement between the CNMI and Quota Management, Inc. (QMI) dated April 14, 2016. NMFS reviewed the agreement and determined that it was consistent with the requirements at 50 CFR 665.819, the FEP, the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable laws (82 FR 49143, October 24, 2017). The criteria that a specified fishing agreement must meet, and the process for attributing longline-caught bigeye tuna, followed the procedures in 50 CFR 665.819—Territorial catch and fishing effort limits.

In accordance with 50 CFR 300.224(d) and 50 CFR 665.819(c)(9), NMFS began attributing bigeye tuna caught in the WCPO by vessels identified in the CNMI/QMI agreement to the CNMI, beginning on October 10, 2017. NMFS monitored catches of longline-caught bigeye tuna by the CNMI longline fisheries, including catches made by U.S. longline vessels operating under the CNMI/QMI agreement. Based on this monitoring, NMFS forecasted that the CNMI territorial allocation limit of 1,000 mt will be reached by December 6, 2017, and is, as an accountability measure, prohibiting the catch and retention of longline-caught bigeye tuna by vessels in the CNMI/QMI agreement.

Notice of Closure and Temporary Rule

Effective 12:01 a.m. local time December 6, 2017, through December 31, 2017, NMFS closes the U.S. pelagic longline fishery for bigeye tuna in the western and central Pacific Ocean as a result of the fishery reaching the 2017

allocation limit of 1,000 mt for the CNMI.

During the closure, a U.S. fishing vessel operating under the CNMI/QMI agreement may not retain on board, transship, or land bigeye tuna captured by longline gear in the WCPO, except that any bigeye tuna already on board a fishing vessel upon the effective date of the restrictions may be retained on board, transshipped, and landed, provided that they are landed within 14 days of the start of the closure; that is, by December 20, 2017.

Additionally, U.S. fishing vessels operating under the CNMI/QMI agreement are also prohibited from transshipping bigeye tuna caught in the WCPO by longline gear to any vessel other than a U.S. fishing vessel with a valid permit issued under 50 CFR 660.707 or 665.801.

During the closure, all other restrictions and requirements NMFS established on September 1, 2017, as a result of the U.S. longline fishery reaching the 2017 U.S. bigeye tuna limit of 3,108 mt (82 FR 37824, August 14, 2017) shall remain valid and effective.

However, any vessel included in the CNMI/QMI agreement that is also included in a valid specified fishing agreement in effect on December 6, 2017, may continue to transship, retain, and land bigeye tuna caught by longline gear in the WCPO. Additionally, if any such vessel is engaged in a longline

fishing trip in the WCPO on December 6, 2017, that vessel would not need to return to port before December 20, 2017. NMFS would announce any subsequent valid specified fishing agreement in the **Federal Register**.

Classification

There is good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment on this action, because it would be impracticable and contrary to public interest, as discussed below. This rule closes the U.S. longline fishery for bigeye tuna in the WCPO as a result of reaching the bigeye tuna allocation limit established by the 2017 specification for catch and allocation limits of bigeye tuna for the CNMI, and the specified fishing agreement between the Government of the CNMI and QMI dated April 14, 2016.

NMFS forecasted that the fishery would reach the 2017 CNMI allocation limit by December 6, 2017. Fishermen have been subject to longline bigeye tuna limits in the western and central Pacific since 2009. They have received ongoing, updated information about the 2017 catch and progress of the fishery in reaching the U.S. bigeye tuna limit via the NMFS Web site, social media, and other means. The publication timing of this rule, moreover, provides longline fishermen with seven days' advance notice of the closure date, and

allows two weeks to return to port and land their catch of bigeye tuna. This action is intended to comply with regulations managing this stock, and, accordingly NMFS finds it impracticable and contrary to the public interest to have prior notice and public comment.

For the reasons stated above, there is also good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness for this temporary rule. NMFS must close the fishery to ensure that fishery does not exceed the allocation limit. NMFS implemented the catch and allocation limits for the CNMI consistent with management objectives to sustainably manage the bigeye tuna stock and restore the stock to levels capable of producing maximum sustainable yield on a continuing basis. Failure to close the fishery before the limit is reached would be inconsistent with bigeye tuna management objections and in violation of Federal law.

This action is required by 50 CFR 665.819(d), and is exempt from review under Executive Order 12866.

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

Dated: November 27, 2017.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2017-25801 Filed 11-27-17; 4:15 pm]

BILLING CODE 3510-22-P

Proposed Rules

Federal Register

Vol. 82, No. 229

Thursday, November 30, 2017

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2017-1096; Product Identifier 2017-NM-072-AD]

RIN 2120-AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Airbus Model A318, A319, A320, and A321 series airplanes; all Model A330-200 Freighter, -200, and -300 series airplanes; and all Model A340-200, -300, -500, and -600 series airplanes. This proposed AD was prompted by reports of false traffic collision avoidance system (TCAS) resolution advisories. This proposed AD would require modifying the software in the TCAS computer processor or replacing the TCAS computer with a new TCAS computer. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by January 16, 2018.

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 Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email account.airworth-eas@airbus.com; Internet <http://www.airbus.com>. You may view this service information at the FAA, Transport Standards Branch, 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-2017-1096; 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 NPRM, the regulatory 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 FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, International Section, Transport Standards Section, FAA, 1601 Lind Avenue SW., Renton, WA 98057-3356; telephone 425-227-1405; fax 425-227-1149.

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-2017-1096; Product Identifier 2017-NM-072-AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. We will consider all comments received by the closing date and may amend this NPRM based on 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 NPRM.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2017-0091R2, dated June 2, 2017 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for certain Airbus Model A318, A319, A320, and A321 series airplanes; all Model A330-200 Freighter, -200, and -300 series airplanes; and all Model A340-200, -300, -500, and -600 series airplanes. The MCAI states:

Since 2012, a number of false TCAS [traffic collision avoidance system] resolution advisories (RA) have been reported by various European Air Navigation Service Providers. EASA has published certification guidance material for collision avoidance systems (AMC 20-15) which defines a false TCAS RA as an RA that is issued, but the RA condition does not exist. It is possible that more false (or spurious) RA events have occurred, but were not recorded or reported. The known events were mainly occurring on Airbus single-aisle (A320 family) aeroplanes, although several events have also occurred on Airbus A330 aeroplanes. Investigation determined that the false RAs are caused on aeroplanes with a certain Honeywell TPA-100B TCAS processor, P/N 940-0351-001, installed, through a combination of three factors: (1) Hybrid surveillance enabled; (2) processor connected to a hybrid GPS source, without a direct connection to a GPS source; and (3) an encounter with an intruder aeroplane with noisy (jumping) ADS-B Out position.

EASA previously published Safety Information Bulletin (SIB) 2014-33 to inform owners and operators of affected aeroplanes about this safety concern. At that time, the false RAs were not considered an unsafe condition. Since the SIB was issued, further events have been reported, involving a third aeroplane.

This condition, if not corrected, could lead to a loss of separation with other aeroplanes, possibly resulting in a mid-air collision.

Prompted by these latest findings, and after review of the available information, EASA reassessed the severity and rate of occurrence of false RAs and has decided that mandatory action must be taken to reduce the rate of occurrence, and the risk of loss of separation with other aeroplanes.

Honeywell International Inc. published Service Bulletin (SB) 940-0351-34-0005 [Publication Number D201611000002] to provide instructions for an upgrade of TPA-100B processors P/N [part number] 940-0351-001 to P/N 940-0351-005, introducing software version 05/01.

Consequently, Airbus developed certain modifications (mod 159658 and mod 206608) and published SB A32034-1656, SB A320-34-1657, SB A330-34-3342, SB A340-34-4304 and SB A340-34-5118, to provide instructions for in-service introduction of the software update (including change to P/N 940-0351-005) on the affected aeroplanes, or to replace the TCAS processor with a P/N 940-0351-005 unit.

Consequently, EASA issued AD 2017-0091, to require modification or replacement of Honeywell TPA-100B TCAS P/N 940-0351-001 processors, hereafter referred to as 'affected processor' in this [EASA] AD. That [EASA] AD also prohibits installation of an affected processor on post-mod aeroplanes.

After that [EASA] AD was issued, it was found that an error had been introduced, inadvertently restricting the required action to those aeroplanes that had the affected part installed on the Airbus production line, thereby excluding those that had the part installed in-service by Airbus SB. Consequently, EASA revised AD 2017-0091 to amend Note 1 and include references to the relevant Airbus SBs that introduced the affected processor in service.

Since EASA AD 2017-0091R1 was issued, prompted by operator feedback and to avoid confusion, it was decided to exclude aeroplanes that had an affected processor installed by STC, for which EASA AD No.: 2017-0091R2 separate [EASA] AD action is planned. It was also determined that the prohibition to install an affected processor was too strict, particularly for Group 2 aeroplanes.

For the reason described above, this [EASA] AD is revised to reduce the Applicability, introduce some minor editorial changes and to amend paragraph (3).

You may examine the MCAI in the AD docket on the Internet at <http://www.regulations.gov> by searching for

and locating Docket No. FAA-2017-1096.

Related Service Information Under 1 CFR Part 51

Airbus has issued the following service information, which describes procedures for modifying the software in the TCAS computer processor and procedures for replacing the TCAS computer with a new TCAS computer. These documents are distinct since they apply to different airplane models in different configurations.

- Airbus Service Bulletin A320-34-1656, dated April 19, 2017.
- Airbus Service Bulletin A320-34-1657, dated April 19, 2017.
- Airbus Service Bulletin A330-34-3342, dated April 19, 2017.
- Airbus Service Bulletin A340-34-4304, dated April 19, 2017.
- Airbus Service Bulletin A340-34-5118, dated April 19, 2017.

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.

Other Related Service Information

Honeywell has issued Service Bulletin 940-0351-34-0005, Revision 0, dated January 20, 2017. This service information describes procedures for modifying an affected TCAS processor and re-identifying the processor as part number (P/N) 940-0351-005.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another

country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of these same type designs.

Differences Between This Proposed AD and the MCAI or Service Information

Paragraph 3 of EASA AD 2017-0091R2, dated June 2, 2017, states that, for Group 2 airplanes (that do not have an affected processor installed), a Honeywell TPA-100B processor having P/N 940-0351-001 should not be installed on any airplane as of June 2, 2018; however, this proposed AD would prohibit installation of a processor having P/N 940-0351-001 as of the effective date of the AD. In cases where a part is known to be unairworthy—such as when it creates an unsafe condition—we typically do not allow such a part to be installed on airplanes that are not affected by the unsafe condition as of the effective date of the AD.

Costs of Compliance

We estimate that this proposed AD affects 205 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
Software modification	2 work-hours × \$85 per hour = \$170	\$0	\$170	\$14,450
TCAS replacement	2 work-hours work-hours × \$85 per hour = \$170	\$298	\$468	\$95,940

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.

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive

Director has delegated the authority to issue ADs applicable to transport category airplanes to the Director of the System Oversight Division.

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):

Airbus: Docket No. FAA–2017–1096; Product Identifier 2017–NM–072–AD.

(a) Comments Due Date

We must receive comments by January 16, 2018.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus airplanes, all manufacturer serial numbers, certificated in any category, as identified in paragraphs (c)(1) through (c)(11) of this AD; except those Model A318, A319, A320 and A321 series airplanes that have been modified by a supplemental type certificate that installs Honeywell traffic alert and collision avoidance system (TCAS) 7.1 processor, part number (P/N) 940–0351–001.

- (1) Model A318–111, –112, –121, and –122 airplanes.
- (2) Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes.
- (3) Model A320–211, –212, –214, –216, –231, –232, –233, –251N, and –271N airplanes.
- (4) Model A321–111, –112, –131, –211, –212, –213, –231, –232, –251N, –253N, and –271N airplanes.
- (5) Model A330–223F and –243F airplanes.
- (6) Model A330–201, –202, –203, –223, and –243 airplanes.
- (7) Model A330–301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes.

(8) Model A340–211, –212, and –213 airplanes.

(9) Model A340–311, –312, and –313 airplanes.

(10) Model A340–541 airplanes.

(11) Model A340–642 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 34, Navigation.

(e) Reason

This AD was prompted by reports of false TCAS resolution advisories. We are issuing this AD to prevent false TCAS resolution advisories. False TCAS resolution advisories could lead to a loss of separation with other airplanes, possibly resulting in a mid-air collision.

(f) Compliance

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

(g) Definition of Group 1 and Group 2 Airplanes

(1) For the purposes of this AD, Group 1 airplanes are those that have a Honeywell TPA–100B TCAS P/N 940–0351–001 processor that was installed during production, or in-service using the procedures in the applicable service information identified in paragraphs (g)(1)(i) through (g)(1)(xii) of this AD.

(i) Airbus Service Bulletin A320–34–1504.

(ii) Airbus Service Bulletin A320–34–1506.

(iii) Airbus Service Bulletin A320–34–1533.

(iv) Airbus Service Bulletin A320–34–1534.

(v) Airbus Service Bulletin A320–34–1572.

(vi) Airbus Service Bulletin A330–34–3247.

(vii) Airbus Service Bulletin A330–34–3281.

(viii) Airbus Service Bulletin A330–34–3344.

(ix) Airbus Service Bulletin A340–34–4263.

(x) Airbus Service Bulletin A340–34–4254.

(xi) Airbus Service Bulletin A340–34–5076.

(xii) Airbus Service Bulletin A340–34–5087.

(2) For the purposes of this AD, Group 2 airplanes are airplanes that do not have a Honeywell TPA–100B TCAS P/N 940–0351–001 processor installed.

(h) Software Modification or TCAS Processor Replacement

For Group 1 airplanes, as identified in paragraph (g)(1) of this AD: Within 12 months after the effective date of this AD, do a modification of the TCAS processor to upgrade the software, or replace the TCAS processor with a TCAS TPA–100B processor having P/N 940–0351–005, in accordance with the Accomplishment Instructions of the applicable service information identified in paragraph (i) of this AD.

Note 1 to paragraph (h) of this AD: Guidance for modifying an affected TCAS processor and re-identifying the processor as P/N 940–0351–005 can be found in paragraph 3.F. of Honeywell Service Bulletin

940–0351–34–0005, Revision 0, dated January 20, 2017.

(i) Service Information for Accomplishment of Actions Specified in Paragraph (h) of This AD

Use the applicable service information specified in paragraphs (i)(1) through (i)(5) of this AD to accomplish the actions required by paragraph (h) of this AD.

(1) For Model A318 and A319 series airplanes; Model A320–211, A320–212, A320–214, A320–216, A320–231, A320–232, and A320–233 airplanes; and Model A321 series airplanes: Airbus Service Bulletin A320–34–1656, dated April 19, 2017.

(2) For Model A320–251N and Model A320–271N airplanes: Airbus Service Bulletin A320–34–1657, dated April 19, 2017.

(3) For Model A330–200, A330–200 Freighter, and A330–300 series airplanes: Airbus Service Bulletin A330–34–3342, dated April 19, 2017.

(4) For Model A340–200 and A340–300 series airplanes: Airbus Service Bulletin A340–34–4304, dated April 19, 2017.

(5) For Model A340–500 and A340–600 series airplanes: Airbus Service Bulletin A340–34–5118, dated April 19, 2017.

(j) Identification of Airplanes That do not Have a Honeywell TPA–100B TCAS P/N 940–0351–001 Processor Installed

An airplane on which Airbus modification 159658 or Airbus modification 206608, as applicable, has been embodied in production and on which it can be positively determined that no TCAS processor has been replaced or modified on that airplane since its date of manufacture is a Group 2 airplane, as identified in paragraph (g)(2) of this AD. Group 2 airplanes are not affected by the requirements of paragraph (h) of this AD. A review of airplane maintenance records is acceptable to make this determination, provided those records can be relied upon for that purpose and that the TCAS processor part number and software standard can be positively identified from that review.

(k) Parts Installation Prohibition

Installation of a Honeywell TCAS TPA–100B processor having P/N 940–0351–001 is prohibited, as required by paragraphs (k)(1) and (k)(2) of this AD.

(1) For Group 1 airplanes, as identified in paragraph (g)(1) of this AD: After modification of an airplane as required by paragraph (h) of this AD.

(2) For Group 2 airplanes, as identified in paragraph (g)(2) of this AD: As of the effective date of this AD.

(l) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Section, Transport Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Section, send it

to the attention of the person identified in paragraph (m)(2) of this AD. Information may be emailed to: 9-ANM-116-AMOC-REQUESTS@faa.gov. 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.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Section, Transport Standards Branch, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* If any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified 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 procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(m) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2017-0091R2, dated June 2, 2017, for related information. This MCAI may be found in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2017-1096.

(2) For more information about this AD, contact Sanjay Ralhan, Aerospace Engineer, International Section, Transport Standards Section, FAA, 1601 Lind Avenue SW., Renton, WA 98057-3356; telephone 425-227-1405; fax 425-227-1149.

(3) For service information identified in this AD, contact Airbus SAS, Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email airworthiness.A330-A340@airbus.com; Internet <http://www.airbus.com>. You may view this service information at the FAA, Transport Standards Branch, 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 22, 2017.

Jeffrey E. Duven,

Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2017-25747 Filed 11-29-17; 8:45 am]

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CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Chapter II

[Docket No. CPSC-2017-0044]

Clothing Storage Unit Tip Overs; Request for Comments and Information

AGENCY: Consumer Product Safety Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Consumer Product Safety Commission is contemplating developing a rule to address the risk of injury and death associated with clothing storage unit furniture tipping over. This advance notice of proposed rulemaking initiates a rulemaking proceeding under the Consumer Product Safety Act. We invite comments concerning the risk of injury associated with clothing storage units tipping over, the alternatives discussed in this notice, and other possible alternatives for addressing the risk. We also invite interested parties to submit existing voluntary standards or a statement of intent to modify or develop a voluntary standard that addresses the risk of injury described in this notice.

DATES: Submit comments by January 29, 2018.

ADDRESSES: You may submit comments, identified by Docket No. CPSC-2017-0044, electronically or in writing (hard copy), using the methods described below. The Commission encourages you to submit comments electronically, by using the Federal eRulemaking Portal.

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: <http://www.regulations.gov>. Follow the instructions for submitting comments provided on the Web site. The Commission does not accept comments submitted by electronic mail (Email), except through www.regulations.gov.

Written Submissions: Submit written comments by mail, hand delivery, or 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 must include the agency name and docket number for this rulemaking proceeding. The Commission may post all comments, 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 by mail, hand delivery, or courier.

Docket: For access to the docket to read background documents or comments, go to: <http://www.regulations.gov>, and insert the docket number, CPSC-2017-0044, into the "Search" box, and follow the prompts.

FOR FURTHER INFORMATION CONTACT: Michael Taylor, Project Manager, Directorate for Laboratory Sciences, U.S. Consumer Product Safety Commission, 5 Research Place, Rockville, MD 20850; telephone: (301) 987-2338; email: MTaylor@cpsc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Consumer Product Safety Commission (Commission or CPSC) is aware of numerous injuries and deaths resulting from furniture tip overs. To address this risk, Commission staff reviewed incident data for furniture tip overs and determined that clothing storage units (CSUs), consisting of chests, bureaus, and dressers, were the primary furniture category involved in fatal and injury incidents. There were 195 deaths related to CSU tip overs between 2000 and 2016, which were reported to CPSC. An estimated 65,200 injuries related to CSU tip overs were treated in U.S. hospital emergency departments between 2006 and 2016. These incident reports indicate that the vast majority of fatal and injury incidents resulting from CSUs tipping over involve children. Eighty-six percent of the reported fatalities involved children under 18 years old, most of which were under 6 years old. Seventy-three percent of the emergency department-treated injuries involved children under 18 years old, most of which were also under 6 years old.

To address the hazard associated with CSU tip overs, the Commission has taken several steps. In June 2015, the Commission launched the Anchor It! campaign. This educational campaign includes print and broadcast public service announcements, information distribution at targeted venues, such as childcare centers, and an informational Web site (www.AnchorIt.gov) explaining the nature of the risk and safety tips for avoiding furniture and television tip overs. In addition, CPSC staff prepared a briefing package in September 2016,¹

¹ U.S. Consumer Product Safety Commission, Staff Briefing Package on Furniture Tipover

to identify hazard patterns involved in tip-over incidents, assess existing voluntary standards that address CSU tip overs, and identify factors that may reduce the likelihood of CSUs tipping over. As part of that effort, Commission staff tested a convenience sample of CSUs. The Commission has also pursued corrective actions with several CSU manufacturers and conducted several voluntary recalls of CSUs.

The Commission is considering developing a mandatory standard to reduce the risk of injury associated with CSU tip overs. Commission staff prepared a briefing package to describe the products at issue, further assess the relevant incident data, examine relevant voluntary standards, and discuss options for addressing the risk associated with CSU tip overs. That briefing package is available at: https://www.cpsc.gov/s3fs-public/ANPR%20-%20Clothing%20Storage%20Unit%20Tip%20Overs%20-%20November%2015%202017.pdf?5IsEEdW_Cb3ULO3TUGjiHEL875Adhvsg.

II. Relevant Statutory Provisions

To address the risk of injury associated with CSUs tipping over, the Commission is considering developing a mandatory safety standard. The rulemaking falls under the Consumer Product Safety Act (CPSA; 15 U.S.C. 2051–2089). Under section 7 of the CPSA, the Commission may issue a consumer product safety standard if the requirements of the standard are “reasonably necessary to prevent or reduce an unreasonable risk of injury associated with [a] product.” *Id.* 2056(a). The safety standard may consist of performance requirements or requirements for warnings and instructions. *Id.* However, if there is a voluntary standard that would adequately reduce the risk of injury the Commission seeks to address, and there is likely to be substantial compliance with that standard, then the Commission must rely on the voluntary standard, instead of issuing a mandatory standard. *Id.* 2056(b)(1). To issue a mandatory standard under section 7, the Commission must follow the procedural and substantive requirements in section 9 of the CPSA. *Id.* 2056(a).

Under section 9 of the CPSA, the Commission may begin rulemaking by issuing an advance notice of proposed rulemaking (ANPR). *Id.* 2058(a). The ANPR must identify the product and the nature of the risk of injury associated

with it; summarize the regulatory alternatives the Commission is considering; and include information about any relevant existing standards, and why the Commission preliminarily believes those standards would not adequately reduce the risk of injury associated with the product. The ANPR also must invite comments concerning the risk of injury and regulatory alternatives and invite the public to submit existing standards or a statement of intent to modify or develop a voluntary standard to address the risk of injury. *Id.* 2058(a).

After publishing an ANPR, the Commission may proceed with rulemaking by reviewing the comments received in response to the ANPR, and publishing a notice of proposed rulemaking (NPR). An NPR must include the text of the proposed rule, alternatives the Commission is considering, a preliminary regulatory analysis describing the costs and benefits of the proposed rule and the alternatives, and an assessment of any submitted standards. *Id.* 2058(c). The Commission would then review comments on the NPR and decide whether to issue a final rule, along with a final regulatory analysis.

III. The Product and Market

CSUs are freestanding furniture intended for storing clothing. CSUs are typically bedroom furniture, but may be used elsewhere. CSUs are available in a variety of designs (*e.g.*, vertical or horizontal dressers), sizes (*e.g.*, weights and heights), and materials (*e.g.*, wood, plastic, leather). CSUs usually have a flat surface on top and commonly include doors, or drawers for consumers to store clothing or other items. Examples of CSUs include chests of drawers, bureaus, dressers, armoires, wardrobes, portable closets, and clothing storage lockers. CSUs do not include products that are permanently attached or built into a structure or products that are not typically intended to store clothing, such as bookcases, shelves, cabinets, entertainment furniture, office furniture, or jewelry armoires. Additional factors may be relevant for the Commission to define CSUs in a mandatory standard, such as the height of products and design features. The Commission seeks comments about the appropriate parameters of a definition for CSUs.

CSUs are available through various distribution channels. The retail price of CSUs varies, with the least expensive products retailing for less than \$100, and the most expensive selling for several thousand dollars. Less expensive CSUs are usually mass produced, while

more expensive products are often handmade. The lifespans of CSUs vary as well. Consumers may use less expensive CSUs for only a few years, while more expensive products may last for generations.

The Commission has not been able to determine the share of CSUs in the overall furniture market because of a lack of information about sales of specific furniture product types or models. However, according to U.S. Census Bureau information, there are approximately 22,600 U.S. firms that manufacture, import, distribute, or retail household furniture, of which CSUs are a subset. Some manufacturers are large and use mass-production techniques; others are smaller and manufacture products individually or for custom orders. The Commission also has been unable to identify information about the number of CSUs that are in use in U.S. households. The Commission requests information about the CSU market, CSU sales, and the number of CSUs in U.S. households.

IV. Risk of Injury

Commission staff reviewed fatal and nonfatal incidents involving CSU tip overs to determine the age of people involved in these incidents, the types of CSUs and other items involved, the hazard patterns (hazard patterns include activities, behaviors, circumstances, or factors that are associated with incidents) involved, and the types of injuries and deaths that result from these incidents. As the fatal and nonfatal incidents discussed below indicate, the vast majority of CSU tip-over incidents involve children. For that reason, the Commission largely focused its analysis on incidents involving children.

A. Fatal Incidents

To identify fatal incidents that involved CSU tip overs, Commission staff reviewed CPSC’s Death Certificates database, In-Depth Investigations database, Injury and Potential Injury Incidents database, and the National Electronic Injury Surveillance System (NEISS) database.² Staff identified 195 fatalities related to CSU tip overs that occurred between January 1, 2000 and December 31, 2016 that were reported to CPSC. Of those fatalities, 22 (11 percent) involved seniors age 60 years and older; 6 (3 percent) involved adults between 18 and 59 years old; and 167 (86 percent) involved children under 18

² Staff reviewed incidents that were in these databases as of June 1, 2017. Reporting is ongoing for these databases, so the reported number of incidents may change. Percentages may not sum to 100, due to rounding.

(September 30, 2016), available at: <https://www.cpsc.gov/s3fs-public/Staff%20Briefing%20Package%20on%20Furniture%20Tipover%20-%20September%2030%202016.pdf>.

years old, of which the oldest child was 8 years old. Of the 167 fatal incidents involving children, 159 (95 percent) were under 6 years old and 142 (85 percent) were under 4 years old. Table 1 provides the number of child fatalities in age categories, broken out by 6-month increments.

TABLE 1—FATAL INCIDENTS INVOLVING CHILDREN UNDER 18 YEARS OLD, BY AGE, BETWEEN JANUARY 1, 2000 AND DECEMBER 31, 2016

Age	Total fatalities
0 to less than 0.5 years	1
0.5 to less than 1 year	5
1 to less than 1.5 years	21
1.5 to less than 2 years	28
2 to less than 2.5 years	31
2.5 to less than 3 years	23
3 to less than 3.5 years	25
3.5 to less than 4 years	8
4 to less than 4.5 years	7
4.5 to less than 5 years	4
5 to less than 5.5 years	5
5.5 to less than 6 years	1
6 to less than 6.5 years	3
6.5 to less than 7 years	1
7 to less than 7.5 years	0
7.5 to less than 8 years	1
8 to less than 8.5 years	3
8.5 to less than 9 years	0
Greater than 9 years	0
Total	167

Children in a sample of 89 of these incidents ranged in weight from 18 to 66 pounds.

Of the 195 total fatal incidents involving all ages, nearly all involved a chest, bureau, or dresser; some of these involved a television falling with the chest, bureau or dresser. Of the 167 fatal incidents involving children, 164 (98 percent) involved a chest, bureau, or dresser, 2 (1 percent) involved a wardrobe, and 1 (less than 1 percent) involved an armoire. Of the 167 child fatalities, 89 (53 percent) involved a television falling in addition to the CSU.

B. Nonfatal Incidents

To identify nonfatal incidents that involved CSU tip overs, Commission staff reviewed the NEISS database. The NEISS database contains reports of injuries treated in emergency departments of U.S. hospitals selected as a probability sample of all U.S. hospitals with emergency departments. Using the surveillance information in this database, CPSC can estimate the number of injuries, nationwide, that are associated with specific consumer products. An estimated 65,200 injuries related to CSU tip overs were treated in U.S. hospital emergency departments

between January 1, 2006 and December 31, 2016. Of these, 47,700 estimated injuries (73 percent) were to children under 18 years old. Of the injuries involving children, 94 percent involved children under 9 years old and 83 percent involved children under 6 years old. Table 2 provides the estimated number of child injuries treated in hospital emergency departments, by age.

TABLE 2—ESTIMATED INJURIES TREATED IN HOSPITAL EMERGENCY DEPARTMENTS INVOLVING CHILDREN UNDER 18 YEARS OLD, BY AGE, BETWEEN JANUARY 1, 2006 AND DECEMBER 31, 2016

Age	Estimated injuries
Less than 1 year	The number of cases is too small to produce an estimate.
1 year	6,300.
2 years	13,200.
3 years	11,200.
4 years	5,800.
5 years	2,300.
6 years	2,300.
7 years	1,800.
8 years	The number of cases is too small to produce an estimate.
9 years	The number of cases is too small to produce an estimate.
10 years ...	The number of cases is too small to produce an estimate.
11 years ...	The number of cases is too small to produce an estimate.
12 years ...	The number of cases is too small to produce an estimate.
13 years ...	The number of cases is too small to produce an estimate.
14 years ...	The number of cases is too small to produce an estimate.
15 years ...	The number of cases is too small to produce an estimate.
16 years ...	The number of cases is too small to produce an estimate.
17 years ...	The number of cases is too small to produce an estimate.

Of the estimated 47,700 incidents involving children, 99 percent involved a chest, bureau, or dresser; the remainder involved armoires, a portable closet, a wardrobe, and a product that was either an armoire or a dresser. In about 30 percent of injuries involving children, a television fell with the CSU.

C. Severity and Consequences of Injuries

The types of injuries that can result from CSUs tipping over can range from scratches, cuts, bruises, joint injuries, and bone fractures to potentially fatal injuries, such as skull fractures, closed-head injuries, internal organ injuries, collapsed lungs, spinal injuries, or mechanical asphyxia (which is a form of suffocation that results from a mechanical force (such as furniture) preventing muscle movement necessary

for breathing). The severity of injuries depends on various factors, such as the body part hit or trapped by the CSU, the weight and nature of the stationary forces involved (*i.e.*, the CSU and the floor), the magnitude and duration of the force the CSU applies, the duration of oxygen deprivation from mechanical asphyxia, and the ability to call for help or self-rescue. Blunt head trauma can result in death or severe injuries, and oxygen deprivation can lead to permanent brain damage, organ and tissue injury, or death.

Children are particularly vulnerable to the risk of injury and death associated with CSU tip overs because of their physical and cognitive abilities, the circumstances often involved in CSU tip overs, and their susceptibility to severe injury. Children generally are not strong enough to move heavy furniture when trapped underneath, do not react quickly enough to avoid falling furniture, and lack cognitive awareness of hazards. In addition, many incidents occur when a child is left unattended, reducing the likelihood that a caregiver could quickly rescue the child. Children, in particular, can suffer long-term harm from head injuries, which can affect their motor and emotional development, speech, cognitive ability, and overall quality of life.

Commission staff reviewed fatal incidents and NEISS incidents involving children to identify the types of fatal and nonfatal injuries associated with CSU tip overs. Of the 167 fatal incidents involving children and CSU tip overs that occurred between 2000 and 2016, 71 (43 percent) were the result of head injuries, skull fractures, and brain hemorrhage from blunt head trauma (including crushing injuries and deep scalp hemorrhage). The remaining 96 fatal incidents (57 percent) were the result of chest compression from a child being pinned under a CSU. In 13 of the 167 fatal incidents involving children, the child died despite receiving medical care.

CSU tip-over injuries to children that are treated in hospital emergency departments ranged in severity, including contusions, abrasions, lacerations, fractures, and internal injuries. Of the estimated 47,700 emergency department-treated injuries to children that were associated with CSUs between January 1, 2006 and December 31, 2016, an estimated 17,700 injuries (37 percent) involved contusions or abrasions; an estimated 12,500 injuries (26 percent) involved internal injuries (including closed head injuries); an estimated 6,600 injuries (14 percent) involved lacerations; and an estimated 4,500 injuries (9 percent)

involved fractures. Injuries to children that were reported through NEISS impacted numerous body parts, but the most common was the head (42 percent), followed by the face (15 percent), and trunk (10 percent). Four percent of NEISS injuries involving children and CSU tip overs required hospitalization, whereas 92 percent were treated and released, and 1 percent were observed.

When a television was involved in a CSU tip over, children's injuries were more likely to require hospitalization and involve internal injuries and head injuries than when no television was involved. When a television was involved in a CSU tip over that resulted in injury to a child, 7 percent of injuries required hospitalization (compared with 3 percent when only a CSU was involved); 36 percent of injuries were internal injuries (compared with 22 percent when only a CSU was involved); and 58 percent were head injuries (compared with 36 percent when only a CSU was involved).

D. Hazard Patterns

CPSC staff analyzed fatal and nonfatal incident reports to identify factors that are associated with CSU tip-over incidents. This analysis revealed that certain user interactions (such as opening multiple drawers) and surroundings (such as specific flooring) were associated with CSU tip overs. To assess relevant incidents in detail, staff reviewed 369 nonfatal incidents involving CSU tip overs that occurred between January 1, 2005 and December 31, 2015, and were reported to CPSC.³ This data set is useful to identify hazard patterns, but it cannot be used to draw statistical conclusions because it does not include the most recent incident reports, and many of the reports do not include detailed information about circumstances surrounding the incidents.⁴

1. Televisions

As the incident data discussed above indicates, in some incidents, televisions tipped over with a CSU, often resulting in more serious injuries. Of the 167 child fatalities between 2000 and 2016, 89 (53 percent) involved a television falling in addition to the CSU. Of the estimated emergency department-

treated injuries to children between 2006 and 2016, approximately 30 percent involved a television falling with a CSU. In many of these incidents, children were using the CSU like a ladder or step stool, climbing or standing in a lower drawer, to reach the television or other media device (e.g., DVD player, video game system) on top of the CSU.

In the majority of incidents that involved a television and CSU tipping over, the television was a cathode-ray tube (CRT) television, rather than a flat-screen television. CRT televisions are front-heavy, with the majority of their weight in the screen portion facing front. This type of television is no longer manufactured. The Commission continues to consider how best to address the hazard of televisions tipping over. A mandatory Commission rule can only apply to products manufactured after the rule takes effect. Thus, the Commission may not be able to address the hazard discontinued CRT televisions present through rulemaking. To assess the relevance of televisions and regulatory options, the Commission requests comments about the extent to which consumers put televisions on top of CSUs, the types of televisions involved in tip-over incidents, and the impact of televisions on the stability of CSUs.

2. Opening Multiple Drawers

Several incident reports indicated that a CSU tipped over when a consumer opened one or more drawers. Of the 369 nonfatal incidents staff reviewed, 50 reported this scenario.

3. Climbing

Several reports indicated that a child was climbing on the CSU at the time of the tip over incident. In some cases, a child was climbing onto or into the CSU to play, and in others, the child was climbing with a purpose other than playing. Examples of play behaviors evidenced in the data include playing hide-and-go-seek, climbing for a challenge or to jump, and sitting in a lower drawer for fun. Examples of purpose-based behaviors include climbing or standing on a lower drawer to reach a television or other item on top of the CSU, standing on a lower drawer to reach or see into an upper drawer, using the CSU to pull into a standing position, scaling the CSU to reach into a crib, and opening drawers to remove clothing.

These behaviors are developmentally expected for children under 6 years old. It is developmentally normal and foreseeable for children in this age group to interact with furniture, such as

CSUs, to play by climbing, sitting, or hiding on or in the CSU. It is also developmentally normal and foreseeable for children to interact with CSUs to dress themselves, place and remove items on top of the CSU, and exercise developing problem-solving skills by stepping on lower drawers to reach items in upper drawers or on top of the CSU.

4. Location, Flooring, and Contents

Of the 369 nonfatal incident reports staff reviewed, all of the reports that included enough information to identify the location of the CSU indicated that the CSU was in a bedroom. Of those reports that specified the flooring surface involved, most occurred on carpet; a smaller number of incidents occurred on wood and tile. Of the reports that indicated the CSU tip over happened on carpeting, nearly all of the incidents involved general stability, such as opening a drawer or no consumer interaction. Of the reports that described the contents of the CSU, most contained only clothing, and very few were empty.

V. Existing Voluntary and International Standards

A. Description of Existing Standards

There are five voluntary or international standards that address CSU or storage unit furniture tip overs:

- ASTM F2057–17, *Standard Safety Specification for Clothing Storage Units* (ASTM F2057–17);
- ASTM F3096–14, *Standard Performance Specification for Tipover Restraint(s) Used with Clothing Storage Unit(s)* (ASTM F3096–14);
- ISO 7171:1988, International Organization for Standardization, *Furniture—Storage units—Determination of stability* (ISO 7171);
- AS/NZS 4935:2009, Australia/New Zealand Standard, *Domestic furniture—Freestanding chests of drawers, wardrobes and bookshelves/bookcases—Determination of stability* (AS/NZS 4935); and
- EN 14749:2016, European Standard, *Furniture—Domestic and kitchen storage units and kitchen-worktops—Safety requirements and test methods* (EN 14749).

The products within the scope of each of these standards vary. ASTM F2057–17 applies to furniture intended for clothing storage, typical of bedroom furniture, and more than 30 inches in height, but excludes built-in furniture and shelving furniture, such as bookcases, office furniture, entertainment furniture, and dining room furniture. ISO 7171 applies to

³ Staff reviewed incidents that were in CPSC's In-Depth Investigations database, Injury and Potential Injury Incidents database, and NEISS database, as of January 15, 2016.

⁴ In addition to the more common hazard patterns described in this section, there were also incident reports that indicated other scenarios were involved in CSU tip overs, such as moving the CSU, pulling on a portion of the CSU, and no consumer interaction before the incident.

freestanding storage furniture, including cupboards, cabinets, and bookshelves that are fully assembled and ready for use, but excludes wall-mounted and built-in products. AS/NZS 4935 applies to domestic freestanding chests, drawers, and wardrobes over 19.7 inches in height, as well as bookshelves and bookcases more than 23.6 inches. EN-14749 applies to all kitchen, bathroom, and domestic storage units with movable and non-moveable parts.

ASTM International approved ASTM F2057-17 on October 1, 2017, and published it in October 2017.⁵ The scope of ASTM F2057-17 specifies that the standard is intended to cover “children up to and including age five.” ASTM F2057-17 includes requirements for stability, labeling, and tip over restraint devices (TRDs).

To assess the stability of a CSU, ASTM F2057-17 requires that the unit withstand two performance tests—one when the unit is loaded, and one when

the unit is unloaded. For the loaded test, the CSU must not tip over when each drawer (or door) is open, one at a time, and weighted with 50 pounds. For the unloaded test, the CSU must not tip over when all of the drawers (or doors) are open at the same time. For both stability tests, testing is on a “hard, level, flat surface” and drawers must be open to the outstop (a feature that limits the outward movement of a drawer) or, when there is no outstop, to 2/3 of the operational sliding length, and doors must be open 90 degrees. The standard specifies that if part of the CSU fails, that part should be repaired or replaced and the test repeated.

ASTM F2057-17 also requires a permanent label on CSUs, in a “conspicuous location when in use,” and includes an example label showing warning content and formatting. The standard also includes a test for assessing label permanence.

ASTM F2057-17 requires that TRDs be provided with all products that fall within the scope of the standard and that they comply with ASTM F3096-14. TRDs are supplementary devices that help prevent tip overs. One example of a TRD is a strap that users attach to the back of a CSU and the wall, to stabilize the CSU. ASTM F3096-14 requires TRDs to be tested for strength by affixing one end of the assembled restraint to a fixed structure and applying a 50-pound weight to the opposite end. ASTM F3096-14 also requires instructional literature that includes illustrations of installation methods, step-by-step instructions, and a list of parts with pictures.

The three international standards—ISO 7171, AS/NZS 4935, and EN 14749—address many of the same key performance requirements as the voluntary ASTM standards. Table 3 compares the key elements in each of the standards.

TABLE 3—KEY PERFORMANCE REQUIREMENTS IN VOLUNTARY AND INTERNATIONAL STANDARDS ADDRESSING STORAGE UNIT FURNITURE TIP OVERS

	Test mass	Minimum furniture height	Element breakage	Element extension	TRDs	Warning labels	Load and force test
ASTM F2057-17 ...	50 lbs	30 in	Repair, if possible	To outstop or 2/3 ...	Required	Required	None.
ISO 7171	Not specified ⁶	Not specified	Not specified	2/3 extension	Not mentioned	Not mentioned	None.
AS/NZS 4935	29 kg (63.88 lbs) ...	500 mm (19.7 in) ...	Fail	2/3 extension	Strongly recommended.	Required	None.
EN 14749	75 N (16.8 lbs)	Not specified	Not specified	To outstop or 2/3 ...	Not mentioned	Not mentioned	Yes.

ISO 7171 testing requirements address only stability. ASTM F2057-17 and AS/NZA 4935 include requirements for both stability testing and warnings. EN 14749 includes stability requirements, as well as strength and durability requirements. The stability test requirements in ASTM F2057-17 and AS/NZA 4935 are similar in that both require one empty drawer to be open for loaded testing. In contrast, EN 14749 requires that all drawers in a row (not column) be open simultaneously, but specifies a lower force than ASTM F2057-17 and AS/NZA 4935. EN 14749 also includes two further stability tests to assess a vertical force and a loaded test with force applied. ASTM F2057-17 is the only standard that requires TRDs.

B. Assessment of Existing Standards

Commission staff assessed the requirements in each of the existing standards and determined that the two

ASTM standards are the most effective existing standards. Nevertheless, Commission staff preliminarily believes that the existing standards do not adequately reduce the risk of CSU tip overs. Staff believes that the two ASTM standards are more effective than the international requirements primarily for two reasons. First, although it may appear that EN 14749 is the most stringent standard because it requires additional stability tests, the additional tests are not as severe as applying a larger force to the front edge of an empty unit, as ASTM F2057-17 and AS/NZA 4935 require. Second, ASTM F2057-17 is the only standard that requires TRDs. The Commission’s Division of Mechanical Engineering staff believes that TRDs are an important component to effectively prevent CSU tip overs. For these reasons, Commission staff believes that the ASTM standards are the most

stringent existing standards, and therefore, focused on these standards when assessing the effectiveness of existing standards that address CSU tip overs. However, as discussed below, there are several provisions in the ASTM standards that staff preliminarily believes do not adequately address the risk of CSU tip overs.

1. Scope

The scope of ASTM F2057-17, which limits the height of CSUs and age of children it addresses, may not adequately reduce the risk of injury associated with CSU tip overs. First, the scope of the standard is limited to addressing CSUs that are more than 30 inches in height. However, there have been incidents involving CSUs that are 30 inches tall or less. These products may present a hazard particularly to children because low-height CSUs may be intended for children and these

⁵ Although ASTM F2057-17 was published shortly before this ANPR and staff’s accompanying briefing package, Commission staff was able to review and assess the standard based on the previous version, ASTM F2057-14, which was largely the same as ASTM F2057-17. The only changes in ASTM F2057-17 were to non-

substantive provisions (introduction, caveats, and principles on standardization) and warning label requirements. The changes to warning label requirements were the addition of performance requirements for label permanence and the addition of a pictogram in the warning label. Staff

considered these changes in their review and assessment.

⁶ ISO 7171 does not include pass/fail criteria for loaded stability testing. Instead, it directs testers to continue to increase the force until a portion of the product “just lifts away from the floor.”

products can weigh as much as 100 pounds.

Second, the scope of ASTM F2057–17 states that the target population for injury reduction is “children up to and including age five.” However, as the incident data demonstrate, children as old as 8 years old have been killed and injured by CSU tip overs. In particular, children under age 6 are most commonly involved in incidents. The “age five” specified in the standard appears to include only children up to exactly age five (*i.e.*, 60 months), however, and not children between their fifth and sixth birthdays (based on the 50-pound stability test weight, which represents the weight of children 60 months old). In addition, hazard patterns, such as opening multiple drawers, present a risk of injury to users of any age.

2. Stability

There are also several components of the stability testing provisions in ASTM F2057–17 that staff preliminarily believes are not adequate to reduce the risk of injury associated with CSU tip overs.

First, the standard requires that stability testing occur on a “hard, level, flat surface.” This does not reflect the surfaces on which CSUs may rest in consumers’ homes. For example, floors in a home may not be level, and carpeting is not flat. As the incident reports suggest, when a flooring type was reported, carpeting was more commonly involved in CSU tip-over incidents than other types of flooring. Assessing the impact of alternate surfaces on stability may be necessary to accurately assess the stability of a product. In addition, the standard does not provide a detailed definition of a “hard, level, flat surface.” Relevant details may include a surface flatness tolerance (*e.g.*, $\pm 0.1^\circ$) over a certain area or a specific type of flooring surface (*e.g.*, Type IV vinyl tile).

Second, the requirement that testing occur with drawers open to the outstop or, if there is no outstop, to $\frac{2}{3}$ of the operational sliding length, is unclear and creates testing inconsistencies. For example, staff has tested CSUs with outstops that are significantly less than $\frac{2}{3}$ of the operational sliding length, the location of the outstop can impact proper placement of the test weight on the drawer, the standard does not address CSUs with multiple outstops, and the standard does not specify a minimum operational sliding length, which would facilitate testing.

Third, the unloaded stability test procedure may not reflect conditions during actual consumer use. This test

requires that all drawers are empty and open simultaneously. However, when contents were reported in CSU tip-over incidents, CSUs generally contained clothing.

Fourth, staff has several concerns with the loaded stability test procedure. The 50-pound test weight is not consistent with the age and weight of victims. The majority of reported CSU tip-over incidents involved children under 6 years old. As such, the test weight in the standard does not reflect the weight of children involved in the majority of incidents, which is approximately 60 pounds (for the 95th percentile weight of children just under six years old, according to Centers for Disease Control growth charts). In addition, the test weight tolerances may impact the repeatability of testing. ASTM F2057–17 allows a tolerance of ± 1 pound for each of the two 25-pound test weights, which means the total weight can range from 48 to 52 pounds, plus the weight of the fastening hardware and strap. Such a wide tolerance may produce variation in test outcomes, which could result in the same CSU passing and failing during multiple tests.

Fifth, the standard’s allowance for the replacement or repair of a failed component may be problematic. For example, this provision does not include a testability requirement, does not account for a failure that cannot be repaired or replaced, and does not account for design-to-fail features that prevent tip overs.

Sixth, during CPSC testing, staff identified several additional issues related to the specificity and clarity of the test procedures in ASTM F2057–17. For example, the standard does not address how to apply test weights to drawers with center components (*e.g.*, handles), does not include a timeframe in which to apply and maintain the test weight, and does not address how to place weights in shallow drawers to avoid contact with the drawer bottom.

3. Labeling

Commission staff has concerns with the location and content requirements for warning labels in ASTM F2057–17.⁷ With respect to location, the standard specifies that a label must be in a “conspicuous location when in use” but does not provide further details. For a

warning label to be effective, it must be in a location where users will see it. For example, users are not likely to notice or read a label in a lower drawer because it is outside their line-of-sight and they would have to crouch to read it. In contrast, if a label is in a drawer at eye level, an adult, parent, or caregiver is more likely to notice and read the label. For this reason, the label placement provision in the standard may not be adequate for the label to be effective.

Staff also has concerns with the hazard communication statements ASTM F2057–17 requires on a label. First, the label does not allow for customization of hazard avoidance statements for different unit designs. Second, the warning messages may not reflect the hazard patterns demonstrated in the incident data. Third, the warning language may not be easy to understand, may not motivate consumers to comply, and contradicts typical CSU uses. For example, the warning label states that consumers should not open multiple drawers simultaneously, but this contradicts common consumer use. Another example is the warning label statement that users should not place a television on a CSU, unless it is specifically designed to accommodate one. The CSU manufacturer, not the consumer, is in the best position to determine whether a CSU is designed to accommodate a television.

4. TRDs

Commission staff believes that the TRD requirements in ASTM F3096–14 do not adequately assess the strength of TRDs under conditions in which they are commonly used. Staff believes the following provisions are inadequate. First, the test method in ASTM F3096–14 only addresses TRD designs that have a linear connection to the means of attachment (strap-style TRDs). This test does not account for varied or innovative TRD designs. Second, the test does not examine the strength of all of the components of a TRD (*e.g.*, brackets, fastener). Third, the test does not simulate the types of materials to which consumers are likely to secure TRDs. Fourth, the standard does not include explicit criteria for determining whether a TRD passes or fails the test.

VI. Regulatory Alternatives the Commission Is Considering

The Commission is considering several alternatives to address the risk of death and injury associated with CSU tip overs.

⁷ Staff also expressed concerns with the label permanence requirements in ASTM F2057–14 in the 2016 briefing package (U.S. Consumer Product Safety Commission, Staff Briefing Package on Furniture Tipover (September 30, 2016)). However, those concerns have been resolved with the label permanence requirements added to ASTM F2057–17.

A. Mandatory Standard

The Commission could issue a mandatory standard addressing the hazard associated with CSU tip overs. A mandatory standard could include performance requirements, warning and instructional requirements, or both. However, warning and instructional requirements alone may not be adequate to address the risk because they rely on consumers noticing, reading, and following the warning. The Commission may consider the following factors in developing performance and warning requirements:

1. Scope and Definition of CSUs

In developing a mandatory standard, the Commission would need to consider the appropriate scope for the standard, including the types of products the standard would cover, the hazard scenarios it would address, and whether to focus on a particular target population for injury reduction. For example, CPSC would need to consider whether to limit the scope of a standard to the CSU tip-over hazard posed to children under 6 years old. Such a scope may be appropriate because the large majority of CSU tip over injuries and deaths involve children under 6 years old. However, it may also be appropriate not to limit the scope of the standard because some injuries and fatalities have involved older children and adults, and some demonstrated hazard patterns (e.g., opening multiple drawers) involve a risk of injury to all ages.

Similarly, CPSC also must consider how to define CSUs that are subject to a mandatory rule. Defining CSUs by certain characteristics may be appropriate. Such characteristics could include product height or weight, product types, or product features, reflecting the characteristics of products involved in incidents.

2. Stability

The Commission believes that it may be appropriate to consider performance requirements and test methods that simulate actual use, including weighting a CSU to represent common use, dynamic testing to represent a child climbing (exerting a downward force), and testing that reflects actual floor surfaces in homes. In developing a mandatory standard, the Commission would consider ways to address the hazard patterns demonstrated in the incident data, such as:

- A child under 6 years old (weighing approximately 60 pounds) climbing on a CSU to play;
- A child under 6 years old (weighing approximately 60 pounds) standing on a

lower drawer to reach into an upper drawer;

- A consumer (of any age) fully opening multiple drawers simultaneously that contain items typically stored in a CSU; and
- A CSU on a soft surface that simulates average carpet.

3. Labeling

Clear and explicit requirements regarding the content and placement of warning labels may assist in reducing the risk of injury associated with CSU tip overs. This may include identifying a conspicuous location on CSUs for a warning label; allowing for customization of hazard-avoidance statements, based on unit designs; comparing warning messages with incident data to make sure that the known hazardous situations are addressed; and including warning content that is easy to understand and consistent with the way consumers typically use CSUs.

4. TRDs

TRDs are an important feature for reducing the risk of CSU tip overs. To assess the effectiveness of TRDs at preventing tip overs, performance requirements and test methods that assess the strength of the entire TRD system and reflect the circumstances under which TRDs are likely to be used (including the materials to which consumers are likely to attach them and the forces to which they are likely to be subjected) would be useful.

B. Rely on Voluntary Standards

The Commission could rely on the voluntary ASTM standards—ASTM F2057–17 and ASTM F3096–14—that address CSU tip overs. If the Commission determines that the voluntary standards adequately reduce the risk of injury associated with CSU tip overs, and it finds that there is substantial industry compliance with the standards, then the Commission must rely on the voluntary standards, instead of issuing a mandatory standard. 15 U.S.C. 2058(b)(2).

However, as discussed above, the Commission preliminarily believes that the ASTM standards do not adequately reduce the risk of injury associated with CSU tip overs. The Commission is assessing the level of compliance with the voluntary standards.

C. No Regulatory Action

The Commission could rely on methods other than mandatory or voluntary standards to address the risk of injuries associated with CSU tip overs. This may include relying on

product recalls or promoting the ongoing Anchor It! educational campaign. These alternatives may not be as effective at reducing the risk of injury as a mandatory standard. Recalls only apply to an individual manufacturer and product and do not extend to similar products. Recalls also can only address products that are already on the market, and cannot prevent unsafe products from entering the market. As for educational campaigns, staff does not have information regarding the effectiveness of the Commission's education campaign to date.

VII. Request for Comments and Information

The Commission requests comments on all aspects of this ANPR, but specifically requests comments regarding:

- Data about the risk of injury associated with CSU tip overs;
- studies, tests, or surveys analyzing furniture tip-over injuries, including the severity and costs associated with injuries;
- the alternatives the Commission is considering, as well as additional alternatives for addressing the risk of injury;
- the appropriate scope of a mandatory standard and definition of CSUs, including the type of products it should address (e.g., other furniture; televisions; all CSUs; CSUs with certain features or over a certain height, such as 30 inches) and the ages it should address (e.g., children under 6 years old, all children, or all ages);
- the effectiveness of the stability, warning, and TRD requirements being considered;
- studies, tests, or surveys analyzing the number and type of televisions (i.e., CRT or flat screen) or other large objects placed on top of CSUs and the impact of those objects on the stability of the CSU;
- studies, tests, or surveys analyzing the use of aftermarket products that address tip-over hazards (e.g., wall straps, anchors) and their effectiveness at reducing tip overs;
- information or studies about how characteristics of the flooring surface under a CSU may impact the stability of the CSU and the effectiveness of a stability standard;
- a suitable definition for a soft surface that could serve as a surrogate for "average" or typical carpet;
- the effectiveness of voluntary or international standards at reducing the risk of injury associated with CSU tip overs;
- compliance with ASTM F2057–17 and ASTM F3096–14;

- CSU retail sales or shipments, especially information about the type of CSUs sold and the number of units sold in recent years;

- the number of CSUs in use;
- studies, tests, or descriptions of technologies or design changes that address tip-over injuries and estimates of costs associated with those features, including manufacturing costs and wholesale prices;

- the expected impact of technologies or design changes that address tip-over injuries on manufacturing costs or wholesale prices;

- the potential impact of design changes to address CSU stability on consumer utility; and

- information about whether any stability requirements for CSUs in either a voluntary standard or potential mandatory rule could have a disparate impact on small entities, such as small manufacturers or importers.

In addition, the Commission invites interested parties to submit any existing standards, or portions of them, for consideration as a consumer product safety standard. The Commission also invites interested persons to submit a statement of intention to modify or develop a voluntary consumer product safety standard addressing the risk of injury associated with CSU tip overs, including a description of the plan to develop or modify such a standard.

Please submit comments in accordance with the instructions in the **ADDRESSES** section at the beginning of this ANPR.

Alberta E. Mills,

Acting Secretary, Consumer Product Safety Commission.

[FR Doc. 2017-25779 Filed 11-29-17; 8:45 am]

BILLING CODE 6355-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 40

[Docket No. RM16-22-000]

Coordination of Protection Systems for Performance During Faults and Specific Training for Personnel Reliability Standards

Correction

Proposed Rule document 2017-25586 beginning on page 56186 was incorrectly published in the issue of Tuesday, November 28, 2017.

[FR Doc. C1-2017-25586 Filed 11-29-17; 8:45 am]

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 15

[Docket No. FDA-2017-N-6529]

The Food and Drug Administration's Approach To Evaluating Nicotine Replacement Therapies; Public Hearing; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification of public hearing; request for comments.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is announcing a public hearing on FDA's approach to evaluating the safety and efficacy of nicotine replacement therapy (NRT) products, including how they should be used and labeled.

DATES: The public hearing will be held on Friday, January 26, 2018, from 9 a.m. to 5 p.m. The public hearing may be extended or may end early depending on the level of public participation. Persons seeking to attend or to present at the public hearing must register by Tuesday, January 2, 2018. Section II provides attendance and registration information. Electronic or written comments will be accepted after the public hearing until Thursday, February 15, 2018.

ADDRESSES: The public hearing will be held at the FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room A, Silver Spring, MD 20993-0002. Entrance for public hearing participants (non-FDA employees) is through Building 1 where routine security check procedures will be performed. For parking and security information, please refer to <https://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/ucm241740.htm>.

You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before February 15, 2018. The <https://www.regulations.gov> electronic filing system will accept comments until midnight Eastern Time at the end of February 15, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked, and identified as confidential as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2017-N-6529 for "FDA's Approach to Evaluating Nicotine Replacement Therapies"; Public Hearing; Request for Comments. Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential

with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.fda.gov/regulatoryinformation/dockets/default.htm>.

Docket: For access to the docket to read background documents or the received electronic and written/paper comments, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Allison Hoffman, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 1314, Silver Spring, MD 20993, 301-796-9203, OMPTFeedback@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A majority (roughly 70%) of adult smokers in the United States report that they want to quit, and nearly half of them make a quit attempt each year. Many of those quit attempts involve the use of NRT products, which are designed to help people quit smoking by supplying controlled amounts of nicotine to ease their withdrawal symptoms. FDA has approved two types of prescription¹ NRT products—a nicotine nasal spray and nicotine inhaler—and three types of over-the-counter (OTC) NRT products—a nicotine gum, transdermal nicotine patch, and nicotine lozenge (see Appendix A). Most of these products

¹ Non-nicotine prescription medications are also available to aid in smoking cessation, but are beyond the scope of this document.

have been approved for over 20 years.² The use of approved prescription and OTC NRT products is generally considered to double the likelihood of a successful quit attempt, although there is variation in efficacy among the types of products.

Although the formulations and routes of administration of currently approved NRT products have remained relatively unchanged for decades, there have been developments in research regarding NRT products and corresponding changes in the regulatory landscape. For example, in 2013, FDA recommended changing the statements on concomitant use and duration of use in the labeling for OTC NRT products because evidence gathered since 1984—the year the first NRT product was approved—suggested that the statements were no longer necessary to ensure the safe use of OTC NRT products for smoking cessation.³ Specifically, the Agency recommended that the statement in the labeling for OTC NRT products warning consumers that they should not use an NRT product if they are still smoking, or using any other product that contains nicotine—including another NRT—be removed. FDA also recommended that the directions in the labeling for OTC NRT products be modified to remove the statement advising consumers to stop using the product at the end of the labeled duration of use. Instead of this statement, FDA recommended that consumers be advised to talk to their health care provider if they feel the need to use the product for longer than the labeled duration of use to keep from smoking. To facilitate these labeling changes, FDA invited the submission of supplemental new drug applications (labeling supplements).

On July 28, 2017, the FDA announced a new comprehensive plan that places nicotine, and the issue of addiction, at the center of the Agency’s tobacco regulation efforts. This plan will serve as a multi-year roadmap to better protect children and significantly reduce tobacco-related disease and death in the United States. One of the first actions of this comprehensive approach will be an advanced notice of proposed rulemaking (ANPRM) to seek input on the potential impacts of reducing nicotine levels in cigarettes to minimally or non-addictive levels. A

² Only the lozenge formulation has been approved for less than 20 years; it was approved in 2002.

³ See the **Federal Register**, available at <https://www.federalregister.gov/documents/2013/04/02/2013-07528/modifications-to-labeling-of-nicotine-replacement-therapy-products-for-over-the-counter-human-use>. Recommendations also included other language revisions that were not related to dosing or duration.

key piece of the FDA’s comprehensive plan is a recognition that nicotine—while highly addictive—is delivered through products that represent a continuum of risk and is most harmful when delivered through combustible tobacco products. Accordingly, the Agency is committed to increasing access to and use of nicotine replacement therapy, which could help more smokers quit. Therefore, the Agency is seeking public input on its approach to evaluating the safety and efficacy of NRT products.

As a part of its mission to protect and promote public health, FDA is responsible for ensuring that approved drugs, including NRT products, are safe and effective.⁴ For FDA to approve a new drug, it must find that the applicant has submitted “substantial evidence” of effectiveness based on adequate and well-controlled studies⁵ and that the drug is safe for use under the conditions set forth in the labeling.⁶ Generally, the safety of a product is assessed by determining whether its benefits outweigh its risks. The benefit–risk assessment takes into account the extensive evidence of safety and effectiveness submitted by a sponsor in a marketing application as well as many other factors.⁷

II. Purpose and Scope of the Public Hearing

To enable a thorough assessment of its approach for evaluating the safety and efficacy NRT products and how they should be used and labeled, FDA is holding a public hearing to receive information and comments from a broad group of stakeholders, including the public health community, researchers, health care professionals, manufacturers, interested industry and professional organizations, and the public, on the appropriate study designs and methods for evaluating the safety and efficacy of OTC NRT drug products. FDA is also seeking input on the warnings and directions sections of the Drug Facts labeling (among other

⁴ Section 1003(b) of the Federal Food, Drug, and Cosmetic Act (FD&C Act), 21 U.S.C. 393(b).

⁵ Section 505(d) of the FD&C Act; 21 U.S.C. 355(d).

⁶ 21 U.S.C. 355(d). FDA also noted in the preamble to the final rule on new drug approvals (NDA final rule) that the new drug approval process and the supplemental application requirements “are intended to ensure that the drug is safe, that its benefits outweigh its risks, and that it is effective.” See 50 FR 7452, 7469 (February, 22, 1985).

⁷ See FDA’s *Structured Approach to Benefit–Risk Assessment in Drug Regulatory Decision-Making, Draft PDUFA V Implementation Plan*—February 2013, Fiscal Years 2013–2017, available at <https://www.fda.gov/downloads/ForIndustry/UserFees/PrescriptionDrugUserFee/UCM329758.pdf>.

aspects) for approved OTC NRT products, specifically regarding the possible impact of current warnings on likelihood of use. The Agency has determined that a public hearing is the most appropriate way to ensure public engagement on these important public health issues. FDA believes it is critical to obtain input across the research and medical fields, the tobacco and pharmaceutical industries, and among public health stakeholders regarding how evolving science could influence FDA's approach to evaluating the safety and effectiveness of NRT products.

Questions for Commenters To Address

Although FDA welcomes all feedback on any public health, scientific, regulatory or legal considerations relating to NRT products and their use in tobacco use cessation, we encourage commenters to consider the following questions as they prepare their comments or statements. Responses to questions should include supporting scientific justification.

1. Might there be ways to improve upon the currently available delivery systems to yield new OTC NRT products that might be more effective? If so, what evidence would be needed to support such changes, and how should they be evaluated?

2. Are there additional indications or regimens for OTC NRT products that could be explored? Concepts to consider could include relapse prevention, craving reduction, maintenance, reduce to quit, use of short- and long-acting products in combination, or cessation of non-cigarette tobacco products. What evidence would be needed to support each indication or regimen?

3. What data would be required to demonstrate health benefits of reduction in consumption of combustible tobacco products?

4. Are there OTC NRT products that could be studied for use in combination that might result in reduced tobacco-related health impacts? What evidence would be needed to support the safety and efficacy of these products when used in combination?

5. Is there other information that could be added to labeling for currently approved or new dosage forms of OTC NRT products that would maximize their ability to be used to support smoking cessation? Please consider the various sections of the Drug Facts labeling, including the Uses, Warnings, and Directions sections.

6. Generally, the labeling of OTC NRT products contains a dosing schedule based on duration of use, and FDA has recommended the labeling on OTC NRT products be modified to include the

following: "If you feel you need to use [the NRT product] for a longer period to keep from smoking, talk to your health care provider." What is the impact of longer term NRT treatment? What is the impact on likelihood of cessation or relapse prevention? What data would support an affirmative recommendation to use approved OTC NRT products for durations that exceed those currently included in the Drug Facts labeling of approved OTC NRT products, or would support a chronic or maintenance drug treatment indication for such products?

Registration and Requests for Oral Presentations: The FDA Conference Center at the White Oak location is a Federal facility with security procedures and limited seating. Attendance will be free and on a first-come, first-served basis. If you wish to attend (either in person or by webcast (see *Streaming Webcast of the Public Hearing*)) and/or present at the hearing, please register for the hearing and/or make a request for oral presentations or comments by email to OMPTfeedback@fda.hhs.gov by Tuesday, January 2, 2018. The email should contain complete contact information for each attendee (*i.e.*, name, title, affiliation, address, email address, and telephone number). For those wishing to present at the hearing, the email should also include a presentation title. Those without email access can register by contacting Allison Hoffman at 301-796-9203 by Tuesday, January 2, 2018 (see **FOR FURTHER INFORMATION CONTACT**).

FDA will try to accommodate all persons who wish to make a presentation. Individuals wishing to present should identify the number of the specific question, or questions, they wish to address. This will help FDA organize the presentations. Individuals and organizations with common interests should consolidate or coordinate their presentations and request time for a joint presentation. FDA will notify registered presenters of their scheduled presentation times. The time allotted for each presentation will depend on the number of individuals who wish to speak. Presenters are encouraged to submit an electronic copy of their presentation to OMPTfeedback@fda.hhs.gov on or before Friday, January 19, 2018. Persons registered to make an oral presentation are encouraged to arrive at the hearing room early and check in at the onsite registration table to confirm their designated presentation time. An agenda for the hearing and any other background materials will be made available 5 days before the hearing at <https://www.fda.gov/NewsEvents/MeetingsConferencesWorkshops/ucm580561.htm>.

If you need special accommodations because of a disability, please contact OMPTFeedback@fda.hhs.gov (see **FOR FURTHER INFORMATION CONTACT**) no later than Tuesday, January 2, 2018, at 12 noon Eastern Time.

Streaming Webcast of the Public Hearing: For those unable to attend in person, FDA will provide a live webcast of the hearing. To join the hearing via the webcast, please go to <https://collaboration.fda.gov/part15nicotine>.

Transcripts: Please be advised that as soon as a transcript is available, it will be accessible at <https://www.regulations.gov>. It may be viewed at the Dockets Management Staff (see **ADDRESSES**).

III. Notice of Hearing Under 21 CFR Part 15

The Commissioner of Food and Drugs is announcing that the public hearing will be held in accordance with 21 CFR part 15. The hearing will be conducted by a presiding officer, who will be accompanied by FDA senior management from the Office of the Commissioner, the Center for Drug Evaluation and Research, and the Center for Tobacco Products. Under § 15.30(f), the hearing is informal and the rules of evidence do not apply. No participant may interrupt the presentation of another participant. Only the presiding officer and panel members can pose questions; they can question any person during or at the conclusion of each presentation. Public hearings under part 15 are subject to FDA's policy and procedures for electronic media coverage of FDA's public administrative proceedings (21 CFR part 10, subpart C). Under § 10.205, representatives of the media may be permitted, subject to certain limitations, to videotape, film, or otherwise record FDA's public administrative proceedings, including presentations by participants. The hearing will be transcribed as stipulated in § 15.30(b) (see *Transcripts*). To the extent that the conditions for the hearing, as described in this notice, conflict with any provisions set out in part 15, this notice acts as a waiver of those provisions as specified in § 15.30(h).

IV. References

The following references are on display in the Dockets Management Staff (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at <https://www.regulations.gov>. FDA has verified the Web site addresses, as of the date this document publishes in the **Federal**

Register, but Web sites are subject to change over time.

1. Babb S, Malarcher A, Schauer G, Asman K, and Jamal A. 2017. Quitting Smoking Among Adults—United States, 2000–2015. *Morbidity and Mortality Weekly Report* 65:1457–1464.

2. Etter J-F and Stapleton JA. 2006. Nicotine Replacement Therapy for Long-Term Smoking Cessation: A Meta-Analysis. *Tobacco Control* 15:280–285.
 3. Silagy C, Mant D, Fowler G, and Lodge M. 1994. Meta-Analysis on Efficacy of Nicotine Replacement Therapies in Smoking Cessation. *Lancet* 343:139–142.

Appendix A: Summary of FDA-Approved Active New Drug Applications (NDAs) of Nicotine Replacement Therapies (September 18, 2017)

Product name (NDA #; holder)	OTC or Rx (date approved; date Rx→OTC)	Route (doses)	Indication	Labeled treatment duration and schedule
Nicorette gum (nicotine polacrilex) (NDA 018612 for 2 mg, NDA 020066 for 4 mg; GSK).	Approved as prescription on 1/13/84 for 2 mg; 6/8/92 for 4 mg; Rx→OTC for both on 2/9/16.	Oral (2, 4 mg gum).	Reduces withdrawal symptoms, including nicotine craving, associated with quitting smoking (under Directions: If you are under 18 years of age ask a doctor before use).	12 weeks: <ul style="list-style-type: none"> • Wk 1–6: 1 per 1–2 hr. • Wk 7–9: 1 per 2–4 hr. • Wk 10–12: 1 per 4–8 hr. If smoke 1st cigarette within 30 min of waking up, use 4 mg; if more than 30 min, use 2 mg.
NicoDerm CQ (nicotine) (NDA 020165; GSK, Sanofi Aventis).	Approved as prescription on 11/7/91; Rx→OTC on 8/2/96.	Patch (7, 14, 21 mg).	Same use as above	10 weeks and 8 weeks: If >10 cigarettes/day: <ul style="list-style-type: none"> • Wk 1–6: one 21 mg/day. • Wk 7–8: one 14 mg/day. • Wk 9–10: one 7 mg/day. If ≤10 cigarettes/day: <ul style="list-style-type: none"> • Wk 1–6: one 14 mg/day. • Wk 7–8: one 7 mg/day.
Habitrol (nicotine) (NDA 020076; Ciba-Geigy, Novartis, Dr. Reddy's).	Approved as prescription on 11/27/91; Rx→OTC on 11/12/99.	Patch (7, 14, 21 mg).	Same use as above	8 weeks: If >10 cigarettes/day: <ul style="list-style-type: none"> • Wk 1–4: one 21 mg/day. • Wk 5–6: one 14 mg/day. • Wk 7–8: one 7 mg/day. If ≤10 cigarettes/day: <ul style="list-style-type: none"> • Wk 1–6: one 14 mg/day. • Wk 7–8: one 7 mg/day.
Nicotrol NS (nicotine) (NDA 020385; Pfizer).	Prescription (3/22/96; N/A) ...	Nasal spray	<ul style="list-style-type: none"> • Indicated as an aid to smoking cessation for the relief of nicotine withdrawal symptoms. • Should be used as a part of a comprehensive behavioral smoking cessation program. 	The label does not specify the recommended duration of treatment, but notes the following in the Indications and Usage section: The safety and efficacy of the continued use of Nicotrol NS for periods longer than 6 months have not been adequately studied and such use is not recommended.
Nicotrol Inhaler (nicotine) (NDA 020714; Pharmacia and Upjohn).	Prescription (5/2/97; N/A)	Inhalant	<ul style="list-style-type: none"> • Indicated as an aid to smoking cessation for the relief of nicotine withdrawal symptoms. • Recommended for use as part of a comprehensive behavioral smoking cessation program. 	The recommended duration of treatment is 3 months, after which patients may be weaned from the inhaler by gradual reduction of the daily dose over the following 6 to 12 weeks. The safety and efficacy of the continued use of Nicotrol Inhaler for periods longer than 6 months have not been studied and such use is not recommended.

Product name (NDA #; holder)	OTC or Rx (date approved; date Rx→OTC)	Route (doses)	Indication	Labeled treatment duration and schedule
Commit lozenge (nicotine polacrilex) (NDA 021330; GSK).	OTC (10/3/02; N/A)	Oral (2, 4 mg) ...	Reduces withdrawal symptoms, including nicotine craving, associated with quitting smoking (under Directions: If you are under 18 years of age ask a doctor before use).	12 weeks: <ul style="list-style-type: none"> • Wk 1–6: 1 per 1–2 hr. • Wk 7–9: 1 per 2–4 hr. • Wk 10–12: 1 per 4–8 hr. If smoke 1st cigarette within 30 min of waking up, use 4 mg; if more than 30 min, use 2 mg.
Nicorette mini lozenge (nicotine polacrilex) (NDA 022366; GSK).	OTC (5/18/09; N/A)	Oral (2, 4 mg) ...	Same use as above	12 weeks; same schedule as Commit lozenge.

Dated: November 22, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017–25671 Filed 11–29–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 878

[Docket No. FDA–2017–N–4919]

Medical Devices; Exemption From Premarket Notification: Class II Devices; Surgical Apparel; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed order; request for comments.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing its intention to exempt certain subtypes of surgical apparel from premarket notification requirements, subject to conditions and limitations. FDA intends to limit the proposed exemption to single-use, disposable respiratory protective devices (RPD) used in a healthcare setting and worn by healthcare personnel during procedures to protect both the patient and the healthcare personnel from the transfer of microorganisms, body fluids, and particulate material. These devices, commonly referred to as N95 filtering facepiece respirators (FFRs) and surgical N95 respirators (herein collectively referred to as N95s) are currently regulated by FDA under product code MSH. All other class II devices classified under FDA’s surgical apparel classification regulation would continue to be subject to premarket notification requirements. FDA is publishing this document to obtain comments regarding

this proposed exemption, in accordance with the Federal Food, Drug, and Cosmetic Act (FD&C Act).

DATES: Submit either electronic or written comments by January 29, 2018.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before January 29, 2018. The <https://www.regulations.gov> electronic filing system will accept comments until midnight Eastern Time at the end of January 29, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA–2017–N–4919 for “Medical Devices; Exemption From Premarket Notification: Class II Devices; Surgical Apparel; Request for Comments.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and

contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Aftin Ross, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5402, Silver Spring, MD 20993, 301-796-5679, email: Aftin.Ross@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Statutory Background

Section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and the implementing regulations, 21 CFR part 807 subpart E, require persons who intend to market a new device to submit and obtain clearance of a premarket notification (510(k)) containing information that allows FDA to determine whether the new device is “substantially equivalent” within the meaning of section 513(i) of the FD&C Act (21 U.S.C. 360c(i)) to a legally marketed device that does not require premarket approval.

The 21st Century Cures Act (Pub. L. 114-255) (Cures Act) was signed into law on December 13, 2016. Section 3054 of the Cures Act amended section 510(m) of the FD&C Act. As amended, section 510(m)(2) of the FD&C Act provides that, 1 calendar day after the date of publication of the final list under paragraph (1)(B), FDA may exempt a class II device from the requirement to submit a report under section 510(k) of the FD&C Act upon its own initiative or a petition of an interested person, if FDA determines that a report under section 510(k) is not necessary to assure the safety and effectiveness of the device. To do so, FDA must publish in the **Federal Register** notice of its intent to exempt the device, or of the petition,

and provide a 60-calendar day period for public comment. Within 120 days after the issuance of the notice, FDA must publish an order in the **Federal Register** that sets forth its final determination regarding the exemption of the device that was the subject of the notice.

II. Factors FDA May Consider for Exemption

There are a number of factors FDA may consider to determine whether a 510(k) is necessary to provide reasonable assurance of the safety and effectiveness of a class II device. These factors are discussed in the January 21, 1998, **Federal Register** notice (63 FR 3142) and subsequently in the guidance the Agency issued on February 19, 1998, entitled “Procedures for Class II Device Exemptions From Premarket Notification, Guidance for Industry and CDRH Staff” (“Class II 510(k) Exemption Guidance”) (Ref. 1). Accordingly, FDA generally considers the following factors to determine whether a 510(k) is necessary for class II devices: (1) The device does not have a significant history of false or misleading claims or of risks associated with inherent characteristics of the device; (2) characteristics of the device necessary for its safe and effective performance are well established; (3) changes in the device that could affect safety and effectiveness will either (a) be readily detectable by users by visual examination or other means such as routine testing, before causing harm, or (b) not materially increase the risk of injury, incorrect diagnosis, or ineffective treatment; and (4) any changes to the device would not be likely to result in a change in the device’s classification. FDA may also consider that, even when exempting devices, these devices would still be subject to the limitations on exemptions.

III. Proposed Class II Device Exemption

FDA, on its own initiative, is proposing to exempt N95 filtering facepiece respirators (FFRs) and surgical N95 respirators (herein collectively referred to as N95s) from 510(k), subject to the conditions and limitations described in this section. FDA considers both of these devices to be a subset of “surgical apparel” intended to be worn by healthcare personnel to protect both the patient and the healthcare personnel from transfer of microorganisms, body fluids, and particulate material. As a result, these devices fall under the generic name “surgical apparel” and are classified in 21 CFR 878.4040(b)(1). In the **Federal Register** of June 24, 1988 (53 FR 23856), FDA issued a final rule

classifying surgical apparel into class II (special controls). We are now announcing our intent to exempt a subset of surgical apparel devices currently regulated under product code MSH from 510(k) review. FDA has assessed the need for 510(k) against the criteria laid out in the Class II 510(k) Exemption Guidance and determined that these devices no longer require a 510(k) to provide reasonable assurance of safety and effectiveness. However, this exemption is limited and FDA’s determination only applies to those N95s under the conditions listed below.

FDA has a Memorandum of Understanding (MOU) with the Centers for Disease Control and Prevention (CDC), acting through its National Institute for Occupational Safety and Health (NIOSH) regarding oversight of N95s (Ref. 2). This agreement outlines the structure through which both Agencies will regulate N95s being proposed for exemption from 510(k). However, this MOU will not be effective unless and until, FDA publishes an order in the **Federal Register**, after reviewing comments, that sets forth its determination finalizing the 510(k) exemption.

Although FDA and CDC share a common public health mission, the Agencies have different statutory authorities and the distinct terminology could lead to confusion among stakeholders. In order to clearly identify the devices that are subject to this document, as well as the corresponding MOU, the following definitions are provided for the devices being proposed for exemption.

The N95 FFR is a single-use disposable, half-mask respiratory protective device that covers the user’s airway (nose and mouth) and offers protection from particulate materials at an N95 filtration efficiency level per 42 CFR 84.181. Such an N95 FFR used in a healthcare setting is a class II device, regulated by FDA under 21 CFR 878.4040.

The surgical N95 respirator is a single-use, disposable respiratory protective device used in a healthcare setting that is worn by HCP during procedures to protect both the patient and HCP from the transfer of microorganisms, body fluids, and particulate material at an N95 filtration efficiency level per 42 CFR 84.181. The surgical N95 respirator is also a class II device, regulated by FDA under 21 CFR 878.4040.

As described in the MOU, the following conditions must be met for N95s to be 510(k) exempt: (1) Application submitted to NIOSH is determined not to exceed the CDC and

FDA mutually agreed upon threshold evaluation criteria and (2) such applicants must have met approval criteria and have NIOSH approval. N95s with applications that meet the mutually agreed upon threshold evaluation criteria and approval criteria and remain approved by NIOSH would be exempt from FDA's 510(k) requirements under section 510(k) of the FD&C Act. Unless an N95 meets the mutually agreed upon threshold evaluation criteria and approval criteria and has NIOSH approval, the device would still be subject to 510(k) review; this includes devices with applications pending NIOSH review, as well as devices with no submitted applications.

N95s are the only devices included within the scope of the MOU. As such, this proposed exemption would only apply to devices currently regulated by FDA under product code MSH. If finalized, this exemption would not affect any other subset of surgical apparel classified under 21 CFR 878.4040. In addition to being subject to the general limitations to the exemptions found in 21 CFR 878.9 and the conditions of exemption identified in this document, these devices will also remain subject to current good manufacturing practices and other general controls under the statute. An exemption from the requirement of 510(k) does not mean that the device is exempt from any other statutory or regulatory requirements, unless such exemption is explicitly provided by order or regulation.

IV. References

The following references are on display in the Dockets Management Staff (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at <https://www.regulations.gov>. FDA has verified the Web site addresses, as of the date this document publishes in the **Federal Register**, but Web sites are subject to change over time.

1. FDA Guidance, "Procedures for Class II Device Exemptions from Premarket Notification, Guidance for Industry and CDRH Staff," February 19, 1998, available at <https://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/UCM080199.pdf>.
2. "Memorandum of Understanding Between the Food and Drug Administration, Center for Devices and Radiological Health, and the Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, National Personal Protective Technology Laboratory," available at

<https://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/>.

List of Subjects in 21 CFR Part 878

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321 *et seq.*, as amended) and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 878 be amended as follows:

PART 878—GENERAL AND PLASTIC SURGERY DEVICES

- 1. The authority citation for part 878 continues to read as follows:

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

- 2. In § 878.4040, revise paragraph (b)(1) to read as follows:

§ 878.4040 Surgical apparel.

* * * * *

(b) * * *

(1) Class II (special controls) for surgical gowns and surgical masks. A surgical N95 respirator or N95 filtering facepiece respirator is not exempt if it is intended to prevent specific diseases or infections, or it is labeled or otherwise represented as filtering surgical smoke or plumes, filtering specific amounts of viruses or bacteria, reducing the amount of and/or killing viruses, bacteria, or fungi, or affecting allergenicity, or it contains coating technologies unrelated to filtration (*e.g.*, to reduce and or kill microorganisms). Surgical N95 respirators and N95 filtering facepiece respirators are exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to § 878.9, and the following conditions for exemption:

(i) The user contacting components of the device must be demonstrated to be biocompatible.

(ii) Analysis and nonclinical testing must:

(A) Characterize flammability and be demonstrated to be appropriate for the intended environment of use; and

(B) Demonstrate the ability of the device to resist penetration by fluids, such as blood and body fluids, at a velocity consistent with the intended use of the device.

(iii) NIOSH approved under its regulation.

* * * * *

Dated: November 24, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017-25781 Filed 11-29-17; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG-119337-17]

RIN 1545-BN95

Centralized Partnership Audit Regime: International Tax Rules

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations implementing section 1101 of the Bipartisan Budget Act of 2015 (BBA), which was enacted into law on November 2, 2015. Section 1101 of the BBA repeals the current rules governing partnership audits and replaces them with a new centralized partnership audit regime that, in general, assesses and collects tax at the partnership level. These proposed regulations provide rules addressing how certain international rules operate in the context of the centralized partnership audit regime, including rules relating to the withholding of tax on foreign persons, withholding of tax to enforce reporting on certain foreign accounts, and the treatment of creditable foreign tax expenditures of a partnership.

DATES: Written or electronic comments and requests for a public hearing must be received by January 29, 2018.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-119337-17), Room 5207, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to CC:PA:LPD:PR (REG-119337-17), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at www.regulations.gov (IRS REG-119337-17).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations relating to creditable foreign tax expenditures, Larry R. Pounders, Jr., of the Office of Associate Chief Counsel (International), (202) 317-5465; concerning the proposed regulations relating to chapters 3 and 4 of subtitle A of the Internal Revenue Code (other than section 1446), Subin Seth of the Office of Associate Chief Counsel (International), (202) 317-5003; concerning the proposed regulations relating to section 1446, Ronald M.

Gootzeit of the Office of Associate Chief Counsel (International), (202) 317-4953; concerning the submission of comments or a request for a public hearing, Regina Johnson, (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to 26 CFR part 301. These proposed regulations supplement the regulations proposed in the notice of proposed rulemaking (REG-136118-15) published in the **Federal Register** on June 14, 2017 (82 FR 27334) (the “June 14 NPRM”) and amend the Procedure and Administration Regulations (26 CFR part 301) under Subpart—Tax Treatment of Partnership Items to implement the centralized partnership audit regime.

1. *The New Centralized Partnership Audit Regime*

For information relating to (1) the new centralized partnership audit regime enacted by the BBA, Public Law 114-74 (129 Stat. 58 (2015)) (as amended by the Protecting Americans from Tax Hikes Act of 2015, Public Law 114-113 (129 Stat. 2242 (2015))); (2) Notice 2016-23 (2016-13 I.R.B. 490 (March 28, 2016)), which requested comments on the new partnership audit regime enacted by the BBA; and (3) the temporary regulations (TD 9780, 81 FR 51795) and a notice of proposed rulemaking (REG-105005-16, 81 FR 51835), which provided the time, form, and manner for a partnership to make an election into the centralized partnership audit regime for a partnership taxable year beginning before the general effective date of the regime, see the Background section of the June 14 NPRM.

2. *Proposed Regulations Implementing the Centralized Partnership Audit Regime*

The June 14 NPRM addresses various issues concerning the scope and process of the new centralized partnership audit regime. Unless otherwise noted, all references to proposed regulations in this Background refer to regulations proposed by the June 14 NPRM.

With respect to the scope of the centralized partnership audit regime, proposed § 301.6221(a)-1(a) provides that any adjustment to items of income, gain, loss, deduction, or credit of a partnership and any partner’s distributive share is determined at the partnership level. Proposed § 301.6221(a)-1(b)(1) broadly defines the phrase “items of income, gain, loss, deduction, or credit” to include all items and information required to be

shown, or reflected, on a partnership return or maintained in the partnership’s books and records. For example, proposed § 301.6221(a)-1(b)(1)(i)(A) provides that the character, timing, source, and amount of the partnership’s income, gain, loss, deductions, and credits, including whether an item is deductible, tax-exempt, or a tax-preference item, must be determined under the centralized partnership audit regime. Similarly, proposed § 301.6221(a)-1(b)(1)(i)(F) provides that an adjustment to the separate category, timing, and amount of the partnership’s creditable foreign tax expenditures described in § 1.704-1(b)(4)(viii)(b), is included within the centralized partnership audit regime. Finally, proposed § 301.6221(a)-1(d) provides that the IRS is not precluded from making an adjustment to an item that must be determined under the centralized partnership audit regime for purposes of determining taxes imposed by provisions of the Internal Revenue Code (the Code) outside of chapter 1 of subtitle A (chapter 1).

Proposed § 301.6222-1 generally requires a partner to treat items consistently with the partnership’s return; however, a partner may take an inconsistent position on an original income tax return if the partner provides notice of the inconsistent position in accordance with proposed § 301.6222-1(c). If a partner treats an item inconsistently with the partnership return position without providing notice, the item may be adjusted to conform to the partnership return, and any underpayment resulting from that adjustment may be assessed and collected as if it were on account of a mathematical or clerical error appearing on the partner’s return.

Proposed § 301.6223-1 provides rules relating to the designation of the partnership representative. Proposed § 301.6223-2 provides rules relating to the authority of the partnership representative and the effect of actions taken by the partnership through the partnership representative. Partners are bound by the actions of the partnership representative and may not take a position that is inconsistent with the actions of the partnership (except with notice on the partner’s return, as provided under section 6222 and proposed § 301.6222-1).

Proposed §§ 301.6225-1, 301.6225-2, and 301.6225-3 provide rules relating to partnership adjustments, including the computation of the imputed underpayment, modification of the imputed underpayment, and the treatment of adjustments that do not result in an imputed underpayment.

Under proposed § 301.6225-1(d), adjustments are separated into four groupings: the reallocation grouping, the credit grouping, the creditable expenditure grouping, and the residual grouping. The June 14 NPRM reserved § 301.6225-1(d)(2)(iv) for rules addressing the treatment of items in the creditable expenditure grouping. Each grouping is further divided into subgroupings of adjustments to account for preferences, restrictions, limitations, and conventions. For example, an adjustment in the residual grouping could be further divided into subgroupings by character, source, category, and other restrictions under the Code.

Under proposed § 301.6225-1, the net positive adjustments in all subgroupings of the residual and reallocation groupings are summed. The sum is the total netted partnership adjustment, which is multiplied by the highest applicable tax rate in effect for the reviewed year (as defined in proposed § 301.6241-1(a)(8)). The resulting figure is then increased, or decreased, by the net adjustments in the credit grouping to produce the imputed underpayment amount. A net non-positive adjustment in the reallocation grouping or the residual grouping (or any subgrouping thereof) is treated as an adjustment that does not result in an imputed underpayment and is taken into account in the adjustment year (as defined under proposed § 301.6241-1(a)(1)) under proposed § 301.6225-3.

The partnership may request a modification, under proposed § 301.6225-2, to adjust the imputed underpayment calculated under proposed § 301.6225-1. The modification rules set out in proposed § 301.6225-2 generally allow: (1) Modifications that result in the exclusion of certain adjustments, or portions thereof, from the calculation of the imputed underpayment (such as a modification under proposed § 301.6225-2(d)(2) (amended returns by partners), (d)(3) (tax-exempt partners), (d)(5) (certain passive losses of publicly traded partnerships), (d)(7) (partnerships with partners that are qualified investment entities described in section 860), (d)(8) (partner closing agreements), and, if applicable, (d)(9) (other modifications)); (2) rate modifications, which affect only the taxable rate applied to the total netted partnership adjustment (described in proposed § 301.6225-2(d)(4)); and (3) modifications to the number and composition of imputed underpayments (described in proposed § 301.6225-2(d)(6)).

Proposed § 301.6225–3 sets forth rules for the treatment of adjustments that do not result in an imputed underpayment. In general, pursuant to proposed § 301.6225–3(b)(1) the partnership takes the adjustment into account in the adjustment year as a reduction in non-separately stated income or as an increase in non-separately stated loss depending on whether the adjustment is to an item of income or loss. Proposed § 301.6225–3(b)(2) provides that if an adjustment is to an item that is required to be separately stated under section 702, the adjustment shall be taken into account by the partnership on its adjustment year return as an adjustment to such separately stated item. Proposed § 301.6225–3(b)(3) provides that an adjustment to a credit is taken into account as a separately stated item.

Proposed §§ 301.6226–1, 301.6226–2, and 301.6226–3 provide rules relating to the election under section 6226 by a partnership to have its partners take into account the partnership adjustments in lieu of paying the imputed underpayment determined under section 6225, the statements the partnership must send to its partners (including the computation of the partners' safe harbor amounts), and the computation and payment of the partners' liability. If a partnership makes the election under section 6226 to "push out" adjustments to its reviewed year partners, the partnership is not liable for the imputed underpayment. Instead, under proposed § 301.6226–3, reviewed year partners must either pay any additional chapter 1 tax that results from taking the adjustments reflected on the statements into account in the reviewed year and from changes to the tax attributes in the intervening years, or pay a safe harbor amount, which is calculated based on rules similar to those used to calculate the imputed underpayment. In addition to being liable for the additional tax or safe harbor amount, the partner must also pay its allocable share of any penalties, additions to tax, or additional amounts reflected on the statement from the partnership, and any interest determined in accordance with proposed § 301.6226–3(d).

Proposed § 301.6227–1 provides rules for a partnership to file an administrative adjustment request (AAR). A partnership subject to the centralized partnership audit regime may file a request for an administrative adjustment to one or more items of income, gain, loss, deduction, or credit of the partnership for any partnership taxable year. Filing an AAR is the only mechanism provided by the centralized partnership audit regime to request a

change to an item reported on a partnership return that has already been filed with the IRS. Proposed § 301.6227–1(a) provides that only a partnership representative acting on behalf of the partnership may file an AAR; a partner may not make a request for an item to be adjusted administratively, such as by filing an amended return to take a position that is inconsistent with the partnership return. However, this rule does not preclude a partner from taking an inconsistent position on an original income tax return if the partner provides notice of the inconsistent position in accordance with proposed § 301.6222–1(c).

Proposed §§ 301.6227–2 and 301.6227–3 provide rules for how the partnership accounts for adjustments in an AAR and for how partners must account for adjustments in an AAR, respectively. Subject to certain special rules, adjustments in an AAR are generally taken into account in a manner similar to IRS-initiated adjustments. For example, an adjustment requested in an AAR may result in an imputed underpayment calculated in a manner similar to the computation of the imputed underpayment under section 6225, although modification is more restricted in the context of an AAR (see proposed § 301.6227–2(a)(2)). The partnership must pay the imputed underpayment or elect to have it and its partners take the adjustments into account under rules similar to those under section 6226. One significant difference between an IRS-initiated adjustment and an adjustment requested in an AAR is that requested adjustments that do not result in an imputed underpayment are accounted for under rules similar to those under section 6226.

Finally, proposed § 301.6241–1 provides definitions for purposes of the centralized partnership audit regime.

Explanation of Provisions

1. In General

These proposed regulations provide guidance on certain international issues related to the centralized partnership audit regime. This Explanation of Provisions proceeds as follows: Part 2 discusses provisions related to chapters 3 and 4 of subtitle A of the Code. Part 3 discusses provisions related to creditable foreign tax expenditures and foreign tax credits. Part 4 discusses issues related to treaties and reductions to the rate of tax on foreign persons under the Code. Part 5 discusses issues related to certain foreign corporations.

Unless otherwise stated, all references to proposed regulations in this

Explanation of Provisions are to the new proposed regulations in this Notice of Proposed Rulemaking. Because these regulations are supplementing the regulations published in the June 14 NPRM, the numbering and ordering of some of the provisions do not follow typical conventions. The Department of the Treasury (Treasury Department) and the IRS intend to appropriately integrate these provisions when both these regulations and the proposed regulations in the June 14 NPRM are finalized.

2. Provisions Related to Chapters 3 and 4 of Subtitle A of the Code

A. Background

Chapter 3 (Withholding of Tax on Nonresident Aliens and Foreign Corporations) of subtitle A of the Code imposes withholding requirements on payments or allocations of income to foreign persons (under sections 1441 through 1446) and provides rules regarding the application of those withholding provisions (under sections 1461 through 1464). Sections 1441 and 1442 require all persons having the control, receipt, custody, disposal, or payment of certain specified items of income of any nonresident alien, foreign partnership, or foreign corporation to withhold tax at a 30-percent rate from such items unless a reduced rate of withholding applies. Amounts subject to withholding under sections 1441 and 1442 include amounts from sources within the United States that constitute fixed or determinable annual or periodical income, which in turn is defined under § 1.1441–2(b)(1)(i) to include all income included in gross income under section 61, subject to certain exceptions. In addition to being required to withhold on a payment made to a foreign person, a domestic (U.S.) partnership is required to withhold under sections 1441 and 1442 on an amount subject to withholding that is includible in the gross income of a partner that is a foreign person. See § 1.1441–5(b)(2)(i). A foreign partnership may also be required to withhold with respect to its foreign partners under sections 1441 and 1442 if it is either a foreign withholding partnership as described in § 1.1441–5(c)(2), or fails to meet the requirements described in § 1.1441–5(c)(3)(v). A partnership satisfies its withholding requirements with respect to its foreign partners by withholding on distributions made to the partner that include amounts subject to withholding, or, to the extent the partnership's withholding liability is not satisfied by withholding on distributions, by

withholding on the partner's distributive share. See § 1.1441–5(b)(2)(i).

Section 1446 requires a partnership to pay withholding tax to the extent that the partnership has effectively connected taxable income (ECTI) that is allocable to a foreign partner, at the highest rate applicable to that partner. See § 1.1446–3(a)(2). ECTI generally refers to the partnership's taxable income as computed under section 703, with adjustments as provided in section 1446(c) and § 1.1446–2, and computed with consideration of only those partnership items that are effectively connected (or treated as effectively connected) with the conduct of a trade or business in the United States. See § 1.1446–2.

Section 1443 imposes withholding requirements on certain payments or allocations of income made to foreign tax-exempt organizations, including income includible under section 512 for computing unrelated business taxable income (subject to section 1443(a)) and income subject to tax under section 4948 (subject to section 1443(b)). Because the tax under section 4948 is not a chapter 1 tax, and therefore is not implicated by the centralized partnership audit regime, references to chapter 3 in this preamble and these proposed regulations refer to the provisions in chapter 3 of subtitle A of the Code, excluding section 1443(b). See proposed § 301.6225–1(a)(4).

Section 1445 imposes withholding requirements upon the disposition of a U.S. real property interest (as defined in section 897(c)) by a foreign person and certain related distributions. To the extent that a partnership's income from the disposition of a U.S. real property interest is allocable to a foreign partner, the partnership is subject to the requirements under section 1446. See §§ 1.1446–2; 1.1446–3(c)(2).

Chapter 4 (Taxes to Enforce Reporting on Certain Foreign Accounts) of subtitle A of the Code (chapter 4) requires a withholding agent (as defined in § 1.1473–1(d)) to withhold tax at a 30-percent rate on a withholdable payment (as defined in § 1.1473–1(a)) made to a foreign financial institution (FFI) unless the FFI has entered into an agreement described in section 1471(b) to obtain status as a participating FFI, or the FFI is deemed to have satisfied the requirements of section 1471(b). A participating FFI is required to withhold tax with respect to payments made to recalcitrant account holders (as defined in § 1.1471–5(g)(2)) and nonparticipating FFIs (as defined in § 1.1471–1(b)(82)) to the extent required under § 1.1471–4(b). Chapter 4 also

generally requires a withholding agent to withhold tax at a 30-percent rate on a withholdable payment made to a nonfinancial foreign entity (NFFE) unless the NFFE has provided information to the withholding agent with respect to the NFFE's substantial U.S. owners or has certified that it has no such owners. See section 1472.

Under sections 1461 and 1474, any person required to withhold tax under chapters 3 and 4 is made liable for such tax, and may also be liable for any penalties, additions to tax, additional amounts, and interest that may apply for failure to timely pay the tax required to be withheld. To the extent that the tax required to be withheld is paid by the beneficial owner of the income (as defined in §§ 1.1441–1(c)(6) and 1.1471–1(b)(8)) or by the withholding agent (as defined in §§ 1.1441–7(a)(1) and 1.1473–1(d)), the tax will not be collected a second time from the other; however, the person that did not pay the tax is not relieved from liability for any penalties, additions to tax, or interest that may apply. See §§ 1.1446–3(e); 1.1463–1; 1.1474–4.

Under §§ 1.1462–1 and 1.1474–3, a beneficial owner is required to include in gross income the entire amount of income from which tax is required to be withheld, but the amount of any tax actually withheld (including any amount withheld on a partner's distributive share) is allowed as a credit under section 33 against the beneficial owner's income tax liability. Similarly, under § 1.1446–3(d)(2)(i), the amount of section 1446 tax paid by the partnership that is allocable to a foreign partner is allowed as a credit under section 33 against the partner's income tax liability. In general, because the beneficial owner will have gross income during the taxable year when the withholding occurs, the beneficial owner will be required to file a U.S. income tax return for that year. See section 6012. However, a beneficial owner's requirement to file a return is waived when it is not engaged in a U.S. trade or business and its tax liability has been fully satisfied through withholding at source. See §§ 1.6012–1(b)(2)(i); 1.6012–2(g)(2)(i).

B. Coordination of the Centralized Partnership Audit Regime With Chapters 3 and 4

Proposed § 301.6221(a)–1(a) (June 14 NPRM) provides that all adjustments to items of income, gain, loss, deduction, or credit of a partnership, and any partner's distributive share of those adjusted items are determined, and any tax attributable thereto is assessed and collected, at the partnership level under

the centralized partnership audit regime. Proposed § 301.6221(a)–1(b)(1)(i) (June 14 NPRM) broadly defines the phrase “items of income, gain, loss, deduction, or credit” to include all items and information required to be shown, or reflected, on a partnership return or maintained in the partnership's books and records. Proposed § 301.6221(a)–1(b)(3) (June 14 NPRM) defines tax for purposes of the centralized partnership audit regime to be the tax imposed by chapter 1. Proposed § 301.6221(a)–1(d) (June 14 NPRM), however, provides that nothing in subchapter C of chapter 63 and the regulations thereunder (the centralized partnership audit regime) precludes the IRS from making any adjustment to any of these items for purposes of determining taxes imposed by other chapters of the Code. The preamble to the June 14 NPRM explains that those taxes that are not covered by the centralized partnership audit regime include taxes imposed by chapters 3 and 4. Accordingly, the IRS will continue to examine a partnership's compliance with its obligations under chapters 3 and 4 in a proceeding outside of the centralized partnership audit regime.

As discussed in Part 2.A of this Explanation of Provisions, a partnership that receives a payment or has income allocable to a partner that is a foreign person, an FFI, or an NFFE may have withholding requirements under chapters 3 and 4. These requirements are imposed on the partnership to ensure that any chapter 1 tax owed by its partners with respect to the item of income is collected, or in the case of chapter 4, to ensure compliance with certain information reporting obligations regarding U.S. persons that hold foreign financial accounts or interests in passive foreign entities. The provisions of chapters 3 and 4, therefore, create a collection mechanism for tax that would otherwise be due from the beneficial owner of the income under chapter 1. This could potentially result in taxes being collected twice and, for this reason, and as discussed in Part 2.A of this Explanation of Provisions, chapters 3 and 4 provide that the tax is collected only once—either from the withholding agent or from the beneficial owner of the income. Similarly, because an imputed underpayment may now be assessed and collected at the partnership level under the centralized partnership audit regime, and is designed to closely reflect the chapter 1 tax that the partners would have reported and paid had the partnership and partners reported

correctly, coordination rules are necessary to clarify how the centralized partnership audit regime interacts with a partnership's obligations under chapters 3 and 4, and to ensure that tax is collected only once with respect to the same item of income.

To demonstrate the rules regarding the scope of the centralized partnership audit regime and the examination of the partnership's obligations under chapters 3 and 4 outside of the centralized partnership audit regime, these proposed regulations provide examples that illustrate what occurs when (1) a partnership fails to withhold at the correct rate on an item of income allocable to a foreign partner, and (2) a partnership fails to report an item of income and, therefore, also fails to withhold on the additional income allocable to a foreign partner. Example 1 under proposed § 301.6221(a)-1(f) clarifies that a partnership's withholding tax liability for failure to withhold at the correct rate on an item of income that the partnership received and properly reported on its partnership return may be adjusted by the IRS under the procedures applicable to an examination under chapter 3 or chapter 4, and that the procedures under the centralized partnership audit regime do not apply to the adjustment. The same result would occur on a partnership's failure to withhold at the correct rate under section 1441 on a payment made to an unrelated foreign person, or upon a partnership's failure to withhold as a transferee of a U.S. real property interest at the correct rate under section 1445. Example 2 under proposed § 301.6221(a)-1(f) presents a case in which the partnership has failed to report on its partnership return an item of income that it received for which it would have had a withholding obligation under chapters 3 and 4, and the failure to report the item is discovered in an examination of the partnership's compliance with its obligations under chapters 3 and 4. Because an adjustment to increase the partnership's income would be an adjustment to an item of income of the partnership, it would be subject to the centralized partnership audit regime. See proposed § 301.6221(a)-1(a) (June 14 NPRM). However, under proposed § 301.6221(a)-1(d) (June 14 NPRM), the IRS is not precluded from determining an adjustment to the same item under chapters 3 and 4 outside of the centralized partnership audit regime.

To address situations in which an item subject to the centralized partnership audit regime is also subject to the rules under chapters 3 and 4, these proposed regulations provide

rules that coordinate the interaction between the separate regimes, and ensure that tax is collected only once with respect to the same adjustment. When an examination of the partnership's obligations under chapters 3 and 4 is conducted before the initiation of an administrative proceeding under the centralized partnership audit regime, proposed § 301.6225-1(c)(5) provides that to the extent that the IRS has collected tax under chapter 3 or chapter 4 attributable to an adjustment to an amount subject to withholding (as defined in § 301.6226-2(h)(3)(i)), that adjustment (or portion thereof) will be disregarded for purposes of calculating the total netted partnership adjustment (upon which the imputed underpayment amount is determined) under the centralized partnership audit regime. When the IRS has not collected tax under chapter 3 or chapter 4 on an amount subject to withholding, and the partnership is subject to examination under the centralized audit partnership regime, proposed § 301.6225-1(a)(4) provides that if the partnership pays the imputed underpayment pursuant to section 6225, and the total netted partnership adjustment (upon which the imputed underpayment amount is determined) includes an adjustment to an amount subject to withholding under chapter 3 or chapter 4, the partnership is treated as having paid the amount required to be withheld with respect to that adjustment under chapter 3 or chapter 4 for purposes of applying § 1.1463-1 or § 1.1474-4. Therefore, the partnership is considered to have satisfied its withholding tax liability associated with the adjustment. The partnership, however, is not relieved from any interest, penalties, or additions to tax that may otherwise apply under current rules for failure to withhold under chapters 3 and 4. See §§ 1.1461-1(a)(2); 1.1461-3; 1.1474-1(h). Under proposed § 301.6227-2(b)(3), this same rule applies when the partnership pays the imputed underpayment in an AAR pursuant to section 6227.

C. Requirement To Withhold and Report Under Chapters 3 and 4 Upon a Section 6226 Election

Under section 6226, a partnership may elect to "push out" adjustments to its reviewed year partners rather than paying an imputed underpayment determined under section 6225. If a partnership makes a valid election under section 6226 (a section 6226 election), proposed § 301.6226-2 (June 14 NPRM) requires it to furnish a statement to each reviewed year partner that includes information regarding the

partner's allocable share of partnership adjustments with respect to the imputed underpayment for which the election is made and the partner's share of any penalties, additions to tax, or additional amounts (a section 6226 statement). The partnership must also calculate and include on each section 6226 statement a safe harbor amount and, for each reviewed year partner that is an individual, an interest safe harbor amount. Under proposed § 301.6226-3 (June 14 NPRM), each reviewed year partner must increase its tax imposed under chapter 1 by its additional reporting year tax for the taxable year that includes the date on which the section 6226 statement is furnished (the reporting year). The additional reporting year tax is either the aggregate of the adjustment amounts (as computed under proposed § 301.6226-3(b) (June 14 NPRM)) or the safe harbor amount. In addition, each reviewed year partner must also pay its share of any penalties, additions to tax, additional amounts, and interest (either as computed at the partner level under proposed § 301.6226-3(d)(1) (June 14 NPRM) or, if applicable, the interest safe harbor amount).

As discussed in the preamble to the June 14 NPRM, it is the view of the Treasury Department and the IRS that, consistent with the purposes of chapters 3 and 4, if adjustments reflected on a section 6226 statement represent additional income allocable to a foreign or domestic partner that was not properly accounted for in the reviewed year, and the partnership makes a section 6226 election to have the partners take the adjustments into account, these allocations of income should be subject to the rules in chapters 3 and 4 to the same extent that these amounts would have been if they had been properly accounted for by the partnership in the reviewed year. Accordingly, these proposed regulations provide rules that apply withholding and reporting requirements under chapters 3 and 4 to a partnership that makes a section 6226 election with respect to a reviewed year partner that would have been subject to withholding in the reviewed year, and rules that apply to the reviewed year partner when taking these adjustments into account. Under proposed § 301.6227-2(b)(4), these same rules apply when a partnership elects to have its reviewed year partners take into account adjustments requested in an AAR.

Proposed § 301.6226-2(h)(3)(i) requires a partnership that makes a section 6226 election to pay the amount of tax required to be withheld under chapters 3 and 4 on any adjustment

allocable to a reviewed year partner that would have been subject to withholding in the reviewed year. The partnership must pay the withholding tax (in the manner prescribed by the IRS in forms, instructions, and other guidance) on or before the due date for furnishing the section 6226 statement that reports the adjusted item. Proposed § 301.6226-2(h)(3)(iii) clarifies the reporting requirements of chapters 3 and 4, including a requirement to file an applicable return (Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, or Form 8804, Annual Return for Partnership Withholding Tax (Section 1446)) and any associated information returns (Forms 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, or Forms 8805, Foreign Partner's Information Statement of Section 1446 Withholding Tax). The partnership must file the return and issue information returns for the partnership's taxable year (for withholding reported on Forms 8804 and 8805) or the calendar year (for withholding reported on Forms 1042 and 1042-S) that includes the date on which the partnership furnishes the section 6226 statement.

Proposed § 301.6226-2(h)(3)(ii) allows a partnership that is required to pay withholding tax under proposed § 301.6226-2(h)(3)(i) to reduce the amount of that tax to the extent that the reviewed year partner provides valid documentation to establish that it is entitled to a reduced rate of tax under chapters 3 and 4. For this purpose, these proposed regulations allow the partnership to rely on documentation that the partnership possesses that is valid with respect to the reviewed year (determined without regard to the expiration after the reviewed year of any validity period prescribed in chapters 3 and 4), or new documentation that the partnership obtains from the reviewed year partner if the partner includes a signed affidavit stating that the associated information and representations are accurate with respect to the reviewed year. However, proposed § 301.6226-2(h)(3)(ii) does not allow the partnership to reduce the amount of withholding tax due based on partner-level items as provided in § 1.1446-6. Consideration of these partner-level items raises administrability issues given the partner's activities in the intervening taxable years between the reviewed year and the reporting year. For example, partner-level deductions and losses certified to the partnership for the reviewed year may have been used in a subsequent year to offset the partner's

allocable share of partnership ECTI or income effectively connected (or treated as effectively connected) with the conduct of a trade or business in the United States from other sources. Accordingly, reductions to the amount of withholding tax a partnership is required to pay under proposed § 301.6226-2(h)(3)(i) are limited to those based on a reduced rate of tax. The procedures under proposed § 301.6226-2(h)(3)(ii) do not constitute a modification as described in section 6225.

Proposed § 301.6226-3(f) requires a reviewed year partner that is subject to withholding under proposed § 301.6226-2(h)(3)(i) to file a return for the reporting year to report its additional reporting year tax and its share of penalties, additions to tax, additional amounts, and interest, notwithstanding any filing exception in § 1.6012-1(b)(2)(i) or § 1.6012-2(g)(2)(i). Therefore, a reviewed year partner whose allocable share of adjustments is subject to withholding under chapters 3 and 4 must file a federal income tax return for the reporting year and pay its allocable share of penalties, additions to tax, additional amounts, and interest, even if the partner's additional reporting year tax has been satisfied by the partnership through withholding at source and the partner would not otherwise be required to file a federal income tax return under an exception in the section 6012 regulations.

In certain circumstances, the reviewed year partner is allowed a credit under section 33 for tax paid by the partnership under proposed § 301.6226-2(h)(3)(i) that the partner may apply against its income tax liability for its reporting year. For purposes of sections 1441 through 1443 and 1471 through 1474, a reviewed year partner is allowed a credit for the amount of tax actually withheld from that partner (including any amounts withheld on the partner's distributive share). To the extent the tax is not withheld, but is instead paid by the partnership (because, for example, the reviewed year partner is no longer a partner in the partnership), the partnership (rather than the partner) is allowed a credit against its withholding tax liability for the amount of tax paid. In that case, the tax will not be collected a second time from the partner, but the partner would remain liable for any applicable penalties, additions to tax, or interest. See §§ 1.1463-1; 1.1464-1; 1.1474-4. For purposes of section 1446, a reviewed year partner is allowed a credit for the tax paid by the partnership with respect to ECTI allocable to the partner. See § 1.1446-3(d)(2). A partner

claiming a credit under section 33 must properly report the additional reporting year tax on its return and substantiate the credit with the appropriate information return (Form 1042-S or Form 8805), as well as any other requirements prescribed by the IRS in forms, instructions, and other guidance.

Because § 301.6226-1(c)(1) (June 14 NPRM) requires a partnership to satisfy the provisions of proposed §§ 301.6226-1 and 301.6226-2 (June 14 NPRM) to make a valid section 6226 election, a partnership must pay the tax due under proposed § 301.6226-2(h)(3)(i) and meet the reporting obligations under proposed § 301.6226-2(h)(3)(iii) to satisfy this requirement. However, a partnership that anticipates making a section 6226 election may instead request during the modification process that the IRS determine a specific imputed underpayment (as defined in § 301.6225-1(e)(2)(iii) (June 14 NPRM)) with respect to adjustments allocated to reviewed year partners that would have been subject to withholding in the reviewed year, and a general imputed underpayment (as defined in § 301.6225-1(e)(2)(ii) (June 14 NPRM)) with respect to all other adjustments. If the IRS agrees with the modification request, upon receipt of the notice of final partnership adjustment the partnership could then (1) pay under section 6225 the specific imputed underpayment that includes adjustments subject to withholding, and (2) make a timely section 6226 election with respect to the adjustments that result in the general imputed underpayment. A partnership might make such a request so that its partners subject to withholding under chapters 3 and 4 would not need to file a return as they would under proposed § 301.6226-3(f) when the partnership makes a section 6226 election with respect to those adjustments.

The Treasury Department and the IRS are considering additional ways to alleviate the filing obligation in proposed § 301.6226-3(f) for foreign persons when a partnership pushes out its adjustments and does not make a specific imputed underpayment for adjustments subject to withholding. Specifically, the Treasury Department and the IRS are considering whether to allow a partnership that pays the withholding tax required under proposed § 301.6226-2(h)(3)(i) to elect to pay the share of penalties, additions to tax, additional amounts, and interest attributable to a partner that would have been subject to withholding in the reviewed year. Under this approach, if the partner's additional reporting year tax and the partner's share of penalties,

additions to tax, additional amounts, and interest have been satisfied by the partnership, the partner's tax liability would be treated as having been fully satisfied through withholding at source with respect to the adjustments on its section 6226 statement. In that case, the partner may be relieved of any filing obligation that would otherwise arise upon receiving a section 6226 statement if the foreign partner otherwise qualifies for a filing exception under § 1.6012-1(b)(2)(i) or § 1.6012-2(g)(2)(i). Comments are requested regarding this approach and how it should operate.

In the June 14 NPRM, the Treasury Department and the IRS requested comments on how the rules under chapters 3 and 4 should apply when a section 6226 statement includes income allocable to a foreign partner that is an intermediary or flow through entity. The Treasury Department and the IRS continue to study this issue in conjunction with the broader issue of how to treat pass-through partners generally under the section 6226 regime. Specifically, comments are still requested regarding the application of chapters 3 and 4 to section 6226 in the case of partners that are foreign flow through entities, including partners that assume primary withholding responsibility as withholding foreign partnerships or withholding foreign trusts.

3. Provisions Related to U.S. Foreign Tax Credits

A. Background

Subject to limitations, a taxpayer may elect to claim a credit under section 901 for income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or possession of the United States. This credit is generally referred to as the foreign tax credit (FTC). Under section 902, certain corporations are deemed, for FTC purposes, to have paid the foreign taxes that are paid or accrued by foreign subsidiaries from which they receive a dividend. Under section 960, inclusions under subpart F of part III of subchapter N of chapter 1 of the Code (subpart F) are treated as dividends for purposes of computing the foreign taxes deemed paid under section 902.

A partnership is not eligible to claim an FTC under section 901 (or a deduction for foreign taxes under section 164). See section 703(b)(3). Instead, under sections 702(a)(6), 706(a), and 901(b)(5) each partner takes into account its distributive share of the creditable foreign taxes paid or accrued by the partnership in the partner's tax year with or within which the

partnership's tax year ends. See § 1.702-1(a)(6). Under section 702(a)(6), this amount, known as a creditable foreign tax expenditure (CFTE), is accounted for as a separately stated item. Similarly, under section 902(c)(7), a partner is treated as owning a proportional share of stock owned by or for the partnership for purposes of computing a deemed paid credit under section 902. Therefore, while a partnership is not deemed to pay foreign taxes paid by a foreign corporation in which it holds stock, each of its domestic corporate partners, if eligible, independently calculates foreign taxes deemed paid with respect to dividends or subpart F inclusions relating to stock owned by or for the partnership.

The amount of FTC allowed against a taxpayer's U.S. tax in a given year is limited to the amount of pre-credit U.S. tax on the taxpayer's foreign source income. See section 904. This FTC limitation is applied separately to foreign source income in each of the separate categories described in section 904(d)(1) (*i.e.*, the passive category and general category) and additional separate categories described in § 1.904-4(m). The components of the FTC limitation computation are maintained and adjusted at the partner level; several of these attributes must be tracked from year to year and can affect the computation of the partner's FTC and FTC limitation (*e.g.*, FTC carrybacks or carryovers under section 904(c) and overall foreign loss accounts or overall domestic loss accounts under section 904(f) and (g)). Other specific rules may further limit a taxpayer's utilization of FTCs (*e.g.*, sections 901, 907, 908, and 909). If a taxpayer pays or accrues creditable foreign tax in excess of the limitation, the taxpayer may not use the excess credits in that year. However, section 904(c) provides that excess FTCs are first carried back one year and then forward for up to 10 years and are utilized in the first year in which the taxpayer has sufficient excess limitation to use the FTCs.

Given the nature and purpose of the FTC to mitigate the effects of double taxation and the importance of preventing the inappropriate use of the credit, special procedural rules often apply. For example, because the amount of foreign tax may change as the result of a foreign audit, refund claim, or other dispute resolution process involving a foreign tax authority, taxpayers are required to notify the IRS if a foreign tax for which credit is claimed is refunded (in whole or in part), if an accrued tax remains unpaid after two years, or if the amount of taxes paid differs from the amount accrued. See section 905(c).

Any underpayment resulting from a change to the amount of creditable foreign tax paid or accrued is collectable upon notice and demand, without regard to the generally applicable statute of limitations. See section 6501(c)(5). Moreover, taxpayers have a special ten-year period of limitations under section 6511(d)(3) for claiming refunds of overpayments attributable to the application of an FTC. The IRS also permits a taxpayer to accrue a contested foreign tax if the amount of the tax has actually been paid to the foreign tax authority. Rev. Rul. 70-290 (1970-1 C.B. 160). These special rules allow increased flexibility with regard to the timing of adjustments in order to better match foreign income and the foreign tax on that income and thereby mitigate double taxation of income.

Neither the statutory text of the centralized partnership audit regime nor the explanation of that text prepared by the staff of the Joint Committee on Taxation explicitly addresses coordination with the FTC rules. Joint Comm. on Taxation, JCS-1-16, *General Explanations of Tax Legislation Enacted in 2015*, 57 (2016) (JCS-1-16). Nothing in the BBA indicates that the new procedures should increase the incidence of double taxation or alter the pre-existing restrictions, limitations, or obligations affecting a taxpayer's right to claim (or retain) an FTC. It is also unlikely that the enactment of the new centralized partnership audit regime was meant to change significant and well-established FTC rules without any explicit reference to those rules in the statutory text.

The view of the Treasury Department and the IRS is that, to the maximum extent possible, the long-standing FTC rules should be preserved while implementing the broader purpose of the centralized partnership audit regime. In order to coordinate these provisions in a manner that is administrable and fair, rules should be promulgated to clarify the appropriate interaction of these two regimes. Some of these issues are discussed in this preamble and addressed in the regulations proposed herein, such as the treatment of CFTEs under the imputed underpayment provisions of the centralized partnership audit regime. Additionally, this preamble discusses the application of the FTC limitation of partners in a partnership subject to the centralized partnership audit regime, certain special procedural FTC rules (including those under sections 905(c) and 6511(d)(3)), and the treatment of credits under sections 902 and 960 (which are not themselves items of the partnership, but the calculation of

which turns on certain items of the partnership, such as the amount and separate category of dividend or subpart F inclusion). The Treasury Department and the IRS request comments both with respect to the items specifically identified and also with respect to any additional issues regarding the coordination of the FTC regime and the new centralized partnership audit regime that warrant clarification or additional guidance.

B. Adjustments Affecting the Category or Amount of CFTEs of a BBA Partnership

A partnership reports CFTEs to its partners as separately stated items, allowing each partner to elect either a credit under section 901 or a deduction under section 164(a)(3). See Sections 702(a)(6) and 901(b)(5). Under current rules, the partnership is not required to maintain records or report to the IRS whether its partners claimed credits or deductions with respect to their CFTEs or the extent to which any such credits are subject to a partner's FTC limitation. Accordingly, the tax effects of an adjustment to the CFTEs reported by a partnership cannot be determined solely by examining the return and other records of the partnership. Similarly, the partnership lacks the necessary information to determine those tax effects in connection with an AAR.

Proposed § 301.6225-1(a)(2) (June 14 NPRM) provides that for purposes of determining the imputed underpayment, all applicable preferences, restrictions, limitations, and conventions will be taken into account to disallow netting of adjustments as if the adjusted item was originally taken into account in the manner most beneficial to the partners. Similarly, proposed § 301.6225-1(d)(1) (June 14 NPRM) provides that items within each grouping are divided into subgroups, for netting purposes, based on preferences, limitations, restrictions, and conventions, such as source, character, holding period, or restrictions under the Code applicable to such items.

Consistent with this general approach, proposed rules are added in the paragraph reserved in the June 14 NPRM for the creditable expenditure grouping, proposed § 301.6225-1(d)(2)(iv)(A), relating to the treatment of adjustments to CFTEs made in an administrative proceeding under the centralized partnership audit regime. Proposed § 301.6225-1(d)(2)(iv)(A)(1) provides that the creditable expenditure grouping includes all adjustments to CFTEs, as defined in § 1.704-1(b)(4)(viii)(b). Proposed § 301.6225-

1(d)(2)(iv)(A)(2) further provides that adjustments to CFTEs are included in subgroupings based on the category of income to which the CFTEs relate in accordance with section 904(d) and the regulations thereunder and in order to account for different allocations of CFTEs between partners. Proposed § 301.6225-1(d)(2)(iv)(A)(3) provides rules used in computing the imputed underpayment when there are one or more adjustments to CFTEs. Specifically, proposed § 301.6225-1(d)(2)(iv)(A)(3) provides that a net reduction to CFTEs in any subgrouping is treated as a decrease to credits in the credits grouping and therefore increases the imputed underpayment (and safe harbor amount) on a dollar-for-dollar basis. A net increase to CFTEs in any subgrouping is an adjustment that does not result in an imputed underpayment and is therefore taken into account in the adjustment year in accordance with proposed § 301.6225-3 (June 14 NPRM). Examples 6, 7, 8, and 9 are added to proposed § 301.6225-1(f) to illustrate the application of the rules in proposed § 301.6225-1(d)(2)(iv).

These CFTE subgrouping rules serve several goals. First, subgrouping prevents netting of CFTEs between partners, or between separate categories with respect to the same partner, a restriction which is necessary to preserve the application of the category-by-category limitation required under section 904 and the regulations thereunder. Second, by subgrouping based on the sharing ratio of the partners in the reviewed year, adjustments that would be allocable to one partner cannot be netted against adjustments to CFTEs that would be allocable to another partner. This is intended to provide greater consistency with the requirement that CFTEs be allocated in accordance with the partners' interests in the partnership under section 704 and the regulations thereunder. Subgrouping based on the category and allocation of the adjustment between the partners is necessary to avoid a net reduction in the U.S. tax collected as the result of adjustments to CFTEs for which no credit would have been allowed to the partner if the CFTEs had been correctly reported in the reviewed year.

One comment received in response to Notice 2016-23 addressed the treatment of adjustments to CFTEs in calculating the imputed underpayment. Specifically, the comment noted the complex FTC limitation computation which must be made at the partner level, based on components maintained and adjusted each year by the partner. After discussing several possible

approaches, the comment recommended that CFTEs be treated as a credit for purposes of computing the imputed underpayment, increasing the imputed underpayment to account for any decrease to CFTEs, but suggested that the regulations disallow any reduction to the imputed underpayment based on an increase to CFTEs, since they may be subject to limitation at the partner level. The comment explained that while this treatment may cause the imputed underpayment to overstate the correct tax amount, this overstatement can be remedied if the partnership provides additional information through the modification process.

Proposed § 301.6225-1(d)(2)(iv) generally adopts the recommended approach. If the amount of CFTEs is decreased on audit, the proposed regulations treat the item as if the partners had reduced their U.S. tax by that amount and, therefore, increase the imputed underpayment by the amount of the CFTE reduction. Conversely, if the amount of CFTEs is increased on audit, the proposed regulations treat the item as if the FTC limitation would prevent use of the increased credit and, therefore, do not reduce the imputed underpayment.

The Treasury Department and the IRS recognize that the rules proposed in § 301.6225-1(d)(2)(iv) may cause the amount of the imputed underpayment to exceed the amount of tax that would have been due if the partnership had accurately reported in the reviewed year, either because CFTEs reported in the reviewed year were not claimed by all partners as FTCs or because any additional CFTEs agreed to on audit could be claimed as FTCs. However, because the partners' FTC posture is neither reflected on the partnership returns nor required to be maintained in the partnership's books and records, the only practical way to maintain the efficacy of the FTC rules is to assume both that the partners claimed FTCs for all CFTEs originally reported and that the FTC limitation would prevent any additional CFTEs from being claimed as credits. This approach preserves the long-standing principles underlying the FTC regime, especially the FTC limitation rules in section 904 and the regulations thereunder, and is consistent with the general rule in § 301.6225-1(a)(2) (June 14 NPRM) which explicitly provides that the adjusted items are treated as if they were originally taken into account by the partnership or the partners, as applicable, in the manner most beneficial to the partnership and the partners. The modification process under section 6225 (including

modification resulting from a partner filing an amended return or entering into a closing agreement) will generally provide an opportunity for the partnership to take the partners particular facts and circumstances into account when determining the imputed underpayment, while at the same time adhering to those long-standing principles.

In addition to the amended return modification or section 6226 election available under the current rules, additional types of modification may be appropriate with respect to some CFTEs under section 6225(c)(6) and proposed § 301.6225-2(d)(9) (June 14 NPRM). For example, not all partners are eligible to look through the partnership for purposes of determining the separate category of their CFTEs. See § 1.904-5(h). Such partners have only passive category CFTEs, regardless of the category of those items at the partnership level. Under these circumstances, a partnership may request modification under section 6225(c)(6) by providing sufficient evidence that a particular portion of CFTEs would be allocable to a partner or group of partners who cannot look through the partnership to characterize such CFTEs, so that all adjustments to CFTEs allocable to that partner or group of partners may be netted without regard to separate category. Similarly, if different sharing ratios apply to the allocation of adjusted CFTEs, some portion of the adjustments subject to different sharing ratios may still ultimately be allocable to the same partner or group of partners. Under these circumstances, the partnership may request modification by providing sufficient evidence of the portion of each adjustment that is allocable to the same partner or group of partners in order to allow netting of those CFTEs by modification, where appropriate.

The Treasury Department and the IRS request comments on the application of the netting rules to CFTEs and the related computation of the imputed underpayment, including any special modification rules that may be appropriate with respect to CFTEs. The Treasury Department and the IRS also request comments regarding circumstances in which the grouping and subgrouping of CFTE adjustments could be improved while preserving the FTC limitation rules.

These proposed regulations continue to reserve the rules on creditable expenditures other than CFTEs. The Treasury Department and the IRS request comments as to whether special rules are needed to address any other creditable expenditures and if so,

whether those rules should follow or differ from the grouping and netting rules for CFTEs set forth in these proposed regulations.

C. Preserving FTC Limitation Rules Under Section 904

Under the principles of proposed section 301.6225-1 (June NPRM), an adjustment decreasing the amount of foreign source income would not offset an adjustment increasing the amount of U.S. source income under the netting process described in proposed § 301.6225-1(c) (June 14 NPRM). Instead, these items, the foreign source income adjustment (which is negative) and the U.S. source income adjustment (which is positive), would be in separate subgroups. Assuming no other adjustments, the decrease in foreign source income would be treated as an adjustment which does not result in an imputed underpayment, and the increase in U.S. source income would be a net positive adjustment included in computing the imputed underpayment. This is an appropriate result.

Without a subgrouping requirement, the netting of U.S. and foreign source items would circumvent FTC limitation calculations under section 904 by effectively ignoring the potential impact of changes to foreign source income on FTCs. Specifically, netting U.S. and foreign source items at the partnership level would, in many cases, understate the true underpayment of tax caused by the partnership treating these items incorrectly in the reviewed year and, in other cases, would cause a permanent reduction in the partners' FTC limitation over time. Similarly, in the case of adjustments to items allocable to foreign partners, because foreign partners typically owe tax only with respect to U.S. source income, netting adjustments to U.S. source items against adjustments to foreign source items may understate the tax owed. Grouping adjustments by source may also facilitate modification requests with respect to amounts allocable to foreign partners.

One obstacle to subgrouping foreign source and U.S. source items is that the source (or allocation and apportionment) of certain partnership items is determinable only by the partners. In this regard, section 861 and the regulations thereunder provide that deductible expenses, including interest expense and research and experimentation (R&E) expense, are allocated and apportioned between foreign source gross income and other income on the basis of partner-level attributes. For example, § 1.861-9(e) provides that, subject to certain

exceptions, a partner's distributive share of the interest expense of a partnership is considered to be related to all income-producing activities and assets of the partner and is apportioned between a partner's U.S. and foreign source income based on the relative values of the partner's assets. See also, for example, § 1.871-17 (providing rules for the allocation and apportionment of R&E expense).

Therefore, these expense items, when allocated and apportioned, affect the partners' net foreign and U.S. source income (and therefore the partner's FTC limitation), in amounts that cannot be determined at the partnership level. Similarly, items of gain or loss attributable to sales of non-inventory property are sourced at the partner level. See section 865(i)(5). Because the source of certain items cannot be accurately established at the partnership level (and because certain expenses must be allocated and apportioned at the partner level), those items cannot definitively be included in either foreign or U.S. source income subgroupings for purposes of computing the imputed underpayment. Moreover, if an adjustment to items sourced (or allocated and apportioned) at the partner level can offset other adjustments not sourced (or allocated and apportioned) in that manner, the purposes of the FTC limitation rules could effectively be circumvented.

Under the proposed regulations in the June 14 NPRM, adjustments to items that may be sourced (or allocated and apportioned) at the partner level will generally be divided into subgroups in accordance with the specific method applicable for the sourcing (or allocation and apportionment) of those items in order to avoid netting that would undermine the application of the FTC limitation under section 904 unless the IRS determines otherwise. See proposed § 301.6225-1(a)(2) (June 14 NPRM). This would prevent, for example, an increase to interest expense from being netted against an increase to U.S. source income. However, netting of an increase to interest expense from one activity against a decrease to interest expense from another activity would generally be permissible because netting these adjustments would not typically affect the partners' section 904 limitation.

The Treasury Department and the IRS recognize that subgrouping significant items of expense, such as R&E or interest, may cause imputed underpayments to exceed the tax that would have been owed had all items been treated correctly in the reviewed year. While the partnership can attempt to reduce this distortion during the

modification process or by making a section 6226 election, the Treasury Department and the IRS request comments regarding whether such distortions can be reduced when computing the imputed underpayment before the modification process, while remaining consistent with the purpose of the source and allocation and apportionment rules under sections 861 and 865, as well as the application of the FTC limitation under section 904.

The Treasury Department and the IRS request comments with respect to the grouping and subgrouping of items of income, gain, loss, or deduction based on source and separate category. Specifically, the Treasury Department and the IRS request comments on any rule or modification method that would allow the calculation of the imputed underpayment to more accurately reflect the amount of tax that would have been due if the partnership had reported correctly in the reviewed year. The Treasury Department and the IRS also specifically request comments relating to any rules that would preserve the potential effects of adjustments to partnership items that are sourced (or allocated and apportioned) at the partner level in determining the imputed underpayment without requiring that all of these items be assigned to separate subgroupings.

D. Application of Section 905(c) to Creditable Foreign Tax Expenditures

Section 905(c) generally requires a taxpayer to notify the IRS in the event of certain changes to creditable foreign taxes. A taxpayer must notify the IRS if any foreign tax claimed as a credit is refunded in whole or in part. Similarly, a taxpayer must notify the IRS if an accrued foreign tax claimed as a credit remains unpaid after two years or if the amount when paid differs from the amount accrued. The notice requirement under section 905(c) is generally satisfied by the taxpayer filing an amended return for the year or years to which the foreign tax relates and paying any underpayment that results from the adjustment to the amount of creditable foreign tax. If such an adjustment results in an overpayment of tax, a taxpayer may generally claim a refund or credit within the 10-year period described in section 6511(d)(3). See section 905(c)(3). In the context of a partnership, the partner who claimed the FTC has historically borne the primary obligation to notify the IRS if there was a change in the foreign tax liability described in section 905(c) (and to pay any underpayment, upon notice and demand, or timely file a claim for refund of any overpayment). However,

several aspects of the centralized partnership audit regime make it difficult to determine the most appropriate application of section 905(c) with respect to CFTEs reported by a partnership subject to the centralized partnership audit regime.

Neither the statutory text of the centralized partnership audit regime, nor the explanation of that text prepared by the staff of the Joint Committee on Taxation, explicitly addresses section 905(c). See JCS–1–16. There is no indication that the new procedures were intended to restrict either the taxpayer's or the government's right to recoup any overpayment or underpayment of U.S. tax resulting from a redetermination required under section 905(c). It is also unlikely that Congress would effectuate a change to long-standing principles through generic procedural provisions without any specific discussion of section 905(c) in the statutory text.

Generally, if a partnership reports CFTEs and has an adjustment described in section 905(c), there are two ways of viewing the adjustment required under section 905(c): It is either an adjustment at the partnership level, which is subject to the centralized partnership audit regime, or it is an adjustment at the partner level, which is subject to the historic application of this provision in the partnership context. Either of these two approaches presents administrative challenges. Therefore, the Treasury Department and the IRS request comments addressing coordination and administration of section 905(c) and the centralized partnership audit regime. Specifically, the Treasury Department and the IRS request comments on using the AAR process for purposes of satisfying the requirements of section 905(c) with respect to changes to the foreign tax liability reported by a partnership as a CFTE.

E. Foreign Taxes Deemed Paid Under Sections 902 and 960

Under sections 902 and 960, certain domestic corporations are permitted to claim credits for foreign taxes "deemed paid" corresponding to foreign taxes paid by a foreign subsidiary from which the domestic corporation receives a dividend or with respect to which the domestic corporation has a subpart F inclusion. As discussed in Part 3.A. of this Explanation of Provisions, section 902(c)(7) provides that stock of a foreign corporation held by or on behalf of a partnership will be treated as if it was actually owned (proportionally) by the partners for purposes of computing the foreign taxes deemed paid under sections 902 and 960. Thus, qualifying partners are generally entitled to claim

FTCs for deemed paid taxes attributable to their allocable share of partnership dividend income and subpart F inclusions.

Section 6221(a) provides that any adjustment to an item of income, gain, loss, deduction, or credit of a partnership for a partnership taxable year must be determined, and any tax attributable thereto must be assessed and collected, at the partnership level pursuant to the centralized partnership audit regime. Further, proposed § 301.6221(a)–1 (June 14 NPRM) provides that all items required to be shown or reflected on the partnership's return and information in the partnership's books and records related to a determination of these items, as well as factors that affect the determination of items of income, gain, loss, deduction, or credit, are subject to determination and adjustment at the partnership level under the centralized partnership audit regime.

Under existing filing requirements, a partnership reports dividends from its subsidiaries, foreign and domestic, and domestic (U.S.) partnerships also report subpart F inclusions, but neither foreign nor domestic partnerships are required to report the amount of foreign taxes deemed paid by a partner with respect to stock held by or for the partnership. Further, a partnership is generally not required to maintain or report all information upon which the computations of those amounts are based (for example, the foreign subsidiary's pools of post-1986 undistributed earnings and post-1986 foreign income taxes). Accordingly, the amount of any deemed paid foreign tax computed with respect to stock owned by or for a partnership cannot be determined based on existing partnership reporting requirements.

The centralized partnership audit regime did not explicitly address the treatment of FTCs allowed with respect to deemed paid foreign taxes under the centralized partnership audit regime. However, the dividends and subpart F inclusions that trigger the availability of the deemed paid FTC are subject to that regime. Therefore, in order to preserve the IRS's ability to audit FTCs for deemed paid taxes claimed with respect to stock owned through partnerships subject to the centralized partnership audit regime, coordinating rules are necessary. These rules should ensure that all restrictions and limitations on the FTC allowed under sections 902 and 960 are given effect with respect to both the items giving rise to FTCs and the FTCs themselves.

The broad scope of the centralized partnership audit regime contemplates

that all tax effects, including FTCs for deemed paid taxes, are considered during a centralized partnership audit. However, in the case of sections 902 and 960, the current rules require the partners, and not the partnership, to maintain and report the relevant information. Therefore, the Treasury Department and the IRS request comments on whether it would be appropriate to require a partnership, as opposed to the individual partners, to maintain and report the information necessary to compute deemed paid foreign taxes with respect to foreign corporations in which the partnership owns shares, so that the IRS can audit foreign tax credits under section 902 and 960 entirely at the partnership level. The Treasury Department and IRS request comments on how this information-reporting requirement could be crafted to minimize compliance costs and burdens, especially for partnerships whose partners are not eligible to compute deemed paid taxes. Alternatively, the Treasury Department and the IRS request comments on any approach, consistent with the statutory principles of the centralized partnership audit regime and the FTC regime, whereby the IRS could effectively adjust credits for deemed paid foreign taxes at either the partnership level or at the partner level, without creating unreasonable distortions or undue burdens on taxpayers or tax administration.

4. Modification of an Imputed Underpayment Based on the Status of a Foreign Partner and Other Treaty Issues

Proposed § 301.6225–2(d)(2) through (8) (June 14 NPRM) provides seven enumerated types of modifications the IRS will consider if requested by the partnership. The preamble to the June 14 NPRM requested comments on modifications that could be considered appropriate where a partner is a foreign person and thus may be subject to gross basis taxation under section 871(a) or 881(a), or where a partnership, partner, or indirect partner is entitled to a reduced rate of tax under the Code or as a resident of a country that has in effect an income tax treaty with the United States.

Under U.S. tax treaties, a foreign partner or partnership may be entitled to benefits with respect to an item of income, profit, or gain paid to an entity that is fiscally transparent under the laws of the United States to the extent it is treated as an item of income, profit, or gain of a resident of the applicable treaty jurisdiction. See also section 894. Thus, for example, the Treasury Department and the IRS are considering

providing a modification in proposed § 301.6225–2(d) (June 14 NPRM) that would apply as illustrated in the following example: The IRS initiates an administrative proceeding with respect to a domestic partnership, and determines a single partnership adjustment increasing the U.S. source dividend income received by the partnership. The partnership had two equal partners during the reviewed year: A, a U.S. citizen, and B, a nonresident alien individual resident in Country X. The United States has in effect an income tax treaty with Country X, and Country X treats the partnership as fiscally transparent. Assuming that the other requirements set forth in the regulations for modifications are satisfied, if the partnership provides documentation demonstrating to the IRS's satisfaction the amount of the adjustment that is allocable to B under the partnership agreement and B's entitlement to a reduced rate of tax on dividends in the reviewed year pursuant to the income tax treaty between Country X and the United States, the IRS could agree to a modification to the imputed underpayment with respect to the amount of the adjustment allocable to B that is subject to a reduced rate of tax under the income tax treaty. Additionally, other methods for modifications could be provided in future guidance with respect to other Code-based exemptions from tax applicable to foreign persons, including sections 871(h) and 881(c), which provide an exemption from tax for foreign persons with respect to interest on certain portfolio debt investments. See also sections 871(a)(2) and 881(a) (limiting taxation of foreign persons on U.S. source capital gains).

The Treasury Department and the IRS are still considering additional modifications to address circumstances where a partnership, partner, or indirect partner is a foreign person, and which potential modifications, such as modifications for portfolio interest and U.S. source capital gains, may already be addressed by one of the seven types of modifications included in the June 14 NPRM. See proposed § 301.6225–2(d)(3) (June 14 NPRM) (providing rules for modifications for tax-exempt partners which, as defined, includes certain foreign persons or entities). Accordingly, the Treasury Department and the IRS continue to request comments on what specific types of modifications available to partners or partnerships that are foreign persons (including partners that are foreign persons described under section 501(c)

should be included in proposed § 301.6225–2(d) (June 14 NPRM).

The June 14 NPRM also requested comments on the coordination of the proposed rules with the mutual agreement procedures (MAP) available under income tax treaties that a partnership, partner, or indirect partner may invoke in order to determine eligibility for treaty benefits that may affect the calculation of the imputed underpayment. Pursuant to income tax treaties in effect between the United States and other jurisdictions, the Treasury Department and the IRS intend to allow access to MAP, when and where appropriate, for a partnership, partner, or indirect partner that is subject to the centralized partnership audit regime. However, the Treasury Department and the IRS are continuing to study this issue and request comments on how to coordinate MAP with the centralized partnership audit regime.

5. Foreign Corporations

The preamble to the June 14 NPRM stated that the Treasury Department and the IRS intend to issue regulations to address situations where a partnership pushes out an adjustment under section 6226 to a direct partner in the partnership that is a foreign entity, such as a trust or corporation, that may not be liable for U.S. federal income tax with respect to one or more adjustments, but an owner of the direct partner is or could be liable for tax with respect to that amount. For example, if a direct partner in the audited partnership is a controlled foreign corporation, the foreign corporation as a direct partner may not have a U.S. tax liability with respect to a given adjustment; however, the adjustment may impact the tax liability of its U.S. shareholder(s) by increasing the subpart F income of the CFC that is included in the income of the U.S. shareholder(s) under section 951(a). The Treasury Department and the IRS continue to study this issue and continue to request comments both on how the reporting obligations concerning foreign entities should be modified to ensure that statements issued under section 6226 are reflected on the returns of the U.S. owners of these entities, and more generally, on how to incorporate rules governing foreign corporations into the centralized partnership audit regime.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a

regulatory impact assessment is not required. Because the regulations would not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, Notices and other guidance cited in this preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS Web site at www.irs.gov.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic and written comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available at www.regulations.gov or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, then notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these proposed regulations are Larry R. Pounders, Jr., Ronald M. Gootzeit, and Subin Seth of the Office of the Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301, as proposed to be amended June 14, 2017 (82 FR 27334), is proposed to be further amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

■ **Paragraph 1.** The authority citation for part 301 continues to read in part as follows:

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

■ **Par. 2.** Section 301.6221(a)–1 is amended by adding paragraph (f) to read as follows:

§ 301.6221(a)–1 Scope of the partnership procedures under subchapter C of chapter 63 of the Internal Revenue Code.

* * * * *

(f) *Examples.* The following examples illustrate the rules of paragraphs (a) and (d) of this section as applied to cases in which a partnership has a withholding obligation under chapter 3 or chapter 4 of subtitle A of the Internal Revenue Code (Code) with respect to income that the partnership earns. For purposes of these examples, each partnership is subject to the provisions of subchapter C of chapter 63 of the Code, and the partnership and its partners are calendar year taxpayers.

Example 1. Partnership, a partnership created or organized in the United States, has two equal partners, A and B. A is a nonresident alien who is a resident of Country A, and B is a U.S. citizen. In 2018, Partnership earned \$200 of U.S. source royalty income. Partnership was required to withhold 30 percent of the gross amount of the royalty income allocable to A unless Partnership had documentation that it could rely on to establish that A was entitled to a reduced rate of withholding. See §§ 1.1441–1(b)(1) and 1.1441–5(b)(2)(i)(A) of this chapter. Partnership withheld \$15 from the \$100 of royalty income allocable to A based on its incorrect belief that A is entitled to a reduced rate of withholding under the U.S.-Country A Income Tax Treaty. In 2020, the IRS determines in an examination of Partnership's Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, that Partnership should have withheld \$30 instead of \$15 on the \$100 of royalty income allocable to A because Partnership failed to obtain documentation from A establishing a valid treaty claim for a reduced rate of withholding. The rate of withholding on the income allocable to A is not an item of income, gain, loss, deduction, or credit under paragraph (b)(1) of this section. Therefore, in accordance with paragraph (a) of this section, the adjustment to increase Partnership's withholding tax liability by \$15 is not determined under subchapter C of chapter 63, and instead must be determined as part of the Form 1042 examination.

Example 2. Partnership, a partnership created or organized in the United States, has two equal partners, A and B. A is a nonresident alien who is a resident of Country A, and B is a U.S. citizen. In 2018, Partnership earned \$100 of U.S. source dividend income. Partnership was required

to report the dividend income on its 2018 Form 1065, "U.S. Return of Partnership Income," and withhold 30 percent of the gross amount of the dividend income allocable to A unless Partnership had documentation that it could rely on to establish that A was entitled to a reduced rate of withholding. See §§ 1.1441–1(b)(1) and 1.1441–5(b)(2)(i)(A) of this chapter. In 2020, in an examination of Partnership's Form 1042, the IRS determines that Partnership earned but failed to report the \$100 of U.S. source dividend income in 2018. The adjustment to increase Partnership's dividend income by \$100 would be an adjustment to an item of income, gain, loss, deduction, or credit under paragraph (b)(1) of this section if made in an administrative proceeding under subchapter C of chapter 63. The tax imposed on Partnership for its failure to withhold on that income, however, is not a tax as defined in paragraph (b)(3) of this section because it is a tax imposed by chapter 3 of subtitle A of the Code (chapter 3 tax). Pursuant to paragraph (d) of this section, the IRS may determine, assess, and collect that chapter 3 tax without conducting a proceeding under subchapter C of chapter 63. Therefore, the IRS may determine the chapter 3 tax in the examination of Partnership's Form 1042 by adjusting Partnership's withholding tax liability by an additional \$15 for failing to withhold on the \$50 of dividend income allocable to A. If the IRS subsequently initiates an administrative proceeding under subchapter C of chapter 63 and makes an adjustment to the same item of income, the portion of the dividend income allocable to A will be disregarded in the calculation of the imputed underpayment to the extent that the chapter 3 tax has been collected with respect to such income. See § 301.6225–1(c)(5).

■ **Par. 3.** Section 301.6225–1 is amended by adding paragraphs (a)(4) and (c)(5), revising paragraph (d)(2)(iv), and adding *Examples 6* through *9* to paragraph (f) to read as follows:

§ 301.6225–1 Partnership Adjustment by the Internal Revenue Service.

* * * * *

(a) * * *

(4) *Coordination with chapters 3 and 4 when partnership pays an imputed underpayment.* If a partnership pays an imputed underpayment (as determined under paragraph (c) of this section) and the total netted partnership adjustment (as determined under paragraph (c)(3) of this section) includes a partnership adjustment to an amount subject to withholding (as defined in § 301.6226–2(h)(3)(i)), the partnership is treated as having paid (at the time that the imputed underpayment is paid) the amount required to be withheld with respect to that adjustment under chapter 3 or chapter 4 for purposes of applying §§ 1.1463–1 and 1.1474–4 of this chapter. For purposes of the regulations under subchapter C of chapter 63 of the Internal Revenue Code (Code), the term

chapter 3 means sections 1441 through 1464 of subtitle A of the Code, but does not include section 1443(b), and the term *chapter 4* means sections 1471 through 1474 of subtitle A of the Code. See paragraph (c)(5) of this section for the coordination rule that applies when an adjustment is made to an amount subject to withholding for which tax has been collected under chapter 3 or chapter 4.

* * * * *

(c) * * *

(5) *Adjustments to items for which tax has been collected under chapters 3 and 4.* To the extent that the IRS has collected tax under chapter 3 or chapter 4 (as defined in paragraph (a)(4) of this section) attributable to an adjustment to an amount subject to withholding (as defined in § 301.6226–2(h)(3)(i)), that adjustment (or portion thereof) will be disregarded for purposes of calculating the total netted partnership adjustment under paragraph (c)(3) of this section. See paragraph (a)(4) of this section for the coordination rule that applies when a partnership pays an imputed underpayment that includes an adjustment to an amount subject to withholding under chapter 3 or chapter 4.

(d) * * *

(2) * * *

(iv) *Creditable expenditure grouping—(A) Creditable foreign tax expenditures—(1) In general.* The creditable expenditure grouping includes all partnership adjustments (including reallocation adjustments as described in paragraph (d)(2)(ii) of this section) to creditable foreign tax expenditures (CFTEs) as defined in § 1.704–1(b)(4)(viii)(b) of this chapter.

(2) *Subgroupings.* Adjustments to CFTEs are grouped into subgroupings based on the separate category of income to which the CFTEs relate in accordance with section 904(d) and the regulations thereunder, and to account for different allocations of CFTEs between partners. Two or more adjustments are included within the same subgrouping only if each adjustment relates to CFTEs in the same separate category and each adjusted item would be allocated to the partners in the same ratio had those items been properly reflected on the partnership return for the reviewed year. An adjustment that changes the separate category of a CFTE for section 904 purposes or that reallocates the distributive share of a CFTE between partners is treated as two separate adjustments: An increase to the amount of CFTEs in one subgrouping and a decrease in another subgrouping.

(3) *Effect on Imputed Underpayment.* For purposes of computing the imputed underpayment in paragraph (c)(1) of this section, a net decrease to CFTEs in any CFTE subgrouping is treated as a decrease to credits in the credit grouping described in paragraph (d)(2)(iii) of this section. A net increase to CFTEs in any CFTE subgrouping is treated as a net non-positive adjustment, as defined in paragraph (d)(3)(ii)(C) of this section. See paragraphs (b) and (c)(2) of this section and § 301.6225–3 for the treatment of adjustments that do not result in an imputed underpayment.

(B) *Other creditable expenditures.*

[Reserved]

* * * * *

(f) * * *

Example 6. Partnership reports on its 2019 partnership return \$400 of CFTEs in the general category under section 904(d). The IRS initiates an administrative proceeding with respect to Partnership's 2019 taxable year and determines that the amount of CFTEs was \$300 instead of \$400 (\$100 adjustment to CFTEs). No other adjustments are made for the 2019 taxable year. The \$100 adjustment to CFTEs falls within the creditable expenditure grouping described in paragraph (d)(2)(iv) of this section and is within the general category subgrouping. Because there are no other adjustments for the 2019 taxable year in this subgrouping, the net adjustment in the subgrouping is \$100. Pursuant to paragraph (d)(2)(iv)(A)(3) of this section, a net decrease to CFTEs in a subgrouping in the creditable expenditure grouping is treated as a decrease to credits under paragraph (d)(2)(iii) of this section. Because no other adjustments have been made, the \$100 adjustment to credits under paragraph (d)(2)(iii) of this section produces an imputed underpayment of \$100 under paragraph (c)(1) of this section.

Example 7. Partnership reports on its 2019 partnership return \$400 of CFTEs in the passive category under section 904(d). The IRS initiates an administrative proceeding with respect to Partnership's 2019 taxable year and determines that the CFTEs reported by Partnership were general category instead of passive category CFTEs. No other adjustments are made. Under the rules in paragraph (d)(2)(iv)(A)(2) of this section, an adjustment to the category of a CFTE is treated as two separate adjustments: An increase to general category CFTEs of \$400 and a decrease to passive category CFTEs of \$400. Both adjustments are included in the creditable expenditure grouping under paragraph (d)(2)(iv) of this section, but they are included in separate subgroupings. Therefore, the two amounts do not net. Instead, the \$400 increase to CFTEs in the general category subgrouping is treated as a net non-positive adjustment within the meaning of paragraph (d)(3)(ii)(C) of this section and is an adjustment that does not result in an imputed underpayment within the meaning of paragraphs (b) and (c)(2) of this section. Therefore, the \$400 increase to CFTEs in the general category subgrouping of

the creditable expenditure grouping is taken into account in accordance with § 301.6225–3. The decrease to CFTEs in the passive category subgrouping of the creditable expenditure grouping results in a net decrease to CFTEs. Therefore, pursuant to paragraph (d)(2)(iv)(A)(3) of this section, it is treated as a decrease to credits under paragraph (d)(2)(iii) of this section, which results in an imputed underpayment of \$400 under paragraph (c)(1) of this section.

Example 8. Partnership has two partners, A and B. Under the partnership agreement, \$100 of the CFTE is specially allocated to A for the 2019 taxable year. The IRS initiates an administrative proceeding with respect to Partnership's 2019 taxable year and determines that \$100 of CFTE should be reallocated from A to B. The partnership adjustment is a <\$100> adjustment to general category CFTE allocable to A and an increase of \$100 to general category CFTE allocable to B. Pursuant to paragraph (d)(2)(iv)(A)(2) of this section, the <\$100> adjustment to general category CFTE and the increase of \$100 to general category CFTE are included in separate subgroupings, and the increase is disregarded for purposes of computing the imputed underpayment under paragraph (c)(1) of this section. The increase and decrease of \$100 of general category CFTE do not net. Instead, the net increase to CFTEs in the general-category, B-allocation subgrouping is treated as a net non-positive adjustment, which does not result in an imputed underpayment and is therefore taken into account by the partnership in the adjustment year in accordance with § 301.6225–3. The net decrease to CFTEs in the general-category, A-allocation subgrouping is treated as a decrease to credits in the credit grouping under paragraph (d)(2)(iii) of this section, resulting in an imputed underpayment of \$100 under paragraph (c)(1) of this section.

Example 9. Partnership has two partners, A and B. Partnership owns two entities, DE1 and DE2, that are disregarded as separate from their owner within the meaning of § 301.7701–3 and are operating in and paying taxes to foreign jurisdictions. The partnership agreement provides that all items (income, gain, loss, deduction, credit, etc.) from DE1 and DE2 are allocable to A and B in the following manner. Items related to DE1: To A 75% and to B 25%. Items related to DE2: To A 25% and to B 75%. Partnership reports CFTEs in the general category of \$300, \$100 with respect to DE1 and \$200 with respect to DE2. Partnership allocates the \$300 of CFTEs \$125 and \$175 to A and B respectively. On examination, the IRS determines that Partnership understated the amount of creditable foreign tax paid by DE2 by \$40 and overstated the amount of creditable foreign tax paid by DE1 by \$80. No other adjustments are made. Because the two adjustments each relate to CFTEs that are subject to different allocations, the two adjustments are in different subgroupings under paragraph (d)(2)(iv)(A)(2) of this section. The adjustment reducing the CFTEs related to DE1 produces a net decrease to CFTEs within that subgrouping and is treated as a reduction to credits under paragraph (d)(2)(iii) of this section and results in an imputed

underpayment of \$80 under paragraph (c)(1) of this section. The increase of \$40 of general category CFTE related to the DE2 subgrouping results in a net increase to CFTEs within that subgrouping and is treated as a net non-positive adjustment, which does not result in an imputed underpayment and is taken into account in the adjustment year in accordance with § 301.6225-3.

* * * * *

■ Par. 4. Section 301.6226-2 is amended by revising paragraph (h)(3) to read as follows:

§ 301.6226-2 Statements furnished to partners and filed with the IRS.

* * * * *

(h) * * *

(3) *Adjustments subject to chapters 3 and 4—(i) In general.* A partnership that makes an election under § 301.6226-1 with respect to an imputed underpayment must pay the amount of tax required to be withheld under chapter 3 or chapter 4 (as defined in § 301.6225-1(a)(4)) on the amount of any adjustment set forth in the statement described in paragraph (a) of this section to the extent that it is an adjustment to an amount subject to withholding and the IRS has not already collected tax attributable to the adjustment under chapter 3 or chapter 4. The partnership must pay the amount due under this paragraph (h)(3)(i) on or before the due date (as determined under paragraph (b) of this section) for furnishing the statement required under paragraph (a) of this section that reflects the adjustment, and must make the payment in the manner prescribed by the IRS in forms, instructions, and other guidance. For purposes of the regulations under subchapter C of chapter 63 of the Internal Revenue Code, the term *amount subject to withholding* means an amount subject to withholding (as defined in § 1.1441-2(a) of this chapter), a withholdable payment (as defined in § 1.1473-1(a) of this chapter), or the allocable share of effectively connected taxable income (as computed under § 1.1446-2(b) of this chapter).

(ii) *Reduced rate of tax.* A partnership may reduce the amount of tax it is required to pay under paragraph (h)(3)(i) of this section to the extent that it can associate valid documentation from a reviewed year partner pursuant to the regulations under chapter 3 or chapter 4 (other than pursuant to § 1.1446-6 of this chapter) with the portion of the adjustment that would have been subject to a reduced rate of tax in the reviewed year. For this purpose, the partnership may rely on documentation that the partnership possesses that is valid with respect to the reviewed year

(determined without regard to the expiration after the reviewed year of any validity period prescribed in § 1.1441-1(e)(4)(ii), § 1.1446-1(c)(2)(iv)(A), or § 1.1471-3(c)(6)(ii) of this chapter), or new documentation that the partnership obtains from the reviewed year partner that includes a signed affidavit stating that the information and representations associated with the documentation are accurate with respect to the reviewed year.

(iii) *Reporting requirements.* A partnership required to pay tax under paragraph (h)(3)(i) of this section must file the appropriate return and issue information returns as required by regulations under chapter 3 or chapter 4. For return and information return requirements, see § 1.1446-3(d)(1)(iii); § 1.1461-1(b), (c); § 1.1474-1(c), (d) of this chapter. The partnership must file the return and issue information returns for the year that includes the date on which the partnership furnishes the statement required under paragraph (a) of this section. The partnership must report the information on the return and information returns in the manner prescribed by the IRS in forms, instructions, and other guidance.

* * * * *

■ Par. 5. Section 301.6226-3 is amended by revising paragraph (f), and adding Example 6 to paragraph (g) to read as follows:

§ 301.6226-3 Adjustments Taken Into Account by Partners.

* * * * *

(f) *Partners subject to withholding under chapters 3 and 4.* A reviewed year partner that is subject to withholding under § 301.6226-2(h)(3)(i) must file an income tax return for the reporting year to report its additional reporting year tax and its share of any penalties, additions to tax, additional amounts, and interest (notwithstanding any filing exception in § 1.6012-1(b)(2)(i) or § 1.6012-2(g)(2)(i) of this chapter). The amount of tax paid by a partnership under § 301.6226-2(h)(3)(i) is allowed as a credit under section 33 to the reviewed year partner to the extent that the tax is allocable to the reviewed year partner (within the meaning of § 1.1446-3(d)(2) of this chapter) or is actually withheld from the reviewed year partner (within the meaning of § 1.1464-1(a) or § 1.1474-3 of this chapter). The credit is allowed against the reviewed year partner's income tax liability for its reporting year. The reviewed year partner must substantiate the credit by attaching the applicable Form 1042-S, "Foreign Person's U.S. Source Income Subject to Withholding," or Form 8805, "Foreign

Partner's Information Statement of Section 1446 Withholding Tax," to its income tax return for the reporting year, as well as meeting any other requirements prescribed by the IRS in forms and instructions.

(g) * * *

Example 6. On its partnership return for the 2020 tax year, Partnership, a domestic partnership, reported U.S. source dividend income of \$2,000. On June 1, 2023, the IRS mails an FPA to Partnership for Partnership's 2020 year increasing the amount of U.S. source dividend income to \$4,000 and asserting an imputed underpayment plus an accuracy-related penalty under section 6662(b). Partnership makes a timely election under section 6226 in accordance with § 301.6226-1 with respect to the imputed underpayment in the FPA for Partnership's 2020 year and does not file a petition for readjustment. The time to file a petition expires on August 30, 2023. Pursuant to § 301.6226-2(b), the partnership adjustments become finally determined on August 30, 2023. On September 30, 2023, Partnership files the statements described under § 301.6226-2 with the IRS and furnishes to partner A, a nonresident alien individual who was a partner in Partnership during 2020 (and remains a partner in Partnership in 2023), a statement described in § 301.6226-2. A had a 50 percent interest in Partnership during all of 2020 and was allocated 50 percent of all items from Partnership for that year. The statement shows A's share of U.S. source dividend income reported on Partnership's return for the reviewed year of \$1,000 and an adjustment to U.S. source dividend income of \$1,000. In addition, the statement reports A's share of the accuracy-related penalty related to the imputed underpayment, and A's safe harbor amount and interest safe harbor amount (as determined under § 301.6226-2(g)). Under § 301.6226-2(h)(3)(i), because the additional \$1,000 in U.S. source dividend income allocated to A is an amount subject to withholding (as defined in § 301.6226-2(h)(3)(i)), Partnership must pay the amount of tax required to be withheld on the adjustment. See §§ 1.1441-1(b)(1) and 1.1441-5(b)(2)(i)(A) of this chapter. Under § 301.6226-2(h)(3)(ii), Partnership may reduce the amount of withholding tax it must pay because it has valid documentation from 2020 that establishes that A was entitled to a reduced rate of withholding in 2020 on U.S. source dividend income of 10 percent pursuant to a treaty. Partnership withholds \$100 of tax from A's distributive share, remits the tax to the IRS, and files the necessary return and information returns required by § 1.1461-1 of this chapter. A does not elect to pay the safe harbor amount and therefore must pay the additional reporting year tax as determined in accordance with paragraph (b) of this section, in addition to A's share of the penalty and interest. On his 2023 return, A must report the additional reporting year tax determined in accordance with paragraph (b) of this section, plus A's share of the accuracy related penalty determined at the partnership level, and interest determined in accordance with

paragraph (d) of this section. Under paragraph (f) of this section, A may claim the \$100 withholding tax paid by Partnership pursuant to § 301.6226–2(h)(3)(i) as a credit under section 33 against A's income tax liability on his 2023 return.

* * * * *

■ Par. 6. Section 301.6227–2 is amended by adding paragraphs (b)(3) and (4) to read as follows.

§ 301.6227–2 Determining and accounting for adjustments requested in an administrative adjustment request by the partnership.

* * * * *

(b) * * *

(3) *Coordination with chapters 3 and 4 when partnership pays an imputed underpayment.* If a partnership pays an imputed underpayment resulting from adjustments requested in an AAR under paragraph (b)(1) of this section, the rules in § 301.6225–1(a)(4) apply to treat the partnership as having paid the amount required to be withheld under chapter 3 or chapter 4 (as defined in § 301.6225–1(a)(4)).

(4) *Coordination with chapters 3 and 4 when partnership elects to have adjustments taken into account by reviewed year partners.* If a partnership elects under paragraph (c) of this section to have its reviewed year partners take into account adjustments requested in an AAR, the rules in § 301.6226–2(h)(3) apply to the partnership, and the rules in § 301.6226–3(f) apply to the reviewed year partners that take into account the adjustments pursuant to § 301.6227–3.

* * * * *

Kirsten Wielobob,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2017–25740 Filed 11–29–17; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2016–0544; FRL–9971–36–OAR]

Notice of Denial of Petitions for Rulemaking To Change the RFS Point of Obligation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Denials of rulemaking requests.

SUMMARY: The Environmental Protection Agency (EPA) is providing notice of its denial of several petitions requesting that EPA initiate a rulemaking process to reconsider or change 40 CFR 80.1406, which identifies refiners and importers

of gasoline and diesel fuel as the entities responsible for complying with the annual percentage standards adopted under the Renewable Fuel Standard (RFS) program.

DATES: November 30, 2017.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2016–0544. 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., 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: Julia MacAllister, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: 734–214–4131; email address: macallister.julia@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On March 26, 2010, the EPA issued a final rule (75 FR 14670) establishing regulatory amendments to the renewable fuel standards (“RFS”) program regulations to reflect statutory amendments to Section 211(o) of the Clean Air Act enacted as part of the Energy Independence and Security Act of 2007. These amended regulations included 40 CFR 80.1406, identifying refiners and importers of gasoline and diesel fuel as the “obligated parties” responsible for compliance with the RFS annual standards. Beginning in 2014, and continuing to the present, some obligated parties and other stakeholders have questioned whether 40 CFR 80.1406 should be amended, and a number of them have filed formal petitions for reconsideration of the definition of “obligated party” in 40 CFR 80.1406, or petitions for rulemaking to amend the provision. On January 27, 2014, Monroe Energy LCC (“Monroe”) filed a “petition to revise” 40 CFR 80.1406 to change the RFS point of obligation, and on January 28, 2016, Monroe filed a “petition for reconsideration” of the regulation. On February 11, 2016, Alon Refining Krotz Springs, Inc.; American Refining Group, Inc.; Calumet Specialty Products Partners, L.P.; Lion Oil Company; Ergon–West Virginia, Inc.; Hunt Refining Company; Placid Refining Company

LLC; U.S. Oil & Refining Company (the “Small Refinery Owners Ad Hoc Coalition”) filed a petition for reconsideration of 40 CFR 80.1406. On February 12, 2016, Valero Energy Corporation and its subsidiaries (“Valero”) filed a “petition to reconsider and revise” the rule. On June 13, 2016, Valero submitted a petition for rulemaking to change the definition of “obligated party.” On August 4, 2016, the American Fuel and Petrochemical Manufacturers (“AFPM”) filed a petition for rulemaking to change the definition of “obligated party.” On September 2, 2016, Holly Frontier also filed a petition for rulemaking to change the definition of “obligated party.”

The petitioners all seek to have the point of obligation shifted from refiners and importers, but differed somewhat in their suggestions for alternatives in their petitions. Some requested in their petitions that EPA shift the point of obligation from refiners and importers to those parties that blend renewable fuel into transportation fuel. Others suggested that it be shifted to those parties that hold title to the gasoline or diesel fuel immediately prior to the sale of these fuels at the terminal (these parties are commonly called the “position holders”), or to “blenders and distributors”. All petitioners argued, among other things, that shifting the point of obligation to parties downstream of refiners and importers in the fuel distribution system would align compliance responsibilities with the parties best positioned to make decisions on how much renewable fuel is blended into the transportation fuel supply in the United States. Some of the petitioners further claimed that changing the point of obligation would result in an increase in the production, distribution, and use of renewable fuels in the United States and would reduce the cost of transportation fuel to consumers.

On November 22, 2016, EPA published a notice in the **Federal Register** announcing its proposed denial of all petitions seeking a change in the definition of “obligated party” in 40 CFR 80.1406, and soliciting comment on its draft analysis of the petitions and proposed rationale for denial. (81 FR 83776). EPA opened a public docket under Docket ID No. EPA–HQ–OAR–2016–0544, where it made its draft analysis available. EPA received over 18,000 comments on the proposed denial, including comments from the petitioners, stakeholders, and individuals supporting the request that EPA change the point of obligation for the RFS program, as well as from many stakeholders and individuals supporting

EPA's proposed denial and reasoning. In comments, petitioners were in agreement that the point of obligation should be moved to "position holders."

II. Final Denial

The final decision document describing EPA's analysis of the petitions seeking a change in the definition of "obligated parties" under the RFS program and our rationale for denying the petitions is available in the docket referenced above (Docket ID No. EPA-HQ-OAR-2016-0544). In evaluating this matter, EPA's primary consideration was whether or not a change in the point of obligation would improve the effectiveness of the program to achieve Congress's goals. EPA does not believe the petitioners or commenters on the matter have demonstrated that this would be the case. At the same time, EPA believes that a change in the point of obligation would unnecessarily increase the complexity of the program and undermine the success of the RFS program, especially in the short term, as a result of increasing instability and uncertainty in programmatic obligations.

We believe that the current structure of the RFS program is working to incentivize the production, distribution, and use of renewable transportation fuels in the United States, while providing obligated parties a number of options for acquiring the RINs they need to comply with the RFS standards. We do not believe that petitioners have demonstrated that changing the point of obligation would likely result in increased use of renewable fuels. Changing the point of obligation would not address challenges associated with commercializing cellulosic biofuel technologies and the marketplace dynamics that inhibit the greater use of fuels containing higher levels of ethanol, two of the primary issues that inhibit the rate of growth in the supply of renewable fuels today. Changing the point of obligation could also disrupt investments reasonably made by participants in the fuels industry in reliance on the regulatory structure the agency established in 2007 and reaffirmed in 2010. While we do not anticipate a benefit from changing the point of obligation, we do believe that such a change would significantly increase the complexity of the RFS program, which could negatively impact its effectiveness. In the short term we believe that initiating a rulemaking to change the point of obligation could work to counter the program's goals by causing significant confusion and uncertainty in the fuels marketplace.

Such a dynamic would likely cause delays to the investments necessary to expand the supply of renewable fuels in the United States, particularly investments in cellulosic biofuels, the category of renewable fuels from which much of the majority of the statutory volume increases in future years is expected.

In addition, changing the point of obligation could cause restructuring of the fuels marketplace as newly obligated parties alter their business practices to avoid the compliance costs associated with being an obligated party under the RFS program. We believe these changes would have no beneficial impact on the RFS program or renewable fuel volumes and would decrease competition among parties that buy and sell transportation fuels at the rack, potentially increasing fuel prices for consumers and profit margins for refiners, especially those not involved in fuel marketing. In addition, we note that in comments on EPA's proposed denial, commenters favoring a change in the definition of "obligated party" were predominantly in favor of designating position holders as obligated parties. However, position holders are not all refiners, importers or blenders. Therefore, EPA believes the petitioners' proposal is not well aligned with the authority provided EPA in the statute to place the RFS obligation on "refineries, importers and blenders, as appropriate."

A number of parties that either petitioned EPA to change the definition of "obligated party," or commented favorably on those petitions also challenged the rule establishing RFS standards for 2014, 2015 and 2016, alleging both that EPA had a duty to annually reconsider the appropriate obligated parties under the RFS program and that it was required to do so in response to comments suggesting that it could potentially avoid or minimize its exercise of the inadequate domestic supply waiver authority if it did so. In a recent ruling in that litigation, the United States Court of Appeals for the District of Columbia Circuit declined to rule on the matter, and instead indicated that EPA could address the matter either in the context of a remand of the rule ordered on other grounds, or in response to the administrative petitions that are the subject of this notice. See *Americans for Clean Energy v. Environmental Protection Agency*, 864 F.3d 691 (D.C. Cir. 2017) ("ACE"). As noted above, EPA is denying the petitions seeking a change in the definition of "obligated parties." EPA also is re-affirming that the existing regulation applies in all years going forward unless and until it is revised.

EPA does not agree with the petitioners in the ACE case that the statute requires annual reconsideration of the matter and, to the extent that EPA has discretion under the statute to undertake such annual reevaluations, EPA declines to do so since we believe the lack of certainty that would be associated with such an approach would undermine success in the program.

EPA has determined that this action is nationally applicable for purposes of CAA section 307(b)(1). since the result of this action is that the current nationally-applicable regulation defining obligated parties who must comply with nationally applicable percentage standards developed under the RFS program remains in place. In the alternative, even if this action were considered to be only locally or regionally applicable, the action is of nationwide scope and effect for the same reason, and because the action impacts entities that are broadly distributed nationwide who must comply with the nationally-applicable RFS percentage standards, as well as other entities who are broadly distributed nationwide that could potentially have been subject to such requirements if EPA had elected to grant the petitions seeking a change in the definition of obligated parties.

Dated: November 22, 2017.

E. Scott Pruitt,
Administrator.

[FR Doc. 2017-25827 Filed 11-29-17; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA-2017-0002; Internal Agency Docket No. FEMA-B-1170]

Proposed Flood Elevation Determinations for Snohomish County, Washington and Incorporated Areas

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule; withdrawal.

SUMMARY: The Federal Emergency Management Agency (FEMA) is withdrawing its proposed rule concerning proposed flood elevation determinations for Snohomish County, Washington and Incorporated Areas.

DATES: The proposed rule published on January 7, 2011 at 76 FR 1125 and the

correction published on February 22, 2011 at 76 FR 9714 are withdrawn as of November 30, 2017.

ADDRESSES: You may submit comments, identified by Docket No. FEMA-B-1170 to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW., Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW., Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov.

SUPPLEMENTARY INFORMATION: On January 7, 2011, FEMA published a proposed rule at 76 FR 1125 and 1126, and a correction on February 22, 2011 at 76 FR 9714, proposing flood elevation determinations along one or more flooding sources in Snohomish County, Washington and Incorporated Areas. FEMA is withdrawing the proposed rule because FEMA has issued a Revised Preliminary Flood Insurance Rate Map featuring updated flood hazard information. A Notice of Proposed Flood Hazard Determinations will be published in the **Federal Register** and in the affected community's local newspaper following issuance of the Revised Preliminary Flood Insurance Rate Map.

Authority: 42 U.S.C. 4104; 44 CFR 67.4.

Dated: November 2, 2017.

Roy E. Wright,

Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2017-25620 Filed 11-29-17; 8:45 am]

BILLING CODE 9110-12-P

FEDERAL MARITIME COMMISSION

46 CFR Parts 531 and 532

[Docket No. 17-10]

RIN 3072-AC68

Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements

AGENCY: Federal Maritime Commission.

ACTION: Notice of proposed rulemaking; notice of availability of finding of no significant impact.

SUMMARY: The Federal Maritime Commission (FMC or Commission) proposes to amend its rules governing

Non-Vessel-Operating Common Carrier (NVOCC) Negotiated Rate Arrangements and NVOCC Service Arrangements. The proposed rule is intended to modernize, update, and reduce regulatory burdens.

DATES: Submit comments on or before January 29, 2018.

In compliance with the Paperwork Reduction Act (PRA), the Commission is also seeking comment on revisions to two information collections. See the Paperwork Reduction Act section under Rulemaking Analyses and Notices below. Please submit all comments relating to the revised information collection requirements to the FMC and to the Office of Management and Budget (OMB) at the address listed below under **ADDRESSES** on or before January 29, 2018. Comments to OMB are most useful if submitted within 30 days of publication.

Petitions for review of the Commission's finding of no significant impact (FONSI) under NEPA must be submitted on or before December 11, 2017.

ADDRESSES: You may submit comments and petitions for review of the FONSI, identified by the Docket No. 17-10 by the following methods:

- **Email:** secretary@fmc.gov. For comments, include in the subject line: "Docket 17-10, Comments on Proposed NSA/NRA Regulations." For petitions for review of the FONSI, include in the subject line: "Docket 17-10, Petition for Review of FONSI." Comments and petitions for review should be attached to the email as a Microsoft Word or text-searchable PDF document. Only non-confidential and public versions of confidential comments and petitions should be submitted by email.

- **Mail:** Rachel E. Dickon, Assistant Secretary, Federal Maritime Commission, 800 North Capitol Street NW., Washington, DC 20573-0001.

Comments regarding the proposed revisions to the relevant information collections should be submitted to the FMC through one of the preceding methods and a copy should also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Federal Maritime Commission, 725 17th Street NW., Washington, DC 20503; by Fax: (202) 395-5167; or by email: OIRA.Submission@OMB.EOP.GOV.

Instructions: For detailed instructions on submitting comments, including requesting confidential treatment of comments, and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of

this document. Note that all comments received will be posted without change to the Commission's Web site, unless the commenter has requested confidential treatment.

Docket: For access to the docket to read background documents or comments received, go to the Commission's Electronic Reading Room at: <http://www.fmc.gov/17-10>, or to the Docket Activity Library at 800 North Capitol Street NW., Washington, DC 20573, between 9:00 a.m. to 5:00 p.m., Monday through Friday, except Federal holidays. Telephone: (202) 523-5725.

FOR FURTHER INFORMATION CONTACT: For questions regarding submitting comments or petitions for review of the FONSI, or the treatment of confidential information, contact Rachel E. Dickon, Assistant Secretary. **Phone:** (202) 523-5725. **Email:** secretary@fmc.gov. For technical questions, contact Florence A. Carr, Director, Bureau of Trade Analysis. **Phone:** (202) 523-5796. **Email:** tradeanalysis@fmc.gov. For legal questions, contact Tyler J. Wood, General Counsel. **Phone:** (202) 523-5740. **Email:** generalcounsel@fmc.gov.

SUPPLEMENTARY INFORMATION:

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- V. Rulemaking Analyses and Notices

I. Executive Summary

The Commission proposes to amend its rules at 46 CFR part 531 governing NVOCC Service Arrangements to remove the NSA filing and publication requirements. The Commission also proposes to amend its rules at 46 CFR part 532 to permit NRAs to be modified at any time. In addition, an NVOCC may provide for the shipper's acceptance of the NRA by booking a shipment thereunder, subject to the NVOCC incorporating a prominent written notice to such effect in each NRA or amendment.

II. Background

The Shipping Act of 1984 (the Shipping Act or the Act) expanded the options for pricing liner services by introducing the concept of carriage under service contracts filed with the

Commission. Public Law No. 98–237, § 8(c). Liner services could be priced via negotiated contracts between ocean common carriers and their shipper customers, rather than solely by public tariffs. Per the Shipping Act and FMC regulations, ocean freight rates, surcharges, and accessorial charges had to be published in tariffs or agreed to via a service contract filed with the Commission. Contemporaneous with the filing of service contracts, ocean carriers were required to make publicly available a statement of essential terms in tariff format.

The Ocean Shipping Reform Act of 1998 (OSRA) amended the Shipping Act of 1984 as it related to service contracts. Public Law No. 105–258, § 106. No longer did contract rates need to be published in the tariff publication, and the essential terms publication was limited to: Origin and destination port ranges, commodities, minimum volume or portion, and duration. Nevertheless, though the Shipping Act and its amendments provided for more efficiency and flexibility for ocean common carriers through the use of service contracts, similar relief was not extended to NVOCCs, which were still required to publish tariffs and adhere to those tariffs when transporting cargo.

A. NVOCC Service Arrangements (NSAs)

In 2003, NCBFAA filed a petition to seek exemption from some of the tariff requirements of the Shipping Act of 1984. See Docket No. P5–03, *Petition of the National Customs Brokers and Forwarders Association of America, Inc. for Limited Exemption of Certain Tariff Requirements of the Shipping Act of 1984*. In response, the Commission issued a notice of proposed rulemaking (NPRM) in which it determined that it had the statutory authority to exempt NVOCCs from the provisions of the Shipping Act, subject to certain conditions. 69 FR 63981, 63985. (Nov. 3, 2004). The Commission distinguished itself from other agencies who, pursuant to the findings in *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) and *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994) had lacked exemption authority. 69 FR at 63985. The Commission determined that in order to ensure there was no substantial reduction in competition among NVOCCs, the exemption had to be available to all NVOCCs compliant with both section 19 of the Shipping Act and the conditions of the exemption. *Id.* The Commission proposed that “the exemption be conditioned on the same statutory and regulatory requirements

and protections applicable to VOCCs’ service contracts: Namely, filing of executed agreements; publication of essential terms of those agreements; and confidential treatment, similar to that set forth in 46 CFR part 530.” 69 FR at 63986. The Commission also proposed the required publication of the essential terms of all NSAs in automated systems and the confidential filing of the text of those NSAs with the Commission. 69 FR at 63987. The Commission further proposed “making applicable to carriage under an NSA, those provisions of the Shipping Act that would be applicable to service contracts.” *Id.* The Commission’s final rule provided a limited exemption, Non-Vessel Operating Service Arrangements (“NSAs”), similar to service contracts, with required filing and publication requirements. (46 CFR part 531) *Non-Vessel Operating Service Arrangements*, 69 FR 75850 (Dec. 20, 2004). To “ensure that the exemption as proposed [would] not result in a substantial reduction in competition,” the Commission limited the exemption to individual NVOCCs acting in their capacity as carriers. 69 FR at 75851. The Commission also decided to allow affiliated NVOCCs to jointly offer NSAs. 69 FR at 75852.

B. NVOCC Negotiated Rate Arrangements (NRAs)

In 2008, the NCBFAA filed another petition with the Commission. This petition sought an exemption from mandatory rate tariff publication. See Docket No. P1–08, *Petition of the National Customs Brokers and Forwarders Association of America, Inc. for Exemption from Mandatory Rate Tariff Publication* (filed July 31, 2008). The proposal sought to exempt from the provisions of the Shipping Act of 1984 the requirement for NVOCCs to publish and/or adhere to rate tariffs “in those instances where they have individually negotiated rates with their shipping customers and memorialized those rates in writing.” NCBFAA Petition in Docket No. P1–08, at 10.

By Notice of Proposed Rulemaking (“NPRM”) issued May 7, 2010, the Commission proposed that the use of NRAs would be allowed, subject to conditions, including (1) a requirement for NVOCCs to continue publishing standard rules tariffs with contractual terms and conditions governing shipments, including any accessorial charges and surcharges, (2) a requirement to make available NVOCC rules tariffs to shippers free of charge; (3) a requirement that NRA rates must be mutually agreed to and memorialized in writing by the date the cargo is received for shipment; and (4) a

requirement that NVOCCs who use NRAs must retain, and make available upon request to the Commission, documentation confirming the terms, and agreed rate, for each shipment for a period of five years. *NVOCC Negotiated Rate Arrangements*, 75 FR 25150, 25154. (May 7, 2010). In the NPRM, the Commission also determined that under Section 16 of the Shipping Act the exemption could be granted as doing so “would not result in substantial reduction in competition or be detrimental to commerce.” 75 FR at 25153.

The Commission subsequently granted the exemption, relieving NVOCCs from the burden and costs of tariff rate publication when using this new class of carrier rate arrangements. *NVOCC Negotiated Rate Arrangements*, 76 FR 11351 (Mar. 2, 2011) (2011 NRA Final Rule). In determining whether to grant the exemption the Commission considered: Competition among NVOCCs; competition between NVOCCs and VOCCs; among VOCCs; as well as competition among shippers. 76 FR at 11352. The Commission determined that granting the exemption would not result in a substantial reduction in competition in any of the above categories. 76 FR at 11352–11353. Analyzing whether granting the exemption would be detrimental to commerce, the Commission determined that such NRAs would be beneficial to commerce because the exemption would “reduce NVOCC operating costs and increase competition in the U.S. trades.” 76 FR at 11353. The Commission also determined that “NVOCCs entering into NRAs continue to be subject to the applicable requirements and strictures of the Shipping Act, including oversight by the Commission.” 76 FR at 11354.

As a condition to offering NRAs, NVOCCs were required to provide their rules tariffs to the public free of charge. 76 FR at 11358. The Commission also determined not to allow for amendment of an NRA after receipt of the cargo by the carrier or its agent. *Id.* Consistent with the Petition’s focus upon negotiated rates only, the Commission determined not to permit NRAs to include non-rate economic terms, such as rate methodology, credit and payment terms, forum selection or arbitration clauses, or minimum quantities. 76 FR at 11355.

C. NCBFAA Petition for Rulemaking and Overview of Comments

NCBFAA petitioned the FMC on April 16, 2015, to initiate a rulemaking to eliminate the NSA provisions in 46 CFR part 531 in their entirety, or

alternatively, eliminate the filing and essential terms publication requirements for NSAs. Consolidated with that request, NCBFAA also asked the Commission to expand the NRA exemption in 46 CFR part 532 to include economic terms beyond rates, and to delete 46 CFR 532.5(e) that precludes any amendment or modification of an NRA.

On April 28, 2015, the Commission published a Notice of Filing and Request for Comments. 80 FR 23549 (Apr. 28, 2015). Comments were received from Mainfreight, Inc. (Mainfreight); ABS Consulting (ABS); Mohawk Global Statistics (Mohawk); Global Logistics Solutions (GLS); World Shipping Council (WSC); DJR Logistics, Inc. (DJR); Crowley Latin America Services, LLC and Crowley Caribbean Services, LLC (Crowley); New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. (NYNJFFF&BA); National Industrial Transportation League (NITL); CaroTrans International, Inc., (CaroTrans); Vanguard Logistics Services (USA), Inc., (Vanguard); Serra International, Inc., (Serra); C. H. Powell Company (Powell); BDG International, Inc., dba Seagull Express Lines, (BDG); John S. James Co. (James); and UPS Ocean Freight Services, Inc., UPS Europe SPRL, and UPS Asia Group Pte., Ltd. collectively submitting one comment (UPS). The comments represent a broad cross-section of industry stakeholders, including licensed NVOCCs and freight forwarders, a major trade association representing beneficial cargo owners, and vessel-operating common carriers (VOCCs). However, the Commission did not receive comments directly from beneficial owners of cargo shipped by NVOCCs under either NRAs or NSAs.

A majority of the OTI comments expressed general support for the petition. Commenters supported either the elimination of 46 CFR part 531 in its entirety, or eliminating the filing and essential terms publication requirements for NSAs. Many supported allowing economic terms beyond rates in NRAs, as well as the modification of NRAs at any time, upon mutual agreement.

The World Shipping Council, while not opposing the Petition, urged even-handed regulatory relief with respect to VOCCs as well. WSC cites prior requests that VOCCs have made for changes to the Commission's regulations governing service contract amendment filings. WSC's comments were supported by Crowley.

NITL, while supporting the negotiation of economic terms between

NVOCCs and shippers, as well as the elimination of the filing and essential terms publication requirement of NSAs, did not support the elimination of part 531 in its entirety. UPS also opposed any restrictions upon, or the elimination of, part 531, expressing support for the continued use of NSAs.

On August 2, 2016, the Commission granted NCBFAA's petition to "initiate a rulemaking with respect to the revisions discussed in the petition." However, because the Commission was in the process of a separate rulemaking to amend portions of part 531 related to NSAs (Docket No. 16-05, *Service Contracts and NVOCC Service Arrangements*), the Commission delayed initiating the requested rulemaking until after the rulemaking in Docket No. 16-05 was concluded.

III. The Commission's Proposed Rule

A. Overview

NCBFAA has proposed deleting in its entirety the NSA exemption in 46 CFR part 531, or alternatively, eliminate the filing and essential terms publication requirements for NSAs. NCBFAA also sought to expand the NRA exemption in 46 CFR part 532 to allow inclusion of economic terms beyond rates into NRAs. NCBFAA Petition at 14. NCBFAA argues that, whereas the NSA exemption currently benefits few NVOCCs, NVOCCs and shippers often seek to negotiate one-on-one on a broad range of service terms including: Rate or service amendments; liability; minimum volumes or time/volume rates; liquidated damages; credit terms; service guarantees and/or service benchmarks; measurements and penalties; surcharges; GRIs or other pass-through charges from the carriers or ports; rate amendment processes; EDI services; and dispute resolution. *Id.* at 8. NCBFAA urges that "each of these terms are relevant to some extent to every rate and service negotiation between an NVOCC and an existing or prospective customer. Yet, none of the items on this list can properly be included in an NRA." *Id.* at 9. NCBFAA contends that "the FMC should now look to meld the features of NSAs and NRAs into a single arrangement." *Id.* at 13.

Mainfreight, ABS, Powell, Mohawk, and John S. James support the elimination of 46 CFR part 531. Mainfreight states that granting the petition "would eliminate a regulatory burden that, over time, has come to represent a significant hurdle to the profitability and sustainability of the NVOCC business model." Mainfreight at

1.¹ ABS states that the petition "clearly reflects how shippers negotiate and contract with NVOCC's today and it will greatly simplify the process and make it easier for NVOCC's [*sic*] and shippers to cooperate and eliminate burdensome and not needed requirements and associated costs." ABS at 1. Powell believes that NRAs and NSAs are "two imperfect methods for memorializing NVOCC rates," and supports the petition's argument to eliminate the NSA exemption. Powell at 1. John S. James Co. likewise supports the petition from the NCBFAA to eliminate NSAs and expand the use of NRAs. James at 1.

Mohawk commented that given the current limitations on NRAs, which allow no provisions "that cover free time, demurrage, per diem and other similar components related to the transport of goods," both Mohawk and its clients had a desire for NRAs to include more terms and provisions. Mohawk at 2. BDG asserts that since BDG is "able to privately negotiate rates with our customers without publishing them in a tariff; it is difficult to understand why other economic terms that we also negotiate have to be treated differently and filed as NSAs." BDG at 2.

Global and NYNJFFF&BA support either eliminating the filing of essential terms publication requirements of NSAs or eliminating part 531 in its entirety. Global at 2; NYNJFFF&BA at 3. Global states that it has not used NRAs or NSAs and finds the provisions confusing. Global believes that combining NRAs and NSAs as one exemption would be more efficient and beneficial to "allow negotiated agreements to be fully comprehensive and cover rates and service arrangements." *Id.* at 1. NYNJFFF&BA insists that if existing restrictions on NRAs were removed, there would no longer be a commercial need for NSAs. NYNJFFF&BA at 3.

NITL does not support eliminating part 531. While advocating generally for greater flexibility for NVOCCs in the commercial marketplace, NITL "believes that NSAs should remain as an option for any shippers and NVOCCs that desire the increased formality of the NSA requirements." NITL at 6.

UPS urges that NSAs be preserved regardless of any changes to the NRA regulations to improve flexibility of the latter. UPS at 4. UPS states that "NSAs

¹ Mainfreight asserts that regulatory relief also is needed to stem a decline in the NVOCC share of the ocean freight business. *Id.* FMC review of current PIERs data for January 2014 through July 2017 indicates that NVOCC cargo as a share of U.S. ocean trades continues to increase overall, exceeding 50% for all U.S. import trades.

are the only method by which larger-volume NVOCCs can maintain an equal playing field with the Vessel Operating Common Carriers (VOCCs).” *id.* at 3, pointing out that “many NSAs are longer term, multi-year large volume contracts between NVOCCs and their shipper customers, often including multiple affiliated companies as additional shippers or consignees, [and] often covering global trade lanes.” *Id.* at 2. Whereas NRAs “may not be the most suitable format for certain types of transactions.” *id.*, UPS believes that preservation of NSAs allows pricing and service benefits “for shippers of all sizes, bringing the benefits of the Commission’s [NSA] exemption to the marketplace.” *Id.* UPS urges the Commission to allow the continued use of NSAs for “those NVOCCs that are now successfully using them, and for the benefit of their shippers.” *Id.* at 2.

The World Shipping Council urges that the issues raised by the NCBFAA Petition “are most logically and equitably considered alongside requests that vessel operating common carriers have made for changes to the Commission’s regulations governing service contract amendment filing.” WSC, at 1. WSC thus proposes that service contract amendments be permitted to be filed within 90 days of the filing of the underlying commercial agreement. *Id.* at 9. WSC asserts that the NCBFAA Petition provides an opportunity for the Commission to address changes to its NRA and NSA regulations at the same time that it considers changes to its VOCC service contract amendment filing regulations. *Id.* at 8. Crowley supports WSC’s comments, and states that the Commission should “initiate a rulemaking proceeding which would amend the FMC’s regulations to permit amendments to service contracts and NSAs to be filed within a specified period of time after the parties agree on the amendment.” Crowley, at 5.

Some commenters claim that the NSA exemption benefits few NVOCCs, citing the low volume of filed NSAs and higher costs and filing formalities attendant to NSAs. However, UPS’ description of NSAs as comprising “multi-year large-volume contracts” with its shipper customers, containing “hundreds or even a thousand or more individual rates” establishes a compelling factual parallel between the content of NSA and service contracts first anticipated by the Commission in creating an exemption for NSAs. Indeed, the exemption was expressly “conditioned on the same statutory and regulatory requirements and protections applicable to VOCCs’ service contracts:

Namely, filing of executed agreements; publication of essential terms of those agreements; and confidential treatment, similar to that set forth in 46 CFR part 530.” 69 FR at 63986.

Like service contracts, NSAs can contain non-rate economic terms, such as rate methodology, credit and payment terms, forum selection or arbitration clauses, or minimum quantities, which delineate the contractual terms and conditions binding both the carrier and shipper signatories. These latter provisions were excluded from application in NRAs. 76 FR at 11355. Indeed, in the Commission’s 2011 Final Rule as to NRAs, a number of commenters therein insisted upon the need for a rate-based NRA exemption notwithstanding the ability of NVOCCs to contractually enter into NSAs. These concerns were premised largely upon the perspectives of their customers, shippers who “do not want or need to engage in a formal contract process.” 76 FR at 11353.² This outlook continues to hold sway today. See, e.g. DJR comments, at 1 (“We will limit our comments to the NRA filing as we have never been able to secure a NSA from one of our clients. They rejected the idea stating that they did not want to be committed to a long term contract should our service levels fail to meet their requirements.”) Other commenters likewise have shared the view that the contractual formalities of NSAs are deemed too time consuming and burdensome, Serra at 1; Vanguard at 2; Powell at 1; and that “[c]hasing down signatures on amendments” had proven problematic. Mohawk at 2.

UPS insists that elimination of NSAs would create competitive conditions unfair to those larger NVOCCs who have invested heavily in building up procedures and business methods for this type of contracting. UPS points to the success of its own efforts and focus upon marketing NSAs, where more than one-third of their container volume in a

² See also supporting attachments to NCBFAA’s seminal Petition in Docket No. P1–08, including Verified Supporting Statement of Anthony Kozlowski, at 2; Verified Support Statement of Edward M. Piza, at 2; Verified Supporting Statement of Cas Pouderoen, at 2. As summarized by Ms. Paulette Kolba of Panalpina: We realize and appreciate the ruling allowing NVOCCs to issue NSAs (NVOCC Service Arrangements) to our customers. NSAs, however, have proven to have limited value, especially to the small and medium sized companies who do not want to get involved in signing a legal contract. They are perfectly happy with the written quotation and rarely understand the need for the NSA. The main benefit of NSAs that we see is in being able to customize rates and services to the unique conditions of some customers.

Verified Supporting Statement of Panalpina, Inc. at 4.

major US trade lane is now shipped under NSAs. NITL likewise echoes the commercial importance of these contractual distinctions between NRAs and NSAs, and urges that “NSAs should remain as an option for any shippers and NVOCCs that desire the increased formality of the NSA requirements.” *Id.* at 6.

Consistent with recent Executive Orders,³ the Commission’s mission is best fulfilled by recognizing and facilitating the further development of emerging business models, including the more contractually complex and service-oriented NSAs. Whereas NSA contracts bear service provisions and terms more equivalent to VOCC service contracts, that differentiation (from NRAs) was at the heart of creating an exemption for a rate-based vehicle for NVOCC shippers, whom the Petitioner previously described as “most of whom are LCL shippers,”⁴ “who do not want to sign formal written contracts,” *id.* at 9, or just do not like the formality of NSAs, *id.* The Commission perceives little value, therefore, in mandating a narrowing of NVOCCs’ choices for contracting with their customers, when it appears that substantial volumes of cargo are now moving successfully under the NSA contract model. UPS, at 2. Rather, where those contracting models may be substantially improved without compromising carrier duties or conditions intended for the protection of the shipper, the Commission has been unafraid to consider further loosening of the restrictions or limitations previously established upon an exemption. The Commission is persuaded that it can do so here by removing unnecessary or burdensome regulatory impediments upon the further development of NSAs, without eliminating the NSA provisions in part 531 in their entirety.

In doing so, the Commission also reaffirms its intention, first stated in Docket No. 10–03, that NRAs should facilitate a new business model conducive to those NVOCCs who could not then, and cannot now, utilize NSAs. While some NVOCCs may wish to issue a NSA to obtain a volume commitment from their shipper customer, many small and medium enterprises continue to work on a quotation basis, without need to engage in a formal contract process. 76 FR at 11353. See also DJR at 1; NYNJFF&BA at 3 (NSAs are not “practical particularly for our smaller members when moving lower or less

³ See e.g. Executive Order 13771, *Reducing Regulation and Controlling Regulatory Costs* (Jan. 30, 2017) and Executive Order 13777, *Enforcing the Regulatory Reform Agenda* (Feb. 24, 2017).

⁴ NCBFAA Petition in Docket No. P1–08, at 6.

frequent freight volumes.”) For such NVOCCs, and their customers, NRAs continue to provide a lower cost, competitive niche in today’s commercial marketplace, made possible by a Commission-issued exemption from the otherwise-applicable requirements of the Shipping Act.

The Commission invites further public comment, particularly from shippers currently using NRAs, on how expanding the NRA exemption to allow inclusion in NRAs of non-rate economic terms may impact their commercial business operations. Non-rate economic terms could include but are not limited to such terms as: Service amendments; per-package liability limits; provision of free time, detention or demurrage charges; provisions for arbitration, dispute resolution or forum selection; minimum volumes or time/volume rates; liquidated damages; credit terms and late payment interest; service guarantees and/or service benchmarks, measurements and penalties; surcharges, GRIs or other pass-through charges from the carriers or ports; rate amendment processes; and EDI services, etc.

B. Remove the NSA Filing and Publication Requirements

NCBFAA argues that the NSA exemption benefits few NVOCCs. As NSAs must be filed with the Commission, and essential terms of NSAs also need to be published in tariffs, NCBFAA opines that NSAs are more burdensome than regular rate tariffs. NCBFAA Petition at 7–8. NCBFAA also argues that continuing the filing requirement for NSAs does not appear to provide any regulatory benefit. *Id.* at 12–13.

A substantial majority of the NVOCC commenters support the NCBFAA position. Commenting on NSAs, Mohawk states “the filing burden and rules of use run parallel to tariff filing. NSAs by their nature are more restrictive than the NRA we have opted to use. They require 30 days advanced filing to increase rates, and must be maintained electronically,” Mohawk at 2. Serra asserts that NSAs, due to the filing requirements, are “far too time consuming and costly both for ourselves and our customers.” Serra, at 2. Carotrans and Vanguard insist that “NSAs are often of little utility to most NVOCCs due to the formality, burden, and cost of its publication and filing requirements.” Carotrans, at 2; Vanguard, at 2. NYNJFF&BA summarizes the current requirements surrounding NSAs as “more formal, more costly, and more time-consuming to put in place.” NYNJFF&BA, at 3.

NITL supports “the elimination of the filing and essential terms publication requirement of NSAs,” NITL at 5, but recommends continuation of provisions that would require “NVOCCs to provide NSA contract terms to the Commission upon its request.” *Id.*

The OTI commenters have made a substantial case that continuing the filing requirement for NSAs does not appear to offer any regulatory benefit. NCBFAA suggests that these filing requirements may be impeding broader commercial acceptance of NSAs by shippers and NVOCCs, noting that approximately 2,300 NVOCCs have instead taken advantage of the NRA exemption. Petition at 7. UPS takes no issue with removing the filing and essential terms publication requirements so long as NSAs are not eliminated nor any material additional restrictions imposed upon NSAs. UPS, at 4. NITL also supports elimination of these requirements, asserting that the Commission “does not (and need not) rely on these submissions to fulfill its enforcement duties.” NITL, at 5.

WSC cites the need for “even-handed regulatory relief” with respect to VOCCs as well. WSC, at 9. While the WSC does not oppose most issues in the petition, WSC does oppose eliminating the filing requirement for NVOCCs because it would create a disparity between NVOCCs and VOCCs. WSC asserts that the NCBFAA Petition provides an opportunity to consider changes to the VOCC service contract amendment filing regulations at the same time the Commission addresses Petitioner’s request for changes to the NRA and NSA regulations. *Id.* at 8. Specifically, WSC cites prior requests that VOCCs have made for changes to the Commission’s regulations permitting contract amendments to be filed subsequent to the execution of such contract amendments. WSC’s comments were supported by Crowley.

As noted, the Commission previously approved initiating a separate rulemaking to amend portions of parts 530 and 531 related to service contracts and NSAs, Docket No. 16–05, *Service Contracts and NVOCC Service Arrangements*. In granting the NCBFAA Petition, the Commission delayed initiating the requested rulemaking until after the rulemaking in Docket No. 16–05 was concluded. A final rule in Docket 16–05 was published on April 4, 2017. 82 FR 16288. The relief granted by the Commission in Docket 16–05 allows amendments to service contracts, including multiple service contract amendments, to become effective during a 30-day period prior to being filed with the Commission. The Commission

therefore has substantially met WSC’s specific request for regulatory relief for VOCCs. Any further relief to VOCCs for service contracts may be undertaken by the Commission after it has had an opportunity to analyze the impact of the 30-day filing period on VOCC operations and shipper feedback.⁵

The Commission proposes to exempt NSAs from both the SERVCON filing requirement and also the requirement that the NVOCC publish, in tariff format, the essential terms of any NSA. See 46 CFR 531.9. The essential terms requirement for NSAs currently mirrors those provisions set forth for VOCC service contracts, 46 CFR 530.12, while recognizing that the VOCCs’ statutory obligation of disclosure to labor organizations for work covered by a collective bargaining agreement extended solely to service contracts, not NSAs. See 46 U.S.C. 40502 and 46 CFR 530.7. Inasmuch as most NVOCCs are not subject to collective bargaining agreements with shoreside labor unions, the Commission solicits public comments why the essential terms publication requirement should not now be removed as an unnecessary burden upon the use of NSAs. Shippers, who were identified by the Commission as the beneficiaries of essential terms in the original 2003 NSA rulemaking, have not since commented on the continuing utility of essential terms publications, and thus maintaining the essential terms publication requirement appears to provide little regulatory benefit.⁶

In removing the NSA filing and essential terms publication requirements, the Commission seeks to preserve the NVOCC’s current range of pricing and contracting choices, while eliminating the filing and publication costs currently associated with NSAs. According to the commenters, this regulatory relief is likely to make NSAs a more attractive pricing and contracting tool and thereby encourage increased use of NSAs. The Commission is mindful that NSAs, comprising both

⁵ While the VOCC commenters to the subject Petition did not expressly request relief from the current service contract filing requirements as to essential terms, the Commission would invite the VOCC community to submit an appropriate request for relief.

⁶ As noted in the Commission’s earlier rulemaking, the most critical elements of both VOCC service contracts and NVOCC NSAs are the important statutory protections provided to shippers that ensure against detriment to commerce. See 69 FR 53969. To ensure consistency with VOCC treatment, the Commission will continue applying to carriage under an NSA, those provisions of the Shipping Act that would be applicable to service contracts which relate to protecting shippers. These include the prohibited acts contained in sections 10(b)(1), (2), (5) and (9), 46 U.S.C. 41104(1), (2), (5) and (9).

rate and service provisions, may remain impractical for smaller NVOCCs or shippers moving lower or less frequent freight volumes. It has been shown, however, that substantial volumes of cargo are already moving under this contract model, and that the NVOCC members of Petitioner NCBFAA would prefer the flexibility of including both service and rate-related items in their contract offerings if relieved of the filing and publication burdens of same. Appropriate regulatory relief thus will allow parties to increase the use and reliance upon NSAs as a means to more efficiently engage in the movement of U.S. import and export cargo, while continuing to protect NSA shippers from potential financial harm for non-performance.

C. Authorize Amendments of NRAs and Shipper Acceptance Upon Booking

NCBFAA has proposed deleting 46 CFR 532.5(e) and expanding the NRA exemption in 46 CFR part 532 to allow modification of NRAs at any time upon mutual agreement between NVOCCs and their customers. NCBFAA Petition at 14.

Mainfreight, ABS, Mohawk, GLS, DJR, NYNJFFF&BA, NITL, CaroTrans, Vanguard, Serra, Powell, and BDG support the NCBFAA petitioner's request to allow modification of NRAs, at any time, upon mutual agreement. DJR states that, under current NRA requirements, either "the NVOCC faces the serious loss of revenue and potentially being put out of business by issuing long period NRAs, or the NVOCC issues 1 day or 1 week NRAs which increases the NVOCCs' operational expense and floods the shipper with constantly changing pricing." DJR at 2-3. NYNJFFF&BA also supports the NCBFAA recommendation that NRAs be allowed to be amended at any time after the receipt of cargo. NYNJFFF&BA states "if NRAs can be amended in conjunction with the shipper's agreement the NRA will become more directly responsive to competitive market conditions and business practices prevalent in the current marketplace." NYNJFFF&BA, at 3.

CaroTrans supports allowing modification of NRAs, as it believes it will improve efficiency and prevent the current "nonsensical" and "inefficient" approach to modification, which entails terminating the current NRA and entering into a new one. CaroTrans at 3. Serra and Powell also support allowing amendment of NRAs after the cargo is received if the shipper and the NVOCC both agree in writing. Serra at 2; Powell at 1-2. NITL supports "allowing a

shipper and NVOCC the power to modify an NRA at any time but only to the extent that the modification is based on a mutual written agreement between the parties and, such agreement should not be in the form of the NVOCC's tariff, bill of lading, or other shipping document that is not subject to mutual negotiation." NITL, at 5.

Due to their smaller cargo volume, recent history has shown, and the commenters' statements support that NRAs tend to be transactional in nature and are generally short term. With their singular focus upon rates, NRAs are more aligned with the "spot market."⁷ This relationship heightens, rather than diminishes, the need for NRAs to respond to an ever-changing marketplace. It appears appropriate, and in keeping with the Commission's commitment to reduce regulatory burden where feasible, to therefore permit NRAs to be extended or amended upon acceptance or agreement by the shipper customer. In initially creating NRAs, the accelerating need for parties to have greater flexibility to more quickly respond to fast-paced market rate fluctuations does not appear to have been fully anticipated. The NVOCC and its customer should not be compelled to create a new NRA in every instance simply because the rules do not currently provide for amendment.

While not expressly included in the NCBFAA Petition, the Commission proposes a further change to enhance the use and competitiveness of NRAs. As noted in the comments of DGR Logistics, the requirement at 46 CFR 532.5(c) that an NRA "be agreed to" by the shipper prior to receipt of cargo by the common carrier or its agent may itself pose logistical and regulatory challenges to the NVOCC. See DGR, at 2. Rather than continuing a persistent practice requiring that shipper acceptance in all cases be memorialized through a formal writing or email, the Commission proposes also to allow NRAs to be more flexibly created, or be amended, upon the shipper's acceptance in the form of a request for booking pursuant to the NRA.⁸ This practice more closely corresponds to the manner in which an NVOCC encounters shipper acceptance when responding to a written rate quote under standard

⁷ UPS has described NRAs as "flexible and confidential rate offerings designed to react quickly to a very fluid marketplace". Comments of UPS in Docket No. 10-03, *NVOCC Negotiated Rate Arrangements*, at 4.

⁸ Towards this same result, NCBFAA recently submitted comments in Docket No. 17-04, *Regulatory Reform Initiative*, requesting changes to the NRA rules to "make it clear that a shipper's tendering or booking of cargo constitutes acceptance of an NRA," NCBFAA Comments at 12.

tariff rates and rules, *i.e.* by communicating its agreement solely in terms of instructing the NVOCC to book the cargo for shipment thereunder. To ensure continued protection of the shipper and avoid confusion or potential disputes as to this new means to conclude an NRA, the Commission proposes that each NVOCC that seeks to recognize shipper acceptance of an NRA through the act of booking must incorporate a prominent written notice to that effect on each such NRA or amendment. As this additional NRA methodology is intended to be optional to the NVOCC and its shipper customers, the Commission will not eliminate the requirement that a shipper's agreement to an NRA should otherwise be in writing or by email. The Commission invites public comment on the desirability of permitting NRA acceptance by booking, and whether the Commission should require particular wording in order to more prominently give notice as to the NVOCC's practice with respect to booking.

IV. Public Participation

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the docket, please include the docket number of this document in your comments.

You may submit your comments via email to the email address listed above under **ADDRESSES**. Please include the docket number associated with this notice and the subject matter in the subject line of the email. Comments should be attached to the email as a Microsoft Word or text-searchable PDF document. Only non-confidential and public versions of confidential comments should be submitted by email.

You may also submit comments by mail to the address listed above under **ADDRESSES**.

How do I submit confidential business information?

The Commission will provide confidential treatment for identified confidential information to the extent allowed by law. If your comments contain confidential information, you must submit the following by mail to the address listed above under

ADDRESSES:

- A transmittal letter requesting confidential treatment that identifies the specific information in the comments or which protection is sought and demonstrates that the information is a

trade secret or other confidential research, development, or commercial information.

- A confidential copy of your comments, consisting of the complete filing with a cover page marked "Confidential-Restricted," and the confidential material clearly marked on each page. You should submit the confidential copy to the Commission by mail.
- A public version of your comments with the confidential information excluded. The public version must state "Public Version—confidential materials excluded" on the cover page and on each affected page, and must clearly indicate any information withheld. You may submit the public version to the Commission by email or mail.

Will the Commission consider late comments?

The Commission will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments received after that date. If the Commission receives a comment too late to consider in developing a final rule (assuming that one is issued), the Commission will consider that comment as an informal suggestion for future rulemaking action.

How can I read comments submitted by other people?

You may read the comments received by the Commission at the Commission's Electronic Reading Room or the Docket Activity Library at the addresses listed above under **ADDRESSES**.

Please note that even after the comment closing date, we may continue to file relevant information in the docket as it becomes available. Further, some commenters may submit late comments. Accordingly, we recommend that you periodically check the docket for new material.

V. Rulemaking Analyses and Notices

Regulatory Flexibility Act

The Regulatory Flexibility Act (codified as amended at 5 U.S.C. 601–612) provides that whenever an agency is required to publish a notice of proposed rulemaking under the Administrative Procedure Act (APA) (5 U.S.C. 553), the agency must prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) describing the impact of the proposed rule on small entities, unless the head of the agency certifies that the rulemaking will not have a significant economic impact on a substantial

number of small entities. 5 U.S.C. 603, 605.

The Commission recognizes that the majority of businesses affected by these rules qualify as small entities under the guidelines of the Small Business Administration. The rule as to Part 531 (NSAs) poses no economic detriment to small business. In this regard, the rule pertains to an NSA entered into between a NVOCC and a shipper, which is an optional pricing arrangement that benefits the shipping public and relieves NVOCCs from the burden of the statutory tariff filing requirements in 46 U.S.C. 40501. In that the proposed rule would eliminate the requirements that NVOCCs file NSAs with the Commission and publish essential terms of such NSAs, the regulatory burden on NVOCCs utilizing NSAs would be reduced. The rule as to part 532 (NRAs) would establish an optional method for NVOCCs to amend an NRA, and to garner shipper agreement to an NRA or amendment thereto, to be used at the NVOCC's discretion. In that the proposed rule would eliminate the prohibition on amendments to NRAs after an initial shipment is received by the carrier and would permit NVOCCs to more flexibly create and amend such NRAs, the regulatory burden on NVOCCs utilizing NRAs would be reduced.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (PRA) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in proposed rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11.

The information collection requirements for part 531, NVOCC Service Arrangements, and part 532 NVOCC Negotiated Rate Arrangements are currently authorized under OMB Control Numbers 3072–0070: 46 CFR part 531, NVOCC Service Arrangements, and 3072–0071: 46 CFR 532—NVOCC Negotiated Rate Arrangements, respectively. In compliance with the PRA, the Commission has submitted the proposed revised information collections to the Office of Management and Budget.

The proposed rule would eliminate the requirement that NVOCCs file NSAs with the Commission and the requirement that NVOCCs publish the essential terms of NSAs. Public burden for the collection of information pursuant to part 531, NVOCC Service

Arrangements, as revised, would comprise 79 likely respondents and an estimated 3,328 annual instances. Given that the proposed rule eliminates the NSA filing requirement as well as the essential terms publication requirement, the burden estimate has been significantly reduced from 831 hours (2016 estimate) to 127 hours, a difference of 704 hours.

The proposed rule would also permit NRAs to be modified after the receipt of the initial shipment by the carrier, and permit shippers' acceptance of the NRA by booking a shipment thereunder, subject to the NVOCC incorporating a prominent written notice to such effect in each NRA or amendment. No new information collection or reporting requirements are proposed with respect to part 532, NVOCC Negotiated Rate Arrangements, as revised.

Comments are invited on:

- Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Whether the Commission's estimate for the burden of the information collection is accurate;
- Ways to enhance the quality, utility, and clarity of the information to be collected;
- Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Please submit any comments, identified by the docket number in the heading of this document, by any of the methods described in the **ADDRESSES** section of this document.

National Environmental Policy Act

Upon completion of an environmental assessment, the Commission has determined that the proposed rule will not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and that preparation of an environmental impact statement is not required. This FONSI will become final within 10 days of publication of this notice in the **Federal Register** unless a petition for review is filed by any of the methods described in the **ADDRESSES** section of the document. The FONSI and environmental assessment are available for inspection at the Commission's Electronic Reading Room at: <http://www.fmc.gov/17-10>, and at the Docket Activity Library at 800 North Capitol Street NW., Washington, DC 20573, between 9:00 a.m. to 5:00 p.m., Monday

through Friday, except Federal holidays.
Telephone: (202) 523-5725.

Executive Order 12988 (Civil Justice Reform)

This proposed rule meets applicable standards in E.O. 12988 titled, "Civil Justice Reform," to minimize litigation, eliminate ambiguity, and reduce burden.

Regulation Identifier Number

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at <http://www.reginfo.gov/public/do/eAgendaMain>.

List of Subjects in 46 CFR Part 531

Freight, Maritime carriers, Report and recordkeeping requirements.

For the reasons stated in the supplementary information, the Federal Maritime Commission proposes to amend 46 CFR part 531 as follows:

PART 531—NVOCC SERVICE ARRANGEMENTS

■ 1. The authority citation for part 531 continues to read as:

Authority: 46 U.S.C. 40103.

■ 2. Revise § 531.1 to read as follows:

§ 531.1 Purpose

The purpose of this part is to facilitate NVOCC Service Arrangements ("NSAs") as they are exempt from the otherwise applicable provisions of the Shipping Act of 1984 ("the Act").

■ 3. Amend § 531.3 by:

■ a. Revising paragraph (c);

■ b. Removing paragraphs (d) through (g), (m), and (n);

■ c. Redesignating paragraphs (h) and (i) as paragraphs (d) and (e), respectively;

■ d. Redesignating paragraphs (k) and (l) as paragraphs (f) and (g), respectively;

■ e. Redesignating paragraphs (o) and (p) as paragraphs (h) and (i), respectively;

■ f. Revising newly redesignated paragraphs (f) and (j).

The revisions to read as follows:

§ 531.3 Definitions.

* * * * *

(c) *Amendment* means any change to a NSA which has prospective effect and

which is mutually agreed upon by all parties to the NSA.

* * * * *

(f) *Effective date* means the date upon which an NSA or amendment is scheduled to go into effect by the parties to the NSA. An NSA or amendment becomes effective at 12:01 a.m. Eastern Standard Time on the beginning of the effective date. The effective date cannot be prior to the date of the NSA or amendment.

* * * * *

(j) *Rules tariff* means a tariff or the portion of a tariff, as defined by 46 CFR 520.2, containing the terms and conditions governing the charges, classifications, rules, regulations and practices of an NVOCC, but does not include a rate.

■ 4. Revise § 531.4 to read as follows:

§ 531.4 NVOCC rules tariff.

(a) Before entering into NSAs under this Part, an NVOCC must provide electronic access to its rules tariffs to the public free of charge.

(b) An NVOCC wishing to invoke an exemption pursuant to this part must indicate that intention to the Commission and the public by a prominent notice in its rules tariff.

§ 531.5 [Removed and reserved]

■ 5. Remove and reserve § 531.5

■ 6. Revise the Subpart B heading to read as follows:

Subpart B—Requirements

■ 7. Amend § 531.6 by:

■ a. Removing paragraphs (a), (f), and (g);

■ b. Redesignating paragraphs (b) through (e) as paragraphs (a) through (d), respectively;

■ c. Revising the introductory text of newly redesignated paragraph (a);

■ d. Revising the newly redesignated paragraph (c)(1) paragraph and adding paragraph (c)(5);

■ e. Revising newly redesignated paragraph (d) to read as follows:

§ 531.6 NVOCC Service Arrangements.

(a) Every NSA shall include the complete terms of the NSA including, but not limited to, the following:

* * * * *

(c) *Other requirements.* (1) For service pursuant to an NSA, no NVOCC may, either alone or in conjunction with any other person, directly or indirectly, provide service in the liner trade that is not in accordance with the rates, charges, classifications, rules and practices contained in a NSA.

* * * * *

(5) Except for the carrier party's rules tariff, the requirement in 46 U.S.C.

40501(a)–(c) that the NVOCC include its rates in a tariff open to public inspection in an automated tariff system and the Commission's corresponding regulations at 46 CFR part 520 shall not apply.

(d) *Format requirements.* Every NSA shall include:

(1) A unique NSA number of more than one (1) but less than ten (10) alphanumeric characters in length ("NSA Number"); and

(2) A consecutively numbered amendment number no more than three digits in length, with initial NSAs using "0" ("Amendment number").

* * * * *

§ 531.7 [Removed and reserved]

■ 8. Remove and reserve § 531.7

■ 9. Revise § 531.8 to read as follows:

§ 531.8 Amendment.

(a) NSAs may be amended by mutual agreement of the parties.

(b) Where feasible, NSAs should be amended by amending only the affected specific term(s) or subterms.

(c) Each time any part of an NSA is amended, a consecutive amendment number (up to three digits), beginning with the number "1" shall be assigned.

(d) Each time any part of a NSA is amended, the "Effective Date" will be the date of the amendment.

§ 531.9 [Removed and Reserved]

■ 10. Remove and Reserve § 531.9.

§ 531.10 [Amended].

■ 11. Amend § 531.10 by removing paragraphs (c) and (d).

■ 12. Revise § 531.11 to read as follows:

§ 531.11 Implementation.

Generally. Performance under an NSA or amendment thereto may not begin before the day it is effective.

■ 13. Revise § 531.99 to read as follows

§ 531.99 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

The Commission has received OMB approval for this collection of information pursuant to the Paperwork Reduction Act of 1995, as amended. In accordance with that Act, agencies are required to display a currently valid control number. The valid control number for this collection of information is 3072-0070.

Appendix A to Part 531 [Removed]

■ 14. Remove Appendix A to part 531.

PART 532—NVOCC NEGOTIATED RATE ARRANGEMENTS

■ 15. The authority citation for part 532 continues to read as:

Authority: 46 U.S.C. 40103.

■ 16. Amend § 532.5 by revising paragraphs (c) and (e) to read as follows:

§ 532.5 Requirements for NVOCC negotiated rate arrangements.

* * * * *

(c) Be agreed to by both NRA shipper and NVOCC, prior to receipt of cargo by the common carrier or its agent (including originating carriers in the case of through transportation). Shipper acceptance of the NRA may be demonstrated through a signed agreement or written communication, including email, from the shipper.

Shipper acceptance of an NRA may also be demonstrated by booking a shipment after receiving the NRA terms from the NVOCC if the NVOCC incorporates a prominent written notice that booking constitutes acceptance of the NRA terms in each NRA or amendment.

(1) To comply with paragraph (c), the NVOCC shall incorporate the following text in bold font or by use of all uppercase letters: “SHIPPER MAY ACCEPT THIS NRA OR NRA AMENDMENT BY BOOKING A SHIPMENT AFTER RECEIVING THE TERMS HEREOF.”

(2) Reserved.

* * * * *

(e) May be amended after the time the initial shipment is received by the carrier or its agent (including originating carriers in the case of through transportation), but such changes may only apply prospectively to shipments not yet received by the carrier or its agent.

By the Commission.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2017–25718 Filed 11–29–17; 8:45 am]

BILLING CODE 6731-AA-P

Notices

Federal Register

Vol. 82, No. 229

Thursday, November 30, 2017

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Boundary Modification to Colorado Roadless Area Boundary, Rio Grande National Forest

AGENCY: Forest Service, USDA.

ACTION: Notice of proposed Colorado Roadless Area boundary modifications; request for comment.

SUMMARY: The Forest Service proposes to modify the Wightman Fork to Lookout Roadless Area boundary on the Rio Grande National Forest to include parcels of non-federal land and remove federal land for the Summitville Interchange land exchange. The Chief of the Forest Service proposes to modify this boundary after a 90-day public comment period.

DATES: Comments must be received in writing by February 28, 2018.

ADDRESSES: Written comments concerning this notice should be addressed to Tom Malecek, Rio Grande National Forest, 1803 West Highway 160, Monte Vista, CO 81144. Comments may also be sent via email to comments-rocky-mountain-rio-grande@fs.fed.us or via facsimile to (719) 852-6250.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the above address. Visitors are encouraged to call ahead to (719) 852-5941 to facilitate entry to the building.

FOR FURTHER INFORMATION CONTACT: For additional information, including maps of the proposed adjustments, contact Tom Malecek, Deputy Forest Supervisor, at (719) 852-6225.

Additional information concerning this boundary modification, including maps, may be obtained on the Internet at: <https://www.fs.usda.gov/project/?project=52819>.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The Colorado Roadless Rule permits the Chief of the Forest Service to modify Colorado Roadless Area boundaries after a 90-day public comment period. Pursuant to 36 CFR 294.47(a), the Forest Service proposes to modify the Wightman Fork to Lookout Roadless Area boundary, located in the Rio Grande National Forest, to allow for the inclusion of 10 acres of non-federal land to be acquired by the Forest Service and remove 16 acres of federal land to be conveyed to non-federal parties for this land exchange. With the boundary modifications, the exchange would result in a net decrease to Colorado Roadless Areas of approximately six acres.

Responsible Official

The Forest Service is analyzing the impacts of the land exchange and roadless area boundary modifications. The Chief of the Forest Service is the responsible official for the boundary modification under the Colorado Roadless Rule. The Forest Supervisor, Rio Grande National Forest, is the responsible official for the land exchange. The Forest Service will consider public comments on the proposed boundary modifications in coordination with the proposed land exchange.

Dated: November 20, 2017.

Tony Tooke,

Chief.

[FR Doc. 2017-25874 Filed 11-29-17; 8:45 am]

BILLING CODE 3411-15-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Regulations and Procedures Technical Advisory Committee; Notice of Partially Closed Meeting

The Regulations and Procedures Technical Advisory Committee (RPTAC) will meet December 12, 2017, 9:00 a.m., Room 3884, in the Herbert C. Hoover Building, 14th Street between

Constitution and Pennsylvania Avenues NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on implementation of the Export Administration Regulations (EAR) and provides for continuing review to update the EAR as needed.

Agenda

Public Session

1. Opening remarks by the Chairman
2. Opening remarks by the Bureau of Industry and Security
3. Presentation of papers or comments by the Public
4. Export Enforcement update
5. Regulations update
6. Working group reports
7. Automated Export System update

Closed Session

8. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 25 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at Yvette.Springer@bis.doc.gov no later than December 5, 2017.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate the distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer via email.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on February 15, 2017, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 § 10(d)), that the portion of the meeting dealing with pre-decisional changes to the Commerce Control List and the U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public. For

more information, call Yvette Springer at (202) 482–2813.

Yvette Springer,
Committee Liaison Officer.

[FR Doc. 2017–25789 Filed 11–29–17; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF611

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Waterfront Improvement Projects at Portsmouth Naval Shipyard

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS has received a request from the U.S. Department of the Navy (Navy) for authorization to take marine mammals incidental to continued construction activities as part of waterfront improvement projects at several Portsmouth Naval Shipyard (the Shipyard) berths in Kittery, Maine. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorization and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than January 2, 2018.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to ITP.pauline@noaa.gov.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to

electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at www.nmfs.noaa.gov/pr/permits/incidental/construction.htm without change. All personal identifying information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Rob Pauline, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: www.nmfs.noaa.gov/pr/permits/incidental/construction.htm. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), 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 takings are set forth.

NMFS has defined “negligible impact” in 50 CFR 216.103 as 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 MMPA states that the term “take” means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal.

Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as: Any act of

pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (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 (Level B harassment).

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action with respect to environmental consequences on the human environment.

Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review. This action is consistent with categories of activities identified in CE B4 of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On July 14, 2017, NMFS received a request from the Navy for an IHA to take marine mammals incidental to impact driving, vibratory pile driving, vibratory pile extraction, and drilling associated with an ongoing waterfront improvement project at the Shipyard. The application was considered adequate and complete on August 25, 2017. The Navy’s request is for take of harbor porpoise (*Phocoena phocoena*), gray seal (*Halichoerus grypus*), harbor seal (*Phoca vitulina*), and harp seal (*Pagophilus groenlandicus*) by Level A and Level B harassment (authorization of Level A harassment is not proposed for the harp seal). Neither the Navy nor NMFS expects serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

This proposed IHA would cover the second year of a five-year project for which the Navy obtained a single prior IHA. The Navy intends to request take authorization for subsequent facets of the project. NMFS previously issued the first IHA to the Navy for this project

effective from January 1, 2017 through December 31, 2017. The larger 5-year project involves restoring and modernizing infrastructure at the Shipyard. The Navy complied with all the requirements (e.g., mitigation, monitoring, and reporting) of the previous IHA and information regarding their monitoring results may be found in the Effects of the Specified Activity on Marine Mammals and their Habitat section.

Description of Proposed Activity

Overview

The purpose of the proposed action is to modernize and maximize dry dock capabilities for performing current and

future missions efficiently and with maximum flexibility. The need for the proposed action is to correct deficiencies associated with the pier structure at Berths 11, 12, and 13 and the Dry Dock 3 caisson and concrete seats to ensure that the Shipyard can continue to support its primary mission to service, maintain, and overhaul submarines. The proposed action covers the second year of activities (January 1, 2018 through December 31, 2018) associated with the waterfront improvement projects at the Shipyard in Kittery, Maine. The project includes impact and vibratory pile driving, vibratory pile removal, and drilling. Construction activities may occur at any time during the calendar year.

Dates and Duration

This authorization request covers in-water construction associated with the Year 2 activity as described above to occur from January 1, 2018–December 31, 2018. No seasonal limitations would be imposed on the construction timeline in 2018. Based on construction and Shipyard schedules, the Navy anticipates that structural repairs initiated during 2017 at Berths 11A, 11B and 11C will continue into 2018. Therefore, the proposed IHA would cover the in-water activities estimated to occur in 2018 at Berths 11A, 11B and 11C. For reference the planned schedule of activity for 2018, Year 2, is included below in Table 1.

TABLE 1—CONSTRUCTION TIMEFRAMES FOR THE PROPOSED WATERFRONT IMPROVEMENT PROJECTS

Project	Estimated construction start	Estimated construction end
Berths 11, 12, and 13 Structural Repairs	January 2017	October 2022.
Phase 1	January 2017	June 2019.
In-Water Work—Phase 1 (Berth 11)	April 2017	December 2018.
Dry Dock 3 Caisson Replacement (in progress)	February 2017	August 2018.
In-Water Work—Phase 2 (Berths 12 and 13)	To be determined based on availability of berths.	To be determined based on availability of berths.

Pile driving, pile extraction, and drilling are scheduled to take place during the timeframe covered by the proposed IHA. Note that pile driving days are not necessarily consecutive. There will be a maximum of 100 days of pile driving and/or drilling during this period. However, there could be up to 16 overlapping days when concurrent driving/drilling would take place simultaneously for a total of 84 driving days. The contractor could be working in more than one area of the berth at one time. Current schedule includes installation of king piles simultaneously with other construction activity including use of the vibratory hammer. A summary report will be issued for 2018 work with verified data of activity and days of duration of overlap.

Specific Geographic Region

The Shipyard is located in the Piscataqua River in Kittery, Maine. The Piscataqua River originates at the boundary of Dover, New Hampshire, and Elliot, Maine. (See Figure 1–1 in application). The river flows in a southeasterly direction for 13 miles before entering Portsmouth Harbor and then emptying into the Atlantic Ocean. The lower Piscataqua River is part of the Great Bay Estuary system and varies in width and depth. Many large and small islands break up the straight-line flow of the river as it continues toward the Atlantic Ocean. Seavey Island, the

location of the Proposed Action, is located in the lower Piscataqua River approximately 547 yards from its southwest bank, 219 yards from its north bank, and approximately 2.5 miles from the mouth of the river.

Water depths in the project area range from 21 feet to 39 feet at Berths 11, 12, and 13. Water depths in the lower Piscataqua River near the project area range from 15 feet in the shallowest areas to 69 feet in the deepest areas. The river is approximately 3,300 feet wide near the project area, measured from the Kittery shoreline north of Wattlebury Island to the Portsmouth shoreline west of Peirce Island. The furthest direct line of sight from the project area would be 0.8 mile to the southeast and 0.26 mile to the northwest.

Benthic sediments and substrates in the project area were characterized during a benthic survey completed in May 2014 (CR Environmental, Inc. 2014). Surficial sediments were characterized using video transects and grab samples captured at five locations along Berths 11, 12, and 13. Sediment characteristics varied between the five locations. At the sample locations at both the north and south sides of the fitting-out pier (Berths 11 and 13), where the current was generally low energy, sediment consisted of soft mud, sand, pebbles, and old mussel shells. At the end of the pier (Berth 12), in an area of higher current flow, the substrate

consisted of hard sand, pebbles/cobbles, and small boulders (CR Environmental, Inc. 2014).

Much of the shoreline in the project area has been characterized as hard shores (rocky intertidal). In general, rocky intertidal areas consist of bedrock that alternates between marine and terrestrial habitats, depending on the tide (Navy 2013). Rocky intertidal areas are characterized by “bedrock, stones, or boulders that singly or in combination cover 75 percent or more of an area that is covered less than 30 percent by vegetation” (Navy 2013).

Detailed Description of Specific Activity

In-water work anticipated for Year 2 work is planned as follows and is summarized in Table 2 below. Work will continue from the 2017 schedule with installation of the king pile template and support for excavation (SOE) system along Berth 11C and any remaining sections of Berth 11B and 11A. The end sheet wall sections (returns) will also be completed. The temporary SOE system with the H-pile is required due to site sediment conditions becoming potentially unstable. The Navy’s contractor requested the use of alternative measures to provide a stable work area and protect worker safety. The SOE would be required to protect workers from underwater engulfment due to unstable sediments disturbed during

drilling and dredging activity. The SOE will maintain an excavation face of up to ten feet to protect divers who must be in the area during installation of the shutter panel system.

It is anticipated that a significant amount of the temporary pile extraction work will be completed from behind the new shutter panel wall during low-water situations which is anticipated to reduce the noise generated from use of the vibratory hammer during extraction; however, work to be conducted from behind the new shutter panel wall has not been included in the calculations for this application as it was not feasible to determine exact amounts of activity which would be accomplished from behind the new shutter panel wall during low water conditions. During Year 2 activity, concurrent work utilizing a vibratory hammer during drilling operations is possible. This potential concurrent activity could occur during installation of the rock sockets for up to 16 days. The vibratory hammer may be working to install SOE sheets or H-pile as the drilling work is being conducted.

The Navy plans to continue the project in 2018 with the installation of a king pile and concrete shutter panel bulkhead at Berth 11C. The bulkhead would extend from the western end of Berth 11B to the southern end of Berth 12. The in-water construction process would be the same as the process described below and utilized in 2017. See Figure 1–2 in the application depicting the layout of the berths at the Shipyard.

The contractor will install templates for the king pile and work in increments along the berth from a jack-up barge. The contractor will set the template (including temporary piles and horizontal members), which may take approximately 1 day. The contractor would then drill the rock sockets, which is estimated to take about one day per socket. King piles would be regularly spaced along the berths and grouted into sockets drilled into the bedrock (*i.e.*, “rock-socketed”).

The SOE system will then be installed within the current work area for the king pile (between king piles). The SOE system consists of an H-pile secured to a road plate. The H-pile will be placed

utilizing the vibratory hammer to a depth sufficient to contain material, which could be dislodged during dredging activity, containing the activity to the permitted work area. The SOE system will not be utilized the full length of the berth. Soil borings and field conditions will determine need. The days and pile number for SOE installation are conservatively estimated from soil boring data obtained in 2017.

The concrete shutter panels would then be installed in stacks between the king piles along most of the length of Berth 11C and remaining portions of 11A and 11B. Installation of the concrete shutter panels is not included in the noise analysis because no pile driving would be required.

Along an approximately 16-foot section at the eastern end of Berth 11A and an additional 101 feet between Berths 11A and 11B, the depth to bedrock is greater, thus allowing a conventional sheet-pile bulkhead to be constructed. The steel sheet-piles would be driven to bedrock using a vibratory hammer. Note that this work was originally slated to occur in Year 1 but has been re-scheduled to occur in Year 2.

Sheet piles installed with a vibratory hammer also would be used to construct “returns,” which would be shorter bulkheads connecting the new bulkheads to the existing bulkhead under the pier. Installation of the sheeting with a vibratory hammer is estimated to take less than one hour per pair of sheets. The contractor would probably install two sheets at a time, and so the time required to install the sheeting (10 pairs = 20 sheets) using vibratory hammers would only be about 8 hours per 10 pairs of sheets. The activities described in Table 2 reflect those estimated installation durations. Time requirements for all other pile types were estimated based on information compiled from ICF Jones and Stokes and Illingworth and Rodkin, Inc. (2012).

Additional in-water work would be required to install steel H-type sister piles at the location of the inboard portal crane rail beam at Berth 11, including Berth 11C. The sister piles would provide additional support for the portal crane rail system and restore

its load-bearing capacity. The sister piles would be driven into the bedrock below the pier, in water generally less than 10 feet deep, using an impact hammer. The timing of this work depends on operational schedules at the berths. The sister piles may be installed either before or after the bulkheads are constructed. Twenty-two (22) sister piles are (11C, 11A) planned for 2018. It is anticipated that this work will also be conducted behind the new shutter panel wall, providing for additional sound attenuation or completion of the work during low tide or “out of water” conditions.

In summary, vibratory hammers will be used to install the following:

- 15-inch timber piles used to reconstruct timber dolphins at the corners of Berth 11;
- 25-inch steel sheet piles used for the bulkhead at Berth 11;
- 14-inch H-pile for SOE system (road plate system) initial installation; and
- 25-inch sheet pile used for SOE in areas where the road plate system is not appropriate.

Extracted piles would include:

- 15-inch timber fender piles at Berth 11;
- 15-inch timber piles making up the existing dolphins at the corner of Berth 11; and
- 25-inch sheet pile and 14-inch H-pile road plate system for SOE.

Piles that would be installed through impact driving include 14-inch steel H-type piles used as sister piles at Berth 11. These piles must be fully installed with an impact hammer because the piles will not reach bearing depth or have the required load-bearing capacity if installed using vibratory methods only. The vibratory hammer will be used to set the pile with the impact hammer used to seat the pile for depth and assure load-bearing capacity. Estimated use of the impact hammer would be approximately four minutes per pile.

Table 2 shows the anticipated work effort (*e.g.*, days) and numbers planned for installation/extraction of each pile type while Table 3 shows estimated hours for each type of pile driving and drilling activity.

TABLE 2—YEAR 2 (2018) PLANNED CONSTRUCTION ACTIVITY

Activity/method	Timing	Number of days	Pile type	Number of piles installed	Number of piles extracted	Overlap days	Production estimates
Extract Timber Piles/Vibratory Hammer.	January–December 2018.	3	15” Timber Piles .....	.....	18	.....	Estimated 6 piles per day.

TABLE 2—YEAR 2 (2018) PLANNED CONSTRUCTION ACTIVITY—Continued

Activity/method	Timing	Number of days	Pile type	Number of piles installed	Number of piles extracted	Overlap days	Production estimates
Install Casing & Drill Sockets/Auger Drilling.	January–December 2018.	56	36" W-Section Steel	35	.....	.....	Estimated less than one pile completed per day. This includes setting the casing and rock socket drilling.
Install Sheet Pile (SKZ–20) SOE Piles/Vibro.	January–December 2018.	12	24" Sheet Piles Steel ..	144	.....	9/during rock sockets ..	Estimated 12 sheets per day.
Remove Sheet Pile (SKZ–20) SOE Piles/Vibro.	January–December 2018.	6	24" Sheet Piles Steel ..	.....	144	4/during rock sockets ..	Estimated 24 sheets per day.
Install Road Plate/H-Pile Support of Excav. Vibro.	January–December 2018.	3	14 inch H-Pile	12	.....	2/during rock sockets ..	Estimated 4 ea. road plates per day.
Remove Road Plate/H-Pile Support of Excav. Vibro.	January–December 2018.	2	14 inch H-Pile .....	.....	12	1/during rock sockets ..	Estimated 8 ea. Road plates per day.
Install Sheet Pile (AZ50) Sheet wall Bulkhead.	January–December 2018.	6	24 inch Sheet Piles Steel.	74	.....	.....	Estimated 13 sheets per day.
Install H-Pile (AZ50) Bulkhead Return @ West End of 11C-Vibro.	January–December 2018.	2	14inch H-Pile Steel	4	.....	.....	Estimated 2 piles per day.
Install Sheet Pile (AZ50) Bulkhead Return @ West End of 11C-Vibro.	January–December 2018.	1	24inch Sheet Piles Steel.	2	.....	.....	Estimated 2 piles per day.
Install Support/Sister Pile/Vibro & Impact Hammer.	January–December 2018.	.....	14inch H-Pile Steel	22	.....	.....	Estimated 2.6 piles per day. The vibro would be used to stick the pile and the impact would drive the pile to refusal.*
Totals .....	.....	Expected total work days (including up to 16 days of concurrent activities) = 84–100 days		293	174	16.	

* Depending on when these piles are driven in the tide cycle there is potential to install all 22 of the support piles in the dry which would further reduce the number of vibratory and impact hammer days. This pile quantity includes all the Support Pile in Berth 11C as well as 8 Support Pile remaining from Berth 11A.

TABLE 3—YEAR 2 (2018) HOURS ESTIMATED FOR EACH PILE DRIVING ACTIVITY

Driving type	Pile type	Number of piles	Days	Hours
Impact	14" H-Pile (Sister Pile)	22 piles	9	1.5.
Vibratory	24" and 36" sheet pile, 15" timber pile, 14" H-pile	236 piles/sheet	27 install 8 remove	216 install 64 remove.
Drilling	36" Installation/Rock Sockets	35 casings	56	448.

The project schedule will include dredging operations. However, dredging operations are not expected to result in the take of any animals and will not be discussed further.

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see “Proposed Mitigation” and “Proposed Monitoring and Reporting”).

Description of Marine Mammals in the Area of Specified Activities

Five marine mammal species, including one cetacean and four pinnipeds, may inhabit or transit the waters near the Shipyard in the lower Piscataqua River during the specified activity. These include the harbor porpoise (*Phocoena phocoena*), gray seal (*Halichoerus grypus*), harbor seal (*Phoca vitulina*), hooded seal

(*Cystophora cristata*), and harp seal (*Pagophilus groenlandicus*). None of the marine mammals that may be found in the Piscataqua River are listed under the Endangered Species Act (ESA). Table 3 lists the marine mammal species that could occur near the Shipyard and their estimated densities within the project area. As there are no specific density data for any of the species in the Piscataqua River, density data from the nearshore zone outside the mouth of the Piscataqua River in the Atlantic Ocean have been used instead. Therefore, it can be assumed that the density estimates presented here for each species are conservative and higher than densities that would typically be expected in an industrialized, estuarine environment such as the lower Piscataqua River in the vicinity of the Shipyard.

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS’s Stock Assessment Reports (SAR; www.nmfs.noaa.gov/pr/sars/) and more general information about these species (e.g., physical and behavioral descriptions) may be found on NMFS’s Web site (www.nmfs.noaa.gov/pr/species/mammals/).

Table 4 lists all species with expected potential for occurrence near the Shipyard and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and potential biological removal (PBR), where known.

For taxonomy, we follow Committee on Taxonomy (2017). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS's SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of

the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprise that stock. For some species, this geographic area may

extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessment—2016 (Hayes *et al.* 2017). All values presented in Table 4 are the most recent available at the time of publication and are available in the 2016 SAR (Hayes *et al.* 2017) (available online at: www.nmfs.noaa.gov/pr/sars/draft.htm).

TABLE 4—MARINE MAMMAL SPECIES POTENTIALLY PRESENT IN THE PISCATAQUA RIVER IN THE VICINITY OF THE SHIPYARD

Common name	Scientific name	Stock	ESA/MMPA status; strategic (Y/N) ¹	Stock abundance (CV, N _{min} , most recent abundance survey) ²	PBR	Annual M/SI ³
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Phocoenidae (porpoises)						
Harbor Porpoise	<i>Phocoena phocoena</i>	Gulf of Maine/Bay of Fundy stock.	;-N	79,883 (0.32; 61,415; 2011) ...	706	437
Order Carnivora—Superfamily Pinnipedia						
Family Phocidae (earless seals)						
Gray Seal	<i>Halichoerus grypus</i> ...	Western North Atlantic stock.	;-N	unknown 505,000 (best estimate 2014 Canadian population DFO 2014).	unknown ..	4,959
Harbor Seal	<i>Phoca vitulina</i>	Western North Atlantic stock.	;-N	75,834 (0.15; 66,884; 2012) ...	2,006	389
Hooded Seal ⁴	<i>Cystophora cristata</i> ...	Western North Atlantic stock.	;-N	592,100 (-;512,000, 2005)	unknown ..	5,199
Harp Seal	<i>Pagophilus groenlandicus</i> .	Western North Atlantic stock.	;-N	7,100,000 (2012)	unknown ..	306,082

¹ Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

² NMFS marine mammal stock assessment reports online at: www.nmfs.noaa.gov/pr/sars/. CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable.

³ These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (e.g., commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

⁴ Abundance estimates for these stocks are greater than eight years old and are, therefore, not considered current. PBR is considered undetermined for these stocks, as there is no current minimum abundance estimate for use in calculation. We nevertheless present the most recent abundance estimates and PBR values, as these represent the best available information for use in this document.

Note—*Italicized species are not expected to be taken or proposed for authorization.*

As described below, all five species temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we are proposing to authorize it. However, the temporal and/or spatial occurrence of hooded seals is such that take is not expected to occur, and they are not discussed further beyond the explanation provided here. While hooded seals have been recorded in the Piscataqua River, only two seals have been sighted near the shipyard with those observations occurring in 2009. We consider occurrence of the hooded

seal in the Piscataqua River to be extralimital.

Harbor Porpoise

The harbor porpoise is a member of the *phocoenidae* family. The Gulf of Maine/Bay of Fundy stock of the harbor porpoise is not listed under the ESA and is not considered strategic or depleted under the MMPA.

Line-transect surveys have been conducted in the Gulf of Maine between 1991 and 2011. Based on the 2011 aerial surveys, the best abundance estimate for the Gulf of Maine/Bay of Fundy stock of harbor porpoise is 79,883 animals (CV = 0.32). The aerial surveys included

central Virginia to the lower Bay of Fundy. The minimum population estimate is 61,415 animals (Hayes *et al.* 2017).

Harbor porpoises are found commonly in coastal and offshore waters of both the Atlantic and Pacific Oceans. In the western North Atlantic, the species is found in both U.S. and Canadian waters. More specifically, the species can be found between West Greenland and Cape Hatteras, North Carolina (Hayes *et al.* 2017). Based on genetic analysis, it is assumed that harbor porpoises in the U.S. and Canadian waters are divided into four

populations, as follows: (1) Gulf of St. Lawrence; (2) Newfoundland; (3) Greenland; and (4) Gulf of Maine/Bay of Fundy.

The Gulf of Maine/Bay of Fundy stock of the harbor porpoise is generally found over the Continental Shelf, ranging from the Gulf of Maine/Bay of Fundy region to North Carolina, in varying abundance and depending on the season (Waring *et al.* 2014). July through September are the primary months this species can be found concentrated in the Gulf of Maine and the southern Bay of Fundy area (Waring *et al.* 2014). During this time, harbor porpoises are generally found in less than approximately 150 m of water (Waring *et al.* 2014). During fall months (October through December) and spring months (April through June), this species is more dispersed throughout a larger region that ranges from Maine though New Jersey. During winter months (January through March), harbor porpoises are generally found in much lower densities between New York and Canada, as well as dispersed in more southerly locations between New Jersey and North Carolina (Waring *et al.*, 2014; CeTAP 1982). Harbor porpoises are known to occur in the Piscataqua River and are the most commonly observed cetacean species for the river.

Harbor porpoises are considered high-frequency cetaceans. Hearing capabilities for harbor porpoises have been tested both behaviorally and with the auditory evoked potential technique. Based on an audiogram developed from behavioral methods, detection thresholds were estimated between 250 hertz (Hz) and 180 kilohertz (kHz). Within that, the range of best hearing was from 16 to 140 kHz, and maximum sensitivity was recorded at 100 to 140 kHz (Kastelein *et al.*, 2002). Harbor porpoises are vocal animals, using echolocation for feeding and navigation and vocalizing for socialization (Southall *et al.*, 2007).

Gray Seal

Gray seals, which are members of the "true seal" family (*phocidae*), are a coastal species that generally remains within the Continental Shelf region. The western North Atlantic stock of the gray seal is not categorized as strategic or depleted under the MMPA.

Gray seals can be found on both sides of the North Atlantic. Within this area, the species is split into three primary populations: (1) Eastern Canada, (2) northwestern Europe, and (3) the Baltic Sea (Hayes *et al.* 2017). Gray seals within U.S. waters are considered the western North Atlantic stock and are expected to be part of the eastern

Canadian population (Hayes *et al.* 2017) 2014). In general, this species can be found year-round in the coastal waters of the Gulf of Maine (Hayes *et al.* 2017). No known haul-out sites for gray seals are in the immediate vicinity of the project area. The closest known haul-out site for seals within the Piscataqua River is 1.5 miles downstream of the project area. Solitary seals could potentially haul out closer to the project area. In coastal Maine, gray seals are known to pup on Green Island and Sea Island and are year-round residents in southern Maine waters (Hayes *et al.* 2017). Gray seals are known to occur within the Piscataqua River but are not as commonly observed as harbor seals. During spring and summer months, gray seals are most commonly observed on offshore ledges off the central coast of Maine (Richardson *et al.* 1995).

Current estimates of the total western Atlantic gray seal population are not available; although estimates of portions of the stock are available for select time periods. The Canadian gray seal stock assessment (DFO 2014) reports gray seal pup production in 2014 for the three Canadian aggregations (Gulf of St. Lawrence, Sable Island, and Nova Scotia) as 93,000 animals; these are projected using population models to total population levels of 505,000 animals.

Gray seals, along with other members of the *phocidae* family, are capable of hearing in both air and water. In general, the estimated bandwidth for functional hearing for phocids in water is 50 Hz to 86 kHz and in air is 75 Hz to 30 kHz (Southall *et al.* 2007). Hearing capabilities for gray seals both in water and in air have been tested behaviorally and with the auditory evoked potential technique (Southall *et al.* 2007).

Harbor Seal

Harbor seals are members of the true seal family (*Phocidae*) and can be found in nearshore waters along both the North Atlantic and North Pacific coasts, generally at latitudes above 30° N. (Burns 2009). In the western Atlantic Ocean, the harbor seal's range extends from the eastern Canadian Arctic to New York; however, they can be found as far south as the Carolinas (Hayes *et al.* 2017). In New England, the species can be found in coastal waters year-round (Hayes *et al.* 2017). Overall, there are five recognized subspecies of harbor seal, two of which occur in the Atlantic Ocean. The western Atlantic harbor seal (*Phoca vitulina concolor*) is the subspecies likely to occur in the project area. There is some uncertainty about the overall population stock structure of harbor seals in the western North

Atlantic Ocean. However, it is theorized that harbor seals along the eastern U.S. and Canada are all from a single population. The western North Atlantic stock of harbor seal is not categorized as strategic or depleted under the MMPA.

The best current abundance estimate of harbor seals is 75,834 (CV = 0.15) which is from a 2012 survey (Waring *et al.* 2015). The minimum population estimate is 66,884 based on corrected available counts along the Maine coast in 2012. In the Piscataqua River, harbor seals are the most abundant pinniped species.

Harbor seals are capable of hearing in both air and water. In general, the estimated bandwidth for functional hearing for phocid (true seals) seals in water is 50 Hz to 86 kHz and in air is 75 Hz to 30 kHz (Southall *et al.* 2007). Harbor seals hear nearly as well in air as underwater (Kastak and Schusterman 1998). Kastak and Schusterman (1998) reported airborne low-frequency (100 Hz) sound detection thresholds at 65.4 decibels (dB) re 20 micropascals (μ Pa) for harbor seals. In air, they hear frequencies from 0.25 kHz to 30 kHz and are most sensitive to frequencies from 6 to 16 kHz (Richardson *et al.* 1995; Terhune and Turnbull 1995; Wolski *et al.* 2003). Adult males also produce underwater sounds during the breeding season that typically range from 0.025 to 4 kHz at a duration range of 0.1 second to multiple seconds (Hanggi and Schusterman 1994). Hanggi and Schusterman (1994) found that there is individual variation in the dominant frequency range of sounds between different males, and Van Parijs *et al.* (2003) reported oceanic, regional, population, and site-specific variation that could be vocal dialects. In water, the species hears frequencies from 1 to 75 kHz (Southall 2007) and can detect sound levels as weak as 60 to 85 dB re 1 μ Pa within that band. They are most sensitive at frequencies below 50 kHz; above 60 kHz, sensitivity rapidly decreases.

Harp Seal

Harp seals are members of the true seal family and are classified into three stocks, which coincide with specific pupping sites on pack ice, as follows: (1) Eastern Canada, including the areas off the coast of Newfoundland and Labrador and the area near the Magdalen Islands in the Gulf of St. Lawrence; (2) the West Ice off eastern Greenland, and (3) the ice in the White Sea off the coast of Russia (Waring *et al.* 2014). The harp seal is a highly migratory species, and its range can extend from the Canadian arctic to New Jersey. In U.S. waters, the species has an

increasing presence in the coastal waters between Maine and New Jersey (Waring *et al.* 2014). In the U.S., they are considered members of the western North Atlantic stock and generally occur in New England waters from January through May in the winter and spring (Waring *et al.* 2014). Harp seals are not listed under the ESA and the western North Atlantic stock is not considered strategic or depleted under the MMPA.

Population abundance of harp seals in the western North Atlantic is derived from aerial surveys and mark-recapture (Waring *et al.* 2014). The most recent population estimate in the western North Atlantic was derived in 2012 from an aerial harp seal survey. The 2012 best population estimate for hooded seals is 7.1 million individuals (Waring *et al.* 2014). Currently, not enough data are available to determine what percentage of this estimate may represent the population within U.S. waters. Harp seals have been known to occur in the Piscataqua River; however, sightings are rare (Navy 2017).

Hearing capabilities of this species have not been directly tested as they have for other species. However, as harp seals are within the *phocidae* family, the functional hearing limit of these species is expected to be similar to that of other phocid seals. In general, the estimated bandwidth for functional hearing for phocids in water is 50 Hz to 86 kHz and in air is 75 Hz to 30 kHz (Southall *et al.* 2007). Pinnipeds in general are also known to produce a wide variety of low-frequency social sounds, with varying hearing capabilities in air and in water (Southall *et al.* 2007).

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.*, Richardson *et al.*, 1995; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.*, low-frequency

cetaceans). Subsequently, NMFS (2016) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 dB threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. The functional groups and the associated frequencies are indicated below (note that these frequency ranges correspond to the range for the composite group, with the entire range not necessarily reflecting the capabilities of every species within that group):

- Low-frequency cetaceans (mysticetes): Generalized hearing is estimated to occur between approximately 7 Hz and 35 kHz, with best hearing estimated to be from 100 Hz to 8 kHz;
- Mid-frequency cetaceans (larger toothed whales, beaked whales, and most delphinids): Generalized hearing is estimated to occur between approximately 150 Hz and 160 kHz, with best hearing from 10 to less than 100 kHz;
- High-frequency cetaceans (porpoises, river dolphins, and members of the genera *Kogia* and *Cephalorhynchus*; including two members of the genus *Lagenorhynchus*, on the basis of recent echolocation data and genetic data): Generalized hearing is estimated to occur between approximately 275 Hz and 160 kHz.
- Pinnipeds in water: Phocidae (true seals): Generalized hearing is estimated to occur between approximately 50 Hz to 86 kHz, with best hearing between 1–50 kHz; and
- Pinnipeds in water: Otariidae (eared seals): Generalized hearing is estimated to occur between 60 Hz and 39 kHz, with best hearing between 2–48 kHz.

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.*, 2006; Kastelein *et al.*, 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2016) for a review of available information. Four marine mammal species (one cetacean and three pinniped (phocid) species) have the reasonable potential to co-occur with the proposed survey activities. Please refer to Table 4. Of the cetacean species that may be present, harbor

porpoises are classified as high-frequency cetaceans, while the three seal species belong within the pinnipeds in water (Phocidae) hearing group.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The “Estimated Take by Incidental Harassment” section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The “Negligible Impact Analysis and Determination” section considers the content of this section, the “Estimated Take by Incidental Harassment” section, and the “Proposed Mitigation” section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

Description of Sound Sources

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 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 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 μ Pa. 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 μ Pa). The received level is the sound level at the listener’s position. Note that all underwater sound levels in this document are referenced to a pressure of 1 μ Pa and all airborne sound levels in

this document are referenced to a pressure of 20 μ Pa.

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Rms is calculated 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 they may be accounted for in the summation of pressure levels (Hastings and Popper 2005). This measurement is often used 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. These waves alternately compress and decompress the water as the sound wave travels. 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 source is directional. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound. Ambient sound is defined as environmental background sound levels lacking a single source or point (Richardson *et al.*, 1995), and the sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.*, waves, earthquakes, ice, atmospheric sound), biological (*e.g.*, sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (*e.g.*, vessels, dredging, aircraft, construction). A number of sources contribute to ambient sound, including the following (Richardson *et al.*, 1995):

- *Wind and waves:* The complex interactions between wind and water surface, including processes such as breaking waves and wave-induced bubble oscillations and cavitation, are a main source of naturally occurring ambient noise for frequencies between 200 Hz and 50 kHz (Mitson, 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Surf noise becomes important near shore, with measurements collected at a distance of 8.5 km from shore showing an increase of 10 dB in the 100 to 700 Hz band during heavy surf conditions;

- *Precipitation:* Sound from rain and hail impacting the water surface can become an important component of total noise at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times;

- *Biological:* Marine mammals can contribute significantly to ambient noise levels, as can some fish and shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz; and

- *Anthropogenic:* Sources of ambient noise related to human activity include transportation (surface vessels and aircraft), dredging and construction, oil and gas drilling and production, seismic surveys, sonar, explosions, and ocean acoustic studies. Shipping noise typically dominates the total ambient noise for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly (Richardson *et al.*, 1995). Sound from identifiable anthropogenic sources other than the activity of interest (*e.g.*, a passing vessel) is sometimes termed background sound, as opposed to ambient sound.

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise “ambient” or “background” sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound 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.

In-water construction activities associated with the project would include impact pile driving, vibratory pile driving and vibratory pile extraction. The sounds produced by these activities fall into one of two general sound types: pulsed and non-pulsed (defined in the following paragraphs). 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.

Pulsed 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, 1998; ISO, 2003) and occur either as isolated events or repeated in some succession. Pulsed sounds are all characterized by 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.

Non-pulsed sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or non-continuous (ANSI, 1995; NIOSH, 1998). Some of these non-pulsed sounds can be transient signals of short duration but without the essential properties of pulses (*e.g.*, rapid rise time). Examples of non-pulsed sounds include those produced by vessels, aircraft, machinery operations such as drilling, vibratory pile driving, and active sonar systems (such as those used by the U.S. Navy). The duration of such sounds, as received at a distance, can be greatly extended in a highly reverberant environment.

Impact hammers operate by repeatedly dropping a heavy piston onto a pile to drive the pile into the substrate. Sound generated by impact hammers is characterized by rapid rise times and high peak levels, a potentially injurious combination (Hastings and Popper 2005). Vibratory hammers install piles by vibrating them and allowing the weight of the hammer to push them into the sediment. Vibratory hammers produce significantly less sound than impact hammers. Peak SPLs may be 180 dB or greater, but are generally 10 to 20 dB lower than SPLs generated during impact pile driving of the same-sized pile (Oestman *et al.*, 2009). Rise time is slower, reducing the probability and severity of injury, and sound energy is distributed over a greater amount of time (Nedwell and Edwards 2002).

Acoustic Impacts

Please refer to the information given previously (*Description of Sound Sources*) regarding sound, characteristics of sound types, and metrics used in this document.

Anthropogenic sounds cover a broad range of frequencies and sound levels and can have a range of highly variable impacts on marine life, from none or minor to potentially severe responses, depending on received levels, duration of exposure, behavioral context, and various other factors. The potential effects of underwater sound from active acoustic sources can potentially result in one or more of the following: Temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, stress, and masking (Richardson *et al.*, 1995; Gordon *et al.*, 2004; Nowacek *et al.*, 2007; Southall *et al.*, 2007). The degree of effect is intrinsically related to the signal characteristics, received level, distance from the source, and duration of the sound exposure. In general, sudden, high level sounds can cause hearing loss, as can longer exposures to lower level sounds. Temporary or permanent loss of hearing will occur almost exclusively for noise within an animal's hearing range. In this section, we first describe specific manifestations of acoustic effects before providing discussion specific to the proposed construction activities in the next section.

Permanent Threshold Shift—Marine mammals exposed to high-intensity sound, or to lower-intensity sound 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 fully recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall *et al.*, 2007). Repeated sound exposure that leads to TTS could cause PTS. In severe cases of PTS, there can be total or partial deafness, while in most cases the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter 1985).

When PTS occurs, there is physical damage to the sound receptors in the ear (*i.e.*, tissue damage), whereas TTS represents primarily tissue fatigue and is reversible (Southall *et al.*, 2007). In addition, other investigators have suggested that TTS is within the normal bounds of physiological variability and tolerance and does not represent physical injury (*e.g.*, Ward 1997). Therefore, NMFS does not consider TTS to constitute auditory injury.

Relationships between TTS and PTS thresholds have not been studied in marine mammals—PTS data exists only

for a single harbor seal (Kastak *et al.*, 2008)—but are assumed to be similar to those in humans and other terrestrial mammals. PTS typically occurs at exposure levels at least several decibels above (a 40-dB threshold shift approximates PTS onset; *e.g.*, Kryter *et al.*, 1966; Miller 1974) that inducing mild TTS (a 6-dB threshold shift approximates TTS onset; *e.g.*, Southall *et al.*, 2007). Based on data from terrestrial mammals, a precautionary assumption is that the PTS thresholds for impulse sounds (such as impact pile driving pulses as received close to the source) are at least six dB higher than the TTS threshold on a peak-pressure basis and PTS cumulative sound exposure level thresholds are 15 to 20 dB higher than TTS cumulative sound exposure level thresholds (Southall *et al.*, 2007).

Temporary Threshold Shift—TTS is the mildest form of hearing impairment that can occur during exposure to sound (Kryter 1985). While experiencing TTS, the hearing threshold rises, and a sound must be at a higher level in order to be heard. In terrestrial and marine mammals, TTS can last from minutes or hours to days (in cases of strong TTS). In many cases, hearing sensitivity recovers rapidly after exposure to the sound ends.

Marine mammal hearing plays a critical role in communication with conspecifics, and interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (*i.e.*, recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious. For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that occurs during a time where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin (*Tursiops truncatus*), beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiatorientalis*)); and three species of pinnipeds (northern elephant seal (*Mirounga angustirostris*), harbor seal, and California sea lion (*Zalophus californianus*) exposed to a limited number of sound sources (*i.e.*, mostly tones and octave-band noise) in

laboratory settings (*e.g.*, Finneran *et al.*, 2002; Nachtigall *et al.*, 2004; Kastak *et al.*, 2005; Lucke *et al.*, 2009; Popov *et al.*, 2011). In general, harbor seals (Kastak *et al.*, 2005; Kastelein *et al.*, 2012a) and harbor porpoises (Lucke *et al.*, 2009; Kastelein *et al.*, 2012b) have a lower TTS onset than other measured pinniped or cetacean species. Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. There are no data available on noise-induced hearing loss for mysticetes. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007), Finneran and Jenkins (2012), and Finneran (2015).

Behavioral Effects—Behavioral disturbance may include a variety of effects, including subtle changes in behavior (*e.g.*, minor or brief avoidance of an area or changes in vocalizations), more conspicuous changes in similar behavioral activities, and more sustained and/or potentially severe reactions, such as displacement from or abandonment of high-quality habitat. Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.*, species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.*, Richardson *et al.*, 1995; Wartzok *et al.*, 2003; Southall *et al.*, 2007; Weilgart, 2007; Archer *et al.*, 2010). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.*, 2012), and can vary depending on characteristics associated with the sound source (*e.g.*, whether it is moving or stationary, number of sources, distance from the source). Please see Appendices B–C of Southall *et al.* (2007) for a review of studies involving marine mammal behavioral responses to sound.

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.*, 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. It is important to note that habituation is appropriately considered as a “progressive reduction in response to stimuli that are perceived as neither aversive nor beneficial,” rather than as, more generally, moderation in response to human disturbance (Bejder *et al.*,

2009). 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. As noted, behavioral state may affect the type of response. 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). Controlled experiments with captive marine mammals have 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 airguns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; see also Richardson *et al.*, 1995; Nowacek *et al.*, 2007).

Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.*, Lusseau and Bejder, 2007; Weilgart, 2007; NRC, 2003). However, there are broad categories of potential response, which we describe in greater detail here, that include alteration of dive behavior, alteration of foraging behavior, effects to breathing, interference with or alteration of vocalization, avoidance, and flight.

Changes in dive behavior can vary widely, and may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive (*e.g.*, Frankel and Clark, 2000; Costa *et al.*, 2003; Ng and Leung, 2003; Nowacek *et al.*, 2004; Goldbogen *et al.*, 2013a,b). Variations in dive behavior may reflect interruptions in biologically significant activities (*e.g.*, foraging) or they may be of little biological significance. The impact of an alteration to dive behavior resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure and the type and magnitude of the response.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.*, bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.*, Croll *et al.*, 2001; Nowacek *et al.*, 2004; Madsen *et al.*, 2006; Yazvenko *et al.*, 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

Variations in respiration naturally vary with different behaviors and alterations to breathing rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Various studies have shown that respiration rates may either be unaffected or could increase, depending on the species and signal characteristics, again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure (*e.g.*, Kastelein *et al.*, 2001, 2005b, 2006; Gailey *et al.*, 2007).

Marine mammals vocalize for different purposes and across multiple modes, such as whistling, echolocation click production, calling, and singing. Changes in vocalization behavior in response to anthropogenic noise can occur for any of these modes and may result from a need to compete with an increase in background noise or may reflect increased vigilance or a startle response. For example, in the presence of potentially masking signals, humpback whales and killer whales have been observed to increase the length of their songs (Miller *et al.*, 2000; Frstrup *et al.*, 2003; Foote *et al.*, 2004), while right whales have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.*, 2007b). In some cases, animals may cease sound production during

production of aversive signals (Bowles *et al.*, 1994).

Avoidance is the displacement of an individual from an area or migration path as a result of the presence of a sound or other stressors, and is one of the most obvious manifestations of disturbance in marine mammals (Richardson *et al.*, 1995). For example, gray whales are known to change direction—deflecting from customary migratory paths—in order to avoid noise from seismic surveys (Malme *et al.*, 1984). Avoidance may be short-term, with animals returning to the area once the noise has ceased (*e.g.*, Bowles *et al.*, 1994; Goold, 1996; Stone *et al.*, 2000; Morton and Symonds, 2002; Gailey *et al.*, 2007). Longer-term displacement is possible, however, which may lead to changes in abundance or distribution patterns of the affected species in the affected region if habituation to the presence of the sound does not occur (*e.g.*, Blackwell *et al.*, 2004; Bejder *et al.*, 2006; Teilmann *et al.*, 2006).

A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. The flight response differs from other avoidance responses in the intensity of the response (*e.g.*, directed movement, rate of travel). Relatively little information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presence of predators have occurred (Connor and Heithaus, 1996). The result of a flight response could range from brief, temporary exertion and displacement from the area where the signal provokes flight to, in extreme cases, marine mammal strandings (Evans and England 2001). However, it should be noted that response to a perceived predator does not necessarily invoke flight (Ford and Reeves 2008), and whether individuals are solitary or in groups may influence the response.

Behavioral disturbance can also impact marine mammals in more subtle ways. Increased vigilance may result in costs related to diversion of focus and attention (*i.e.*, when a response consists of increased vigilance, it may come at the cost of decreased attention to other critical behaviors such as foraging or resting). These effects have generally not been demonstrated for marine mammals, but studies involving fish and terrestrial animals have shown that increased vigilance may substantially reduce feeding rates (*e.g.*, Beauchamp and Livoreil, 1997; Fritz *et al.*, 2002; Purser and Radford, 2011). In addition, chronic disturbance can cause population declines through reduction

of fitness (e.g., decline in body condition) and subsequent reduction in reproductive success, survival, or both (e.g., Harrington and Veitch, 1992; Daan *et al.*, 1996; Bradshaw *et al.*, 1998). However, Ridgway *et al.* (2006) reported that increased vigilance in bottlenose dolphins exposed to sound over a five-day period did not cause any sleep deprivation or stress effects.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hour cycle). Disruption of such functions resulting from reactions to stressors such as sound exposure are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.*, 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.*, 2007). Note that there is a difference between multi-day substantive behavioral reactions and multi-day anthropogenic activities. For example, just because an activity lasts for multiple days does not necessarily mean that individual animals are either exposed to activity-related stressors for multiple days or, further, exposed in a manner resulting in sustained multi-day substantive behavioral responses.

Stress Responses—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (e.g., Seyle, 1950; Moberg, 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (e.g., Moberg, 1987; Blecha, 2000). Increases in the circulation of

glucocorticoids are also equated with stress (Romano *et al.*, 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and "distress" is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well-studied through controlled experiments and for both laboratory and free-ranging animals (e.g., Holberton *et al.*, 1996; Hood *et al.*, 1998; Jessop *et al.*, 2003; Krausman *et al.*, 2004; Lankford *et al.*, 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker, 2000; Romano *et al.*, 2002b) and, more rarely, studied in wild populations (e.g., Romano *et al.*, 2002a). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as "distress." In addition, any animal experiencing TTS would likely also experience stress responses (NRC 2003).

Auditory Masking—Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (e.g., those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.*, 1995). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (e.g., snapping shrimp, wind, waves, precipitation) or anthropogenic (e.g., shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds

depends on the characteristics of both the noise source and the signal of interest (e.g., signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (e.g., sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions.

Under certain circumstances, marine mammals experiencing significant masking could also be impaired from maximizing their performance fitness in survival and reproduction. Therefore, when the coincident (masking) sound is man-made, it may be considered harassment when disrupting or altering critical behaviors. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. For example, low-frequency signals may have less effect on high-frequency echolocation sounds produced by odontocetes but are more likely to affect detection of mysticete communication calls and other potentially important natural sounds such as those produced by surf and some prey species. The masking of communication signals by anthropogenic noise may be considered as a reduction in the communication space of animals (e.g., Clark *et al.*, 2009) and may result in energetic or other costs as animals change their vocalization behavior (e.g., Miller *et al.*, 2000; Foote *et al.*, 2004; Parks *et al.*, 2007b; Di Iorio and Clark 2009; Holt *et al.*, 2009). Masking can be reduced in situations where the signal and noise come from different directions (Richardson *et al.*, 1995), through amplitude modulation of the signal, or through other compensatory behaviors (Houser and Moore 2014). Masking can be tested directly in captive species (e.g., Erbe, 2008), but in wild populations it must be either modeled or inferred from evidence of masking compensation. There are few studies addressing real-world masking sounds likely to be experienced by marine mammals in the wild (e.g., Branstetter *et al.*, 2013).

Masking affects both senders and receivers of acoustic signals and can potentially have long-term chronic effects on marine mammals at the

population level as well as at the individual level. Low-frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, with most of the increase from distant commercial shipping (Hildebrand, 2009). All anthropogenic sound sources, but especially chronic and lower-frequency signals (e.g., from vessel traffic), contribute to elevated ambient sound levels, thus intensifying masking.

Non-Auditory Physiological Effects—Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage (Cox *et al.*, 2006; Southall *et al.*, 2007). Studies examining such effects are limited. In general, little is known about the potential for pile driving to cause auditory impairment or other physical effects in marine mammals. Available data suggest that such effects, if they occur at all, would presumably be limited to short distances from the sound source, where SLs are much higher, and to activities that extend over a prolonged period. The available data do not allow identification of a specific exposure level above which non-auditory effects can be expected (Southall *et al.*, 2007) or any meaningful quantitative predictions of the numbers (if any) of marine mammals that might be affected in those ways. However, the proposed activities do not involve the use of devices such as explosives or mid-frequency active sonar that are associated with these types of effects. Therefore, non-auditory physiological impacts to marine mammals are considered unlikely.

Underwater Acoustic Effects From the Proposed Activities

Potential Effects of Pile Driving and Drilling Sound—The effects of sounds from pile driving might include one or more of the following: temporary or permanent hearing impairment, non-auditory physical or physiological effects, and behavioral disturbance (Richardson *et al.*, 1995; Gordon *et al.*, 2003; Nowacek *et al.*, 2007; Southall *et al.*, 2007). The effects of pile driving on marine mammals are dependent on several factors, including the type and depth of the animal; the pile size and type, and the intensity and duration of the pile driving sound; the substrate; the standoff distance between the pile and the animal; and the sound propagation properties of the environment. Impacts to marine mammals from pile driving

activities are expected to result primarily from acoustic pathways. As such, the degree of effect is intrinsically related to the frequency, received level, and duration of the sound exposure, which are in turn influenced by the distance between the animal and the source. The further away from the source, the less intense the exposure should be. The substrate and depth of the habitat affect the sound propagation properties of the environment. In addition, substrates that are soft (e.g., sand) would absorb or attenuate the sound more readily than hard substrates (e.g., rock) which may reflect the acoustic wave. Soft porous substrates would also likely require less time to drive the pile, and possibly less forceful equipment, which would ultimately decrease the intensity of the acoustic source.

Hearing Impairment and Other Physical Effects—Marine mammals exposed to high intensity sound repeatedly or for prolonged periods can experience hearing threshold shifts. PTS constitutes injury, but TTS does not (Southall *et al.*, 2007). Based on the best scientific information available, the SPLs for the proposed construction activities may exceed the thresholds that could cause TTS or the onset of PTS based on NMFS' new acoustic guidance (NMFS, 2016).

Disturbance Reactions—Responses to continuous sound, such as vibratory pile installation, have not been documented as well as responses to pulsed sounds. With both types of pile driving, it is likely that the onset of pile driving could result in temporary, short term changes in an animal's typical behavior and/or avoidance of the affected area. Specific behavioral changes that may result from this proposed project include changing durations of surfacing and dives, moving direction and/or speed; 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); and avoidance of areas where sound sources are located. If a marine mammal responds to a stimulus by changing its behavior (e.g., through relatively minor changes in locomotion direction/speed or vocalization behavior), the response may or may not constitute taking at the individual level, and is unlikely to affect the stock or the species as a whole. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, potential impacts on the stock or species could potentially be significant if growth, survival and

reproduction are affected (e.g., Lusseau and Bejder, 2007; Weilgart, 2007). Note that the significance of many of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor.

Auditory Masking—Natural and artificial sounds can disrupt behavior by masking. Given that the energy distribution of pile driving covers a broad frequency spectrum, sound from these sources would likely be within the audible range of marine mammals present in the project area. Impact pile driving activity is relatively short-term, and mostly for proofing, with rapid pulses occurring for only a few minutes per pile. The probability for impact pile driving resulting from this proposed action masking acoustic signals important to the behavior and survival of marine mammal species is low. Vibratory pile driving is also relatively short-term. It is possible that vibratory pile driving resulting from this proposed action may mask acoustic signals important to the behavior and survival of marine mammal species, but the short-term duration and limited affected area would result in insignificant impacts from masking. Any masking event that could possibly rise to Level B harassment under the MMPA would occur concurrently within the zones of behavioral harassment already estimated for vibratory and impact pile driving, and which have already been taken into account in the exposure analysis.

Airborne Acoustic Effects From the Proposed Activities—Pinnipeds that occur near the project site could be exposed to airborne sounds associated with pile driving that have the potential to cause behavioral harassment, depending on their distance from pile driving activities. Cetaceans are not expected to be exposed to airborne sounds that would result in harassment as defined under the MMPA.

Airborne noise will primarily be an issue for pinnipeds that are swimming or hauled out near the project site within the range of noise levels elevated above the acoustic criteria. We recognize that pinnipeds in the water could be exposed to airborne sound that may result in behavioral harassment when looking with heads above water. Most likely, airborne sound would cause behavioral responses similar to those discussed above in relation to underwater sound. However, these animals would previously have been "taken" as a result of exposure to underwater sound above the behavioral harassment thresholds, which are in all cases larger than those associated with airborne sound. Thus, the behavioral

harassment of these animals is already accounted for in these estimates of potential take. Multiple instances of exposure to sound above NMFS' thresholds for behavioral harassment are not believed to result in increased behavioral disturbance, in either nature or intensity of disturbance reaction. Therefore, we do not believe that authorization of incidental take resulting from airborne sound for pinnipeds is warranted, and airborne sound is not discussed further here.

Potential Pile Driving Effects on Prey—Construction activities would produce continuous (*i.e.*, vibratory pile driving) sounds and pulsed (*i.e.*, impact driving) sounds. Fish react to sounds that are especially strong and/or intermittent low-frequency sounds. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fish, although several are based on studies in support of large, multiyear bridge construction projects (*e.g.*, Scholik and Yan, 2001, 2002; Popper and Hastings, 2009). Sound pulses at received levels of 160 dB may cause subtle changes in fish behavior. SPLs of 180 dB may cause noticeable changes in behavior (Pearson *et al.*, 1992; Skalski *et al.*, 1992). SPLs of sufficient strength have been known

to cause injury to fish and fish mortality.

The most likely impact to fish from pile driving activities at the project area would be temporary behavioral avoidance. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated. In general, impacts to marine mammal prey species from the proposed project are expected to be minor and temporary due to the relatively short timeframe of between 84 and 100 days of pile driving, pile extraction and drilling.

Effects to Foraging Habitat—Pile installation may temporarily impact foraging habitat by increasing turbidity resulting from suspended sediments. Any increases would be temporary, localized, and minimal. The Navy must comply with state water quality standards during these operations by limiting the extent of turbidity to the immediate project area. In general, turbidity associated with pile installation is localized to about a 25-foot radius around the pile (Everitt *et al.* 1980). Cetaceans are not expected to be close enough to the project pile driving areas to experience effects of turbidity, and any pinnipeds will be transiting the area and could avoid localized areas of turbidity. Therefore, the impact from increased turbidity levels is expected to be discountable to marine mammals. Furthermore, pile driving and removal

at the project site will not obstruct movements or migration of marine mammals.

In summary, given the relatively short and intermittent nature of sound associated with individual pile driving and drilling events and the relatively small area that would be affected, pile driving activities associated with the proposed action are not likely to have a permanent, adverse effect on any fish habitat, or populations of fish species. Thus, any impacts to marine mammal habitat are not expected to cause significant or long-term consequences for individual marine mammals or their populations.

Previous Monitoring Report—The Navy submitted a preliminary monitoring report covering the period between April 18, 2017 and October 27, 2017. During this period piles were installed using vibratory hammer, the impact hammer, and drilling. Work was conducted over 73 days. Drilling has accounted for 98.8% of the total noise-generating time spent on installation/extraction activities at the Shipyard; vibratory activity occurred during 1% of the total time; and impact driving took place <1% of the total time. During this time, observers noted 142 occurrences of marine mammals within designated zones, with all but one occurring within the Level B harassment zone as shown in Table 13.

TABLE 13—SUMMARY OF 2017 TAKES

	Harbor porpoise	Harbor seal	Gray seal	Harp seal	Hooded seal
Takes through October 28, 2018					
Level A	0	1	0	0	0
Level B	3	120	18	0	0

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of "small numbers" and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines "harassment" as any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (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 (Level B harassment).

Authorized takes would primarily be by Level B harassment, as impact and vibratory pile driving as well as drilling have the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) due to large predicted auditory injury zones. The proposed mitigation and monitoring measures are expected to minimize the severity of such taking to the extent practicable.

As described previously, no mortality is anticipated or proposed to be

authorized for this activity. Below we describe how the take is estimated.

Described in the most basic way, we estimate take by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) and the number of days of activities. Below, we describe these components in more detail and present the proposed take estimate.

Acoustic Thresholds

NMFS recommends acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment for non-explosive sources—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed by varying degrees by other factors related to the source (e.g., frequency, predictability, duty cycle), the environment (e.g., bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.*, 2007, Ellison *et al.*, 2011). Based on what the available science indicates and

the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 µPa (rms) for continuous non-impulsive (e.g. vibratory pile-driving, drilling) and above 160 dB re 1 µPa (rms) for non-explosive impulsive (e.g., impact pile driving, seismic airguns) or intermittent (e.g., scientific sonar) sources.

The Navy’s proposed activity includes the use of continuous (vibratory pile driving, drilling) and impulsive (impact pile driving) sources, and therefore the 120 and 160 dB re 1 µPa (rms) are applicable.

Level A harassment for non-explosive sources—NMFS’ Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Technical Guidance, 2016) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The Navy’s proposed activity includes the use of impulsive (impact pile driving) and non-impulsive (vibratory pile driving, drilling) sources.

These thresholds are provided in Table 5. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2016 Technical Guidance, which may be accessed at: <http://www.nmfs.noaa.gov/pr/acoustics/guidelines.htm>.

TABLE 5—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT (Received level)

Hearing group	PTS onset acoustic thresholds *	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	Cell 1: $L_{pk,flat}$: 219 dB $L_{E,LF,24h}$: 183 dB	Cell 2: $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	Cell 3: $L_{pk,flat}$: 230 dB $L_{E,MF,24h}$: 185 dB	Cell 4: $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	Cell 5: $L_{pk,flat}$: 202 dB $L_{E,HF,24h}$: 155 dB	Cell 6: $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	Cell 7: $L_{pk,flat}$: 218 dB $L_{E,PW,24h}$: 185 dB	Cell 8: $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	Cell 9: $L_{pk,flat}$: 232 dB $L_{E,OW,24h}$: 203 dB	Cell 10: $L_{E,OW,24h}$: 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 µPa, and cumulative sound exposure level (L_E) has a reference value of 1 µPa²s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript “flat” is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (i.e., varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that will feed into identifying the area ensonified above the acoustic thresholds.

Pile driving generates underwater noise that can potentially result in disturbance to marine mammals in the project area. Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

$$TL = B * \log_{10}(R1/R2),$$

Where:

- R1 = the distance of the modeled SPL from the driven pile, and
- R2 = the distance from the driven pile of the initial measurement.

This formula neglects loss due to scattering and absorption, which is assumed to be zero here. The degree to which underwater sound propagates away from a sound source is dependent on a variety of factors, most notably the water bathymetry and presence or absence of reflective or absorptive conditions including in-water structures and sediments. Spherical spreading occurs in a perfectly unobstructed (free-field) environment not limited by depth or water surface, resulting in a 6 dB reduction in sound level for each doubling of distance from the source ($20 * \log[\text{range}]$). Cylindrical spreading

occurs in an environment in which sound propagation is bounded by the water surface and sea bottom, resulting in a reduction of 3 dB in sound level for each doubling of distance from the source ($10 * \log[\text{range}]$). Although cylindrical spreading loss was applied to driving of 14-inch H-piles in the previous IHA, in an effort to maintain consistency NMFS utilized practical spreading loss (4.5 dB reduction in sound level for each doubling of distance) for all driving and drilling activities for this proposed IHA. A practical spreading value of 15 is often used under conditions, such as at the Shipyard dock, where water increases with depth as the receiver moves away from the shoreline, resulting in an expected propagation environment that

would lie between spherical and cylindrical spreading loss conditions.

Underwater Sound—The intensity of pile driving sounds is greatly influenced by factors such as the type of piles, hammers, and the physical environment in which the activity takes place. A number of studies have measured sound produced during underwater pile driving projects. These data are largely for impact driving of steel pipe piles and concrete piles as well as vibratory driving of steel pipe piles.

Source Levels

Source levels were collected for the four types of piles that would be installed and two pile-driving methods proposed for the project:

1. 14-inch steel H-type piles—Used as sister piles and for SOE system installation; installed/extracted via vibratory hammer and seated as needed with impact hammer.
2. 15-inch timber piles—Used for re-installation of dolphins at Berths 11, 12, and 13 and extracted via vibratory hammer.
3. 25-inch steel sheet piles—Used for the bulkhead at Berth 11 and for SOE

installed/extracted via vibratory hammer.

Reference source levels for the project were determined using data for piles of similar sizes, the same pile-driving method as that proposed for the project, and at similar water depths. While the pile sizes and water depths chosen as proxies do not exactly match those for the project, they are the closest matches available, and it is assumed that the source levels shown in Table 6, 7 and 8 are the most representative for each pile type and associated pile-driving method.

The intensity of pile driving or sounds is greatly influenced by factors such as the type of piles, hammers, and the physical environment in which the activity takes place. Reference source levels for the proposed project were determined using data for piles of similar sizes, the same pile driving method as that proposed for the project, and at similar water depths. While the pile sizes and water depths chosen as proxies do not exactly match those for the project, they are the closest matches available, and it is assumed that the source levels shown in Table 6, 7, and 8 are the most representative for each

pile type and associated pile driving method.

The Navy analyzed source level values associated with a number of projects involving impact driving of steel H-piles to approximate environmental conditions and driving parameters at the Shipyard (Caltrans 2015). Data from pertinent projects were used to obtain average SEL and rms values for H pile impact installation. To be sure all values were relevant to the site, the Navy eliminated all piles in waters greater than 5 m, as well as all readings measured at ranges greater than 10 m. The Navy used all H piles for which the diameter was not specified as well as the 14 to 15-inch H piles, converted the dB measurements to a linear scale before averaging, and re-converted the average measurements to the appropriate dB units. Piles driven at this project site will be driven in 0–11 feet of water (0–3.4 m). During low tide, piles will essentially be driven in the dry. This varies drastically from other Navy projects on the east coast, such as at the Naval Submarine Base New London, where 14-inch H piles will be driven in water depths of 25 feet (7.62 m). Results are shown in Table 6.

TABLE 6—SOURCE LEVELS FOR IN-WATER IMPACT HAMMER 14-INCH STEEL H-TYPE (SISTER) PILES

Pile size and type	Water depth (m)	Distance measured (m)	Peak	RMS (dB)	SEL (dB)
15-inch steel H pile	2–3	10	187	164	154
15-inch steel H pile	2–3	10	180	165	155
15-inch steel H pile	2–3	10	194	177	170
Unspecified steel H pile	0.5–2	10	172	160	147
14-inch steel H pile	1–5	10	205	184	174
14-inch steel H pile	1–5	10	206	182	172
14-inch steel H pile	1–5	10	206	184	174
14-inch steel H pile	1–5	10	210	190	180
14-inch steel H pile	1–5	10	212	192	182
14-inch steel H pile	1–5	10	210	189	179
14-inch steel H pile	1–5	10	212	190	180
14-inch steel H pile	1–5	10	205	190	180
14-inch steel H pile	1–5	10	207	187	177
Unspecified steel H pile	0–0.9	10	.....	151	142
Unspecified steel H pile	0–0.9	10	.....	154	144
Unspecified steel H pile	0–0.9	10	.....	170	159
Unspecified steel H pile	0–0.9	10	.....	147	136
Unspecified steel H pile	0–0.9	10	.....	147	136
Unspecified steel H pile	0–0.9	10	.....	150	143
Unspecified steel H pile	0–0.9	10	.....	153	142
Unspecified steel H pile	0–0.9	10	.....	151	142
Unspecified steel H pile	0–0.9	10	.....	156	146
Unspecified steel H pile	0–0.9	10	.....	172	162
Unspecified steel H pile	0–0.9	10	.....	161	150
Unspecified steel H pile	0–0.9	10	.....	155	145
Unspecified steel H pile	0–0.9	10	.....	163	152
Unspecified steel H pile	0–0.9	10	.....	178	145
Unspecified steel H pile	0–0.9	10	.....	165	154
Averages	.....	.....	200.4	181.4	171.3

Source: Caltrans 2015.

While the average rms value is 181.4, the Navy rounded up to 182 dB rms to be conservative.

Table 7 shows the source levels that were utilized to calculate isopleths for vibratory driving of 24-inch steel sheet piles, and 15-inch timber piles. An

average value of 163 dB rms was used for 24-inch AZ steel sheet and 150 dB rms for 15-inch timber pile. For Year 1 work at the Shipyard Berth 11 the contractor has obtained initial acoustic readings associated with vibratory driving of 14" H-Pile of 148 dB rms at

10 m. Additional details are found in Appendix A in the application. NMFS will use 148 dB as the source level since it is site-specific and more conservative than the 145 dB value depicted in WSDOT 2012.

TABLE 7—SOURCE LEVELS FOR IN-WATER VIBRATORY HAMMER 24-INCH STEEL SHEET PILES, AND 15-INCH TIMBER PILES

Pile size and pile type	Water depth (m)	Distance measured (m)	Peak (dB)	RMS (dB)	SEL (dB)	Location
24-inch AZ Steel Sheet ¹	15	10	177	163	162	Berth 23, Port of Oakland, CA.
24-inch AZ Steel Sheet ¹	15	10	175	162	162	Berth 30, Port of Oakland, CA.
24-inch AZ Steel Sheet ¹	15	10	177	163	163	Berth 35/37, Port of Oakland, CA.
24-inch AZ Steel Sheet—Typical ¹	15	10	175	160	160	CA (Specific location unknown).
24-inch AZ Steel Sheet—Loudest ¹	15	10	182	165	165	CA (Specific location unknown).
24-inch AZ Steel Sheet (Average) ¹	15	10	178	163	163	CA (Specific location unknown).
15-inch Timber Pile ²	10	16	164	150	.....	WSF Port Townsend Ferry Terminal, WA.
14-inch H-type Pile ³	6	10	155	148	145	CA (Specific location unknown).

Source:
¹ICF Jones & Stokes and Illingsworth & Rodkin 2012.
²WSDOT 2010.
³WSDOT 2012.

Using the data presented in Table 6 and Table 7, underwater sound levels were estimated using the practical spreading model to determine over what distance the thresholds would be exceeded.

Drilling is considered a continuous, non-impulsive noise source, similar to vibratory pile driving. Very little information is available regarding source levels of in-water drilling

activities associated with nearshore pile installation such as that proposed for the Berths 11, 12, and 13 structural repairs project. Dazey *et al.* (2012) attempted to characterize the source levels of several marine pile-drilling activities. One such activity was auger drilling (including installation and removal of the associated steel casing). Auger drilling will be employed as part of the Shipyard Project. The average

sound pressure levels re 1 µPa rms were displayed for casing installation, auger drilling (inside the casing), and casing removal. For the purposes of this plan, it is assumed that the casing installation and removal activities would be conducted in a manner similar to that described in Dazey *et al.*, (2012), primarily via oscillation. These average source levels are reported in Table 8.

TABLE 8—AVERAGE SOURCE LEVELS FOR AUGER DRILLING ACTIVITIES DURING PILE INSTALLATION

Drilling activity	Water depth (m)	Distance measured (m)	RMS (dB)	Location
Casing Installation	1–5	1	157	Bechers Bay Santa Rosa Island, CA.
Auger Drilling	1–5	1	151	Bechers Bay Santa Rosa Island, CA.
Casing Removal	1–5	1	152	Bechers Bay Santa Rosa Island, CA.
Average Drilling Activity	1–5	1	154	

Source: Dazey *et al.*, 2012.
Note: All source levels are referenced to 1 microPascal (re 1 µPa).

IHA applications for other construction projects have reported that, due to a lack of information regarding pile drilling source levels, it is generally assumed that pile drilling would produce less in-water noise than both impact and vibratory pile driving. Based on the general lack of information about these activities and the assumption that in-water noise from pile drilling would be less than either impact or vibratory pile driving, it is assumed that the source levels presented in Table 7 are the most applicable for acoustic impact analysis at Berths 11, 12, and 13. For the purposes of this proposed IHA, however, we will conservatively assume that drilling has identical source levels

to vibratory driving when calculating zones of influence. This includes instances where drilling is underway in the absence of any concurrent driving.

During the proposed Year 2 activity, concurrent work utilizing a vibratory hammer during drilling operations is possible. This potential concurrent activity could occur during installation of the rock sockets for approximately 16 days. The vibratory hammer may be working to install SOE sheets or H-Pile as the drilling work is being conducted. Under concurrent driving conditions, the Navy will use the larger of the two source level values to calculate size of entire ensonified area. Since the vibratory source level is greater than the

level associated with drilling, it will be utilized.

With limited source level data available for vibratory pile extraction of 24-inch steel sheet piles, NMFS used the same values for both vibratory installation and extraction assuming that the two activities would produce similar source levels if water depth, pile size, and equipment remain constant.

When NMFS Technical Guidance (2016) was published, in recognition of the fact that ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds, an User Spreadsheet was developed that includes tools to help predict a simple

isopleth that can be used in conjunction with marine mammal density or occurrence to help predict takes. We note that because of some of the assumptions included in the methods used for these tools, we anticipate that isopleths produced are typically going to be overestimates of some degree, which will result in some degree of

overestimate of Level A take. However, these tools offer the best way to predict appropriate isopleths when more sophisticated 3D modeling methods are not available, and NMFS continues to develop ways to quantitatively refine these tools, and will qualitatively address the output where appropriate. For stationary sources pile driving,

NMFS User Spreadsheet predicts the closest distance at which, if a marine mammal remained at that distance the whole duration of the activity, it would not incur PTS. Inputs used in the User Spreadsheet and the resulting isopleths are reported below in Table 9 and Table 10.

TABLE 9—TABLE INPUT FOR LEVEL A ISOPLETH PTS CALCULATIONS

User spreadsheet input	14" steel H impact	14" steel vibro	15" timber vibro	25" steel sheet vibro	Drilling
Spreadsheet Tab Used	(E.1) Impact pile driving.	(A) Non-Impulsive, Stationary, Continuous.	(A) Non-Impulsive, Stationary, Continuous.	(A) Non-Impulsive, Stationary, Continuous.	(A) Non-Impulsive, Stationary, Continuous.
Source Level (Single Strike/shot SEL)	171 SEL	148 rms	150 rms	163	154 rms.
Weighting Factor Adjustment (kHz)	2	2.5	2.5	2.5	2.5.
Number of strikes per pile	160	NA	NA	NA	NA.
Activity duration within 24-h period OR number of piles per day.	4 piles	4 hours	4 hours	4 hours	8 hours.
Propagation (xLogR)	15LogR	15LogR	15LogR	15LogR	15LogR.
Distance of source level measurement (meters) +.	10	10	16	10	10.

TABLE 10—USER SPREADSHEET OUTPUT FOR LEVEL A ISOPLETH AND ENSONIFIED AREA PTS CALCULATIONS

Source type	PTS Isopleth	
	High-frequency cetaceans	Phocid pinnipeds
14" Steel H Impact	140 m	63 m.
14" Steel Vibro	3.5 m	1.4 m.
15" Timber Vibro	7.5 m	1.9 m.
25" Steel Sheet Vibro	34.6 m	14.2 m.
Drilling (8 hours/day) within Shutdown Zone * utilizing 163 dB rms value	54.9 m	22.6 m.
Daily Ensonified Area		
14" Steel H Impact	0.0615 km ²	0.0125 km ² .
14" Steel H Vibro	38.46 m ²	6.15 m ² .
15" Timber Vibro	179.9 m ²	11.33 m ² .
25" Steel Sheet Vibro	0.0038 km ²	0.00062 km ² .
Drilling (8 hours/day) within Shutdown Zone * utilizing 163 dB rms value	0.0095 km ²	0.0016 km ² .

* While 154 dB rms is shown for drilling activity source level, take estimates and calculation of the ensonified area have been based on 163 dB rms (vibratory drilling) as these activities may run concurrently.

Using the same source level and transmission loss inputs discussed in the Level A isopleths section above, the Level B distance was calculated for both impact and vibratory driving (Table 11). The attenuation distance for impact hammer use associated with the installation of the sister pile/support pile with a source level of 182 dB rms

resulted in an isopleth of 293 meters (m). The attenuation distance for vibratory hammer use with a source level of 163 dB rms resulted in an isopleth of 7.35 kilometers (km). The Level B area associated with the 120-dB isopleth for vibratory driving and which is used in the take calculations is 0.9445 square kilometers (km²). Note that these

attenuation distances are based on sound characteristics in open water. The project area is located in a river surrounded by topographic features. Therefore, the actual attenuation distances are constrained by numerous land features and islands.

TABLE 11—PILE-DRIVING SOUND EXPOSURE DISTANCES (IN-WATER) LEVEL B ZONE OF INFLUENCE

Drilling activity	Behavioral thresholds for cetaceans and pinnipeds	Propagation model	Attenuation distance to threshold
Vibratory Hammer	120 dB rms	Practical Spreading Loss	7.35 km (4.57 mi).
Impact Hammer (rms)	160 dB rms	Practical Spreading Loss	293 m (961 ft).

Marine Mammal Occurrence

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations. For all species, the best scientific

information available was considered for use in the marine mammal take assessment calculations. Density information was taken from the Navy Marine Mammal Density Database as shown in Table 12. (Craine 2015; Krause

2015). These data are generally used for broad-scale offshore activities; however, due to a lack of any other data within the general project area, these data are presented as the best available data for the Piscataqua River.

TABLE 12—MARINE MAMMAL SPECIES POTENTIALLY PRESENT IN THE PISCATAQUA RIVER NEAR THE SHIPYARD

Species	Relative occurrence in Piscataqua River	Season(s) of occurrence	Approximate density in the vicinity of the project area (individuals per km ²) ¹			
			Winter	Spring	Summer	Fall
Harbor Porpoise Gulf of Maine/Bay of Fundy stock	Occasional use	Spring to Fall (April to December). ²	1.2122	1.1705	0.7903	0.9125
Gray Seal Western North Atlantic stock	Common	Year-round	0.2202	0.2202	0.2202	0.2202
Harbor Seal Western North Atlantic stock	Common	Year-round	0.1998	0.1998	0.1998	0.1998
Harp Seal Western North Atlantic stock	Rare	Winter to Spring (January–May)	0.0125	0.0125	0.0125	0.0125

Notes:

¹Density data are taken from the Navy Marine Species Density Database (Crain 2015; Krause 2015).

²Densities shown for all seasons, even when species are unlikely to occur in the river.

Take Calculation and Estimation

Here we describe how the information provided above is brought together to produce a quantitative take estimate.

The following assumptions are made when estimating potential incidences of take:

- All marine mammal individuals potentially available are assumed to be present within the relevant area, and thus incidentally taken;
- An individual can only be taken once during a 24-h period;
- While up to 16 days of concurrent driving/drilling could occur, NMFS will conservatively assume that there are zero (0) days resulting in a total of 100 pile driving/drilling days; and
- Exposures to sound levels at or above the relevant thresholds equate to take, as defined by the MMPA.

In this case, the estimation of marine mammal takes uses the following calculation:

$$\text{Exposure estimate} = n * \text{ZOI} * \text{days of total activity}$$

Where:

n = density estimate used for each species/season.

ZOI = sound threshold ZOI area; the area encompassed by all locations where the SPLs equal or exceed the threshold being evaluated.

The ZOI impact area is estimated using the relevant distances in Table 10 and Table 11, assuming that sound radiates from a central point in the water column at project site and taking into consideration the possible affected area due to topographical constraints of the action area (*i.e.*, radial distances to thresholds are not always reached) as shown in Figure 6–1 in the application.

There are a several reasons why estimates of potential incidents of take may be conservative, assuming that

available density and estimated ZOI areas are accurate. We assume, in the absence of information supporting a more refined conclusion, that the output of the calculation represents the number of individuals that may be taken by the specified activity. In fact, in the context of stationary activities such as pile driving and in areas where resident animals may be present, this number more realistically represents the number of incidents of take that may accrue to a smaller number of individuals. While pile driving can occur any day throughout the period of validity, and the analysis is conducted on a per day basis, only a fraction of that time (typically a matter of hours on any given day) is actually spent pile driving. The potential effectiveness of mitigation measures in reducing the number of takes is typically not quantified in the take estimation process. For these reasons, these take estimates may be conservative.

Harbor Porpoise

Harbor porpoises may be present in the project area year-round. Based on density data from the Navy Marine Species Density Database, their presence is highest in winter and spring, decreases in summer, and slightly increases in fall. However, in general, porpoises are known to occasionally occur in the river. Average density for the predicted seasons of occurrence was used to determine abundance of animals that could be present in the area for exposure, using the equation abundance = n * ZOI. Estimated abundance estimate for harbor porpoises was 0.96 animals generated from the equation (0.9445 km² Level B ensonified area * 1.02 animals/km²). The number of Level B harbor porpoise exposures within the ZOIs is (100 days * 0.96

animals/day) is 96. Therefore, NMFS proposed 96 Level B takes of harbor porpoise.

The injury zone for harbor porpoise was calculated to extend to a radius of 140 m from impact driven piles and a maximum of 55 m from vibratory or drilling activity. A 75-m shutdown zone is proposed (see “Proposed Mitigation”); therefore, the area between the 75 m and 140 m isopleths is where Level A take may occur during impact hammer use. The area of the 75 m shutdown zone was subtracted from the full Level A injury zone to obtain the Level A take zone, 0.0132 km². The density of harbor porpoises is estimated at 1.02 harbor porpoises/km². Using the density of harbor porpoises potentially present (1.02 animal/km²) and the area of the Level A take zone, less than one (0.1218 mammals) harbor porpoise a day was estimated to be exposed to injury over the nine days of impact pile driving. Therefore, we assume that one harbor porpoise could be exposed to injurious noise levels during impact pile driving.

Harbor Seal

Harbor seals may be present year-round in the project vicinity, with constant densities throughout the year. Based on local anecdotal data, harbor seals are the most common pinniped in the Piscataqua River near the Shipyard. Average density for the predicted seasons of occurrence was used to determine abundance of animals that could be present in the area for exposure, using the equation abundance = n * ZOI. Abundance for harbor seals were 0.19/day. (Average year-round density = 0.1998). Therefore, Level B harbor seal exposures within the ZOI is (100 days * 0.19 animals/day) would be up to 19 Level B exposures of harbor

seals within the ZOI. As described above in the gray seal section, however, the modeling of estimated takes may be underestimated. The data from the preliminary monitoring report indicated 120 Level B exposures of harbor seals over 73 work days resulting in 1.64 takes per day (120 takes/73 days). Therefore, NMFS is proposing to authorize 164 Level B harbor seal takes (1.64 takes/day * 100 days).

The injury zone for harbor seals was calculated to extend a radius of 63 m from impact driven piles and 14m for vibratory hammer use. The injury zone for drilling activity is estimated at 23 m. The Level A injury zone is within the shutdown zone, therefore no injurious takes of harbor seals are estimated to occur. However, as stated above for the gray seal take request, this may be an underestimate. The Navy has requested four Level A takes of harbor seal to coincide with the same number of Level A takes requested in Year 1. Preliminary monitoring report results support authorization of Level A take as one harbor seal was detected within 50 m of drilling activity. Therefore, NMFS is conservatively proposing four Level A takes of harbor seals so that operations will not have to be suspended due to exceeding authorized Level A takes.

Gray Seal

Gray seals are less common in the Piscataqua River than the harbor seal. Average density for the predicted seasons of occurrence was used to determine abundance of animals that could be present in the area for exposure, using the equation abundance = $n * ZOI$. The estimated abundance for gray seals is 0.21/day (average year-round density = 0.2202). Therefore, the number of Level B gray seal exposures within the ZOI is (100 days * 0.21 animals/day) resulting in up to 21 Level B exposures of gray seals within the ZOI.

However, current monitoring data indicate that this could be an underestimate. While there could be 21 Level B and 0 Level A takes for gray seal during construction activity monitoring of the zones, observations of gray seals have shown 18 Level B exposures over 73 days of activity through October 27, 2017. This comes out to 0.246 exposures per day (18/73 = 0.246). Therefore, the Navy has requested and NMFS is proposing to authorize 25 gray seal takes (0.246 takes/day * 100 days) under the proposed IHA.

The injury zone for gray seals was calculated to extend to a radius of 63m from impact driven piles and 14m for vibratory hammer use. Drilling activity is estimated at 23m from the activity.

The injury zone for impact, vibratory and drilling activity remains within the shutdown zone of 75m for impact hammer use and 55 m for vibratory driving and drilling (see "Proposed Mitigation"). These zones were utilized during Year 1. Based on these calculations and continued implementation of the shutdown zones, no injurious takes of gray seals are estimated to occur. The Navy, however, requests authorization of two Level A takes of gray seal to coincide with the same number of Level A takes requested in Year 1. This is partially supported by data collected in the preliminary Year 1 IHA monitoring report in which observers recorded one gray seal within 50 m of drilling activity. Because animals were observed within the shutdown zone during Year 1, NMFS is conservatively proposing authorization of two Level A gray seal takes, so that operations will not have to be suspended if animals unexpectedly occur in the Level A zones.

Harp Seal

Harp seals may be present in the project vicinity during the winter and spring, from January through February. In general, harp seals are much rarer than the harbor seal and gray seal in the Piscataqua River. These animals are conservatively assumed to be present within the underwater Level B ZOI during each day of in-water pile driving. Average density for the predicted seasons of occurrence was used to determine abundance of animals that could be present in the area for exposure, using the equation abundance = $n * ZOI$. Abundance for harp seals was 0.014/day (average year-round density = 0.0125). The number of Level B harp seal exposures within the ZOI is (100 days * 0.0125 animals/day) resulting in approximately 1 Level B exposure. Therefore, NMFS is proposing to authorize Level B take of 1 harp seal.

The injury zone for harp seals was calculated to extend a radius of 63m from impact driven piles and 14m for vibratory hammer use. Drilling activity is estimated at 23 m from the activity. These isopleths are within the shutdown zones and NMFS. Therefore, no Level A take is proposed as shown in Table 14.

Proposed Mitigation

In order to issue an IHA 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 impact on such 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 taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

- (1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned) the likelihood of effective implementation (probability implemented as planned); and
- (2) The practicability of the measures for applicant implementation, which may consider such things as cost and impact on operations.

Mitigation for Marine Mammals and Their Habitat

The mitigation strategies described below are similar to those required and implemented under the first IHA associated with this project. In addition to the measures described later in this section, the Navy would conduct briefings between construction supervisors and crews, marine mammal monitoring team, and Navy staff prior to the start of all pile driving activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

The following measures would apply to the Navy's mitigation through shutdown and disturbance zones:

Time Restrictions—Pile driving/removal (vibratory as well as impact) will only be conducted during daylight hours so that marine mammals can be adequately monitored to determine if mitigation measures are to be implemented.

Establishment of Shutdown Zone—During pile driving and removal, shutdown zones shall be established to prevent injury to marine mammals as determined under acoustic injury thresholds. During all pile driving and removal activities, regardless of predicted sound pressure levels (SPLs), the entire shutdown zone will be monitored to prevent injury to marine mammals from their physical interaction with construction equipment during in-water activities. The shutdown zone during impact driving will extend to 75 m for all authorized species. The shutdown during vibratory driving and drilling will extend to 55 m for all authorized species. Pile driving and removal operations will cease if a marine mammal approaches the shutdown zone. Pile driving and removal operations will restart once the marine mammal is visibly seen leaving the zone or after 15 minutes have passed with no sightings.

Establishment of Level A Harassment Zone—The Level A harassment zone is an area where animals may be exposed to sound levels that could result in PTS injury. The primary purpose of the Level A zone is monitoring for documenting incidents of Level A harassment. The Level A zones will extend from the 75 m shutdown zone out to 140 m for harbor porpoises. Animals observed in the Level A harassment zone will be recorded as potential Level A takes.

Establishment of Disturbance/Level B Harassment Zone—During pile driving and removal, the Level B zone shall include areas where the underwater SPLs are anticipated to equal or exceed the Level B harassment criteria for marine mammals (160 dB rms isopleths for impact pile driving, 120 dB rms isopleth for vibratory pile-driving and drilling). The Level B zone will extend out to 293 m for impact driving and 7.35 km during vibratory driving and drilling and will include all waters in the sight line of the driving or drilling operation not constrained by land.

Shutdown Zone During Other In-Water Construction or Demolition Activities—During all in-water construction or demolition activities having the potential to affect marine mammals, in order to prevent injury from physical interaction with construction equipment, a shutdown zone 10 m will be implemented to ensure marine mammals are not present within this zone. These activities could include, but are not limited to: (1) The movement of a barge to the construction site, or (2) the removal of a pile from the water column/substrate via a crane (*i.e.*, a “dead pull”).

Soft Start for Impact Pile Driving—The use of a soft-start procedure is believed to provide additional protection to marine mammals by providing a warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. The project will use soft-start techniques recommended by NMFS for impact pile driving. Soft start must be conducted at beginning of day’s activity and at any time impact pile driving has ceased for more than 30 minutes. If an impact hammer is used, contractors are required to provide an initial set of three strikes from the impact hammer at 40 percent energy, followed by a 1-minute waiting period, then two subsequent 3-strike sets.

Monitoring Protocols—Monitoring would be conducted before, during, and after pile driving activities. In addition, observers shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven. Observations made outside the shutdown zone will not result in shutdown; that pile segment would be completed without cessation, unless the animal approaches or enters the shutdown zone, at which point all pile driving activities would be halted. Monitoring will take place from 15 minutes prior to initiation through 30 minutes post-completion of pile driving activities. Pile driving activities include the time to remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

Monitoring will be conducted within the Level A harassment shutdown zone during all pile-driving operations and the Level B harassment buffer zone during two-thirds of pile-driving days. If a marine mammal is observed approaching a Level A zone, operations will be shut down. If an animal is seen entering the Level B harassment zone, an exposure would be recorded and behaviors documented. The Navy will extrapolate data collected during monitoring days and calculate total takes for all pile-driving days.

Prior to the start of pile driving activity, the shutdown zone will be monitored for 15 minutes to ensure that it is clear of marine mammals. Pile driving will only commence once observers have declared the shutdown zone clear of marine mammals; animals will be allowed to remain in the shutdown zone (*i.e.*, must leave of their own volition) and their behavior will be monitored and documented. The shutdown zone may only be declared clear, and pile driving started, when the

entire shutdown zone is visible (*i.e.*, when not obscured by dark, rain, fog, etc.). In addition, if such conditions should arise during impact pile driving that is already underway, the activity would be halted.

If a marine mammal approaches or enters the shutdown zone during the course of pile driving operations, activity will be halted and delayed until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone or 15 minutes have passed. Monitoring will be conducted throughout the time required to drive a pile and for 30 minutes following the conclusion of pile driving.

Based on our evaluation of the applicant’s proposed measures NMFS has preliminarily determined that the proposed mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS 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 authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*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 marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;

- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;

- Effects on marine mammal habitat (e.g., marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and

- Mitigation and monitoring effectiveness.

Visual Monitoring

Observers shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven or removed. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

Marine mammal monitoring will include the following:

A minimum of two marine mammal observers (MMOs) will be on location during two-thirds of all pile driving/removal days. They will be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown/delay procedures when applicable by calling for the shutdown to equipment operators. The observer will be trained on the observation zones, potential species, how to observe, and how to fill out the data sheets by the Navy Natural Resources Manager prior to any pile-driving activities. The supervisory observer will be a trained biologist; additional observers will be trained by that supervisor as needed.

Shutdown zones must be monitored at all times. When MMOs are not available during one-third of pile driving/removal days, project contractors/workers will be responsible for monitoring shutdown zones and will call for shutdown as appropriate. The following additional measures apply to visual monitoring during the $\frac{2}{3}$ of days on which MMOs are present:

- Independent observers (*i.e.*, not construction personnel) are required;
- At least one observer must have prior experience working as an observer;
- Other observers (that do not have prior experience) may substitute education (undergraduate degree in

biological science or related field) or training for experience;

- NMFS will require submission and approval of observer resumes.

Qualified observers are trained biologists with the following minimum qualifications:

- Visual acuity in both eyes (correction is permissible) sufficient for discernment of moving targets at the water's surface with ability to estimate target size and distance; use of binoculars may be necessary to correctly identify the target;

- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;

- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates and times when in-water construction activities were suspended to avoid potential incidental injury from construction sound of marine mammals observed within a defined shutdown zone; and marine mammal behavior; and

- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

Monitoring will be conducted within the Level A harassment and shutdown zone during all pile-driving operations and the Level B harassment buffer zone during two-thirds of pile-driving days. Monitoring will take place from 15 minutes prior to initiation through 30-minutes post-completion of pile-driving/removal activities.

- During pile removal or installation the observers will monitor the shutdown zones to record take when marine mammals enter the relevant Level B harassment zones based on type of construction activity.

- Prior to the start of pile-driving/removal activity, the shutdown and safety zones will be monitored for 15 minutes to ensure that they are clear of marine mammals. Pile driving will only commence once observers have declared the shutdown zone clear of marine mammals; if present, animals will be allowed to remain in the ZOI and their behavior will be monitored and documented.

- In the unlikely event of conditions that prevent the visual detection of marine mammals, such as heavy fog, activities with the potential to result in Level A or Level B harassment will not be initiated. Impact pile driving would be curtailed, but vibratory pile driving

or extraction would be allowed to continue if such conditions arise after the activity has begun.

A draft marine mammal monitoring report will be submitted to NMFS within 90 days after the completion of pile driving and removal activities or 60 days prior to the issuance of any subsequent IHA for this project, whichever comes first. It will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated marine mammal observation data sheets.

Specifically, the report must include:

- Date and time that monitored activity begins or ends;
- Construction activities occurring during each observation period;
- Weather parameters (e.g., percent cover, visibility);
- Water conditions (e.g., sea state, tide state);
- Species, numbers, and, if possible, sex and age class of marine mammals;
- Description of any observable marine mammal behavior patterns, including bearing and direction of travel and distance from pile driving activity;
- Distance from pile driving activities to marine mammals and distance from the marine mammals to the observation point;
- Locations of all marine mammal observations; and
- Other human activity in the area.

If no comments are received from NMFS within 30 days, the draft final report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by the IHA (if issued), such as serious injury or mortality, the Navy will immediately cease the specified activities and report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Northeast/Greater Atlantic Regional Stranding Coordinator. The report would include the following information:

- Description of the incident;
- Environmental conditions (e.g., Beaufort sea state, visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities would not resume until NMFS is able to review the

circumstances of the prohibited take. NMFS would work with the Navy to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The Navy would not be able to resume their activities until notified by NMFS via letter, email, or telephone.

In the event that the Navy discovers an injured or dead marine mammal, and the lead MMO determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.*, in less than a moderate state of decomposition as described in the next paragraph), the Navy would immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Northeast/Greater Atlantic Regional Stranding Coordinator. The report would include the same information identified in the paragraph above. Activities would be able to continue while NMFS reviews the circumstances of the incident. NMFS would work with the Navy to determine whether modifications in the activities are appropriate.

In the event that the Navy discovers an injured or dead marine mammal and the lead MMO determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the Navy would report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Northeast/Greater Atlantic Regional Stranding Coordinator within 24 hours of the discovery. The Navy would provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network.

Hydroacoustic Monitoring

The Navy will continue to implement its in situ acoustic monitoring efforts in 2018. During Year 2, the Navy will verify acoustic monitoring at the source (33 feet) and, where the potential for Level A harassment exists, at a second representative monitoring location at an intermediate distance between the cetacean and pinniped shutdown zones. A draft hydroacoustic monitoring plan will be submitted to NMFS for approval. A final report will be submitted to NMFS within 30 days of completing the verification monitoring. Results from the 2017 Hydroacoustic Monitoring Report may be found in Appendix A of the application.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact 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 (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of 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 harassment, NMFS considers 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 effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS’s implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.*, as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

Pile driving, pile extraction and drilling activities associated with the Navy project as outlined previously have the potential to injure, disturb or displace marine mammals. Specifically, the specified activities may result in Level B harassment (behavioral disturbance) for all species authorized for take from underwater sound generated during pile driving. Level A harassment in the form of PTS may also occur to limited numbers of three marine mammal species. Potential takes could occur if individuals of these species are present in the ensonified zone when pile driving and removal occurs.

No serious injury or mortality is anticipated given the nature of the activities and measures designed to minimize the possibility of injury to marine mammals. The potential for these outcomes is minimized through the construction method and the implementation of the planned mitigation measures. Specifically,

vibratory driving and drilling will be the primary methods of installation (impact driving will occur for only 1.5 hours over 84–100 days). During impact driving, implementation of soft start and shutdown zones significantly reduces any possibility of injury. Given sufficient “notice” through use of soft start (for impact driving), marine mammals are expected to move away from a sound source that is annoying prior to it becoming potentially injurious. Conditions at the Shipyard offer MMOs clear views of the shutdown zones, enabling a high rate of success in implementation of shutdowns to avoid injury.

The Navy’s planned activities are highly localized. A small portion of the Piscataqua River may be affected which is only a subset of the ranges of species for which take is authorized. The project is not expected to have significant adverse effects on marine mammal habitat. No important feeding and/or reproductive areas for marine mammals are known to be near the project area. Project-related activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals’ foraging opportunities in a limited portion of the foraging range, but because of the relatively small area of the habitat range utilized by each species that may be affected, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

Exposures to elevated sound levels produced during pile driving activities may cause behavioral responses by an animal, but they are expected to be mild and temporary. Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (*e.g.*, Thorson and Reyff, 2006; Lerma, 2014). Most likely, individuals will simply move away from the sound source and be temporarily displaced from the areas of pile driving, although even this reaction has been observed primarily only in association with impact pile driving. These reactions and behavioral changes are expected to subside quickly when the exposures cease. The pile driving activities analyzed here are similar to, or less impactful than, numerous construction activities conducted in other similar locations, which have taken place with no reported injuries or mortality to marine mammals, and no known long-term adverse consequences

from behavioral harassment. Repeated exposures of individuals to levels of sound that may cause Level B harassment are unlikely to result in permanent hearing impairment or to significantly disrupt foraging behavior. Level B harassment will be reduced through use of mitigation measures described herein.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality or serious injury is anticipated or authorized;
- The area of potential impacts is highly localized;
- No adverse impacts to marine mammal habitat;
- The absence of any significant habitat within the project area, including rookeries, or known areas or

features of special significance for foraging or reproduction;

- Anticipated incidences of Level A harassment would be in the form of a small degree of PTS to a limited number of animals;
- Anticipated incidents of Level B harassment consist of, at worst, temporary modifications in behavior;
- Very few individuals are likely to be affected by project activities (<0.01 percent of population for all authorized species); and
- The anticipated efficacy of the required mitigation measures in reducing the effects of the specified activity.

Based on the 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 proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from

the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under Section 101(a)(5)(D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

TABLE 14—ESTIMATED NUMBER OF EXPOSURES AND PERCENTAGE OF STOCKS THAT MAY BE SUBJECTED TO LEVEL A AND LEVEL B HARASSMENT

Species	Proposed authorized take		% Population
	Level B	Level A	
Harbor porpoise	96	1	<0.01
Gray Seal	25	2	<0.01
Harbor Seal	164	4	<0.01
Harp Seal	1	0	<0.01

Table 14 illustrates the number of animals that could be exposed to Level A and Level B harassment from work associated with the waterfront improvement project. The analysis provided indicates that authorized takes account for <0.01 percent of the populations of the stocks that could be affected. These are small numbers of marine mammals relative to the sizes of the affected species and population stocks under consideration.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has 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)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that consultation under section 7 of the ESA is not required for this action.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to the Navy for conducting in-water construction activities at the Portsmouth Naval Shipyard in Kittery, Maine from January 1, 2018 through December 31, 2018 provided the previously mentioned mitigation, monitoring, and reporting requirements

are incorporated. This section contains a draft of the IHA itself. The wording contained in this section is proposed for inclusion in the IHA (if issued).

1. This Incidental Harassment Authorization (IHA) is valid from January 1, 2018 through December 31, 2018. This IHA is valid only for pile driving, extraction, and drilling activities associated with the waterfront improvements project at the Shipyard.

2. General Conditions.

(a) A copy of this IHA must be in the possession of the Navy, its designees, and work crew personnel operating under the authority of this IHA.

(b) The species authorized for taking are the harbor porpoise (*Phocoena phocoena*), gray seal (*Halichoerus grypus*), harbor seal (*Phoca vitulina*), and harp seal (*Pagophilus groenlandicus*).

(c) The taking, by Level A and Level B harassment, is limited to the species listed in condition 2(b). See Table 14 for numbers of Level A and Level B take authorized.

(d) The take of any other species not listed in condition 2(b) of marine mammal is prohibited and may result in

the modification, suspension, or revocation of this IHA.

(e) The Navy shall conduct briefings between construction supervisors and crews, marine mammal monitoring team, acoustical monitoring team prior to the start of all pile driving activities, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

3. Mitigation Measures.

The holder of this Authorization is required to implement the following mitigation measures.

(a) Time Restriction: For all in-water pile driving activities, the Navy shall operate only during daylight hours.

(b) Pile driving shall only take place when the shutdown and Level A zones are visible and can be adequately monitored. If conditions (*e.g.*, fog) prevent the visual detection of marine mammals, activities with the potential to result in Level A harassment (*i.e.*, impact driving) shall not be initiated. If such conditions arise after the activity has begun, impact pile driving shall be halted but vibratory pile driving or extraction is allowed to continue.

(c) Establishment of Shutdown Zones.

(i) The shutdown zone during impact driving shall extend to 75 m for all authorized species. The shutdown during vibratory driving or drilling shall extend to 55 m for all authorized species.

(ii) If a marine mammal comes within or approaches the shutdown zone, pile driving operations shall cease.

(iii) Pile driving and removal operations shall restart once the marine mammal is visibly seen leaving the zone or after 15 minutes have passed with no sightings.

(iii) For in-water heavy machinery work other than pile driving (using, *e.g.*, standard barges, tug boats), if a marine mammal comes within 10 m, operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions.

(iv) Shutdown shall occur if a species for which authorization has not been granted or for which the authorized numbers of takes have been met approaches or is observed within the Level B harassment zone. The Navy shall then contact NMFS within 24 hours.

(d) Establishment of Level A and B Harassment Zones.

(i) The Level A take zones shall extend from the 75 m shutdown zone out to 140 m for harbor porpoises during all impact pile driving activities.

(ii) The Level B take zones shall extend from the 55 m shutdown zone out to 293 m during impact driving activities and from 55 m out to 7.35 km during vibratory driving activities.

(e) Use of Soft-Start for Impact Pile Driving.

(i) The project shall utilize soft start techniques for impact pile driving. The Navy shall conduct an initial set of three strikes from the impact hammer at 40 percent energy, followed by a 1-minute waiting period, then two subsequent three strike sets. Soft start shall be required for any impact driving, including at the beginning of the day, and at any time following a cessation of impact pile driving of 30 minutes or longer.

4. Monitoring.

The holder of this Authorization is required to conduct visual marine mammal monitoring and acoustic monitoring during pile driving activities.

(a) Visual Marine Mammal Observation—The Navy shall collect sighting data and behavioral responses to pile driving for marine mammal species observed in the region of activity during the period of activity. Visual monitoring shall include the following:

(i) A minimum of two marine mammal observers (MMOs) shall be in place during two-thirds of pile driving days.

(ii) Shutdown zones shall be monitored at all times. When MMOs are not on-site during one-third of pile driving/removal days, project contractors/workers shall be responsible for monitoring shutdown zones and shall call for shutdown as appropriate.

(iii) Monitoring shall take place from 15 minutes prior to initiation of pile driving activity through 30 minutes post-completion of pile driving activity.

(iv) MMOs shall be placed at the best vantage point(s) practicable to monitor for marine mammals during two-thirds of all pile driving days.

(b) The following additional measures apply to visual monitoring during two-thirds of all pile driving days:

(i) Independent observers (*i.e.*, not construction personnel) are required;

(ii) At least one observer must have prior experience working as an observer;

(iii) Other observers (that do not have prior experience) may substitute education (undergraduate degree in biological science or related field) or training for experience;

(iv) NMFS shall require submission and approval of observer resumes.

(v) Visual acuity in both eyes (correction is permissible) sufficient for discernment of moving targets at the

water's surface with ability to estimate target size and distance; use of binoculars may be necessary to correctly identify the target;

(vi) Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;

(vii) Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates and times when in-water construction activities were suspended to avoid potential incidental injury from construction sound of marine mammals observed within a defined shutdown zone; and marine mammal behavior; and

(viii) Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

(c) Hydroacoustic Monitoring.

(i) During Year 2, the Navy shall verify acoustic monitoring at the source (33 feet) and, where the potential for Level A harassment exists, at a second representative monitoring location at an intermediate distance between the cetacean and pinniped shutdown zones.

(ii) A draft hydroacoustic monitoring plan shall be submitted to NMFS for approval.

(iii) A final report shall be submitted to NMFS within 30 days of completing the verification monitoring.

5. Reporting.

(a) A draft marine mammal monitoring report shall be submitted to NMFS within 90 days after the completion of pile driving and removal activities or 60 days prior to the issuance of any subsequent IHA for this project, whichever comes first. The report shall include an overall description of work completed, a narrative regarding marine mammal sightings, and associated marine mammal observation data sheets. Specifically, the report shall include.

(i) Date and time that monitored activity begins or ends;

(ii) Construction activities occurring during each observation period;

(iii) Weather parameters (*e.g.*, percent cover, visibility);

(iv) Water conditions (*e.g.*, sea state, tide state);

(v) Species, numbers, and, if possible, sex and age class of marine mammals;

(vi) Description of any observable marine mammal behavior patterns, including bearing and direction of travel and distance from pile driving activity;

(vii) Distance from pile driving activities to marine mammals and

distance from the marine mammals to the observation point;

(viii) Locations of all marine mammal observations; and

(ix) Other human activity in the area.

(b) Reporting injured or dead marine mammals:

(i) In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by this IHA, such as serious injury, or mortality, the Navy shall immediately cease the specified activities and report the incident to the Office of Protected Resources, NMFS, and the Northeast/Greater Atlantic Regional Stranding Coordinator, NMFS. The report must include the following information:

(1) Time and date of the incident;

(2) Description of the incident;

(3) Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, and visibility);

(4) Description of all marine mammal observations and active sound source use in the 24 hours preceding the incident;

(5) Species identification or description of the animal(s) involved;

(6) Fate of the animal(s); and

(7) Photographs or video footage of the animal(s).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with the Navy to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The Navy may not resume their activities until notified by NMFS.

(ii) In the event that the Navy discovers an injured or dead marine mammal, and the lead observer determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.*, in less than a moderate state of decomposition), the Navy shall immediately report the incident to the Office of Protected Resources, NMFS, and the Northeast/Greater Atlantic Regional Stranding Coordinator, NMFS.

The report must include the same information identified in 5(b)(i) of this IHA. Activities may continue while NMFS reviews the circumstances of the incident. NMFS shall work with the Navy to determine whether additional mitigation measures or modifications to the activities are appropriate.

(iii) In the event that the Navy discovers an injured or dead marine mammal, and the lead observer determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.*, previously wounded animal, carcass

with moderate to advanced decomposition, or scavenger damage), the Navy shall report the incident to the Office of Protected Resources, NMFS, and the Northeast/Greater Atlantic Regional Stranding Coordinator, NMFS, within 24 hours of the discovery. The Navy shall provide photographs or video footage or other documentation of the stranded animal sighting to NMFS.

6. This Authorization may be modified, suspended or withdrawn if the holder fails to abide by the conditions prescribed herein, or if NMFS determines the authorized taking is having more than a negligible impact on the species or stock of affected marine mammals.

Request for Public Comments

We request comment on our analyses, the draft authorization, and any other aspect of this Notice of Proposed IHA for proposed Waterfront Improvement Projects at Portsmouth Naval Shipyard. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: November 24, 2017.

Donna S. Wieting,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

[FR Doc. 2017-25783 Filed 11-29-17; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XF827

Endangered Species; File No. 21260

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that NMFS Pacific Islands Fisheries Science Center [Responsible Party: Michael Seki, Ph.D.], 1845 Wasp Boulevard, Honolulu, Hawaii, 96818, has applied in due form for a permit to take green (*Chelonia mydas*), hawksbill (*Eretmochelys imbricata*), leatherback (*Dermochelys coriacea*), loggerhead (*Caretta caretta*), and olive ridley (*Lepidochelys olivacea*) sea turtles for purposes of scientific research.

DATES: Written, telefaxed, or email comments must be received on or before January 2, 2018.

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 Protected Species (APPS) home page, <https://apps.nmfs.noaa.gov>, and then selecting File No. 21260 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: Erin Markin or Amy Hapeman, (301) 427-8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of 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).

The Pacific Islands Fisheries Science Center proposes to continue long-term monitoring of sea turtles in the Pacific Islands Region to understand population status, abundance, and trends as well as age at maturity, growth rates, and foraging and movement ecology of green, hawksbill, leatherback, loggerhead, and olive ridley sea turtles. Annually, up to 250 green, 150 hawksbill, 100 loggerhead, 100 leatherback, and 100 olive ridley sea turtles would be captured for morphometric data, tagging (flipper and passive integrated transponder), biological samples, and instrument attachment (acoustic, satellite, and/or archival) prior to release. The permit would be valid for up to ten years from the date of issuance.

Dated: November 27, 2017.

Julia Harrison,

*Chief, Permits and Conservation Division,
Office of Protected Resources, National
Marine Fisheries Service.*

[FR Doc. 2017-25794 Filed 11-29-17; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration**

RIN 0648–XF833

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Management Area; Cost Recovery Programs

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

ACTION: Notice of standard prices and fee percentages.

SUMMARY: NMFS publishes standard prices and fee percentages for cost recovery for the Amendment 80 Program, the American Fisheries Act (AFA) Program, the Aleutian Islands Pollock (AIP) Program, and the Western Alaska Community Development Quota (CDQ) groundfish and halibut Programs. The fee percentage for 2017 is 0.71 percent for the Amendment 80 Program, 0.19 percent for the AFA inshore cooperatives, 0.21 percent for the AFA catcher/processor sector, 0.22 percent for the AFA mothership cooperative, 0 percent for the AIP program, and 0.55 percent for the CDQ groundfish and halibut Programs. This action is intended to provide the 2017 standard prices and fee percentages to calculate the required payment for cost recovery fees due by December 31, 2017.

DATES: The standard prices and fee percentages are valid on November 30, 2017.

FOR FURTHER INFORMATION CONTACT: Carl Greene, Fee Coordinator, 907–586–7105.

SUPPLEMENTARY INFORMATION:**Background**

Section 304(d) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) authorizes and requires the collection of cost recovery fees for limited access privilege programs and the CDQ Program. Cost recovery fees recover the actual costs directly related to the management, data collection, and enforcement of the programs. Section 304(d) of the Magnuson-Stevens Act mandates that cost recovery fees not exceed three percent of the annual ex-vessel value of fish harvested by a program subject to a cost recovery fee, and that the fee be collected either at the time of landing, filing of a landing report, or sale of such fish during a fishing season or in the last quarter of the calendar year in which the fish is harvested.

NMFS manages the Amendment 80 Program, AFA Program, and AIP Program as limited access privilege programs. On January 5, 2016, NMFS published a final rule to implement cost recovery for these three limited access privilege programs and the CDQ groundfish and halibut programs (81 FR 150). The designated representative (for the purposes of cost recovery) for each program is responsible for submitting the fee payment to NMFS on or before the due date of December 31 of the year in which the landings were made. The total dollar amount of the fee due is determined by multiplying the NMFS published fee percentage by the ex-vessel value of all landings under the program made during the fishing year. NMFS publishes this notice of the fee percentages for the Amendment 80, AFA, AIP, and CDQ groundfish and halibut fisheries in the **Federal Register** by December 1 each year.

Standard Prices

The fee liability is based on the ex-vessel value of fish harvested in each program. For purposes of calculating cost recovery fees, NMFS calculates a standard ex-vessel price (standard price) for each species. A standard price is determined using information on landings purchased (volume) and ex-vessel value paid (value). For most groundfish species, NMFS annually summarizes volume and value information for landings of all fishery species subject to cost recovery in order to estimate a standard price for each species. The standard prices are described in U.S. dollars per pound for landings made during the year. The standard prices for all species in the Amendment 80, AFA, AIP, and CDQ groundfish and halibut programs are listed in Table 1. Each landing made under each program is multiplied by the appropriate standard price to arrive at an ex-vessel value for each landing. These values are summed together to arrive at the ex-vessel value of each program (fishery value).

Fee Percentage

NMFS calculates the fee percentage each year according to the factors and methods described in Federal regulations at 50 CFR 679.33(c)(2), 679.66(c)(2), 679.67(c)(2), and 679.95(c)(2). NMFS determines the fee percentage that applies to landings made during the year by dividing the total costs directly related to the management, data collection, and enforcement of each program (direct program costs) during the year by the fishery value. NMFS captures direct program costs through an established

accounting system that allows staff to track labor, travel, contracts, rent, and procurement. For 2017, the direct program costs were tracked from October 1, 2016, to September 30, 2017 (the end of the fiscal year). The individual 2017 fee percentages for the Amendment 80 Program, the American Fisheries Act (AFA) Program, and the Western Alaska Community Development Quota (CDQ) groundfish and halibut Programs are higher relative to percentages calculated for the programs in 2016. This is primarily because direct program costs in 2016 were tracked for only part of the fiscal year, from February 4, 2016 (the effective date of the rule) to September 30, 2016.

NMFS will provide an annual report that summarizes direct program costs for each of the programs in early 2018. NMFS calculates the fishery value as described under the section “Standard Prices.”

Amendment 80 Program Standard Prices and Fee Percentage

The Amendment 80 Program allocates total allowable catches (TACs) of groundfish species, other than Bering Sea pollock, to identified trawl catcher/processors in the Bering Sea and Aleutian Islands (BSAI). The Amendment 80 Program allocates a portion of the BSAI TACs of six species: Atka mackerel, Pacific cod, flathead sole, rock sole, yellowfin sole, and Aleutian Islands Pacific ocean perch. Participants in the Amendment 80 sector have established cooperatives to harvest these allocations. Each Amendment 80 cooperative is responsible for payment of the cost recovery fee for fish landed under the Amendment 80 Program. Cost recovery requirements for the Amendment 80 Program are at 50 CFR 679.95.

For most Amendment 80 species, NMFS annually summarizes volume and value information for landings of all fishery species subject to cost recovery in order to estimate a standard price for each fishery species. Regulations specify that for rock sole, NMFS shall calculate a separate standard price for two periods—January 1 through March 31, and April 1 through October 31, which accounts for a substantial difference in estimated rock sole prices during the first quarter of the year relative to the remainder of the year. The volume and value information is obtained from the First Wholesale Volume and Value Report, and the Pacific Cod Ex-Vessel Volume and Value Report.

Using the fee percentage formula described above, the estimated percentage of direct program costs to

fishery value for the 2017 calendar year is 0.71 percent for the Amendment 80 Program. For 2017, NMFS applied the fee percentage to each Amendment 80 species landing that was debited from an Amendment 80 cooperative quota allocation between January 1 and December 31 to calculate the Amendment 80 fee liability for each Amendment 80 cooperative. The 2017 fee payments must be submitted to NMFS on or before December 31, 2017. Payment must be made in accordance with the payment methods set forth in 50 CFR 679.95(a)(3)(iv).

AFA Standard Price and Fee Percentages

The AFA allocates the Bering Sea directed pollock fishery TAC to three sectors—catcher/processor, mothership, and inshore. Each sector has established cooperatives to harvest the sector’s exclusive allocation. These cooperatives are responsible for paying the fee for Bering Sea pollock landed under the AFA. Cost recovery requirements for the AFA sectors are at 50 CFR 679.66.

NMFS calculates the standard price for pollock using the most recent annual value information reported to the Alaska Department of Fish & Game for the Commercial Operator’s Annual Report and compiled in the Alaska Commercial Fisheries Entry Commission Gross Earnings data for Bering Sea pollock. Due to the time required to compile the data, there is a one-year delay between the gross earnings data year and the fishing year to which it is applied. For example, NMFS used 2016 gross earnings data to calculate the standard price for 2017 pollock landings.

Using the fee percentage formula described above, the estimated percentage of direct program costs to fishery value for the 2017 calendar year is 0.19 percent for the AFA inshore sector, 0.21 percent for the AFA catcher/processor sector, and 0.22 percent for the AFA mothership sector. For 2017, NMFS applied the fee percentage to each AFA inshore cooperative, AFA mothership cooperative, and AFA catcher/processor sector landing of Bering Sea pollock debited from its AFA pollock fishery allocation between January 1 and December 31 to calculate the AFA fee liability for each AFA

cooperative. The 2017 fee payments must be submitted to NMFS on or before December 31, 2017. Payment must be made in accordance with the payment methods set forth in 50 CFR 679.66(a)(4)(iv).

AIP Program Standard Price and Fee Percentage

The AIP Program allocates the Aleutian Islands directed pollock fishery TAC to the Aleut Corporation, consistent with the Consolidated Appropriations Act of 2004 (Pub. L. 108–109), and its implementing regulations. Annually, prior to the start of the pollock season, the Aleut Corporation provides NMFS with the identity of its designated representative for harvesting the Aleutian Islands directed pollock fishery TAC. The same individual is responsible for the submission of all cost recovery fees for pollock landed under the AIP Program. Cost recovery requirements for the AIP Program are at 50 CFR 679.67.

NMFS calculates the standard price for pollock using the most recent annual value information reported to the Alaska Department of Fish & Game for the Commercial Operator’s Annual Report and compiled in the Alaska Commercial Fisheries Entry Commission Gross Earnings data for Aleutian Islands pollock. Due to the time required to compile the data, there is a one-year delay between the gross earnings data year and the fishing year to which it is applied. For example, NMFS used 2016 gross earnings data to calculate the standard price for 2017 pollock landings.

For the 2017 fishing year, the Aleut Corporation did not select any participants to harvest or process the Aleutian Islands directed pollock fishery TAC, and most of that TAC was reallocated to the Bering Sea directed pollock fishery TAC. Using the fee percentage formula described above, the estimated percentage of direct program costs to fishery value for the 2017 calendar year is 0 percent for the AIP Program.

CDQ Standard Price and Fee Percentage

The CDQ Program was implemented in 1992 to provide access to BSAI fishery resources to villages located in

Western Alaska. Section 305(i) of the Magnuson-Stevens Act identifies 65 villages eligible to participate in the CDQ Program and the six CDQ groups to represent these villages. CDQ groups receive exclusive harvesting privileges of the TACs for a broad range of crab species, groundfish species, and halibut. NMFS implemented a CDQ cost recovery program for the BSAI crab fisheries in 2005 (70 FR 10174, March 2, 2005) and published the cost recovery fee percentage for the 2017/2018 crab fishing year on July 13, 2017 (82 FR 32329). This notice provides the cost recovery fee percentage for the CDQ groundfish and halibut programs. Each CDQ group is subject to cost recovery fee requirements for landed groundfish and halibut, and the designated representative of each CDQ group is responsible for submitting payment for their CDQ group. Cost recovery requirements for the CDQ Program are at 50 CFR 679.33.

For most CDQ groundfish species, NMFS annually summarizes volume and value information for landings of all fishery species subject to cost recovery in order to estimate a standard price for each fishery species. The volume and value information is obtained from the First Wholesale Volume and Value Report and the Pacific Cod Ex-Vessel Volume and Value Report. For CDQ halibut and fixed-gear sablefish, NMFS calculates the standard prices using information from the Individual Fishing Quota (IFQ) Ex-Vessel Volume and Value Report, which collects information on both IFQ and CDQ volume and value.

Using the fee percentage formula described above, the estimated percentage of direct program costs to fishery value for the 2017 calendar year is 0.55 percent for the CDQ groundfish and halibut programs. For 2017, NMFS applied the calculated CDQ fee percentage to all CDQ groundfish and halibut landings made between January 1 and December 31 to calculate the CDQ fee liability for each CDQ group. The 2017 fee payments must be submitted to NMFS on or before December 31, 2017. Payment must be made in accordance with the payment methods set forth in 50 CFR 679.33(a)(3)(iv).

TABLE 1—STANDARD EX-VESSEL PRICES BY SPECIES FOR THE 2017 FISHING YEAR

Species	Gear type	Reporting period	Standard ex-vessel price per pound (\$)
Arrowtooth flounder	All	January 1, 2017–October 31, 2017	0.32
Atka mackerel	All	January 1, 2017–October 31, 2017	0.36

TABLE 1—STANDARD EX-VESSEL PRICES BY SPECIES FOR THE 2017 FISHING YEAR—Continued

Species	Gear type	Reporting period	Standard ex-vessel price per pound (\$)
Flathead sole	All	January 1, 2017–October 31, 2017	0.22
Greenland turbot	All	January 1, 2017–October 31, 2017	0.55
CDQ halibut	Fixed gear	October 1, 2016–September 30, 2017	5.97
Pacific cod	Fixed gear	January 1, 2017–October 31, 2017	0.33
	Trawl gear	January 1, 2017–October 31, 2017	0.28
Pacific ocean perch	All	January 1, 2017–October 31, 2017	0.25
Pollock	All	January 1, 2016–December 31, 2016	0.14
Rock sole	All	January 1, 2017–March 31, 2017	0.23
	All	April 1, 2017–October 31, 2017	0.17
Sablefish	Fixed gear	October 1, 2016–September 30, 2017	4.12
	Trawl gear	January 1, 2017–October 31, 2017	1.05
Yellowfin sole	All	January 1, 2017–October 31, 2017	0.17

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

Dated: November 27, 2017.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2017–25800 Filed 11–29–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2017–OS–0063]

Submission for OMB Review; Comment Request

ACTION: 30-day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by January 2, 2018.

ADDRESSES: Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *Oira_submission@omb.eop.gov*. Please identify the proposed information collection by DoD Desk Officer and the Docket ID number and title of the information collection.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil*.

SUPPLEMENTARY INFORMATION:

Title, Associated Form and OMB Number: Data for Payment of Retired Personnel, DD Form 2656, OMB Control Number 0704–XXXX.

Type of Request: Emergency.

Number of Respondents: 65,000.

Responses per Respondent: 1.

Annual Responses: 65,000.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 16,250.

Needs and Uses: This information collection is being submitted as an emergency. The information collection requirement is necessary to obtain applicable retirement information from Uniformed Service members and allow those members to make certain retired pay and survivor annuity elections prior to retirement from service or prior to reaching eligibility to receive retired pay. The form will also allow eligible members covered by the Blended Retirement System to make a voluntary election of a partial lump sum of retired pay, as required by Section 1415 of title 10, United States Code.

Affected Public: All Uniformed Service members who are eligible to retire or to begin receiving retired pay, their spouses, and dependents.

Frequency: As Required.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Mr. Frederick Licari.

Written requests for copies of the information collection proposal should be sent to Mr. Licari at WHS/ESD Directives Division, 4800 Mark Center Drive, East Tower, Suite 03F09, Alexandria, VA 22350–3100.

Dated: November 27, 2017.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2017–25820 Filed 11–29–17; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2016–OS–0033]

Submission for OMB Review; Comment Request

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by January 2, 2018.

ADDRESSES: Comments and recommendations on the proposed information collection should be emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at *Oira_submission@omb.eop.gov*. Please identify the proposed information collection by DoD Desk Officer and the Docket ID number and title of the information collection.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil*.

SUPPLEMENTARY INFORMATION:

Title, Associated Form and OMB Number: OUSD—Policy Pulse Survey.

OMB Control Number: 0704—XXXX.

Type of Request: New collection.

Number of Respondents: 153.

Responses per Respondent: 2.

Annual Responses: 306.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 76.5.

Needs and Uses: The information collection requirement is necessary to obtain and record responses from contractor personnel employed within the Office of the Under Secretary of Defense for Policy and its components. The survey results are analyzed by the Leadership and Organizational Development Office to assess the progress of the current human capital strategy and to address emerging human capital and training issues.

Affected Public: Individuals or households.

Frequency: Semi-annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Mr. Frederick Licari.

Written requests for copies of the information collection proposal should be sent to Mr. Licari at WHS/ESD Directives Division, 4800 Mark Center Drive, East Tower, Suite 03F09, Alexandria, VA 22350–3100.

Dated: November 27, 2017.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2017–25812 Filed 11–29–17; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2017–OS–0033]

Submission for OMB Review; Comment Request

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by January 2, 2018.

ADDRESSES: Comments and recommendations on the proposed information collection should be Emailed to Ms. Jasmeet Seehra, DoD Desk Officer, at Oira_submission@omb.eop.gov. Please identify the proposed information collection by DoD Desk Officer and the Docket ID number and title of the information collection.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493, or whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

SUPPLEMENTARY INFORMATION:

Title, Associated Form and OMB Number: Computer Aided Dispatch and Record Management System (CAD/RMS); OMB Control Number 0704–0522.

Type of Request: Reinstatement.

Number of Respondents: 693.

Responses per Respondent: 1.

Annual Responses: 693.

Average Burden per Response: 20 minutes.

Annual Burden Hours: 231.

Needs and Uses: The information collection requirement is necessary to obtain information regarding incidents that occur at the Pentagon and other facilities under the jurisdiction of the Pentagon Force Protection Agency.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number and title for this **Federal Register** document. The general policy for comments and other submissions

from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Mr. Frederick Licari.

Written requests for copies of the information collection proposal should be sent to Mr. Licari at WHS/ESD Directives Division, 4800 Mark Center Drive, East Tower, Suite 03F09, Alexandria, VA 22350–3100.

Dated: November 27, 2017.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2017–25804 Filed 11–29–17; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2017–ICCD–0120]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Study of Higher Education Articulation Agreements Covering the Early Care and Education Workforce

AGENCY: Office of Planning, Evaluation and Policy Development (OPEPD), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before January 2, 2018.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED–2017–ICCD–0120. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 216–32, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Erica Lee, 202–260–1463.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Study of Higher Education Articulation Agreements Covering the Early Care and Education Workforce.

OMB Control Number: 1875–NEW.

Type of Review: A new information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 47.

Total Estimated Number of Annual Burden Hours: 104.

Abstract: The purpose of this study is to identify elements that states have in place to enable successful articulation as early care and education (ECE) workers progress from an associate's degree to a bachelor's degree and describe states' successes and challenges in implementing the elements. Specifically, the study will use telephone interviews, focus groups, and review of extant documents to examine ECE articulation policies and their implementation in six focal states that have statewide articulation policies addressing degrees or coursework in early childhood education.

This analysis will rely on three types of data sources:

- *Telephone interviews.* One-on-one phone interviews will be conducted with 76 individuals including: Faculty and college administrators from states' two-year and four-year institutions of higher education; state higher education administrators; representatives from higher education governing bodies and ECE licensure bodies; and other individuals who are knowledgeable about development, implementation, and monitoring of ECE articulation policies and the ECE workforce.

- *Focus groups.* Virtual focus groups will be held in each of the six states, including student focus groups (with 24 students total) and focus groups of institutional support staff (with 20 staff total).

- *Review of extant documents.* These documents will include articulation policies, legislation, and governing body meeting notes.

Dated: November 27, 2017.

Stephanie Valentine,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2017–25796 Filed 11–29–17; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2017–ICCD–0119]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; E-Complaint Form

AGENCY: Office of Management (OM), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before January 2, 2018.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED–2017–ICCD–0119. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after*

the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 216–32, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Kathleen Styles, 202–453–5587.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: E-Complaint Form.

OMB Control Number: 1880–0544.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 500.

Total Estimated Number of Annual Burden Hours: 500.

Abstract: The Family Policy Compliance Office (FPCO) is the office responsible for administering the Family Educational Rights and Privacy Act (FERPA). The E-Complaint Form is used by parents and students to submit complaints requesting an investigation of alleged violations under FERPA.

Dated: November 27, 2017.

Stephanie Valentine,

Acting Director, Information Collection
Clearance Division, Office of the Chief Privacy
Officer, Office of Management.

[FR Doc. 2017-25790 Filed 11-29-17; 8:45 am]

BILLING CODE 4000-01-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2017-0009; FRL-9966-69]

Pesticide Emergency Exemptions; Agency Decisions and State and Federal Agency Crisis Declarations

AGENCY: Environmental Protection
Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted or denied emergency exemptions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) for use of pesticides as listed in this notice. The exemptions or denials were granted during the period April 1, 2017 to June 30, 2017 to control unforeseen pest outbreaks.

FOR FURTHER INFORMATION CONTACT: Michael L. 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: RDfRNNotices@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

If you have any questions regarding the applicability of this action to a particular entity, consult the person listed at the end of the emergency exemption or denial.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA-HQ-OPP-2017-0009, 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>.

II. Background

EPA has granted or denied emergency exemptions to the following State and Federal agencies. The emergency exemptions may take the following form: Crisis, public health, quarantine, or specific. EPA has also listed denied emergency exemption requests in this notice.

Under FIFRA section 18 (7 U.S.C. 136p), EPA can authorize the use of a pesticide when emergency conditions exist. Authorizations (commonly called emergency exemptions) are granted to State and Federal agencies and are of four types:

1. A “specific exemption” authorizes use of a pesticide against specific pests on a limited acreage in a particular State. Most emergency exemptions are specific exemptions.
2. “Quarantine” and “public health” exemptions are emergency exemptions issued for quarantine or public health purposes. These are rarely requested.
3. A “crisis exemption” is initiated by a State or Federal agency (and is confirmed by EPA) when there is insufficient time to request and obtain EPA permission for use of a pesticide in an emergency.

EPA may deny an emergency exemption: If the State or Federal agency cannot demonstrate that an emergency exists, if the use poses unacceptable risks to the environment, or if EPA cannot reach a conclusion that the proposed pesticide use is likely to result in “a reasonable certainty of no harm” to human health, including exposure of residues of the pesticide to infants and children.

If the emergency use of the pesticide on a food or feed commodity would result in pesticide chemical residues,

EPA establishes a time-limited tolerance meeting the “reasonable certainty of no harm standard” of the Federal Food, Drug, and Cosmetic Act (FFDCA).

In this document: EPA identifies the State or Federal agency granted the exemption or denial, the type of exemption, the pesticide authorized and the pests, the crop or use for which authorized, number of acres (if applicable), and the duration of the exemption. EPA also gives the **Federal Register** citation for the time-limited tolerance, if any.

III. Emergency Exemptions and Denials

A. U.S. States and Territories

Alabama

Department of Agriculture

Specific exemption: EPA authorized the use of flupyradifurone on a maximum of 500 acres of sweet sorghum (forage and syrup) to control sugarcane aphid. A time-limited tolerance in connection with this action has been established in 40 CFR 180.679(b). Effective June 12, 2017 to November 15, 2017.

Arizona

Department of Agriculture

Specific exemption: EPA authorized the use of sulfoxaflor on a maximum of 26,000 acres of sorghum (grain and forage) to control sugarcane aphid. A time-limited tolerance in connection with this action has been established in 40 CFR 180.668(b). Effective May 1, 2017 to November 30, 2017.

EPA authorized the use of sulfoxaflor on a maximum of 150,000 acres of cotton to control tarnished plant bug (*Lygus spp.*). A permanent tolerance in connection with an earlier registration action has been established in 40 CFR 180.668(a). Effective June 1, 2017 to October 31, 2017.

Arkansas

State Plant Board

Specific exemptions: EPA authorized the use of sulfoxaflor on a maximum of 420,000 acres of cotton to control tarnished plant bug (*Lygus lineolaris*). A permanent tolerance in connection with an earlier registration action has been established in 40 CFR 180.668(a). Effective June 1, 2017 to October 31, 2017.

EPA authorized the use of flupyradifurone on a maximum of 200 acres of sweet sorghum (forage and syrup) to control sugarcane aphid. A time-limited tolerance in connection with this action has been established in 40 CFR 180.679(b). Effective June 12, 2017 to November 15, 2017.

California

Department of Pesticide Regulation

Specific exemption: EPA authorized the use of methoxyfenozide on a maximum of 100,000 acres of rice to control armyworm (*Mythimna unipuncta*) and Western Yellow striped Armyworm (*Spodoptera praefica*). A time-limited tolerance in connection with this action has been established in 40 CFR 180.544(b). Effective June 30, 2017 to October 4, 2017.

Colorado

Department of Agriculture

Specific exemption: EPA authorized the use of sulfoxaflor on a maximum of 500,000 acres of sorghum (grain and forage) to control sugarcane aphid. A time-limited tolerance in connection with this action has been established in 40 CFR 180.668(b). Effective April 9, 2017 to November 30, 2017.

Delaware

Department of Agriculture

Specific exemptions: EPA authorized the use of bifenthrin on a maximum of 415 acres of apples, pears, and nectarines, to control the brown marmorated stink bug. A time-limited tolerance in connection with this action has been established in 40 CFR 180.442(b). Effective April 20, 2017 to October 15, 2017.

EPA authorized the use of dinotefuran on a maximum of 415 acres of pome and stone fruit to control the brown marmorated stink bug. A time-limited tolerance in connection with this action has been established in 40 CFR 180.603(b). Effective May 22, 2017 to October 15, 2017.

Florida

Department of Agriculture and Consumer Services

Quarantine exemption: EPA authorized the use of propiconazole on a maximum of 7,500 acres of avocado trees to control Laurel wilt (*Raffaelea lauricola*). A time-limited tolerance in connection with this action has been established in 40 CFR 180.434(b). Effective April 3, 2017 to April 3, 2020.

Public health exemptions: EPA authorized use of pyriproxyfen (a larvicide) and *Beauveria bassiana* (a fungus pathogenic to adult insects) to help control *Aedes* species of mosquitoes, vectors of the Zika virus, in Florida. Effective June 15, 2017 to June 15, 2018.

Georgia

Department of Agriculture

Specific exemptions: EPA authorized the use of sulfoxaflor on a maximum of 50,000 acres of sorghum (grain and forage) to control sugarcane aphid. A time-limited tolerance in connection with this action has been established in 40 CFR 180.668(b). May 1, 2017 to November 30, 2017.

EPA authorized the use of flupyradifurone on a maximum of 200 acres of sweet sorghum (forage and syrup) to control sugarcane aphid. A time-limited tolerance in connection with this action has been established in 40 CFR 180.679(b). Effective June 12, 2017 to November 15, 2017.

Hawaii

Department of Agriculture

Crisis exemption: On May 31, 2017 the Hawaii Department of Agriculture declared a crisis exemption for the use of tolfenpyrad on watermelon to control watermelon thrips. The use season is expected to last until October 31, 2017, and a specific exemption request was also submitted.

Kansas

Department of Agriculture

Specific exemption: EPA authorized the use of sulfoxaflor on a maximum of 2,850,000 acres of sorghum (grain and forage) to control sugarcane aphid. A time-limited tolerance in connection with this action has been established in 40 CFR 180.668(b). Effective April 9, 2017 to November 30, 2017.

Kentucky

Department of Agriculture

Specific exemption: EPA authorized the use of flupyradifurone on a maximum of 1,500 acres of sweet sorghum (forage and syrup) to control sugarcane aphid. A time-limited tolerance in connection with this action has been established in 40 CFR 180.679(b). Effective June 12, 2017 to November 15, 2017.

Maryland

Department of Agriculture

Specific exemptions: EPA authorized the use of bifenthrin on a maximum of 3,570 acres of apples, pears, and nectarines, to control the brown marmorated stink bug. A time-limited tolerance in connection with this action has been established in 40 CFR 180.442(b). Effective April 20, 2017 to October 15, 2017.

EPA authorized the use of dinotefuran on a maximum of 3,730 acres of pome and stone fruit to control the brown

marmorated stink bug. A time-limited tolerance in connection with this action has been established in 40 CFR 180.603(b). Effective May 22, 2017 to October 15, 2017.

Michigan

Department of Agriculture

Crisis exemption: On June 29, 2017 the Michigan Department of Agriculture declared a crisis exemption for the use of zeta-cypermethrin on tart cherries to control Spotted Wing Drosophila. The use season is expected to last until August 15, 2017, and a specific exemption request was also submitted.

Mississippi

Department of Agriculture and Commerce

Specific exemptions: EPA authorized the use of sulfoxaflor on a maximum of 750,000 acres of cotton to control tarnished plant bug (*Lygus lineolaris*). A permanent tolerance in connection with an earlier registration action has been established in 40 CFR 180.668(a). Effective June 1, 2017 to October 31, 2017.

EPA authorized the use of flupyradifurone on a maximum of 1,000 acres of sweet sorghum (forage and syrup) to control sugarcane aphid. A time-limited tolerance in connection with this action has been established in 40 CFR 180.679(b). Effective June 12, 2017 to November 15, 2017.

Missouri

Department of Agriculture

Specific exemptions: EPA authorized the use of sulfoxaflor on a maximum of 85,000 acres of sorghum (grain and forage) to control sugarcane aphid. A time-limited tolerance in connection with this action has been established in 40 CFR 180.668(b). April 20, 2017 to November 30, 2017.

EPA authorized the use of sulfoxaflor on a maximum of 241,500 acres of cotton to control tarnished plant bug (*Lygus lineolaris*). A permanent tolerance in connection with an earlier registration action has been established in 40 CFR 180.668(a). Effective June 1, 2017 to October 31, 2017.

New Mexico

Department of Agriculture

Specific exemption: EPA authorized the use of sulfoxaflor on a maximum of 140,000 acres of sorghum (grain and forage) to control sugarcane aphid. A time-limited tolerance in connection with this action has been established in 40 CFR 180.668(b). May 5, 2017 to November 30, 2017.

New York

Department of Environmental Conservation

Specific exemption: EPA authorized the use of bifenthrin on a maximum of 7,321 acres of apples, pears, and nectarines, to control the brown marmorated stink bug. A time-limited tolerance in connection with this action has been established in 40 CFR 180.442(b). Effective June 26, 2017 to October 15, 2017.

North Carolina

Department of Agriculture and Consumer Services

Specific exemptions: EPA authorized the use of fluridone on a maximum of 25,000 acres of sweet potatoes to control Palmer Amaranth. A tolerance is established at 40 CFR 180.420(d) for vegetable, root and tuber, group 1 at 0.1 ppm (for indirect or inadvertent residues) which will support any residues resulting from this emergency use. Effective April 25, 2017 to July 20, 2017.

EPA authorized the use of sulfoxaflor on a maximum of 50,000 acres of sorghum (grain and forage) to control sugarcane aphid. A time-limited tolerance in connection with this action has been established in 40 CFR 180.668(b). Effective May 5, 2017 to November 30, 2017.

EPA authorized the use of bifenthrin on a maximum of 3,000 acres of apples, pears, and nectarines, to control the brown marmorated stink bug. A time-limited tolerance in connection with this action has been established in 40 CFR 180.442(b). Effective May 12, 2017 to October 15, 2017.

EPA authorized the use of dinotefuran on a maximum of 4,000 acres of pome and stone fruit to control the brown marmorated stink bug. A time-limited tolerance in connection with this action has been established in 40 CFR 180.603(b). Effective May 22, 2017 to October 15, 2017.

EPA authorized the use of flupyradifurone on a maximum of 150 acres of sweet sorghum (forage and syrup) to control sugarcane aphid. A time-limited tolerance in connection with this action has been established in 40 CFR 180.679(b). Effective June 12, 2017 to November 15, 2017.

Oklahoma

Department of Agriculture

Specific exemption: EPA authorized the use of sulfoxaflor on a maximum of 300,000 acres of sorghum (grain and forage) to control sugarcane aphid. A time-limited tolerance in connection

with this action has been established in 40 CFR 180.668(b). Effective April 9, 2017 to November 30, 2017.

Pennsylvania

Department of Agriculture

Specific exemptions: EPA authorized the use of bifenthrin on a maximum of 24,973 acres of apples, pears, and nectarines, to control the brown marmorated stink bug. A time-limited tolerance in connection with this action has been established in 40 CFR 180.442(b). Effective April 20, 2017 to October 15, 2017.

EPA authorized the use of dinotefuran on a maximum of 24,974 acres of pome and stone fruit to control the brown marmorated stink bug. A time-limited tolerance in connection with this action has been established in 40 CFR 180.603(b). Effective May 22, 2017 to October 15, 2017.

South Carolina

Department of Pesticide Regulation

Specific exemption: EPA authorized the use of sulfoxaflor on a maximum of 19,600 acres of sorghum (grain and forage) to control sugarcane aphid. A time-limited tolerance in connection with this action has been established in 40 CFR 180.668(b). Effective April 9, 2017 to November 30, 2017.

Tennessee

Department of Agriculture

Specific exemption: EPA authorized the use of sulfoxaflor on a maximum of 240,000 acres of cotton to control tarnished plant bug (*Lygus lineolaris*). A permanent tolerance in connection with an earlier registration action has been established in 40 CFR 180.668(a). Effective June 1, 2017 to September 30, 2017.

EPA authorized the use of flupyradifurone on a maximum of 750 acres of sweet sorghum (forage and syrup) to control sugarcane aphid. A time-limited tolerance in connection with this action has been established in 40 CFR 180.679(b). Effective June 12, 2017 to November 15, 2017.

Texas

Department of Agriculture

Specific exemption: EPA authorized the use of sulfoxaflor on a maximum of 5.5 million acres of cotton to control tarnished plant bug (*Lygus lineolaris*). A permanent tolerance in connection with an earlier registration action has been established in 40 CFR 180.668(a). Effective April 28, 2017 to October 31, 2017.

EPA authorized the use of tolfenpyrad on a maximum of 10,000 acres of dry

bulb onions to control thrips (*Thrips tabaci*). A time-limited tolerance in connection with this action will be established in 40 CFR 180.675(b). Effective June 2, 2017 to July 10, 2017.

Virginia

Department of Agriculture and Consumer Services

Specific exemption: EPA authorized the use of sulfoxaflor on a maximum of 16,591 acres of sorghum (grain and forage) to control sugarcane aphid. A time-limited tolerance in connection with this action has been established in 40 CFR 180.668(b). Effective April 9, 2017 to November 30, 2017.

EPA authorized the use of bifenthrin on a maximum of 29,000 acres of apples, pears, and nectarines, to control the brown marmorated stink bug. A time-limited tolerance in connection with this action has been established in 40 CFR 180.442(b). Effective April 20, 2017 to October 15, 2017.

EPA authorized the use of dinotefuran on a maximum of 29,000 acres of pome and stone fruit to control the brown marmorated stink bug. A time-limited tolerance in connection with this action has been established in 40 CFR 180.603(b). Effective May 22, 2017 to October 15, 2017.

West Virginia

Department of Agriculture

Specific exemption: EPA authorized the use of bifenthrin on a maximum of 5,986 acres of apples, pears, and nectarines, to control the brown marmorated stink bug. A time-limited tolerance in connection with this action has been established in 40 CFR 180.442(b). Effective May 5, 2017 to October 15, 2017.

EPA authorized the use of dinotefuran on a maximum of 5,986 acres of pome and stone fruit to control the brown marmorated stink bug. A time-limited tolerance in connection with this action has been established in 40 CFR 180.603(b). Effective May 22, 2017 to October 15, 2017.

B. Federal Departments and Agencies

Defense Department

Department of Defense

Armed Forces Pest Management Board

Specific exemption. EPA authorized use of permethrin for treatment of unoccupied military aircraft to comply with disinsection requirements of Italy and other countries, to prevent dissemination of potential insect disease vectors such as the *Aedes* mosquito, vector of the zika virus. Signed June 26,

2017, effective July 13, 2017 to July 13, 2018.

Centers for Disease Control and Prevention

Public health exemptions: EPA authorized use of pyriproxyfen (a larvicide) and *Beauveria bassiana* (a fungus pathogenic to adult insects) to help control *Aedes* species of mosquitoes, vectors of the zika virus, in Puerto Rico. Effective May 12, 2017 to May 12, 2018.

Authority: 7 U.S.C. 136 *et seq.*

Dated: October 18, 2017.

Michael Goodis,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2017-25831 Filed 11-29-17; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPPT-2016-0675; FRL-9968-41]

TSCA Reporting and Recordkeeping Requirements; Standards for Small Manufacturers and Processors; Final Determination

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: On December 15, 2016, EPA issued a notice in the **Federal Register** requesting public comment on whether revision to the current size standards for small manufacturers and processors, which are used in connection with reporting regulations under the Toxic Substances Control Act (TSCA) section 8(a), is warranted. This document describes EPA's final determination that revision to the current size standards is warranted.

FOR FURTHER INFORMATION CONTACT: For technical information contact: Lynne Blake-Hedges, Chemistry, Economics, and Sustainable Strategies Division (7406M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460-0001; telephone number: (202) 564-8807; email address: blake-hedges.lynne@epa.gov.

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email address: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you manufacture or process chemical substances or mixtures. 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:

- Basic Chemical Manufacturers (NAICS code 3251);
- Resin, Synthetic Rubber, and Artificial Synthetic Fibers and Filament Manufacturers (NAICS code 3252);
- Pesticide, Fertilizer, and Other Agricultural Chemical Manufacturers (NAICS code 3253);
- Paint, Coating, and Adhesive Manufacturers (NAICS code 3255);
- Other Chemical Product and Preparation Manufacturers (NAICS code 3259); and
- Petroleum Refineries (NAICS code 32411).

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA-HQ-OPPT-2016-0675, is available at <http://www.regulations.gov> or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC. 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 OPPT Docket is (202) 566-0280. Please review the visitor instructions and additional information about the docket available at <http://www.epa.gov/dockets>.

II. What action is the agency taking?

On June 22, 2016, President Obama signed into law the Frank R. Lautenberg Chemical Safety for the 21st Century Act which amends the Toxic Substances Control Act (TSCA), the nation's primary chemicals management law. A summary of the new law is available at <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/frank-r-lautenberg-chemical-safety-21st-century-act>. This particular action involves revised TSCA section 8(a)(3)(C), which requires EPA, after consultation with the Administrator of the Small Business Administration, to

review the adequacy of the standards for determining which manufacturers and processors qualify as small manufacturers and processors for purposes of TSCA sections 8(a)(1) and 8(a)(3). (Note that under TSCA section 3(9), manufacture includes import.) TSCA furthermore requires that (after consulting with the Small Business Administration and providing public notice and an opportunity for comment) EPA determine whether revision of the standards is warranted. For the reasons described below, EPA determines that revision of the standards is warranted.

In the 1980s, EPA issued standards that are used in identifying which businesses qualify as small manufacturers and processors for purposes of the reporting and recordkeeping rules issued under TSCA section 8(a). Under TSCA section 8(a)(1), small manufacturers and processors are generally exempt from section 8(a) reporting requirements, except in limited cases set forth in TSCA section 8(a)(3).

In 1982, EPA finalized standards for determining which manufacturers of a reportable chemical substance qualify as small manufacturers for purposes of the section 8(a) Preliminary Assessment Information Reporting (PAIR) rules, codified in 40 CFR part 712, subpart B. The small manufacturer standard for PAIR rules is found at 40 CFR 712.25(c).

In 1988, EPA established general small manufacturer standards for use in other rules issued under TSCA section 8(a) (40 CFR 704.3). For example, these are the standards that now apply to the Chemical Data Reporting (CDR) rule (40 CFR part 711). The general standards are somewhat different from the earlier standards that are codified for use in the PAIR rules. The general small manufacturer standards are as follows:

Small manufacturer or importer means a manufacturer or importer that meets either of the following standards:

1. *First standard.* A manufacturer or importer of a substance is small if its total annual sales, when combined with those of its parent company (if any), are less than \$40 million. However, if the annual production or importation volume of a particular substance at any individual site owned or controlled by the manufacturer or importer is greater than 45,400 kilograms (100,000 pounds), the manufacturer or importer shall not qualify as small for purposes of reporting on the production or importation of that substance at that site, unless the manufacturer or importer qualifies as small under standard (2) of this definition.

2. *Second standard.* A manufacturer or importer of a substance is small if its

total annual sales, when combined with those of its parent company (if any), are less than \$4 million, regardless of the quantity of substances produced or imported by that manufacturer or importer.

3. *Inflation index.* EPA shall make use of the Producer Price Index for Chemicals and Allied Products, as compiled by the U.S. Bureau of Labor Statistics, for purposes of determining the need to adjust the total annual sales values and for determining new sales values when adjustments are made. EPA may adjust the total annual sales values whenever the Agency deems it necessary to do so, provided that the Producer Price Index for Chemicals and Allied Products has changed more than 20 percent since either the most recent previous change in sales values or the date of promulgation of this rule, whichever is later. EPA shall provide **Federal Register** notification when changing the total annual sales values.

Pursuant to authority under section 8(a)(3)(B), certain section 8(a) rules codify slight variations of the general small manufacturer standards at 40 CFR 704.3. (See, e.g., 40 CFR 704.45). Other rules issued under TSCA section 8(a) establish (for use in a particular rule) analogous standards for small processors (See, e.g., 40 CFR 704.33).

As an initial step in evaluating whether a change in these current size standards are warranted, EPA reviewed the change in the Producer Price Index (PPI) for Chemicals and Allied Products between 1988 (the year the general size standards at 40 CFR 704.3 were last revised) and 2015 (the most recent year of PPI data available) (Ref. 1). EPA found that the PPI has changed by 129 percent, far exceeding the 20 percent inflation index specified as a level above which EPA may adjust annual sales levels in the current standard if deemed necessary. This change to the PPI is pertinent for both the \$4 million annual sales standard and the \$40 million threshold used in the combined sales and production standard. Furthermore, among the more than 500 revenue-based size standards set by the Small Business Administration (SBA), the lowest is \$5.5 million, and more than 75% of those standards are in excess of \$7.5 million. Some revenue-based standards are as high as \$38.5 million. Thus, EPA's existing \$4 million annual sales standard is an outlier at the low end of this range. Along the same lines, the sales-only size standard EPA recently adopted for the TSCA section 8(a) nanoscale reporting rule is \$11 million, significantly larger than \$4 million. Because of the magnitude of the increase in the PPI since the last

revision of the size standards and because the current annual sales standard is comparatively low given current revenue-based size standards developed by SBA, EPA preliminarily determined that a revision to currently codified size standards is warranted.

On December 15, 2016, EPA published its preliminary determination and requested public comment on the adequacy of the current standards and whether revision of the standards is warranted. In addition, EPA consulted with the SBA and received feedback on the consultation from SBA on April 5, 2017. SBA's consultation feedback recommended that EPA "apply a comprehensive approach that not only evaluates inflation but also examines other important factors, such as the characteristics of firms and industries associated with manufacturing or importation of chemical substances and percentage of firms impacted by the rules, to determine whether or not a revision to the current size standards is warranted."

EPA reopened the public comment period on May 9, 2017 to give the public an opportunity to review SBA's consultation feedback to inform their comments on EPA's preliminary determination. On May 9, 2017, EPA's preliminary finding and its basis remained the same as in the December 15, 2016 publication in the **Federal Register**.

EPA's decision not to consider a more comprehensive range of factors as recommended in SBA's consultation feedback before taking the current action is appropriate because the current action is limited to determining whether "revision of the standards" is warranted or not. See TSCA section 8(a)(3)(C)(ii). (The set of size standards covered by this determination are those that EPA has issued under TSCA section 8(a)(3)(B), pertinent to information collection under TSCA section 8(a).) EPA found that the PPI index changed by a percentage far exceeding the 20 percent inflation index. EPA had previously specified 20 percent as a level above which EPA may adjust annual sales levels in the current standard if deemed necessary. This change in the PPI index (along with the observation that the current annual sales standard is comparatively low given current revenue-based size standards developed by SBA) is a sufficient basis to determine that *some* revision of the standards is warranted, even if there are other factors that could have supported the same conclusion. EPA notes that the SBA's Office of Advocacy substantively agreed with EPA's preliminary determination (that a revision to the

current size standards is warranted) even though it requested EPA to consider additional factors in reaching that conclusion.

EPA received a number of comments on its preliminary determination. Most commenters agreed with EPA's preliminary determination that an update is warranted. SBA submitted comments that argued that EPA should have considered more than the second (*i.e.*, the sales-only) standard when making a final determination, such as whether the standard is structured appropriately. This comment is similar to the SBA's recommendation in its consultation feedback that EPA evaluate a broader set of factors related to firm and industry characteristics and percentage of firms impacted by section 8 rules to determine whether or not a revision to the standards is necessary. However, as previously noted, the change in the PPI index (along with the comparative analysis of the current annual sales standard) is a sufficient basis to determine (even if other factors could have supported the same conclusion) that some revision of the standards for small manufacturers and processors is warranted, for both the sales-only and the sales plus production standards.

Two commenters questioned whether a revision to the standards is warranted. One of these commenters argued that the standards should not be changed, based on the serious nature of unspecified chemicals of concern. The second commenter argued that a revision to the standards that would result in classifying more manufacturers or processors as small is not warranted because states need to have complete information about chemical use, including volume, location, and toxicity, in order to effectively respond to emergencies and to prioritize resources to address concerns among various chemicals.

EPA does not agree that either argument justifies a determination that revision of the standards is not warranted. The first commenter did not explain how chemical risks would be exacerbated by updating the status quo of small manufacturer standards. With regard to the second comment, the outcome of the rulemaking (*i.e.*, whether it would result in exempting more firms from reporting than under the current standards) cannot be known until the rulemaking is complete. Although revising the size standards for inflation could be presumed to increase the number of exempt firms, the second commenter did not explain how such increase would necessarily translate into a loss of information necessary for

states to effectively respond to emergencies and prioritize resources. With respect to the need of states to have complete information about the toxicity of particular chemical substances, EPA notes that the size standards at issue in this action only relate to the collection of information under TSCA section 8(a). The primary information collection under TSCA section 8(a) is the Chemical Data Reporting rule, 40 CFR part 711, which collects exposure-related data rather than hazard data. In any event, although the exemption of small businesses from reporting necessarily reduces the amount of chemical information EPA collects, Congress nonetheless decided to provide for an exemption and directed EPA to determine the need for revision. As explained above, EPA believes the currently promulgated standards are clearly outdated with respect to the current understanding of what qualifies a business as small. EPA has not yet proposed any revisions to the size standards; any changes would be established through future notice and comment rulemaking. At that time, public comments regarding the merits of any proposed revisions would be sought by EPA and subsequently addressed.

Several commenters also provided their opinions on how the standards should be specifically revised or explained why specific parts of the standards ought to be maintained. For example, SBA commented that, when developing standards, EPA should consider a broad range of factors that may potentially be relevant in the context of TSCA reporting. These factors include barriers to entry, start-up and expansion costs, capital versus labor intensiveness of industries, average firm size (employment and revenue), growth trends, and technological factors. Multiple commenters agreed with SBA's recommendations. Additionally, one commenter argued that the combined sales and production standard should be revised by lowering its production threshold and not changing its \$40 million sales threshold. However, the scope of this action is limited to a general determination as to whether *some* revision to the TSCA small manufacturer and processor standards is warranted. More particular issues (*i.e.*, relating to how the standards ought to be revised) will be addressed in a subsequent rulemaking and are beyond the scope of this action. Although EPA has no obligation to respond to the suggestions for specific revisions submitted as comments on this action, EPA intends to consider these comments as it develops its rulemaking

proposal. Members of the public who wish to maintain previously submitted comments or who wish to submit new comments may do so following the publication of EPA's proposal in the **Federal Register**. EPA will address such comments prior to finalizing any changes to the TSCA size standards.

EPA's preliminary determination that a revision to size standards was warranted did not include the size standard for nanoscale materials found at 40 CFR 704.20. See 81 FR 90842 (determination was only with respect to *currently codified* size standards as of December 15, 2016). EPA promulgated the size standards at 40 CFR 704.20 on January 12, 2017, along with the other provisions of EPA's reporting and recordkeeping rule for nanoscale materials. Concurrent with promulgating the size standards at 40 CFR 704.20, EPA indicated that it would consider the adequacy of the size standards at 40 CFR 704.20 in the course of finalizing this determination under TSCA section 8(a)(3)(C). 82 FR 3650. At this point, EPA has not made a determination as to whether the size standards in the nanotechnology rule warrant revision. EPA will further evaluate the need for any revision as part of the rulemaking to revise the standards identified in this final determination.

Based on EPA's preliminary determination, a review of the comments on the preliminary determination, and the feedback from consultation from SBA, EPA is now making a final determination under TSCA section 8(a)(3)(C)(ii) that revision to the TSCA section 8(a) size standards for manufacturers and processors is warranted.

III. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

U.S. Bureau of Labor Statistics. "Producer Price Index, Series WPU06, Chemicals and Allied Products, 1933–2015". Retrieved November 14, 2016 from <http://data.bls.gov/cgi-bin/srgatet>.

Authority: 15 U.S.C. 2607(a).

Dated: November 21, 2017.

Charlotte Bertrand,

Acting Principal Deputy Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2017–25822 Filed 11–29–17; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Notice of Request for Comment on the Annual Report for Fiscal Year 2017 and Three-Year Plan

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice.

Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act (Pub. L. 92–463), as amended, and the FASAB Rules of Procedure, as amended in October 2010, notice is hereby given that the Federal Accounting Standards Advisory Board (FASAB) has issued its *Annual Report for Fiscal Year 2017 and Three-Year Plan*.

The *Annual Report for Fiscal Year 2017 and Three-Year Plan* is available on the FASAB Web site at <http://www.fasab.gov/our-annual-reports/>. Copies can be obtained by contacting FASAB at (202) 512–7350.

Respondents are encouraged to comment on the content of the annual report and FASAB's project priorities for the next three years. Written comments are requested by January 29, 2018, and should be sent to fasab@fasab.gov or Wendy M. Payne, Executive Director, Federal Accounting Standards Advisory Board, 441 G Street NW., Suite 6814, Mailstop 6H19, Washington, DC 20548.

The Board is also conducting an online survey to help in assessing the most important priorities for the future. The annual planning survey is available at <https://tell.gao.gov/fasabplanning2017/>. The survey closes on November 30, 2017.

FOR FURTHER INFORMATION CONTACT: Ms. Wendy M. Payne, Executive Director, 441 G Street NW., Mailstop 6H19, Washington, DC 20548, or call (202) 512–7350.

Authority: Federal Advisory Committee Act, Pub. L. 92–463.

Dated: November 15, 2017.

Wendy M. Payne,
Executive Director.

[FR Doc. 2017–25819 Filed 11–29–17; 8:45 am]

BILLING CODE 1610–02–P

FEDERAL ELECTION COMMISSION**Sunshine Act Meeting**

TIME AND DATE: Tuesday, December 5, 2017, at 10:00 a.m. and its continuation at the conclusion of the open meeting on December 7, 2017.

PLACE: 999 E Street NW., Washington, DC.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Compliance matters pursuant to 52 U.S.C. 30109.

* * * * *

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694-1220.

Dayna C. Brown,

Secretary and Clerk of the Commission.

[FR Doc. 2017-25961 Filed 11-28-17; 4:15 pm]

BILLING CODE 6715-01-P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**Sunshine Act Notice**

November 28, 2017.

TIME AND DATE: 10:00 a.m., Thursday, December 14, 2017.

PLACE: The Richard V. Backley Hearing Room, Room 511N, 1331 Pennsylvania Avenue NW., Washington, DC 20004 (enter from F Street entrance).

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Jeffrey Pappas v. CalPortland Company, et al.*, Docket No. WEST 2016-264-DM (Issues include whether the Judge erred in ruling that the operators had not discriminated against the miner by not rehiring him).

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFO: Emogene Johnson, (202) 434-9935/(202) 708-9300 for TDD Relay/1-800-877-8339 for toll free.

PHONE NUMBER FOR LISTENING TO

MEETING: 1-(866) 867-4769, Passcode: 678-100.

Sarah L. Stewart,

Deputy General Counsel.

[FR Doc. 2017-25967 Filed 11-28-17; 4:15 pm]

BILLING CODE 6735-01-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 18, 2017.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198-0001:

1. *Jeffrey Alan Svajgr, Omaha, Nebraska*; to acquire voting shares of Midwest Banco Corporation, and thereby indirectly acquire voting shares of Waypoint Bank, both in Cozad, Nebraska.

Board of Governors of the Federal Reserve System, November 27, 2017.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2017-25805 Filed 11-29-17; 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 28, 2017.

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. *Midland States Bancorp, Inc., Effingham, Illinois*; to acquire 100 percent of the voting shares of Alpine Bancorporation, Inc., Belvidere, Illinois, and thereby indirectly acquire Alpine Bank & Trust Company, Rockford, Illinois.

Board of Governors of the Federal Reserve System, November 27, 2017.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2017-25806 Filed 11-29-17; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Disease Control and Prevention**

[60Day-18-0278]

Proposed Data Collection Submitted for Public Comment and Recommendations—National Hospital Ambulatory Medical Care Survey (NHAMCS)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice; correction.

SUMMARY: The Centers for Disease Control and Prevention (CDC) requested publication of a document in the **Federal Register**. Document 2017-25496, Proposed Data Collection Submitted for Public Comment and Recommendations—*National Hospital Ambulatory Medical Care Survey (NHAMCS)*, has been scheduled to publish on November 27, 2017. The document provided the incorrect docket number (CDC-2018-0101).

FOR FURTHER INFORMATION CONTACT:

Leroy Richardson, 1600 Clifton Road, MS D-74, Atlanta, GA 30333; telephone (404) 639-4965; email: omb@cdc.gov.

Correction

Correct the docket number on the ADDRESSES line to read: Docket No. CDC-2017-0101.

Dated: November 24, 2017.

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2017-25778 Filed 11-29-17; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Food and Drug Administration**

[Docket Nos. FDA-2015-E-3316 and FDA-2015-E-3315]

Determination of Regulatory Review Period for Purposes of Patent Extension; ADVANTAME

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for ADVANTAME and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that food additive. **DATES:** Anyone with knowledge that any of the dates as published (in the SUPPLEMENTARY INFORMATION section) are incorrect may submit either electronic or written comments and ask for a redetermination by January 29, 2018. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by May 29, 2018. See "Petitions" in the SUPPLEMENTARY INFORMATION section for more information.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before January 29, 2018. The <https://www.regulations.gov> electronic filing system will accept comments until midnight Eastern Time

at the end of January 29, 2018.

Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket Nos. FDA-2015-E-3316 and FDA-2015-E-3315 for "Determination of Regulatory Review Period for Purposes of Patent Extension; ADVANTAME." Received comments, those filed in a timely manner (see ADDRESSES), will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9

a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301-796-3600.

SUPPLEMENTARY INFORMATION:**I. Background**

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100-670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, human biologic product,

animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For food and color additive products, the testing phase begins on the date a major health or environmental effects test is begun and runs until the approval phase begins. The approval phase begins on the date a petition relying on the major health or environmental effects test and requesting the issuance of a regulation for use of the additive under section 409 or 721 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) is initially submitted to FDA and ends upon whichever of the following occurs last: (i) The regulation for the additive becomes effective; or (ii) objections filed against the regulation that result in a stay of effectiveness are resolved and commercial marketing is permitted; or (iii) proceedings resulting from objections to the regulation, after commercial marketing has been permitted and later stayed pending resolution of the proceedings, are finally resolved and commercial marketing is permitted.

Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a food and color additive will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(2)(B).

FDA has approved for marketing the food additive ADVANTAME. ADVANTAME may be safely used as a sweetening agent and flavor enhancer in foods generally, except in meat and poultry, in accordance with current good manufacturing practice, in an amount not to exceed that reasonably required to achieve the intended technical effect, in foods for which standards of identity established under section 401 of the FD&C Act do not preclude such use. Subsequent to this approval, the USPTO received patent term restoration applications for ADVANTAME (U.S. Patent Nos. 6,548,096 and 7,141,263) from Ajinomoto Co., Inc., and the USPTO requested FDA's assistance in determining the patents' eligibility for

patent term restoration. In a letter dated October 30, 2015, FDA advised the USPTO that this food and color additive had undergone a regulatory review period and that the approval of ADVANTAME represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for ADVANTAME is 4,967 days. Of this time, 3,091 days occurred during the testing phase of the regulatory review period, while 1,876 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date a major health or environmental effects test on the food additive was initiated:* October 16, 2000. FDA has verified the Ajinomoto Co., Inc. claim that October 16, 2000, is the date the major health or environmental effects test was begun.

2. *The date a petition relying on the major health or environmental effects test and requesting the issuance of a regulation for use of the additive under section 409 or 721 of the Federal Food Drug, and Cosmetic Act is initially submitted to FDA:* April 2, 2009. The applicant claims that the food additive petition (FAP) for ADVANTAME (FAP 9A4778) was submitted on March 30, 2009. However, according to FDA records, FAP 9A4778 was submitted on April 2, 2009, when a complete application was received.

3. *The date the regulation for the additive becomes effective or the date objections filed against the regulation that result in a stay of effectiveness are resolved and commercial marketing is permitted, or the date proceedings resulting from objections to the regulation after commercial marketing has been permitted and later stayed pending resolution of the proceedings, are finally resolved and commercial marketing is permitted:* May 21, 2014.

FDA has verified the applicant's claim that FAP 9A4778 became effective on May 21, 2014.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 5 years of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to <https://www.regulations.gov> at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: November 22, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017–25780 Filed 11–29–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Vaccine Injury Compensation Program; List of Petitions Received

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HRSA is publishing this notice of petitions received under the National Vaccine Injury Compensation Program (the program), as required by the Public Health Service (PHS) Act, as amended. While the Secretary of Health and Human Services is named as the respondent in all proceedings brought by the filing of petitions for compensation under the program, the United States Court of Federal Claims is charged by statute with responsibility for considering and acting upon the petitions.

FOR FURTHER INFORMATION CONTACT: For information about requirements for filing petitions, and the program in general, contact Lisa L. Reyes, Acting Clerk, United States Court of Federal Claims, 717 Madison Place NW., Washington, DC 20005, (202) 357-6400. For information on HRSA's role in the Program, contact the Director, National Vaccine Injury Compensation Program, 5600 Fishers Lane, Room 08N146B, Rockville, MD 20857; (301) 443-6593, or visit our Web site at: <http://www.hrsa.gov/vaccinecompensation/index.html>.

SUPPLEMENTARY INFORMATION: The program provides a system of no-fault compensation for certain individuals who have been injured by specified childhood vaccines. Subtitle 2 of Title XXI of the PHS Act, 42 U.S.C. 300aa-10 *et seq.*, provides that those seeking compensation are to file a petition with the U.S. Court of Federal Claims and to serve a copy of the petition on the Secretary of HHS, who is named as the respondent in each proceeding. The Secretary has delegated this responsibility under the Program to HRSA. The Court is directed by statute to appoint special masters who take evidence, conduct hearings as appropriate, and make initial decisions as to eligibility for, and amount of, compensation.

A petition may be filed with respect to injuries, disabilities, illnesses, conditions, and deaths resulting from vaccines described in the Vaccine Injury Table (the table) set forth at 42 CFR 100.3. This table lists for each covered childhood vaccine the conditions that may lead to compensation and, for each condition, the time period for occurrence of the first symptom or manifestation of onset or of significant aggravation after vaccine administration. Compensation may also be awarded for conditions not listed in the Table and for conditions that are manifested outside the time periods specified in the Table, but only if the petitioner shows that the condition was caused by one of the listed vaccines.

Section 2112(b)(2) of the PHS Act, 42 U.S.C. 300aa-12(b)(2), requires that "[w]ithin 30 days after the Secretary receives service of any petition filed under section 2111 the Secretary shall publish notice of such petition in the **Federal Register**." Set forth below is a list of petitions received by HRSA on October 1, 2017, through October 31, 2017. This list provides the name of petitioner, city and state of vaccination (if unknown then city and state of person or attorney filing claim), and case number. In cases where the Court

has redacted the name of a petitioner and/or the case number, the list reflects such redaction.

Section 2112(b)(2) also provides that the special master "shall afford all interested persons an opportunity to submit relevant, written information" relating to the following:

1. The existence of evidence "that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition," and

2. Any allegation in a petition that the petitioner either:

a. "[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Vaccine Injury Table but which was caused by" one of the vaccines referred to in the Table, or

b. "[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was caused by a vaccine" referred to in the Table.

In accordance with Section 2112(b)(2), all interested persons may submit written information relevant to the issues described above in the case of the petitions listed below. Any person choosing to do so should file an original and three (3) copies of the information with the Clerk of the U.S. Court of Federal Claims at the address listed above (under the heading **FOR FURTHER INFORMATION CONTACT**), with a copy to HRSA addressed to Director, Division of Injury Compensation Programs, Healthcare Systems Bureau, 5600 Fishers Lane, 08N146B, Rockville, MD 20857. The Court's caption (Petitioner's Name v. Secretary of HHS) and the docket number assigned to the petition should be used as the caption for the written submission. Chapter 35 of title 44, United States Code, related to paperwork reduction, does not apply to information required for purposes of carrying out the Program.

Dated: November 21, 2017.

George Sigounas,
Administrator.

List of Petitions Filed

1. Connie Fong, San Mateo, California, Court of Federal Claims No: 17-1400V
2. Matthew McDermott, Babylon, New York, Court of Federal Claims No: 17-1401V

3. Marcella Boettcher, Pittsburg, Kansas, Court of Federal Claims No: 17-1402V
4. Alice Rhee, San Antonio, Texas, Court of Federal Claims No: 17-1403V
5. Julie K. Beyers, Indianapolis, Indiana, Court of Federal Claims No: 17-1406V
6. Deborah Kay Tomlin, Richmond, Virginia, Court of Federal Claims No: 17-1410V
7. Debra Sepulveda, Portland, Maine, Court of Federal Claims No: 17-1412V
8. Cynthia Levin, Orange, Virginia, Court of Federal Claims No: 17-1413V
9. Charles Thompson, North Fort Myers, Florida, Court of Federal Claims No: 17-1414V
10. Samuel Kazery, Fayetteville, Arkansas, Court of Federal Claims No: 17-1415V
11. Julie Nicholson, Lynchburg, Virginia, Court of Federal Claims No: 17-1416V
12. Keith Noe and Carol Langley on behalf of J. J. N., Brockton, Massachusetts, Court of Federal Claims No: 17-1418V
13. Mitchell Godfrey, Bozeman, Montana, Court of Federal Claims No: 17-1419V
14. Audrea Dale, Raleigh, North Carolina, Court of Federal Claims No: 17-1420V
15. Amy Capesius, Broomfield, Colorado, Court of Federal Claims No: 17-1421V
16. Wanda E. Evin, Fargo, North Dakota, Court of Federal Claims No: 17-1422V
17. Cindy Kissler, Milwaukee, Wisconsin, Court of Federal Claims No: 17-1425V
18. Lindsey Lally, San Francisco, California, Court of Federal Claims No: 17-1426V
19. Virginie Bridges, Charlotte, North Carolina, Court of Federal Claims No: 17-1429V
20. Scott A. Youngmark, Waupun, Wisconsin, Court of Federal Claims No: 17-1431V
21. Mary Tennesen, St. Louis, Missouri, Court of Federal Claims No: 17-1441V
22. Bitu Fotuhi, Baltimore, Maryland, Court of Federal Claims No: 17-1442V
23. Samuel J. LaBine, St. Cloud, Minnesota, Court of Federal Claims No: 17-1443V
24. Michael Pollio, Staten Island, New York, Court of Federal Claims No: 17-1444V
25. Paul Gallagher on behalf of R. G., South Hadley, Massachusetts, Court of Federal Claims No: 17-1445V

26. Kyle Anderson, Killeen, Texas, Court of Federal Claims No: 17-1452V
27. Ginger Pahos, Minneapolis, Minnesota, Court of Federal Claims No: 17-1455V
28. April J. Barr, Nashville, Indiana, Court of Federal Claims No: 17-1462V
29. Genevieve Mergen-Barret, Coconut Creek, Florida, Court of Federal Claims No: 17-1463V
30. Robert Nemmer, Salt Lake City, Utah, Court of Federal Claims No: 17-1464V
31. Bangone Thirakul, San Diego, California, Court of Federal Claims No: 17-1465V
32. Sandra Sneathen, Charlevoix, Michigan, Court of Federal Claims No: 17-1466V
33. Leslee Moran, Fremont, New Hampshire, Court of Federal Claims No: 17-1467V
34. Purna Kami, Columbus, Ohio, Court of Federal Claims No: 17-1468V
35. Ramon Cuevas, Boston, Massachusetts, Court of Federal Claims No: 17-1469V
36. Rebecca Eugley, Oxford, Maine, Court of Federal Claims No: 17-1470V
37. Patricia Piazza, Brick, New Jersey, Court of Federal Claims No: 17-1471V
38. Olwen Dowling, Florence, Massachusetts, Court of Federal Claims No: 17-1472V
39. Kay Lynne Klotz, Martinsburg, Pennsylvania, Court of Federal Claims No: 17-1473V
40. Lucita Singleton, Shelbyville, Tennessee, Court of Federal Claims No: 17-1474V
41. Katherine Kelly, Celebration, Florida, Court of Federal Claims No: 17-1475V
42. Deborah Miller on behalf of A. M., Ithaca, New York, Court of Federal Claims No: 17-1476V
43. Kathleen Mosley, Oklahoma City, Oklahoma, Court of Federal Claims No: 17-1477V
44. Sean McLoughlin on behalf of John McLoughlin, Summit, New Jersey, Court of Federal Claims No: 17-1478V
45. Angelina Cavallo and Matthew Polanco on behalf of M. P., Paterson, New Jersey, Court of Federal Claims No: 17-1479V
46. Frances MacCormack, Somerset, New Jersey, Court of Federal Claims No: 17-1482V
47. Bryan Kitt, West Bend, Wisconsin, Court of Federal Claims No: 17-1483V
48. Ann Pelelo on behalf of T. P., Dubuque, Iowa, Court of Federal Claims No: 17-1485V
49. Linda Jones, Springfield, Missouri, Court of Federal Claims No: 17-1486V
50. Hector Baez, Baxley, Georgia, Court of Federal Claims No: 17-1488V
51. Elmer J. George on behalf of James C. McMurtry, Lebanon, Kentucky, Court of Federal Claims No: 17-1489V
52. Damaris Shaffer Miltenberger, Carbondale, Illinois, Court of Federal Claims No: 17-1491V
53. Angela B. Cooper, Pittsburgh, Pennsylvania, Court of Federal Claims No: 17-1493V
54. Jessica Watts, Indianapolis, Indiana, Court of Federal Claims No: 17-1494V
55. Kevin R. Danchik, Pittsburgh, Pennsylvania, Court of Federal Claims No: 17-1495V
56. Jan Skugstad, Minneapolis, Minnesota, Court of Federal Claims No: 17-1497V
57. Laurie Ann Minns, Corvallis, Montana, Court of Federal Claims No: 17-1499V
58. Marlena Carrillo on behalf of K. C., Phoenix, Arizona, Court of Federal Claims No: 17-1500V
59. Gary Foster, Conway, Arkansas, Court of Federal Claims No: 17-1502V
60. Clifford Schneider, Naples, Florida, Court of Federal Claims No: 17-1504V
61. Melba L. Callaway, Pittsburgh, Pennsylvania, Court of Federal Claims No: 17-1506V
62. Donald Jackson, Stafford, Virginia, Court of Federal Claims No: 17-1508V
63. Stephanie Walker, Poplar Bluff, Missouri, Court of Federal Claims No: 17-1509V
64. Karen Falconio, Langhorne, Pennsylvania, Court of Federal Claims No: 17-1510V
65. Robin Lara Camacho Keja, Harrisburg, Pennsylvania, Court of Federal Claims No: 17-1511V
66. Rafael D. Leal, Houston, Texas, Court of Federal Claims No: 17-1513V
67. Tawnya Montano, Murray, Utah, Court of Federal Claims No: 17-1526V
68. Ruth Nortey, Tulsa, Oklahoma, Court of Federal Claims No: 17-1527V
69. Ryan Thompson, Washington, District of Columbia, Court of Federal Claims No: 17-1529V
70. Ryan M. Schmidt, Ooltewah, Tennessee, Court of Federal Claims No: 17-1530V
71. Donna Wissbaum, Montello, Wisconsin, Court of Federal Claims No: 17-1531V
72. Latoya Christie on behalf of P. A., Wellesley Hills, Massachusetts, Court of Federal Claims No: 17-1532V
73. Connie Rainbolt, Torrington, Wyoming, Court of Federal Claims No: 17-1533V
74. John G. Rima, North Bend, Washington, Court of Federal Claims No: 17-1534V
75. Samantha Rivera and Timur Rivera on behalf of S. R., Beverly Hills, California, Court of Federal Claims No: 17-1535V
76. Stacy Hendrick, Hampton, Virginia, Court of Federal Claims No: 17-1536V
77. Sheila Harshaw, Van Nuys, California, Court of Federal Claims No: 17-1537V
78. Quinton Kapper, Greenwich, New York, Court of Federal Claims No: 17-1538V
79. Melani DePetro, Boston, Massachusetts, Court of Federal Claims No: 17-1539V
80. Paul L. Cooper, Arlington, Virginia, Court of Federal Claims No: 17-1541V
81. Shannon Mercer, Springboro, Ohio, Court of Federal Claims No: 17-1544V
82. Timothy Biery, Goodlettsville, Tennessee, Court of Federal Claims No: 17-1546V
83. Melanie Machado, Tacoma, Washington, Court of Federal Claims No: 17-1547V
84. Joyce Lineberger, Matthews, North Carolina, Court of Federal Claims No: 17-1548V
85. Suzanne Schaffer, San Diego, California, Court of Federal Claims No: 17-1550V
86. Robert David Dupach-Carron and Elizabeth Joanna Carron on behalf of A. R. D-C., Nassau, Bahamas, Court of Federal Claims No: 17-1551V
87. Audrey Walton, Bozeman, Montana, Court of Federal Claims No: 17-1552V
88. Clark Elaine, Salem, New Hampshire, Court of Federal Claims No: 17-1553V
89. Frances Labonte, Boston, Massachusetts, Court of Federal Claims No: 17-1554V
90. Robin Cooley, Louisville, Colorado, Court of Federal Claims No: 17-1556V
91. Cheyenne Whitesell on behalf of M. W., Deceased, Piermont, New York, Court of Federal Claims No: 17-1557V
92. Sarah D. Geschwindner, Concord, New Hampshire, Court of Federal Claims No: 17-1558V

93. Timothy Werner Boothe, San Jose, California, Court of Federal Claims No: 17-1560V
94. Louise Gartner on behalf of Anthony J. Gartner, Jr., Deceased, St. Peters, Missouri, Court of Federal Claims No: 17-1561V
95. Rosalie Helen Pedersen, Pine Bush, New York, Court of Federal Claims No: 17-1562V
96. Patricia Richards, Loganville, Georgia, Court of Federal Claims No: 17-1563V
97. Peggy W. Vice on behalf of Michael Louie Vice, Deceased, Southside, Alabama, Court of Federal Claims No: 17-1568V
98. James Gudaitis, San Mateo, California, Court of Federal Claims No: 17-1570V
99. Michael Braun on behalf of Heath Braun, Dover, New Jersey, Court of Federal Claims No: 17-1571V
100. Deanne A. Graf, Rice Lake, Wisconsin, Court of Federal Claims No: 17-1572V
101. Gary L. Larson, Portland, Oregon, Court of Federal Claims No: 17-1573V
102. Ibironke Akintaju, Clinton, Maryland, Court of Federal Claims No: 17-1574V
103. Kathleen Smith, Norwalk, Connecticut, Court of Federal Claims No: 17-1575V
104. Joseph Spataro, Fairfield, Connecticut, Court of Federal Claims No: 17-1576V
105. Gayle Randall, Armuchee, Georgia, Court of Federal Claims No: 17-1579V
106. Jessica Harding, Corvallis, Oregon, Court of Federal Claims No: 17-1580V
107. Jose Monsalvez, Houston, Texas, Court of Federal Claims No: 17-1583V
108. Minnie Bullock, Bowling Green, Kentucky, Court of Federal Claims No: 17-1584V
109. Susan Pierce, Seattle, Washington, Court of Federal Claims No: 17-1585V
110. Anthony Rucker, Winter Haven, Florida, Court of Federal Claims No: 17-1586V
111. Janice Berkow, Lenoir, North Carolina, Court of Federal Claims No: 17-1587V
112. Melinda Porter, Oklahoma City, Oklahoma, Court of Federal Claims No: 17-1589V
113. Kurt Rhodes, Grand Rapids, Michigan, Court of Federal Claims No: 17-1590V
114. Bruchy Schik, Brooklyn, New York, Court of Federal Claims No: 17-1591V
115. Barbara Van Esler, St. Louis, Missouri, Court of Federal Claims No: 17-1592V
116. Mary Guler, North Myrtle Beach, South Carolina, Court of Federal Claims No: 17-1593V
117. Robert Robinson, Fort Pierce, Florida, Court of Federal Claims No: 17-1594V
118. Rachael Anne Witherspoon, New Orleans, Louisiana, Court of Federal Claims No: 17-1595V
119. Richard Hirsch, Delray Beach, Florida, Court of Federal Claims No: 17-1596V
120. Judith Tucker, Tarrytown, New York, Court of Federal Claims No: 17-1597V
121. Carrie Gregory, South Kingstown, Rhode Island, Court of Federal Claims No: 17-1599V
122. Mark Ferrara, Fayetteville, Georgia, Court of Federal Claims No: 17-1601V
123. Sandra Sundlov, Jamestown, New York, Court of Federal Claims No: 17-1603V
124. Terri E. Scarbro, Great Falls, Montana, Court of Federal Claims No: 17-1604V
125. Robin Hamlin, Holly Hill, Florida, Court of Federal Claims No: 17-1606V
126. Donna Martin, St. Petersburg, Pennsylvania, Court of Federal Claims No: 17-1607V
127. Gayle Kligis, Aurora, Illinois, Court of Federal Claims No: 17-1608V
128. Joan Creech, Zebulon, North Carolina, Court of Federal Claims No: 17-1609V
129. Georgiana McKenzie, Dorchester, Massachusetts, Court of Federal Claims No: 17-1610V
130. Sheree Garrett, Dallas, Texas, Court of Federal Claims No: 17-1611V
131. Ninnart Changkiendee, South Jordan, Utah, Court of Federal Claims No: 17-1612V
132. Richard Denham, Franklin, Tennessee, Court of Federal Claims No: 17-1613V
133. Margaret Parsons, Faribault, Minnesota, Court of Federal Claims No: 17-1615V
134. Stacy James-Cornelius on behalf of E. J., Phoenix, Arizona, Court of Federal Claims No: 17-1616V
135. Joyce Carter, Bethel Park, Pennsylvania, Court of Federal Claims No: 17-1617V
136. Erica Livingston, Englewood, New Jersey, Court of Federal Claims No: 17-1619V
137. Walter C. Jones, Jr., Mukilteo, Washington, Court of Federal Claims No: 17-1620V
138. Antonio Katz, Ocean City, New Jersey, Court of Federal Claims No: 17-1621V
139. Lisa Guerrero, Boston, Massachusetts, Court of Federal Claims No: 17-1624V
140. Timothy A. Thatcher, Boise, Idaho, Court of Federal Claims No: 17-1628V
141. Kenneth Niemczyk, West Lebanon, New Hampshire, Court of Federal Claims No: 17-1629V
142. Lisa Laimer, Moreno Valley, California, Court of Federal Claims No: 17-1630V
143. Cheryl Gibbs, New Orleans, Louisiana, Court of Federal Claims No: 17-1632V
144. Rhonda Meade, Kingsport, Tennessee, Court of Federal Claims No: 17-1633V
145. Marina Vidal, Annandale, Virginia, Court of Federal Claims No: 17-1635V
146. Bassam Al Saddawi, Laguna Niguel, California, Court of Federal Claims No: 17-1640V
147. Rosemary Morgan-Lee, Dresher, Pennsylvania, Court of Federal Claims No: 17-1641V
148. Tonya Hood, Rocky Mount, North Carolina, Court of Federal Claims No: 17-1642V
149. Darlene Lopez, Englewood, New Jersey, Court of Federal Claims No: 17-1643V
150. Cynthia Quinn, Hammond, Louisiana, Court of Federal Claims No: 17-1644V

[FR Doc. 2017-25817 Filed 11-29-17; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Request for Public Comment: 60 Day Proposed Information Collection: Indian Health Service Information Security Ticketing and Incident Reporting

AGENCY: Indian Health Service, HHS.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, which requires 60 days for public comment on proposed information collection projects, the Indian Health Service (IHS) invites the general public to take this opportunity to comment on the information collection Office of Management and Budget (OMB) Control Number 0917-XXXX, titled, Information Security Ticketing and Incident Reporting. The purpose of this notice is to allow 60 days for public comment to be submitted directly to OMB. A copy

of the draft supporting statement is available at www.regulations.gov (see Docket ID IHS_FRDOC_001).

SUPPLEMENTARY INFORMATION: The IHS Office of Information Technology is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995. This notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to:

- (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;
- (3) Enhance the quality, utility, and clarity of the information to be collected;
- (4) Minimize the burden of the collection of information on those who are to respond; including

through the use of appropriate automated collection techniques of other forms of information technology, e.g., permitting electronic submission of responses.

Proposed Collection: Title: 0917–XXXX, “Information Security Ticketing and Incident Reporting.”

Type of Information Collection Request: This is a new information request for a three year approval of this new information collection, 0917–XXXX.

Form(s) and Form number(s): Incident Reporting Form, Form F07–02b.

Title of Proposal: Information Security Ticketing and Incident Reporting

OMB Control Number: To be assigned.

Need and Use of Information Collection: The Indian Health Service (IHS) uses secure information technology (IT) to improve health care quality, enhance access to specialty care, reduce medical errors, and modernize administrative functions

consistent with the Department of Health and Human Services (HHS) enterprise initiatives.

IHS is responsible for maintaining an information security program that provides protection for information collected or maintained by or on behalf of the Agency, and protection for information systems used or operated by the Agency or by another organization on behalf of the Agency.

Members of Affected Public: IHS staff, including federal and non-federal employees (contractors, Tribal employees, etc.).

Status of the Proposed Information Collection: New request.

Type of Respondents: Individuals.

The table below provides: Types of data collection instruments, estimation to number of respondents, number of responses per respondent, annual number of responses, average burden hour per response, and total annual burden hours.

Data collection instrument(s)	Estimated number of respondents	Responses per respondent	Annual number of responses	Average burden hour per response*	Total annual burden hours
IHS Federal and Non-Federal Staff	1700	1	1700	15	425
Total	1700	1	1700	15	425

* For ease of understanding, average burden hours are provided in actual minutes. There are no direct costs, to respondents to report.

For Comments: Submit comments, requests for more information on the collection, or requests to obtain a copy of the data collection instrument and instruction to CDR. Steven Miller, by one of the following methods:

- *Mail:* CDR. Steven Miller, Indian Health Service, 5600 Fishers Lane, STOP 07E30, Rockville, MD 20857.
- *Phone:* (301) 443–2452.
- *Email:* steven.miller@ihs.gov.

Comment Due Date: Your comments regarding this information collection are best assured of having full effect if received within 60 days of the date of this publication.

Dated: November 17, 2017.

Michael D. Weahkee,

Assistant Surgeon General, U.S. Public Health Service, Acting Director, Indian Health Service.

[FR Doc. 2017–25814 Filed 11–29–17; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Request for Public Comment: 30-Day Notice for Extension of Fast Track Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery: IHS Customer Service Satisfaction and Similar Surveys

AGENCY: Indian Health Service, HHS.

ACTION: Notice and request for comments. Request for extension of approval.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Indian Health Service (IHS) is submitting to the Office of Management and Budget (OMB) a request for an extension of a previously approved collection of information titled, “Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery: IHS Customer Service Satisfaction and Similar Surveys” (OMB Control Number 0917–0036), which expires July 30, 2018. This proposed information collection project was recently published in the **Federal**

Register on September 27, 2017, and allowed 60 days for public comment. The IHS received no comments regarding this collection. The purpose of this notice is to allow 30 days for public comment to be submitted directly to OMB.

A copy of the supporting statement is available at www.regulations.gov (see Docket ID IHS_FRDOC_001).

DATES: January 2, 2018. Your comments regarding this information collection are best assured of having full effect if received within 30 days of the date of this publication.

Direct Your Comments to OMB: Send your comments and suggestions regarding the proposed information collection contained in this notice, especially regarding the estimated public burden and associated response time to: Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, Attention: Desk Officer for IHS.

FOR FURTHER INFORMATION CONTACT: To request additional information, please contact Evonne Bennett-Barnes by one of the following methods:

- *Mail:* Evonne Bennett-Barnes, Information Collection Clearance

Officer, Indian Health Service, 5600 Fishers Lane, Rockville, MD 20857.

- Phone: 301-443-4750.

- Email: Evonne.Bennett-Barnes@ihs.gov.

- Fax: 301-443-4750.

SUPPLEMENTARY INFORMATION: *Title:* OMB Control No. 0917-0036, Fast Track Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery: IHS Customer Service Satisfaction and Similar Surveys.

Abstract: The IHS will be engaging in information collection activities that will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery within Federal Agencies. Qualitative feedback is information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insight into customer or stakeholder perceptions, opinions, experiences and expectations, and provide an early warning of issues with service. Also, the collection of qualitative feedback will assist IHS to focus its attention on areas where communication, training, or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. Furthermore, the collection activity will allow feedback to contribute directly to the improvement of program management.

Feedback or information collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative collection will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, sampling frame, sample design (including stratification and clustering), precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, protocols for data collection, and any testing procedures that were or will be undertaken prior fielding the study. Depending on the degree of influence the results are likely to have, such

collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results. Below are the IHS projected average estimates for the next three years:¹

Current Actions: Extension of approval for a collection of information.

Type of Review: Extension.

Affected Public: Individuals and households, businesses and organizations, and Tribal Government.

Average expected annual number of activities: 100.

Respondents: 105,000.

Annual responses: 105,000.

Frequency of response: Once per request.

Average minutes per response: 10.

Burden hours: 17,500.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Dated: November 17, 2017.

Michael D. Weahkee,

Assistant Surgeon General, U.S. Public Health Service, Acting Director, Indian Health Service.

[FR Doc. 2017-25815 Filed 11-29-17; 8:45 am]

BILLING CODE 4165-16-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The 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.

¹ The 60-day notice included the following estimate of the aggregate burden hours for this generic clearance for IHS federal-wide:

Average expected annual number of activities: 100.

Average number of respondents per activity: 1,050.

Annual responses: 105,000.

Frequency of response: Once per request.

Average minutes per response: 10.

Burden hours: 17,500.

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI SPORE I Review.

Date: January 25-26, 2018.

Time: 4:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Cambria Hotel & Suite Rockville, 1 Helen Heneghan Way, Rockville, MD 20850.

Contact Person: David G. Ransom, Ph.D., Scientific Review Officer, Research Program Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W124, Bethesda, MD 20892-9750, 240-276-6351, david.ransom@nih.gov.

Name of Committee: National Cancer Institute Initial Review Group; Subcommittee F—Institutional Training and Education.

Date: February 26-27, 2018.

Time: 7:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Timothy C. Meeker, MD, Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W642, Bethesda, MD 20892-9750, 240-276-6464, meekert@mail.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 24, 2017.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017-25785 Filed 11-29-17; 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, 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; Mechanism for Time-Sensitive Drug Abuse Research (R21).

Date: December 15, 2017.

Time: 3:00 p.m. to 5:00 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: Ivan K. Navarro, Ph.D., Scientific Review Officer, Office of Extramural Policy and Review, Division of Extramural Research, National Institute on Drug Abuse, NIH, DHHS, 6001 Executive Boulevard, Room 4242, MSC 9550, Bethesda, MD 20892, 301-827-5833, ivan.navarro@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: November 24, 2017.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017-25787 Filed 11-29-17; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict.

Date: December 12, 2017.

Time: 12:00 p.m. to 2:00 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: Mike Radtke, Ph.D., Scientific Review Officer, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4176, MSC 7806, Bethesda, MD 20892, 301-435-1728, radtkem@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 24, 2017.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017-25784 Filed 11-29-17; 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 Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of meetings of the National Advisory Allergy and Infectious Diseases Council. The meetings will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The 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 Advisory Allergy and Infectious Diseases Council.

Date: January 29, 2018.

Open: 10:30 a.m. to 11:40 a.m.

Agenda: Report from the Institute Director.

Place: National Institutes of Health, Natcher Building, Conference Rooms E1/E2, 45 Center Drive, Bethesda, MD 20892.

Closed: 11:40 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Conference Rooms E1/E2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Matthew J. Fenton, Ph.D., Director, Division of Extramural Activities, National Institute of Allergy and Infectious

Diseases, 5601 Fishers Lane, Rm 4F50 Bethesda, MD 20892, 301-496-7291, fentonm@niaid.nih.gov.

Name of Committee: National Advisory Allergy and Infectious Diseases Council; Allergy, Immunology and Transplantation Subcommittee.

Date: January 29, 2018.

Closed: 8:30 a.m. to 10:15 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Conference Room D, 45 Center Drive, Bethesda, MD 20892.

Open: 1:00 p.m. to adjournment.

Agenda: Reports from the Division Director and other staff.

Place: National Institutes of Health, Natcher Building, Conference Room D, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Matthew J. Fenton, Ph.D., Director, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rm 4F50, Bethesda, MD 20892, 301-496-7291, fentonm@niaid.nih.gov.

Name of Committee: National Advisory Allergy and Infectious Diseases Council; Microbiology and Infectious Diseases Subcommittee.

Date: January 29, 2018.

Closed: 8:30 a.m. to 10:15 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Conference Rooms F1/F2, 45 Center Drive, Bethesda, MD 20892.

Open: 1:00 p.m. to adjournment.

Agenda: Reports from the Division Director and other staff.

Place: National Institutes of Health, Natcher Building, Conference Rooms F1/F2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Matthew J. Fenton, Ph.D., Director, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rm 4F50, Bethesda, MD 20892, 301-496-7291, fentonm@niaid.nih.gov.

Name of Committee: National Advisory Allergy and Infectious Diseases Council; Acquired Immunodeficiency Syndrome Subcommittee.

Date: January 29, 2018.

Closed: 8:30 a.m. to 10:15 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Conference Room A, 45 Center Drive, Bethesda, MD 20892.

Open: 1:00 p.m. to adjournment.

Agenda: Program advisory discussions and reports from division staff.

Place: National Institutes of Health, Natcher Building, Conference Rooms E1/E2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Matthew J. Fenton, Ph.D., Director, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rm 4F50, Bethesda, MD 20892, 301-496-7291, fentonm@niaid.nih.gov.

Name of Committee: National Advisory Allergy and Infectious Diseases Council; Allergy, Immunology and Transplantation Subcommittee.

Date: June 4, 2018.

Closed: 8:30 a.m. to 10:15 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Conference Room D, 45 Center Drive, Bethesda, MD 20892.

Open: 1:00 p.m. to adjournment.

Agenda: Reports from the Division Director and other staff.

Place: National Institutes of Health, Natcher Building, Conference Room D, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Matthew J. Fenton, Ph.D., Director, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rm 4F50, Bethesda, MD 20892, 301-496-7291, fentonm@niaid.nih.gov.

Name of Committee: National Advisory Allergy and Infectious Diseases Council; Microbiology and Infectious Diseases Subcommittee.

Date: June 4, 2018.

Closed: 8:30 a.m. to 10:15 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Conference Rooms F1/F2, 45 Center Drive, Bethesda, MD 20892.

Open: 1:00 p.m. to adjournment.

Agenda: Reports from the Division Director and other staff.

Place: National Institutes of Health, Natcher Building, Conference Rooms F1/F2, 45 Center Drive, Bethesda, MD 20892.

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Name of Committee: National Advisory Allergy and Infectious Diseases Council; Acquired Immunodeficiency Syndrome Subcommittee.

Date: June 4, 2018.

Closed: 8:30 a.m. to 10:15 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Conference Room A, 45 Center Drive, Bethesda, MD 20892.

Open: 1:00 p.m. to adjournment.

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Place: National Institutes of Health, Natcher Building, Conference Rooms E1/E2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Matthew J. Fenton, Ph.D., Director, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rm 4F50, Bethesda, MD 20892, 301-496-7291, fentonm@niaid.nih.gov.

Name of Committee: National Advisory Allergy and Infectious Diseases Council.

Date: June 4, 2018.

Open: 10:30 a.m. to 11:40 a.m.

Agenda: Report from the Institute Director.

Place: National Institutes of Health, Natcher Building Conference Rooms E1/E2, 45 Center Drive, Bethesda, MD 20892

Closed: 11:40 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications,

Place: National Institutes of Health, Natcher Building, Conference Rooms E1/E2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Matthew J. Fenton, Ph.D., Director, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rm 4F50, Bethesda, MD 20892, 301-496-7291, fentonm@niaid.nih.gov.

Name of Committee: National Advisory Allergy and Infectious Diseases Council; Microbiology and Infectious Diseases Subcommittee.

Date: September 17, 2018.

Closed: 8:30 a.m. to 10:15 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Conference Rooms F1/F2, 45 Center Drive, Bethesda, MD 20892.

Open: 1:00 p.m. to adjournment.

Agenda: Reports from the Division Director and other staff.

Place: National Institutes of Health, Natcher Building, Conference Rooms F1/F2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Matthew J. Fenton, Ph.D., Director, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rm 4F50, Bethesda, MD 20892, 301-496-7291, fentonm@niaid.nih.gov.

Name of Committee: National Advisory Allergy and Infectious Diseases Council.

Date: September 17, 2018.

Open: 10:30 a.m. to 11:40 a.m.

Agenda: Report from the Institute Director.

Place: National Institutes of Health, Natcher Building, Conference Rooms E1/E2, 45 Center Drive, Bethesda, MD 20892.

Closed: 11:40 a.m. to 12:00 p.m.

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Place: National Institutes of Health, Natcher Building, Conference Rooms E1/E2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Matthew J. Fenton, Ph.D., Director, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rm 4F50, Bethesda, MD 20892, 301-496-7291, fentonm@niaid.nih.gov.

Name of Committee: National Advisory Allergy and Infectious Diseases Council; Allergy, Immunology and Transplantation Subcommittee.

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Place: National Institutes of Health, Natcher Building, Conference Room D, 45 Center Drive, Bethesda, MD 20892.

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Contact Person: Matthew J. Fenton, Ph.D., Director, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rm 4F50, Bethesda, MD 20892, 301-496-7291, fentonm@niaid.nih.gov.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: www.niaid.nih.gov/facts/facts.htm, where an agenda and any additional information for the meeting will be posted when available.

(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 24, 2017.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017-25786 Filed 11-29-17; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG-2017-1051]

Certificate of Alternative Compliance for the TUG BENSON GEORGE MORAN

AGENCY: Coast Guard, DHS.

ACTION: Notice of issuance of a certificate of alternative compliance.

SUMMARY: The Coast Guard has issued a Certificate of Alternative Compliance (COAC) to the TUG BENSON GEORGE MORAN because it is a vessel of special construction or purpose, that, with respect to the position of its navigation

and towing lights, is not able to fully comply with the provisions of the International Regulations for Preventing Collisions at Sea, 1972, without interfering with the normal operation of the vessel. Our publication of this notice fulfills a statutory requirement and promotes maritime safety.

DATES: The Certificate of Alternative Compliance was issued on November 16, 2017.

FOR FURTHER INFORMATION CONTACT: For information or questions about this notice call or email Mr. Kevin Miller, First District Towing Vessel/Barge Safety Specialist, U.S. Coast Guard; telephone (617) 223-8272, email Kevin.L.Miller2@uscg.mil.

SUPPLEMENTARY INFORMATION: The United States is signatory to the International Maritime Organization's International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), as amended. The special construction or purpose of some vessels makes them unable to comply with the light, shape, and sound signal provisions of the 72 COLREGS. Under statutory law¹ and Coast Guard regulation,² a vessel may instead meet alternative requirements and the vessel's owner, builder, operator, or agent may apply for a Certificate of Alternate Compliance (COAC).

For vessels of special construction, the cognizant Coast Guard District Office determines whether the vessel for which the COAC is sought complies as closely as possible with the 72 COLREGS, and decides whether to issue the COAC. The Coast Guard issued a COAC to the TUG BENSON GEORGE MORAN on November 16, 2017. That COAC will remain valid until information supplied in the COAC application or the COAC terms become inapplicable to the vessel.

Under the governing statute³ and regulation,⁴ the Coast Guard must publish notice of having issued this COAC. This notice promotes maritime safety by informing vessels that may encounter the TUG BENSON GEORGE MORAN to expect alternative positioning of its navigation and towing lights.

The Commandant, U.S. Coast Guard, certifies that the TUG BENSON GEORGE MORAN is a vessel of special construction or purpose, and that, with respect to the position of the navigation and towing lights, it is not possible to comply fully with the requirements of

the provisions enumerated in the 72 COLREGS, without interfering with the normal operation of the vessel. The Commandant further finds and certifies that the sidelights (13' 5" from the vessel's side mounted on the pilot house) and the vessel's stern light and towing lights (3' 6" aft of frame 20) are in the closest possible compliance with the applicable provisions of the 72 COLREGS and that full compliance with the 72 COLREGS would not significantly enhance the safety of the vessel's operation.

This notice is issued under authority of 33 U.S.C. 1605(c) and 33 CFR 81.18.

Dated: November 27, 2017.

Captain Byron L. Black,

Chief, Prevention Department, First District, U.S. Coast Guard.

[FR Doc. 2017-25791 Filed 11-29-17; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA-2017-0002; Internal Agency Docket No. FEMA-B-1758]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR). The LOMR will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings. For rating purposes, the currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the

dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibt, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW., Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibt@fema.dhs.gov; or visit the FEMA Map Information eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

¹ 33 U.S.C. 1605(c).

² 33 CFR 81.3.

³ 33 U.S.C. 1605(c).

⁴ 33 CFR 81.18.

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other

Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are

accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: November 2, 2017.

Roy E. Wright,

Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Alabama: Calhoun	City of Anniston (17-04-2695P).	The Honorable Jack Draper, Mayor, City of Anniston, P.O. Box 2168, Anniston, AL 36202.	City Hall, 1128 Gurnee Avenue, Anniston, AL 36202.	https://msc.fema.gov/portal/advanceSearch .	Nov. 20, 2017	010020
Tuscaloosa	City of Northport (16-04-8221P).	The Honorable Donna Aaron, 3500 McFarland Boulevard, Northport, AL 35476.	City Hall, 3500 McFarland Boulevard, Northport, AL 35476.	https://msc.fema.gov/portal/advanceSearch .	Oct. 24, 2017	010202
Tuscaloosa	City of Tuscaloosa (16-04-7839P).	The Honorable Walter Maddox, Mayor, City of Tuscaloosa, 2201 University Boulevard, Tuscaloosa, AL 35401.	Engineering Department, 2201 University Boulevard, Tuscaloosa, AL 35401.	https://msc.fema.gov/portal/advanceSearch .	Nov. 20, 2017	010203
Tuscaloosa	City of Tuscaloosa (16-04-7840P).	The Honorable Walter Maddox, Mayor, City of Tuscaloosa, 2201 University Boulevard, Tuscaloosa, AL 35401.	Engineering Department, 2201 University Boulevard, Tuscaloosa, AL 35401.	https://msc.fema.gov/portal/advanceSearch .	Nov. 20, 2017	010203
Tuscaloosa	City of Tuscaloosa (16-04-8217P).	The Honorable Walter Maddox, Mayor, City of Tuscaloosa, 2201 University Boulevard, Tuscaloosa, AL 35401.	Engineering Department, 2201 University Boulevard, Tuscaloosa, AL 35401.	https://msc.fema.gov/portal/advanceSearch .	Oct. 24, 2017	010203
Tuscaloosa	City of Tuscaloosa (16-04-8221P).	The Honorable Walter Maddox, Mayor, City of Tuscaloosa, 2201 University Boulevard, Tuscaloosa, AL 35401.	Engineering Department, 2201 University Boulevard, Tuscaloosa, AL 35401.	https://msc.fema.gov/portal/advanceSearch .	Oct. 24, 2017	010203
Tuscaloosa	Unincorporated areas of Tuscaloosa County (16-04-7839P).	The Honorable W. Hardy McCollum, Chairman, Tuscaloosa County Board of Commissioners, 714 Greensboro Avenue, Tuscaloosa, AL 35401.	Tuscaloosa County Public Works Department, 2810 35th Street, Tuscaloosa, AL 35401.	https://msc.fema.gov/portal/advanceSearch .	Nov. 20, 2017	010201
Tuscaloosa	Unincorporated areas of Tuscaloosa County (16-04-7840P).	The Honorable W. Hardy McCollum, Chairman, Tuscaloosa County Board of Commissioners, 714 Greensboro Avenue, Tuscaloosa, AL 35401.	Tuscaloosa County Public Works Department, 2810 35th Street, Tuscaloosa, AL 35401.	https://msc.fema.gov/portal/advanceSearch .	Nov. 20, 2017	010201
Tuscaloosa	Unincorporated areas of Tuscaloosa County (16-04-8217P).	The Honorable W. Hardy McCollum, Chairman, Tuscaloosa County Board of Commissioners, 714 Greensboro Avenue, Tuscaloosa, AL 35401.	Tuscaloosa County Public Works Department, 2810 35th Street, Tuscaloosa, AL 35401.	https://msc.fema.gov/portal/advanceSearch .	Oct. 24, 2017	010201
Tuscaloosa	Unincorporated areas of Tuscaloosa County (16-04-8221P).	The Honorable W. Hardy McCollum, Chairman, Tuscaloosa County Board of Commissioners, 714 Greensboro Avenue, Tuscaloosa, AL 35401.	Tuscaloosa County Public Works Department, 2810 35th Street, Tuscaloosa, AL 35401.	https://msc.fema.gov/portal/advanceSearch .	Oct. 24, 2017	010201
Colorado: Douglas	Town of Castle Rock (17-08-0108P).	The Honorable Jennifer Green, Mayor, Town of Castle Rock, 100 North Wilcox Street, Castle Rock, CO 80104.	Water Department, 175 Kellogg Court, Castle Rock, CO 80109.	https://msc.fema.gov/portal/advanceSearch .	Dec. 20, 2017	080050

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Weld	Unincorporated areas of Weld County (17-08-1017X).	The Honorable Julie Cozad, Chair, Weld County, Board of Commissioners, P.O. Box 758, Greeley, CO 80632.	Weld County Commissioner's Office, 915 10th Street, Greeley, CO 80632.	https://msc.fema.gov/portal/advanceSearch .	Dec. 22, 2017	080266
Florida:						
Charlotte	Unincorporated areas of Charlotte County (17-04-5277P).	The Honorable Bill Truex, Chairman, Charlotte County Board of Commissioners, 18500 Murdock Circle, Port Charlotte, FL 33948.	Charlotte County Community Development Department, 18400 Murdock Circle, Port Charlotte, FL 33948.	https://msc.fema.gov/portal/advanceSearch .	Dec. 28, 2017	120061
Collier	Unincorporated areas of Collier County (17-04-5062P).	The Honorable Penny Taylor, Chair, Collier County Board of Commissioners, 3299 Tamiami Trail East, Suite 303, Naples, FL 34112.	Collier County Administrative Building, 3301 Tamiami Trail East, Building F, 1st Floor, Naples, FL 34112.	https://msc.fema.gov/portal/advanceSearch .	Dec. 14, 2017	120067
Lafayette	Unincorporated areas of Lafayette County (17-04-4985P).	The Honorable Ernest Jones, Chairman, Lafayette County Board of Commissioners, P.O. Box 88, Mayo, FL 32066.	Lafayette County Building Department, 120 West Main Street, Mayo, FL 32066.	https://msc.fema.gov/portal/advanceSearch .	Dec. 15, 2017	120131
Lee	Town of Fort Myers Beach (17-04-5861P).	The Honorable Dennis C. Boback, Mayor, Town of Fort Myers Beach, 2525 Estero Boulevard, Fort Myers Beach, FL 33931.	Community Development Department, 2525 Estero Boulevard, Fort Myers Beach, FL 33931.	https://msc.fema.gov/portal/advanceSearch .	Dec. 26, 2017	120673
Manatee	Unincorporated areas of Manatee County (16-04-8547P).	The Honorable Betsy Benac, Chair, Manatee County Board of Commissioners, P.O. Box 1000, Bradenton, FL 34206.	Manatee County Building and Development Services Department, 1112 Manatee Avenue West, Bradenton, FL 34205.	https://msc.fema.gov/portal/advanceSearch .	Dec. 22, 2017	120153
Manatee	Unincorporated areas of Manatee County (17-04-1580P).	The Honorable Betsy Benac, Chair, Manatee County Board of Commissioners, P.O. Box 1000, Bradenton, FL 34206.	Manatee County Building and Development Services Department, 1112 Manatee Avenue West, Bradenton, FL 34205.	https://msc.fema.gov/portal/advanceSearch .	Jan. 8, 2018	120153
Miami-Dade	City of North Miami (17-04-4598P).	The Honorable Smith Joseph, Mayor, City of North Miami, 776 Northeast 125th Street, 2nd Floor, North Miami, FL 33161.	Building Department, 12340 Northeast 8th Avenue, North Miami, FL 33161.	https://msc.fema.gov/portal/advanceSearch .	Dec. 8, 2017	120655
Pinellas	City of St. Pete Beach (17-04-2937P).	The Honorable Alan Johnson, Mayor, City of St. Pete Beach, 155 Corey Avenue, St. Pete Beach, FL 33706.	Building Services Department, 155 Corey Avenue, St. Pete Beach, FL 33706.	https://msc.fema.gov/portal/advanceSearch .	Dec. 26, 2017	125149
Pinellas	Town of Indian Shores (17-04-1784P).	The Honorable Patrick Soranno, Mayor, Town of Indian Shores, 19305 Gulf Boulevard, Indian Shores, FL 33785.	Building Department, 19305 Gulf Boulevard, Indian Shores, FL 33785.	https://msc.fema.gov/portal/advanceSearch .	Dec. 26, 2017	125118
Georgia: Douglas	Unincorporated areas of Douglas County (17-04-5176P).	The Honorable Romona Jackson Jones, Chair, Douglas County Board of Commissioners, 8700 Hospital Drive, 3rd Floor, Douglasville, GA 30134.	Douglas County Engineering Division, 8700 Hospital Drive, 1st Floor, Douglasville, GA 30134.	https://msc.fema.gov/portal/advanceSearch .	Dec. 28, 2017	130306
Iowa: Woodbury	City of Sioux City (17-07-0805P).	The Honorable Bob Scott, Mayor, City of Sioux City, P.O. Box 447, Sioux City, IA 51102.	Planning Division, 405 6th Street, Room 308, Sioux City, IA 51102.	https://msc.fema.gov/portal/advanceSearch .	Dec. 8, 2017	190298
Maryland: Independent City	City of Baltimore (17-03-1132P).	The Honorable Catherine E. Pugh, Mayor, City of Baltimore, 100 North Holliday Street, Baltimore, MD 21202.	Planning Department, 417 East Fayette Street, 8th floor, Baltimore, MD 21202.	https://msc.fema.gov/portal/advanceSearch .	Dec. 18, 2017	240087
Massachusetts:						

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Barnstable	Town of Provincetown (17-01-0821P).	Mr. David Panagore, Manager, Town of Provincetown, 260 Commercial Street, Provincetown, MA 02657.	Town Hall, 260 Commercial Street, Provincetown, MA 02657.	https://msc.fema.gov/portal/advanceSearch .	Dec. 15, 2017	255218
Plymouth	Town of Hingham (17-01-0559P).	The Honorable Mary Power, Chair, Town of Hingham Board of Selectmen, 210 Central Street, Hingham, MA 02043.	Conservation Department, 210 Central Street, Hingham, MA 02043.	https://msc.fema.gov/portal/advanceSearch .	Dec. 13, 2017	250268
Plymouth	Town of Hull (17-01-0559P).	The Honorable Kevin Richardson, Chairman, Town of Hull Board of Selectmen, 253 Atlantic Avenue, Hull, MA 02045.	Building Department, 253 Atlantic Avenue, Hull, MA 02045.	https://msc.fema.gov/portal/advanceSearch .	Dec. 13, 2017	250269
Plymouth	Town of Wareham (17-01-1783P).	Mr. Derek Sullivan, Administrator, Town of Wareham, 54 Marion Road, Wareham, MA 02571.	Town Hall, 54 Marion Road, Wareham, MA 02571.	https://msc.fema.gov/portal/advanceSearch .	Dec. 8, 2017	255223
Nebraska: Dakota	City of South Sioux City (17-07-0805P).	The Honorable Rod Koch, Mayor, City of South Sioux City, 1615 1st Avenue, South Sioux City, NE 68776.	Inspection Services Department, 1615 1st Avenue, South Sioux City, NE 68776.	https://msc.fema.gov/portal/advanceSearch .	Dec. 8, 2017	310054
Dakota	Unincorporated areas of Dakota County (17-07-0805P).	The Honorable Scott Love, Chairman, Dakota County Board of Commissioners, P.O. Box 338, Dakota City, NE 68731.	Dakota County Planning and Zoning Department, 1863 North Bluff Road, Hubbard, NE 68741.	https://msc.fema.gov/portal/advanceSearch .	Dec. 8, 2017	310429
North Carolina: Surry	Unincorporated areas of Surry County (17-04-4112P).	The Honorable Eddie Harris, Chairman, Surry County Board of Commissioners 118 Hamby Road, Dobson, NC 27017.	Surry County Planning and Development Department, 122 Hamby Road Dobson, NC 27017.	https://msc.fema.gov/portal/advanceSearch .	Dec. 1, 2017	370364
Surry	Unincorporated areas of Surry County (17-04-4113P).	The Honorable Eddie Harris, Chairman, Surry County, Board of Commissioners, 118 Hamby Road, Dobson, NC 27017.	Surry County Planning and Development Department, 122 Hamby Road Dobson, NC 27017.	https://msc.fema.gov/portal/advanceSearch .	Jan. 4, 2018	370364
Wake	City of Raleigh (16-04-2709P).	The Honorable Nancy McFarlane, Mayor, City of Raleigh, P.O. Box 590, Raleigh, NC 27602.	Stormwater Management Division, 1 Exchange Plaza, Suite 304, Raleigh, NC 27601.	https://msc.fema.gov/portal/advanceSearch .	Dec. 7, 2017	370243
Pennsylvania: Bucks	Township of Buckingham (17-03-0837P).	The Honorable Maggie Rash, Chair, Township of Buckingham, Board of Supervisors, P.O. Box 413, Buckingham, PA 18912.	Township Building, 4613 Hughesian Drive, Buckingham, PA 18912.	https://msc.fema.gov/portal/advanceSearch .	Jan. 4, 2018	420985
Centre	Borough of Bellefonte (17-03-0534P).	The Honorable Gay D. Dunne, President, Borough of Bellefonte Council, 236 West Lamb Street, Bellefonte, PA 16823.	Borough Hall, 236 West Lamb Street, Bellefonte, PA 16823.	https://msc.fema.gov/portal/advanceSearch .	Dec. 5, 2017	420257
South Carolina: Charleston	Town of Mount Pleasant (17-04-5432P).	The Honorable Linda Page, Mayor, Town of Mount Pleasant, 100 Ann Edwards Lane, Mount Pleasant, SC 29464.	Planning Department, 100 Ann Edwards Lane, Mount Pleasant, SC 29464.	https://msc.fema.gov/portal/advanceSearch .	Dec. 20, 2017	455417
Charleston	Unincorporated areas of Charleston County (17-04-5432P).	The Honorable A. Victor Rawl, Chairman, Charleston County Council, 4045 Bridge View Drive, Suite B254, North Charleston, SC 29405.	Building Inspection Services Department, 4045 Bridgeview Drive, Suite A311, North Charleston, SC 29405.	https://msc.fema.gov/portal/advanceSearch .	Dec. 20, 2017	455413

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Tennessee: Shelby	City of Memphis (17-04-2464P).	The Honorable Jim Strickland, Mayor, City of Memphis, 125 North Main Street, Room 700, Memphis, TN 38103.	Engineering Division, 125 North Main Street, Room 677, Memphis, TN 38103.	https://msc.fema.gov/portal/advanceSearch .	Dec. 27, 2017	470177
Texas:						
Bexar	City of San Antonio (17-06-2618P).	The Honorable Ron Nirenberg, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Transportation and Capital Improvements Department, Stormwater Division, 1901 South Alamo Street, 2nd Floor, San Antonio, TX 78204.	https://msc.fema.gov/portal/advanceSearch .	Dec. 14, 2017	480045
Collin	City of Celina (17-06-1207P).	The Honorable Sean Terry, Mayor, City of Celina, 142 North Ohio Street, Celina, TX 75009.	City Hall, 142 North Ohio Street, Celina, TX 75009.	https://msc.fema.gov/portal/advanceSearch .	Jan. 2, 2018	480133
Collin	City of Celina (17-06-2118P).	The Honorable Sean Terry, Mayor, City of Celina, 142 North Ohio Street, Celina, TX 75009.	City Hall, 142 North Ohio Street, Celina, TX 75009.	https://msc.fema.gov/portal/advanceSearch .	Dec. 18, 2017	480133
Harris	Unincorporated areas of Harris County (17-06-3378P).	The Honorable Edward M. Emmett, Harris County Judge, 1001 Preston Street, Suite 911, Houston, TX 77002.	Harris County Permit Office, 10555 Northwest Freeway, Suite 120, Houston, TX 77092.	https://msc.fema.gov/portal/advanceSearch .	Dec. 11, 2017	480287
Lubbock	City of Lubbock (17-06-2588P).	The Honorable Dan Pope, Mayor, City of Lubbock, P.O. Box 2000, Lubbock, TX 79457.	Public Works Department, 1625 13th Street, Room 107, Lubbock, TX 79401.	https://msc.fema.gov/portal/advanceSearch .	Dec. 18, 2017	480452
Lubbock	City of Lubbock (17-06-2768P).	The Honorable Dan Pope, Mayor, City of Lubbock, P.O. Box 2000, Lubbock, TX 79457.	Public Works Department, 1625 13th Street, Room 107, Lubbock, TX 79401.	https://msc.fema.gov/portal/advanceSearch .	Dec. 18, 2017	480452
Montgomery ...	City of Conroe (17-06-2714X).	The Honorable Toby Powell, Mayor, City of Conroe, P.O. Box 3066, Conroe, TX 77305.	Public Works Department, 401 Sergeant Ed Holcomb Boulevard South, Conroe, TX 77304.	https://msc.fema.gov/portal/advanceSearch .	Dec. 1, 2017	480484
Tarrant	City of Fort Worth (17-06-0577P).	The Honorable Betsy Price, Mayor, City of Fort Worth, 1000 Throckmorton Street, Fort Worth, TX 76102.	Transportation and Public Works Department, 1000 Throckmorton Street, Fort Worth, TX 76102.	https://msc.fema.gov/portal/advanceSearch .	Dec. 11, 2017	480596
Tarrant	City of Fort Worth (17-06-1457P).	The Honorable Betsy Price, Mayor, City of Fort Worth, 1000 Throckmorton Street, Fort Worth, TX 76102.	Transportation and Public Works Department, 1000 Throckmorton Street, Fort Worth, TX 76102.	https://msc.fema.gov/portal/advanceSearch .	Dec. 18, 2017	480596
Tarrant	City of North Richland Hills (17-06-0350P).	The Honorable Oscar Trevino, Jr., Mayor, City of North Richland Hills, 4301 City Point Drive, North Richland Hills, TX 76180.	Administration and Engineering Department, 4301 City Point Drive, North Richland Hills, TX 76180.	https://msc.fema.gov/portal/advanceSearch .	Dec. 11, 2017	480607

[FR Doc. 2017-25616 Filed 11-29-17; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**[Docket No. FR-6065-C-02]****The Performance Review Board; Correction****AGENCY:** Office of the Chief Human Capital Officer, HUD.**ACTION:** Notice of appointments, correction.**SUMMARY:** The Department of Housing and Urban Development published a notice on November 21, 2017, listing

individuals appointed to serve on two Performance Review Boards. Today's notice corrects the November 21, 2017, notice by substituting Jereon M. Brown for Tawanna Preston on the senior executive Performance Review Board. For the convenience of the public, the Department is republishing the corrected notice.

FOR FURTHER INFORMATION CONTACT:

Persons desiring any further information about the Performance Review Board and its members may contact Lynette Warren, Director, Office of Executive Resources, Department of Housing and Urban Development, Washington, DC 20410. Telephone (202) 708-1381. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION:

The Department of Housing and Urban Development announces the establishment of two Performance Review Boards to make recommendations to the appointing authority on the performance of its senior executives. Dominique G. Blom, Towanda A. Brooks, Sarah L. Gerecke, Jean L. Pao, Jereon M. Brown, and Todd M. Richardson will serve as members of the Departmental Performance Review Board to review career SES performance. Seth D. Appleton, Matthew F. Hunter, Johnson P. Joy, Gisele G. Roget, and Bethany A. Zorc will serve as members of the Departmental Performance Review

Board to review noncareer SES performance. The address is: Department of Housing and Urban Development, Washington, DC 20410-0050.

Dated: November 21, 2017.

Towanda A. Brooks,
Chief Human Capital Officer.

[FR Doc. 2017-25818 Filed 11-29-17; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS-HQ-IA-2017-0080;
FXIA1671090000-178-FF09A30000]

Endangered Species; Marine Mammal 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, marine mammals, or both. With some exceptions, the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA) 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 January 2, 2018.

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-2017-0080.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Docket No. FWS-HQ-IA-2017-0080; 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 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: Joyce Russell, Government Information Specialist, Division of Management Authority, U.S. Fish and Wildlife Service Headquarters, MS: IA; 5275 Leesburg Pike, Falls Church, VA 22041-3803; telephone 703-358-2023; facsimile 703-358-2280.

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 **FOR FURTHER INFORMATION CONTACT**. 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.*; ESA), and the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *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. Under the MMPA, you may request a hearing on any MMPA application received. If you request a hearing, give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Service Director.

III. Permit Applications

We invite the public to comment on applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (16 U.S.C. 1531 *et seq.*; ESA) prohibits activities with listed species unless Federal authorization is acquired that allows such activities.

A. Endangered Species

Applicant: Bruce Fairchild, Johnson City, TX; PRT-69947A

The applicant requests renewal of a captive-bred wildlife registration under 50 CFR 17.21(g) for barasingha (*Rucervus duvaucelii*), Arabian oryx (*Oryx leucoryx*), and Hartmann’s mountain zebra (*Equus zebra hartmannae*) to enhance species propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Florida Fish and Wildlife Commission, Fish and Wildlife

Research Institute, St. Petersburg, FL; PRT-48288C

The applicant requests a permit to import biological samples from wild specimens of hawksbill turtle (*Eretmochelys imbricata*), loggerhead turtle (*Caretta caretta*), and Kemp's ridley turtle (*Lepidochelys kempii*), from Panama and Bermuda for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: White Oak Conservation, Yulee, FL; PRT-43164C

The applicant requests a permit to import 2.2 southern black rhinoceros (*Diceros bicornis*) from Wildlife Assignments International (PTY) Ltd., Gauteng, South Africa, for breeding to enhance the propagation or survival of the species. This notification is for a single import.

B. Marine Mammals

Applicant: University of California, UC Davis Stable Isotope Facility, Davis, CA; PRT-32831C

The applicant requests a permit to import small amounts of biological samples that may be derived from museum, wild-caught or salvaged specimens worldwide for the purpose of scientific research for the following marine mammal species: manatee (*Trichechus manatus*), *T. inunguis*, *T. senegalensis*, polar bear (*Ursus maritimus*), walrus (*Odobenus rosmarus*), dugong (*Dugong dugon*), sea otter (*Enhydra lutris lutris*, *E. l. kenyoni*, *E. l. nereis*), and marine otter (*Lontra felina*). This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: BBC Natural History Unit, London, UK; PRT-53019C

The applicant requests a permit to photograph southern sea otters (*Enhydra lutris nereis*) within a 12-month period at the Monterey Bay and Elkhorn Slough areas, California, for the purpose of education. This notification covers activities to be conducted by the applicant over a 5-year period.

IV. Next Steps

If the Service decides to issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**. You may locate the **Federal Register** notice announcing the permit issuance date by searching in www.regulations.gov under the permit number listed in this document.

V. Public Comments

You may submit your comments and materials concerning this notice by one of the methods listed in **ADDRESSES**. We

will not consider comments sent by email or fax or to an address not listed in **ADDRESSES**.

If you submit a comment via <http://www.regulations.gov>, your entire comment, including any personal identifying information, will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

We will post all hardcopy comments on <http://www.regulations.gov>.

VI. Authorities

Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*);

Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 *et seq.*).

Joyce Russell,

Government Information Specialist, Branch of Permits, Division of Management Authority.

[FR Doc. 2017-25782 Filed 11-29-17; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCOF02000 L12200000.AL0000-17X]

Notice of Intent To Collect Fees at the Guffey Gorge Day-Use Area in Park County, Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Pursuant to applicable provisions of the Federal Lands Recreation Enhancement Act (FLREA), the Bureau of Land Management's (BLM) Royal Gorge Field Office is proposing to begin collecting fees for a Standard Amenity Day-Use Site in the Guffey Gorge Day-Use Area, east of Guffey, within Park County, Colorado. In the 2015 Guffey Gorge Management Plan, the BLM designated Guffey Gorge Day-Use Area as a Special Area, where resources require intensive management and control measures for their protection, and a permit system to achieve management objectives.

DATES: Comments on the proposed fee changes must be received or postmarked by February 28, 2018 and include a legible full name and address. Applicable May 29, 2018, the BLM will initiate fee collection at the Guffey Gorge Day-Use Area, unless the BLM publishes a **Federal Register** notice to the contrary. Comments received after

the close of the comment period or delivered to an address other than the one listed in this notice may not be considered or included in the administrative record for the proposed fee.

ADDRESSES: Documents concerning this fee change may be reviewed at the Royal Gorge Field Office, 3028 E. Main Street, Canon City, CO 81212; phone: 719-269-8500; and online at: <https://go.usa.gov/xnKWH>.

FOR FURTHER INFORMATION CONTACT:

Linda Skinner, Outdoor Recreation Planner, at the address above. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1-800-877-8339 to contact the above individual during normal business hours. The Service is available 24 hours a day, seven days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: In 2013, the BLM began the public planning process for developing a management plan for the 80-acre Guffey Gorge parcel to manage the increasing impacts and conflicts related to high visitation numbers. This process included presentations and site tours with the Resource Advisory Council (RAC), the BLM Solicitor, the Park County Sheriff, and neighboring landowners. The BLM released the draft Business Plan and Guffey Gorge Management Plan Environmental Assessment (EA) for public comment in November 2014. The BLM considered all comments from the EA when preparing the final versions of these documents as well as the Finding of No Significant Impact (FONSI) and Decision Record. The BLM signed the FONSI and Decision Record on June 29, 2015.

The EA and Business Plan provide management direction for regulating recreational visitation, while minimizing impacts to other resources and providing a high quality experience. The Business Plan analyzed anticipated management costs and a variety of revenue structures to determine a fee that is comparable to fees charged by regional facilities that offer similar amenities.

This Business Plan, prepared pursuant to the FLREA and BLM recreation fee program policy, addressed establishing user fees. It established the rationale for charging standard amenity fees, explained the fee collection process, and outlined how the fees would be used at the Guffey Gorge Day-Use Area.

This special area qualifies as a site wherein visitors can be charged a fee in conjunction with a Recreation Use Permit (RUP or Permit), authorized under Section 803(h) of the FLREA, 16 U.S.C. 6802(h). In accordance with the FLREA and implementing regulations at 43 CFR 2930, visitors will obtain an RUP upon arrival at the site.

Permits/day-use passes will be available at a cost of \$6 per vehicle and will be valid from dawn to dusk. The day-use pass will be available for purchase during the summer season (May 15 to September 30). As a standard amenity site within the National System of Public Lands, the fee will be waived on dates specified as fee-free days by the BLM. All applicable Federal Recreational Lands Passes will be accepted. All fees collected will be used to enhance visitor experiences, address environmental impacts and manage conflicting uses at Guffey Gorge Day-Use Area.

The BLM has notified and involved the public at each stage of the planning process, including the proposal to collect fees. The BLM posted the Guffey Gorge Business Plan in May 2016, which outlined operational goals of the area and the purpose of the fee program. The Rocky Mountain (formerly Front Range) RAC considered the proposal at its August 19, 2016, meeting and recommended approval. Future adjustments in the fee amount will be made in accordance with the Business Plan and through consultation with the RAC and the public prior to a fee increase. FLREA fee revenue and how the revenue is spent will be posted annually on-site and online at: <https://go.usa.gov/xnKWH>. Copies of the Business Plan will be available at the Royal Gorge Field Office and online.

Comments, including names, street addresses, and other contact information of commenters, will be available for public review at the BLM Royal Gorge Field Office (see **ADDRESSES** above). Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 16 U.S.C. 6803(b) and 43 CFR 2932.13.

Gregory P. Shoop,

Acting BLM Colorado State Director.

[FR Doc. 2017–25836 Filed 11–29–17; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

**[18X L1109AF LLUT980300
L12200000.PM0000–24–1A]**

Notice of Public Meeting for the Utah Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act, the Federal Advisory Committee Act, and the Federal Lands Recreation Enhancement Act, the U.S. Department of the Interior, Bureau of Land Management's (BLM) Utah Resource Advisory Council (RAC) will meet as indicated below.

DATES: The Utah RAC will hold a public meeting on December 11 and 12, 2017. On December 11, the RAC will meet from 8:00 a.m. to 11:00 a.m. A field tour of the Indian Creek area is scheduled on December 11 from 11:00 a.m. to 5 p.m. On December 12, the RAC will meet from 8 a.m. to 3:30 p.m.

ADDRESSES: The meeting will be held at the Hideout Community Center, 648 Hideout Way, Monticello, Utah, 84535. Field tour participants will depart from the Hideout Community Center, Monticello, Utah. Written comments may be sent to the BLM Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101.

FOR FURTHER INFORMATION CONTACT: Lola Bird, Public Affairs Specialist, BLM, Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101; phone (801) 539–4033; or by email at lbird@blm.gov. If you wish to attend the field tour, contact Ms. Bird no later than December 6, 2017. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to leave a message or question for the above individual. The FRS is available 24 hours a day, seven days a week. Replies are provided during normal business hours.

SUPPLEMENTARY INFORMATION: The Utah RAC consists of 15 members chartered and appointed by the Secretary of the Interior. Their diverse perspectives are represented in commodity,

conservation, and general interests. The RAC provides advice to BLM resource managers regarding management plans and proposed resource actions on public land in Utah. The meeting agenda topics will include: The Secretary of the Interior's priorities, statewide oil and gas leasing, Canyon Country District overview, Monticello Field Office updates, Manti-La Sal National Forest recreation fee proposal, BLM Utah recreation donation policy, Utah Recreation Fee Program Initiative, Proposed Moab Campground Business Plan, updates on current resource management planning efforts and major projects, and RAC work projects and business.

A public comment period will take place on December 12 from 11:00 a.m. to 11:30 a.m., when the public may address the RAC. Depending on the number of people who wish to speak, and the time available, the time for individual comments may be limited. Written comments may also be sent to the BLM Utah State Office at the address listed in the **ADDRESSES** section of this notice. On December 11, 2017, the RAC will have a field tour of the Indian Creek area to gain familiarity with BLM issues in southeast Utah, including recreation uses, travel management, and partnerships.

The meeting and field tour are open to the public; however, transportation, lodging, and meals are the responsibility of the participating individuals.

Before including your address, phone number, email address, or other personal identifying information in your comments, please be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 CFR 1784.4–2.

Edwin L. Roberson,

State Director.

[FR Doc. 2017–25835 Filed 11–29–17; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF JUSTICE

[OMB Number 1125-0010]

Agency Information Collection Activities; Proposed Collection; Comments Requested; Notice of Appeal to the Board of Immigration Appeals From a Decision of a DHS Officer

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Executive Office for Immigration Review (EOIR), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This proposed information collection was previously published in the **Federal Register** allowing for a 60-day comment period.

DATES: Comments are encouraged and will be accepted for an additional 30 days until January 2, 2018.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Jean King, General Counsel, Executive Office for Immigration Review, U.S. Department of Justice, Suite 2600, 5107 Leesburg Pike, Falls Church, Virginia, 22041; telephone: (703) 305-0470. Written comments and/or suggestions can also be sent to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503 or sent to OIRA_submissions@omb.eop.gov.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

- Enhance the quality, utility, and clarity of the information to be collected; and/or
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

1. *Type of Information Collection:* Revision and extension of a currently approved collection.
2. *The Title of the Form/Collection:* Notice of Appeal to the Board of Immigration Appeals from a Decision of a DHS Officer.
3. *The agency form number:* Form EOIR-29 (OMB 1125-0010).
4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: A party who appeals a decision of a DHS Officer to the Board of Immigration Appeals (Board).

Other: None.

Abstract: A party affected by a decision of a DHS Officer may appeal that decision to the Board, provided that the Board has jurisdiction pursuant to 8 CFR 1003.1(b). The party must complete the Form EOIR-29 and submit it to the DHS office having administrative control over the record of proceeding in order to exercise the regulatory right to appeal.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that there are 5,501 respondents, 5,501 annual responses, and that each response takes 30 minutes to complete.

6. *An estimate of the total public burden (in hours) associated with the collection:* 2,750.5 annual burden hours.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E.405B, Washington, DC 20530.

Dated: November 11, 2017

Melody D. Braswell,
Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2017-25793 Filed 11-29-17; 8:45 am]

BILLING CODE 4410-30-P

DEPARTMENT OF LABOR**Agency Information Collection Activities; Submission for OMB Review; Comment Request; Workforce Innovation and Opportunity Act (WIOA) Implementation Study**

AGENCY: Office of the Assistant Secretary for Policy, Chief Evaluation Office, Department of Labor.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Department of Labor (DOL), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents is properly assessed.

Currently, DOL is soliciting comments concerning the collection of site visit data for a study of the implementation of the Workforce Innovation and Opportunity Act (WIOA). A copy of the proposed Information Collection Request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee section below on or before January 29, 2018.

ADDRESSES: You may submit comments by either one of the following methods:

Email: ChiefEvaluationOffice@dol.gov; *Mail or Courier:* Janet Javar, Chief Evaluation Office, OASP, U.S. Department of Labor, Room S-2312, 200 Constitution Avenue NW., Washington, DC 20210. *Instructions:* Please submit one copy of your comments by only one method. All submissions received must include the agency name and OMB Control Number identified above for this information collection. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via email or to submit them by mail early. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for OMB

approval of the information collection request.

FOR FURTHER INFORMATION CONTACT:

Contact Janet Javar by email at ChiefEvaluationOffice@dol.gov.

SUPPLEMENTARY INFORMATION:

I. Background: WIOA, signed into law on July 22, 2014, authorized and amended a series of employment and educational programs under five titles. DOL seeks to understand how the implementation of WIOA is changing the core workforce programs authorized under Title I (Adult, Dislocated Worker, and Youth programs) and the Employment Service program authorized under the Wagner-Peyser Act and amended by Title III, as well as how the implementation is contributing to more integration with stakeholders in programs authorized under Titles II (Adult Education and Literacy) and IV (Vocational Rehabilitation).

DOL is funding a study to document and describe how critical state-level activities under WIOA are being implemented and identify possible areas for which further technical assistance, guidance, or policies might be needed in order to help implement the law. The study’s major research questions are: (1) How are the critical reforms under WIOA related to the core workforce programs for Title I and III being implemented? (2) to what extent is WIOA’s vision for an integrated workforce system being achieved through state- and local-level synergies

between Titles I and III and Titles II and IV stakeholders? and (3) what changes or supplemental technical assistance, guidance, or policy would be helpful to states administering the core programs and in providing guidance and oversight to the local level to improve service quality and management?

This **Federal Register** Notice provides the opportunity to comment on the proposed data collection instruments for the semi-structured interviews that will be used during site visits to support the implementation study. Site visits will be conducted in 14 states and two local areas per state and will include semi-structured interviews with state and local area program staff to document WIOA implementation. The state and local area program staffs who will be interviewed include workforce board staffs; staffs responsible for implementation of Titles I, II, III, and IV; state-level staffs in charge of Unemployment Insurance (UI) program; other state- and local area-level partner staffs involved in WIOA implementation; as well as key American Job Center (AJC) operators and center management staffs. Each respondent will be interviewed once on their experience with WIOA implementation. A future information collection request will include a national survey of state-level workforce administrators.

II. Desired Focus of Comments: Currently, DOL is soliciting comments

concerning the above data collection for the WIOA implementation study. DOL is particularly interested in comments that do the following:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology—for example, permitting electronic submission of responses.

III. Current Actions: At this time, DOL is requesting clearance for the interview protocols to be used during the site visits.

Type of Review: New information collection request.

OMB Control Number: 1290–0NEW.

Affected Public: State and local program staff involved in WIOA implementation.

ESTIMATED TOTAL BURDEN HOURS

Type of instrument	Total number respondents	Annual number of respondents	Number of responses per respondent	Average burden time per response (hours)	Annual estimated burden (hours)	Estimated total burden (hours)
State-Level Staff Interview						
Workforce board	42	14	1	1.2	16.3	49
Title I Adult and Dislocated Worker program	70	23	1	1.3	30.3	91
Title I Youth program	14	5	1	1.0	4.7	14
Title II (Adult Education and Literacy) and IV (Vocational Rehabilitation)	84	28	1	1.3	37.3	112
Title III (Employment Service Program)	42	14	1	1.3	18.7	56
Unemployment Insurance	14	5	1	1.5	7.0	21
Other state partner	14	5	1	1.5	7.0	21
Local-Level Staff Interview						
Workforce board	112	37	1	1.2	43.7	131
Title I Adult and Dislocated Worker program	56	19	1	1.0	18.7	56
Title I Youth program	56	19	1	1.0	18.7	56
American Job Center Operator	28	9	1	1.25	11.7	35
American Job Center Manager	28	9	1	1.25	11.7	35
Title II (Adult Education and Literacy) and IV (Vocational Rehabilitation)	112	37	1	1.5	56.0	168
Title III (Employment Service Program)	56	19	1	1.0	18.7	56
Other local partner	56	19	1	1.0	18.7	56
Total	784	261	.....	.....	319	957

Comments submitted in response to this request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: November 15, 2017.

Molly Irwin,

Chief Evaluation Officer, U.S. Department of Labor.

[FR Doc. 2017-25833 Filed 11-29-17; 8:45 am]

BILLING CODE 4510-HX-P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Renew an Information Collection

AGENCY: National Science Foundation.

ACTION: Notice and Request for Comments.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the National Science Foundation (NSF) will publish periodic summaries of proposed projects.

DATES: Written comments on this notice must be received by January 29, 2018 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Suite W 18000, Alexandria, Virginia 22314; telephone (703) 292-7556; or send email to splimpto@nsf.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including federal holidays). You also may obtain a copy of the data collection instrument and instructions from Ms. Plimpton.

SUPPLEMENTARY INFORMATION:

Title of Collection: Request for Proposals.

OMB Approval Number: 3145-0080.

Expiration Date of Approval: May 31, 2018.

Type of Request: Intent to seek approval to extend an information collection for three years.

Proposed Project: The Federal Acquisition Regulations (FAR) Subpart 15.2—"Solicitation and Receipt of Proposals and Information" prescribes policies and procedures for preparing and issuing Requests for Proposals. The FAR System has been developed in accordance with the requirement of the Office of Federal Procurement Policy Act of 1974, as amended. The NSF Act of 1950, as amended, 42 U.S.C. 1870, Sec. II, states that NSF has the authority to:

(c) Enter into contracts or other arrangements, or modifications thereof, for the carrying on, by organizations or individuals in the United States and foreign countries, including other government agencies of the United States and of foreign countries, of such scientific or engineering activities as the Foundation deems necessary to carry out the purposes of this Act, and, at the request of the Secretary of Defense, specific scientific or engineering activities in connection with matters relating to international cooperation or national security, and, when deemed appropriate by the Foundation, such contracts or other arrangements or modifications thereof, may be entered into without legal consideration, without performance or other bonds and without regard to section 5 of title 41, U.S.C.

Use of the Information: Request for Proposals (RFP) is used to competitively solicit proposals in response to NSF need for services. Impact will be on those individuals or organizations who elect to submit proposals in response to the RFP. Information gathered will be evaluated in light of NSF procurement requirements to determine who will be awarded a contract.

Estimate of Burden: The Foundation estimates that, on average, 558 hours per respondent will be required to complete the RFP.

Respondents: Individuals; business or other for-profit; not-for-profit institutions; Federal government; state, local, or tribal governments.

Estimated Number of Responses: 75.

Estimated Total Annual Burden on Respondents: 41,850 hours.

Dated: November 27, 2017.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2017-25795 Filed 11-29-17; 8:45 am]

BILLING CODE 7555-01-P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #15393 and #15394; North Carolina Disaster Number NC-00096]

Administrative Declaration of a Disaster for the State of North Carolina

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of North Carolina dated 11/21/2017.

Incident: Flooding and Heavy Winds.

Incident Period: 10/23/2017.

DATES: Issued on 11/21/2017.

Physical Loan Application Deadline Date: 01/22/2018.

Economic Injury (EIDL) Loan Application Deadline Date: 08/21/2018.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416, (202) 205-6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Watauga

Contiguous Counties:

North Carolina: Ashe, Avery,

Caldwell, Wilkes

Tennessee: Johnson

The Interest Rates are:

	Percent
<i>For Physical Damage:</i>	
Homeowners with Credit Available Elsewhere	3.500
Homeowners without Credit Available Elsewhere	1.750
Businesses with Credit Available Elsewhere	6.770
Businesses without Credit Available Elsewhere	3.385
Non-Profit Organizations with Credit Available Elsewhere ...	2.500

	Percent
Non-Profit Organizations without Credit Available Elsewhere	2.500
<i>For Economic Injury:</i>	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	3.385
Non-Profit Organizations without Credit Available Elsewhere	2.500

The number assigned to this disaster for physical damage is 15393 6 and for economic injury is 15394 0.

The States which received an EIDL Declaration # are North Carolina, Tennessee.

(Catalog of Federal Domestic Assistance Number 59008)

Dated: November 21, 2017.

Linda E. McMahon,
Administrator.

[FR Doc. 2017-25813 Filed 11-29-17; 8:45 am]

BILLING CODE 8025-01-P

SMALL BUSINESS ADMINISTRATION

National Small Business Development Centers Advisory Board

AGENCY: Small Business Administration.

ACTION: Notice of open Federal Advisory Committee meetings.

SUMMARY: The SBA is issuing this notice to announce the location, date, time and agenda for December meeting of the Federal Advisory Committee for the Small Business Development Centers Program. The meeting will be open to the public; however, advance notice of attendance is required.

DATES: Tuesday, December 12, 2017, at 1:00 p.m. EST.

ADDRESSES: Meeting will be held via conference call.

FOR FURTHER INFORMATION CONTACT: Monika Nixon, Office of Small Business Development Center, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416; *monika.nixon@sba.gov*; (202) 205-7310. If anyone wishes to be a listening participant or would like to request accommodations, please contact Monika Nixon at the information above.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a) of the Federal Advisory Committee Act (5 U.S.C. Appendix 2), SBA announces the meetings of the National SBDC Advisory Board. This Board provides advice and counsel to the SBA Administrator and Associate Administrator for Small Business Development Centers.

The purpose of the meetings is to discuss the following issues pertaining to the SBDC Program:
SBA Update.
Annual Meetings.
Board.
Assignments.
Member Roundtable.

Richard Kingan,
Acting White House Liaison.

[FR Doc. 2017-25803 Filed 11-29-17; 8:45 am]

BILLING CODE 8025-01-P

DEPARTMENT OF STATE

[Public Notice: 10214]

Notice of Availability of the Final Environmental Impact Statement for the Foreign Missions Center at the Former Walter Reed Army Medical Center, Washington, DC

AGENCY: Department of State.

ACTION: Notice of Availability.

SUMMARY: The U.S. Department of State (DOS) announces the availability of the Final Environmental Impact Statement (FEIS) on the master plan for the long-term development of a Foreign Missions Center, under authorities of the Foreign Missions Act of 1982, on the site of the former Walter Reed Army Medical Center (WRAMC) in the District of Columbia. Actions evaluated in the master plan consist of assignment of federal land to foreign missions for the purpose of constructing and operating new chancery facilities. DOS has prepared this FEIS on Alternative 7 as its Selected Action Alternative for the master plan, consistent with the National Environmental Policy Act (NEPA) of 1969, as amended, regulations developed by the Council on Environmental Quality, and DOS regulations for implementing NEPA.

DATES: Following this thirty (30) day notice in the **Federal Register**, DOS will issue a Record of Decision (ROD) at which time its availability will be announced in the **Federal Register** and local media. Please note that the public review period will close on December 31, 2017.

FOR FURTHER INFORMATION CONTACT: Geoffrey Hunt, Department of State, A/OPR/RPM, Room 1264, 2201 C St. NW., Washington, DC 20520-1264, or (202) 647-7530, or *FMC.info@state.gov*.

SUPPLEMENTARY INFORMATION: The master plan is intended to guide the development of a cohesive campus by establishing design and land-use planning principles for the construction of new buildings, roadways, open green

space, and utilities, while minimizing environmental impacts. The FEIS analyzes the potential impacts associated with Alternative 7 that could satisfy the purpose and need defined in the FEIS and master plan. Additionally, the FEIS addresses substantive comments submitted by the public and other stakeholders during the public comment period for the Supplemental Draft Environmental Impact Statement (SDEIS).

The SDEIS was previously circulated publicly in April 2017 and Draft Environmental Impact Statement (DEIS) was previously circulated publicly in February 2014. Subsequent to the publication of the DEIS, the total acreage of the land available for transfer from the Army to DOS was reduced from 43.5 to 31.7 acres through the National Defense Authorization Act of 2015. Because of the change in the proposed action, DOS prepared the SDEIS to describe the new preferred alternative, and evaluate any change in potential impacts from the reduction in size of the proposed action.

In addition, DOS is carrying out the Section 106 review process under the National Historic Preservation Act of 1966, through which it consults with interested parties on the potential effect of the proposed undertaking on identified historic properties.

A “chancery” is the principal office of a foreign mission used for diplomatic or related purposes, and annexes to such offices (including ancillary offices and support facilities), and includes the site and any buildings on the site which are used for such purposes. A “foreign mission” is any mission to or agency or entity in the United States which is involved in diplomatic, consular or other activities of, or which is substantially owned or effectively controlled by, a foreign government; or an organization representing a territory or political entity which has been granted diplomatic or other official privileges and immunities under the laws of the United States or which engages in some aspect of the conduct of international affairs of such territory or political entity, including any real property of such a mission and the personnel of such a mission.

The need for the project is based on increased and high demand for foreign mission facilities in the District of Columbia, a lack of large sites for foreign mission development or redevelopment in the District of Columbia, and the need for land to use in property exchanges with other countries. The proposed Foreign Missions Center is needed to primarily address the increasing scarcity of

suitable properties within the District of Columbia to locate the operations of foreign missions. This scarcity has impacted, in certain cases, DOS's ability to acquire properties of considerable size in foreign nations.

Master Plan Description

Alternatives Considered

DOS identified, developed, and analyzed the No Action Alternative and seven action alternatives that could potentially satisfy the proposed action's purpose and need. Alternative 7 and the No Action Alternative were retained for detailed study within the FEIS. Alternative 7 would provide up to 15 lots for chancery development, retain the historic Memorial Chapel building for adaptive reuse, and potentially retain other buildings for adaptive reuse, depending on marketability. Dahlia Street and 14th Street would be developed as connections to the surrounding neighborhoods. The existing historic perimeter fence along 16th Street and Alaska Avenue would remain. The existing landscape on the western boundary of the site would be enhanced to create a 50-foot vegetated buffer, maximizing the tree canopy in that area. Access to individual lots would be internal to the former WRAMC campus.

The No Action Alternative was included to provide a basis for comparison to the action alternative described above as required by the NEPA regulations. DOS has identified Alternative 7 as its Selected Action Alternative because it best satisfies the study purpose and needs, would fulfill their statutory mission and responsibilities, and has the least adverse environmental impact.

Distribution

The FEIS is available to the public at the Web site: <http://www.state.gov/ofm/property/fmc/index.htm>. DOS sends information related to this environmental review to individuals, organizations, and government entities interested in and/or potentially affected by the proposed project and maintains a distribution list for this purpose. The distribution list includes: Federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; other interested parties; and local libraries and newspapers. Copies are being distributed at the Advisory Neighborhood Commission 4A and 4B offices, the Juanita E. Thornton-Shepherd Park Library, the Takoma Park

Neighborhood Library, and the Petworth Neighborhood Library.

Cliff C. Seagroves,

*Director of the Office of Foreign Missions,
Acting Department of State.*

[FR Doc. 2017-25788 Filed 11-29-17; 8:45 am]

BILLING CODE 4710-43-P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. USTR-2017-0023]

Request for Comments Regarding the Administration's Action Following a Determination of Import Injury With Regard to Large Residential Washers

AGENCY: Office of the United States Trade Representative.

ACTION: Request for comments and notice of public hearing.

SUMMARY: The United States International Trade Commission (ITC) has determined that large residential washers are being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article that is like or directly competitive with the imported articles. The Commissioners who voted in the affirmative are now conducting a process to recommend a remedy (or safeguard measure) for the President to apply. The Office of the United States Trade Representative (USTR), on behalf of the Trade Policy Staff Committee (TPSC), is announcing a process so that, once the ITC makes its recommendation, domestic producers, importers, exporters, and other interested parties may submit their views and evidence on the appropriateness of the recommended safeguard measure and whether it would be in the public interest. USTR also invites interested parties to participate in a public hearing regarding this matter.

DATES: December 11, 2017 at midnight EST: Deadline for submission of written comments and for requests to testify at the hearing.

December 18, 2017 at midnight EST: Deadline for submission of written responses to the initial round of comments.

January 3, 2018 at 9:30 a.m. EST: The TPSC will hold a public hearing in Rooms 1 and 2, 1724 F Street NW., Washington DC.

ADDRESSES: USTR strongly encourages electronic submissions made through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the

instructions for submitting comments in section III below. The docket number is Docket No. USTR-2017-0023. For alternatives to on-line submissions, please contact Yvonne Jamison, Trade Policy Staff Committee at (202) 395-3475.

FOR FURTHER INFORMATION CONTACT:

Victor Mroczka, Office of WTO and Multilateral Affairs, at vmroczka@ustr.eop.gov or (202) 395-9450, or Juli Schwartz, Office of General Counsel, at juli_c_schwartz@ustr.eop.gov or (202) 395-3150.

SUPPLEMENTARY INFORMATION:

I. The ITC Investigation and Section 201

On June 5, 2017, the ITC instituted Investigation No. TA-201-076 under section 202 of the Trade Act (19 U.S.C. 2252), as a result of a petition properly filed on May 31, 2017, and amended on June 5, 2017, by Whirlpool Corp., a domestic producer of large residential washers. The ITC would determine if large residential washers were being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article that is like or directly competitive with the imported articles. The ITC's notice of institution (82 FR 27075) identifies the scope of the products covered by this investigation.

On October 5, 2017, after receiving submissions from interested parties and holding a public hearing that provided an opportunity to present opposing views and supporting evidence, the ITC determined that increased imports of residential washers into the United States are a substantial cause of serious injury to the domestic industry. You can find the ITC determination and additional information about the investigation, including the administrative record consisting of briefs and other submissions, in the Electronic Document Information System (EDIS) on the ITC Web site at www.usitc.gov.

In light of the affirmative finding on injury, the ITC held a public hearing on October 19, 2017, regarding the question of remedy and interested parties received an opportunity to file submissions on this issue. On December 4, 2017, after the remedy hearing and consideration of the submissions, including post-hearing submissions, the ITC will submit a report to the President with its recommendation on action(s) to address the serious injury, or threat thereof, to the domestic industry and to facilitate the efforts of the domestic

industry to make a positive adjustment to import competition.

II. Proposed Measure and Opportunity to Comment

Section 201 of the Trade Act (19 U.S.C. 2251) authorizes the President, in the event of an affirmative determination by the ITC, to take all appropriate and feasible action within his power that he determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs. The statute provides for the President to take action within 60 days after receiving the ITC report, subject to any decision the President makes to request additional information from the ITC. In accordance with section 203(a)(1)(C) of the Trade Act (19 U.S.C. 2253(a)(1)(C)), the TPSC will make a recommendation to the President. This recommendation will take into account the ITC recommendation, the extent to which the domestic industry will benefit from adjustment assistance, the efforts of the domestic industry to make positive adjustments, and other relevant considerations.

The potential action the President may take to provide a remedy in the form of a safeguard measure includes:

- Imposition, or increase, of a duty on the imported articles in question
- Use of a tariff-rate quota.
- Modification or imposition of any quantitative restriction on the importation of the articles into the United States.
- A proposal to negotiate and carry out an agreement with foreign countries to limit the exportation from foreign countries and importation into the United States.
- Procedures for the granting of import licenses.
- Other negotiations to identify the underlying cause of the increased imports to alleviate the injury or threat thereof.
- Legislative proposals that would facilitate a positive adjustment.
- Other action consistent with the President's authority.
- Any combination of these actions.

USTR offers these potential remedies for further consideration by domestic producers, importers, exporters, and other interested parties, and invites views and evidence on whether a proposed remedy is appropriate and in the public interest. In commenting on the action to take, we request that you address:

1. The appropriateness of any other proposed action and how it would be in the public interest;

2. the short- and long-term effects the proposed action is likely to have on the domestic residential washers industry, other domestic industries, and downstream consumers; and

3. the short- and long-term effects that not taking the proposed action is likely to have on the domestic residential washers industry, its workers, and on other domestic industries and communities.

The TPSC will convene a public hearing on January 3, 2018, at 9:30 a.m. EST in Rooms 1 and 2, 1724 F Street NW., Washington, DC. Requests to testify are due on December 11, 2017, and must include: (1) The name, address, telephone number, email address, and firm or affiliation of the individual wishing to testify, and (2) a brief summary of the proposed oral presentation. Please note the following:

- Your written comments should include a summary of no more than two pages that identifies the key points.
- The deadline to submit a request to testify at the hearing is December 11, 2017 at midnight EST and it must include your written comments.
- The TPSC will not accept written testimony at the hearing. You must include any materials you intend to use during your testimony with the written comments you submit.

We will provide information about the format and schedule for the hearing to interested parties.

III. Submission Instructions

USTR seeks public comments with respect to the issues described in Section II. To be assured of consideration, you must submit written comments by midnight EST on December 11, 2017, and any written responses to those comments by midnight EST on December 18, 2017. All comments must be in English and must identify on the reference line of the first page of the submission "Section 201: Large Residential Washers."

We strongly encourage commenters to make on-line submissions using the www.regulations.gov Web site. To submit comments via www.regulations.gov, enter docket number USTR-2017-0023 on the home page and click "search." The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice and click on the link entitled "Comment Now!" For further information on using www.regulations.gov, please consult the resources provided on the Web site by clicking "How to Use Regulations.gov" on the bottom of the home page. We will not accept hand-delivered submissions.

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. We prefer that you provide comments as an attached document 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.

For any comments submitted electronically that contain 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.

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.

As noted, we strongly urge submitters to file comments through www.regulations.gov. You must make arrangements for any alternative method of submission with Yvonne Jamison at (202) 395-3475 in advance of transmitting a comment. You can find general information about USTR at www.ustr.gov.

We will post comments in the docket for public inspection, except business confidential information. You can view comments on www.regulations.gov by

entering the relevant docket number in the search field on the home page.

Edward Gresser,

*Chair of the Trade Policy Staff Committee,
Office of the United States Trade
Representative.*

[FR Doc. 2017-25797 Filed 11-29-17; 8:45 am]

BILLING CODE 3290-F8-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Neighborhood Environmental Survey

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Notice and request for
comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The purpose of this research is to conduct a nation-wide survey to update the scientific evidence of the relationship between aircraft noise exposure and its effects on communities around airports.

DATES: Written comments should be submitted by January 29, 2018.

ADDRESSES: Send comments to the FAA at the following address: Barbara Hall, Federal Aviation Administration, ASP-110, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

FOR FURTHER INFORMATION CONTACT: Barbara Hall by email at: Barbara.L.Hall@faa.gov; phone: 940-594-5913.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120-0762.
Title: Neighborhood Environmental Survey.

Form Numbers: None.

Type of Review: Renewal of an information collection.

Respondents: 12,656 respondents affected by airport noise.

Frequency: One time per respondent.

Estimated Average Burden per Response: Five minutes for a mail survey, twenty minutes for a telephone survey for selected respondents.

Estimated Total Annual Burden: 1,637 hours.

Issued in Fort Worth, TX, on November 21, 2017.

Barbara L. Hall,

FAA Information Collection Clearance Officer, Performance, Policy, and Records Management Branch, ASP-110.

[FR Doc. 2017-25844 Filed 11-29-17; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Change in Use of Aeronautical Property at Laurinburg-Maxton Airport, Maxton, NC

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) is requesting public comment on a request by the Laurinburg-Maxton Airport Commission, on behalf of the airport Sponsor (the City of Laurinburg and the Town of Maxton), to change a portion of airport property from aeronautical to non-aeronautical use at the Laurinburg-Maxton Airport. The request consists of release of approximately 29.10 acres to Scotland County Economic Development Corporation (SCEDC) to be used for future economic development.

DATES: Comments must be received on or before January 2, 2018.

ADDRESSES: Comments on this notice may be mailed or delivered in triplicate to the FAA at the following address: Memphis Airports District Office, Attn: Koty Brown, Program Manager, 2600 Thousand Oaks Boulevard, Suite 2250, Memphis, TN 38118.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Ms. Joanne Gentry, Executive Director for Laurinburg-Maxton Airport Commission at the following address: 16701 Airport Road, Maxton, NC 28364.

FOR FURTHER INFORMATION CONTACT: Koty Brown, Program Manager, Federal Aviation Administration, Memphis Airports District Office, 2600 Thousand Oaks Boulevard, Suite 2250, Memphis,

TN 38118-2482. The application may be reviewed in person at this same location, by appointment.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the request to release property for non-aeronautical purposes at Laurinburg-Maxton Airport, Maxton, NC under the provisions of 49 U.S.C. 47107(h)(2). The FAA determined that the request to release property at Laurinburg-Maxton Airport (MEB) submitted by the Laurinburg-Maxton Airport Commission on behalf of the City of Laurinburg and the Town of Maxton meets the procedural requirements of the FAA and the release of the property does not and will not impact future aviation needs at the airport. The FAA may approve the request, in whole or in part, no sooner than thirty days after the publication of this notice.

The following is a brief overview of the request:

The Laurinburg-Maxton Airport Commission on behalf of the City of Laurinburg and the Town of Maxton is proposing the release of approximately 29.10 acres to Scotland County Economic Development Corporation (SCEDC) to be used for future economic development. This property is located along Airport Road and U.S. 74 Bypass in Scotland County, NC. The property is separated from the majority of airport property by other parcels of land owned by others. The proposed use of this property is compatible with airport operations.

Any person may inspect, by appointment, the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

Issued in Memphis, TN, on November 17, 2017.

Phillip Braden,

*Manager, Memphis Airports District Office,
Southern Region.*

[FR Doc. 2017-25839 Filed 11-29-17; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Laser Operations in the Navigable Airspace (Advisory Circular (AC), Outdoor Laser Operations Previously Mistitled Notice of Proposed Outdoor Laser Operations

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to reinstate a previously approved information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on August 31, 2017. In that the notice the collection was mistitled: "Laser Operations in the Navigable Airspace (Advisory Circular (AC), Outdoor Laser Operations." We received no comments. In order for the FAA to ensure safety it proposes to collect information from potential outdoor laser operators. The FAA will review the proposed laser activity against air traffic operations and verify that the laser operation will not interfere with air traffic operations.

DATES: Written comments should be submitted by January 2, 2018.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to oir_submission@omb.eop.gov, or faxed to (202) 395-6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

FOR FURTHER INFORMATION CONTACT: Barbara Hall at (940) 594-5913, or by email at: Barbara.L.Hall@faa.gov.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120-0662.

Title: Laser Operations in the Navigable Airspace (Advisory Circular (AC), Outdoor Laser Operations.

Form Numbers: FAA Form AC 7140-1.

Type of Review: Reinstatement of an information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on August 31, 2017(82 FR 41463). No comments were received. The FAA will use the information gathered from laser operators planning to conduct outdoor laser operations to evaluate potential hazards to aircraft operating in the National Airspace System (NAS). Ultimately, the goal is to prevent an aircraft from being hit by the laser operation. The information will be reviewed by one of the three FAAs service centers and sent to the facility, which can be a Tower, TRACON or Center, that is being impacted by the operation. The faculty will review the proposed operation and state no objection or list an objection to the operation. If the facility lists an objection, then the service center will contact the proponent and see if adjustments can be made to the proposed operation.

Respondents: Approximately 405 laser operations.

Frequency: One time per laser operation.

Estimated Average Burden per Response: Approximately 4 hours per form.

Estimated Total Annual Burden: An estimated 1,620 hours.

Issued in Washington, DC on November 1, 2017.

Barbara Hall,

FAA Information Collection Clearance Officer, Performance, Policy, and Records Management Branch, ASP-110.

[FR Doc. 2017-25841 Filed 11-29-17; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Extension Without Change of a Currently Approved Information Collection: Pilots Convicted of Alcohol or Drug Related Motor Vehicle Offenses or Subject to State Motor Vehicle Administrative Procedures

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our

intention to request the Office of Management and Budget (OMB) approval to extend an information collection. Pilots who have been involved in a drug or alcohol related motor vehicle action are required to send specific information to the FAA. The information to be collected will be used to and/or is necessary for the FAA to ensure the safety of the National Airspace System with regard to those airmen.

DATES: Written comments should be submitted by January 29, 2018.

ADDRESSES: Send comments to the FAA at the following address: Barbara Hall, Federal Aviation Administration, ASP-110, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

FOR FURTHER INFORMATION CONTACT:

Barbara Hall by email at: Barbara.L.Hall@faa.gov; phone: 940-594-5913.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120-0543.

Title: Pilots Convicted of Alcohol or Drug Related Motor Vehicle Offenses or Subject to State Motor Vehicle Administrative Procedures.

Form Numbers: No forms.

Type of Review: Extension Without Change.

Background: After a study and audit conducted from the late 1970's through the 1980's by the Department of Transportation, Office of the Inspector General, (DOT/OIG), the DOT/OIG recommended the FAA find a way to track alcohol abusers and those dependent on the substance that may pose a threat to the National Airspace (NAS). Through a Congressional act issued in November of 1990, the FAA established a Driving Under the Influence (DUI) and Driving While Impaired (DWI) Investigations Branch. The final rule for this program is found in Title 14 Code of Federal Regulations (CFR)—part 61 § 61.15.

This regulation calls for pilots certificated by the FAA to send information regarding Driving Under the Influence (or similar charges) of alcohol

or drugs to the FAA within 60 days from either an administrative action against their driver's license and/or criminal conviction. Part of the regulation also calls for the FAA to seek certificate action should an airman be involved in multiple, separate drug/alcohol related motor vehicle incidents within a three-year period. Information sent by the airman is used to confirm or refute any violations of these regulations, as well as by the Civil Aerospace Medical Institute (CAMI) for medical qualification purposes. Collection by CAMI is covered under a separate OMB control number 2120-0034.

An airman is required to provide a letter via mail or facsimile, with the following information: Name, address, date of birth, pilot certificate number, the type of violation which resulted in the conviction or administrative action, and the state which holds the records or action.

Respondents: Airmen with drug/alcohol related motor vehicle actions.

Frequency: Approximately 1,000 per year.

Estimated Average Burden per Response: 15 Minutes.

Estimated Total Annual Burden: 10–20 minutes per respondent, 167 hours total for all respondents.

Issued in Fort Worth, TX on November 21, 2017.

Barbara L. Hall,

FAA Information Collection Clearance Officer, Performance, Policy, and Records Management Branch, ASP-110.

[FR Doc. 2017-25843 Filed 11-29-17; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2017-0067; Notice 2]

Reports, Forms, and Record Keeping Requirements Agency Information Collection Activity Under OMB Review

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

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** Notice soliciting public comment on the ICR, with a 60-day

comment period was published on August 25, 2017.

DATES: Comments must be submitted on or before January 2, 2018.

ADDRESSES: George Stevens, Office of Vehicle Safety Compliance (NEF-230), National Highway Traffic Safety Administration, West Building, 4th Floor, Room W43-481, 1200 New Jersey Avenue SE., Washington, DC 20590. Mr. Stevens's telephone number is (202) 366-5308.

SUPPLEMENTARY INFORMATION:

National Highway Traffic Safety Administration

Title: 49 CFR part 556, Exemption for Inconsequential Defect or Noncompliance.

OMB Number: 2127-0045.

Type of Request: Extension of a Currently Approved Collection.

Abstract: NHTSA's statute at 49 U.S.C. 30118, *Notification of Defects and Noncompliance*, and 49 U.S.C. 30120, *Remedies for Defects and Noncompliance*, generally requires manufacturers of motor vehicles and items of replacement equipment to conduct a notification and remedy campaign (recall) when their products are determined to contain a safety-related defect or a noncompliance with a Federal motor vehicle safety standard (FMVSS). Those sections require a manufacturer of motor vehicles or motor vehicle equipment to notify distributors, dealers, and purchasers if any of the manufacturer's products are determined to either contain a safety-related defect or fail to comply with an applicable FMVSS. The manufacturer is under a concomitant obligation to remedy such a defect or noncompliance. Pursuant to 49 U.S.C. 30118(d) and 30120(h), Exemptions, a manufacturer may seek an exemption from these notification and remedy requirements on the basis that the defect or noncompliance is inconsequential as it relates to motor vehicle safety. NHTSA exercised this statutory authority to excuse inconsequential defects or noncompliances when it promulgated 49 CFR part 556, Exemption for Inconsequential Defect or Noncompliance. This regulation establishes the procedures for manufacturers to submit exemption petitions to the agency and the procedures the agency will use in evaluating those petitions. The petition must state the full name and address of the applicant, the nature of its organization (e.g., individual, partnership, or corporation), and the name of the State or country under the laws of which it is organized. See 49

CFR 556.4(b)(3). The petition must also describe the motor vehicle or item of replacement equipment, including the number involved and the period of production, and the defect or noncompliance concerning which an exemption is sought. See 49 CFR 556.4(b)(4). The petition must also set forth all data, views, and arguments of the petitioner supporting the petition, and be accompanied by three copies of the report the manufacturer has submitted, or is submitting, to NHTSA in accordance with 49 CFR part 573, relating to its determination of the existence of the safety-related defect or noncompliance that is the subject of the petition. See 49 CFR 556.4(b)(5) and (6). These requirements allow the agency to ensure that inconsequentiality petitions are both properly substantiated and efficiently processed.

Affected Public: Businesses or other for-profit entities that manufacture or import motor vehicles or motor vehicle replacement equipment.

Estimated Total Annual Burden: 150 hours; \$4,500.

Address: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention NHTSA Desk Officer.

Comments are Invited On: Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; the accuracy of the Agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is most effective if OMB receives it within 30 days of publication.

Jeffrey M. Giuseppe,

Associate Administrator for Enforcement.

[FR Doc. 2017-25447 Filed 11-29-17; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated National and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT:

OFAC: Associate Director for Global Targeting, tel.: 202-622-2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202-622-2490; Assistant Director for Licensing, tel.: 202-622-2480; or the Department of the Treasury's Office of the General Counsel: Office of the Chief Counsel (Foreign Assets Control), tel.: 202-622-2410.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's Web site (www.treas.gov/ofac).

Notice of OFAC Actions

On November 20, 2017, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

Individuals

1. HEIDARI, Reza; DOB 10 Jan 1977; Additional Sanctions Information—Subject to Secondary Sanctions; Gender Male; Passport A37899489 (Iran) expires 26 Jul 2021; alt. Passport R24530943 (Iran) expires 23 Jun 2017 (individual) [SDGT] [IRGC] [IFSR].

Designated pursuant to sections 1(c) and 1(d)(i) of Executive Order 13224 of September 23, 2001, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism," (E.O. 13224) for having acted for or on behalf of, and for having assisted in, sponsored, or provided financial, material, technological support for, or financial or other services to or in support of, Iran's ISLAMIC REVOLUTIONARY GUARD CORPS—QODS FORCE, a person determined to be subject to E.O. 13224.

2. SEIF, Mahmoud (a.k.a. AL-SAYF, Mahmud; a.k.a. SAJADDINIA, Mohsen; a.k.a.

SAJADINIA, Mohsen; a.k.a. SAJJADI NIA, Mohsen; a.k.a. SAJJADINIA, Mohsen); DOB 05 Jun 1964; alt. DOB 05 Jun 1967; alt. DOB 05 Jun 1969; Additional Sanctions Information—Subject to Secondary Sanctions; Gender Male (individual) [SDGT] [IRGC] [IFSR].

Designated pursuant to section 1(d)(i) of E.O. 13224 for having assisted in, sponsored, or provided financial, material, technological support for, or financial or other services to or in support of, Iran's ISLAMIC REVOLUTIONARY GUARD CORPS—QODS FORCE, a person determined to be subject to E.O. 13224

Entities

1. FORENT TECHNIK GMBH, Konrad-Duden-Weg 1, Frankfurt am Main, Hessen 60437, Germany; Additional Sanctions Information—Subject to Secondary Sanctions; Registration ID 60313B102980 (Germany); alt. Registration ID HRB102980 (Germany) [SDGT] [IRGC] [IFSR].

Designated pursuant to section 1(c) of E.O. 13224 for being owned or controlled by REZA HEIDARI, a person determined to be subject to E.O. 13224.

2. PARDAZESH TASVIR RAYAN CO. (a.k.a. RAYAN IMAGE PROCESSING CORPORATION; a.k.a. RAYAN PRINTING), No. 9, 22nd St., 9th Km. of Karaj Special Rd., 1389843613, Tehran, Iran; Africa St., West Nahid St., Akhtaran Ave., p. 57, 1967773314, Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions; National ID No. 10102041648 (Iran); Registration ID 161530 (Iran) [SDGT] [IRGC] [IFSR].

Designated pursuant to section 1(c) of E.O. 13224 for being owned by TEJARAT ALMAS MOBIN HOLDING, a person determined to be subject to E.O. 13224; pursuant to 1(c) of E.O. 13224 for being controlled by REZA HEIDARI, a person determined to be subject to E.O. 13224; and pursuant to 1(c) and 1(d)(i) of E.O. 13224 for having acted for or on behalf of, and for having assisted in, sponsored, or provided financial, material, technological support for, or financial or other services to or in support of, Iran's ISLAMIC REVOLUTIONARY GUARD CORPS—QODS FORCE, a person determined to be subject to E.O. 13224.

3. PRINTING TRADE CENTER GMBH (a.k.a. PTC GMBH), Konrad Duden Weg 3, 60437, Frankfurt am Main, Germany; Schubertstr. 1 a, 65760, Eschborn, Hessen, Germany; Web site www.ptccenter.de; Additional Sanctions Information—Subject to Secondary Sanctions; Registration ID HRB58893 (Germany) [SDGT] [IRGC] [IFSR].

Designated pursuant to sections 1(c) and 1(d)(i) of E.O. 13224 for having acted for or on behalf of, and for having assisted in, sponsored, or provided financial, material, technological support

for, or financial or other services to or in support of, REZA HEIDARI, a person determined to be subject to E.O. 13224.

4. TEJARAT ALMAS MOBIN HOLDING (a.k.a. ALMAS MOBIN TRADING), 57 Akhtaran Lane, West Nahid Street, Africa Blvd., Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions [SDGT] [IRGC] [IFSR].

Designated pursuant to section 1(c) of E.O. 13224 for being owned or controlled by MAHMOUD SEIF, a person determined to be subject to E.O. 13224.

Dated: November 20, 2017.

John E. Smith,

Director, Office of Foreign Assets Control.
[FR Doc. 2017-25792 Filed 11-29-17; 8:45 am]

BILLING CODE 4810-AL-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Publication of the Tier 2 Tax Rates

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: Publication of the tier 2 tax rates for calendar year 2018 as required by section 3241(d) of the Internal Revenue Code. Tier 2 taxes on railroad employees, employers, and employee representatives are one source of funding for benefits under the Railroad Retirement Act.

DATES: The tier 2 tax rates for calendar year 2018 apply to compensation paid in calendar year 2018.

FOR FURTHER INFORMATION CONTACT:

Kathleen Edmondson, CC:TEGE:EOEG:ET1, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, Telephone Number (202) 317-6798 (not a toll-free number). **TIER 2 TAX RATES:** The tier 2 tax rate for 2018 under section 3201(b) on employees is 4.9 percent of compensation. The tier 2 tax rate for 2018 under section 3221(b) on employers is 13.1 percent of compensation. The tier 2 tax rate for 2018 under section 3211(b) on employee representatives is 13.1 percent of compensation.

Dated: November 21, 2017.

Victoria A. Judson,

Associate Chief Counsel (Tax Exempt and Government Entities).

[FR Doc. 2017-25741 Filed 11-29-17; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY**Open Meeting of the Federal Advisory Committee on Insurance**

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice of open meeting.

SUMMARY: This notice announces that the Department of the Treasury's Federal Advisory Committee on Insurance ("Committee") will convene a meeting on Wednesday, December 6, 2017, in the Cash Room, 1500 Pennsylvania Avenue NW., Washington, DC 20220, from 1:00–5:00 p.m. Eastern Time. The meeting is open to the public, and the site is accessible to individuals with disabilities.

DATES: The meeting will be held on Wednesday, December 6, 2017, from 1:00–5:00 p.m. Eastern Time.

ADDRESSES: The Committee meeting will be held in the Cash Room, Department of the Treasury, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

The meeting will be open to the public. Because the meeting will be held in a secured facility, members of the public who plan to attend the meeting must register online at <http://www.cvent.com/d/htq0ht> and fill out the secure online registration form. A valid email address will be required to complete the online registration. (Note: The online registration will close at 12:00 p.m. Eastern Time on Friday December 1, 2017.)

Requests for reasonable accommodations under Section 504 of the Rehabilitation Act should be directed to Mariam G. Harvey, Office of Civil Rights and Diversity, Department of the Treasury, at 202–622–0316 or mariam.harvey@do.treas.gov.

FOR FURTHER INFORMATION CONTACT: Daniel McCarty, Federal Insurance Office, Room 1410, Department of the Treasury, 1500 Pennsylvania Avenue NW., Washington, DC 20220 at 202–622–5892 (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 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. II, 10(a)(2), through implementing regulations at 41 CFR 102–3.150.

Public Comment: Members of the public wishing to comment on the business of the Federal Advisory Committee on Insurance are invited to submit written statements by any of the following methods:

Electronic Statements

- Send electronic comments to faci@treasury.gov.

Paper Statements

- Send paper statements triplicate to the Federal Advisory Committee on Insurance, Room 1410, Department of the Treasury, 1500 Pennsylvania Avenue NW., Washington, DC 20220. In general, the Department of the Treasury will post all statements on its Web site (<http://www.treasury.gov/about/organizational-structure/offices/Pages/Federal-Insurance.aspx>) without change, including any business or personal information provided such as names, addresses, email addresses, or telephone numbers. The Department of the Treasury will also make such statements available for public inspection and copying in the Department of the Treasury's Library, 1500 Pennsylvania Avenue NW., Washington, DC 20220, on official business days between the hours of 10:00 a.m. and 5:00 p.m. Eastern Time. You can make an appointment to inspect statements by telephoning (202) 622–0990. All statements, including attachments and other supporting materials, received are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

Tentative Agenda/Topics for Discussion: This is a periodic meeting of the Federal Advisory Committee on Insurance. In this meeting, the Committee will discuss topics including: Cyber regulation, the effect of natural catastrophes on the insurance market, and Treasury's October 2017 report titled *A Financial System That Creates Economic Opportunities, Asset Management and Insurance*. Due to scheduling challenges, this meeting is being announced with less than 15 days notice (see 41 CFR 102–3.150(b)).

Steven E. Seitz,

Deputy Director, Federal Insurance Office.

[FR Doc. 2017–25840 Filed 11–29–17; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0013]

Agency Information Collection Activity: Application for United States Flag for Burial Purposes

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 29, 2018.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at www.Regulations.gov or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to nancy.kessinger@va.gov. Please refer to "OMB Control No. 2900–0013" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor at (202) 461–5870.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA'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 respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: 38 U.S.C. 2301(f)(1)).

Title: Application for United States Flag for Burial Purposes, (VA Form 27–2008).

OMB Control Number: 2900–0013.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 27–2008 is used for family members and/or next-of-kin to apply for a burial flag.

Affected Public: Individuals and households.

Estimated Annual Burden: 162,500 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One time per Veteran's family.

Estimated Number of Respondents: 650,000.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Department Clearance Officer, Office of Quality, Privacy and Risk, Department of Veterans Affairs.

[FR Doc. 2017–25809 Filed 11–29–17; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0031]

Agency Information Collection Activity Under OMB Review: Veteran/ Servicemember's Supplemental Application for Assistance in Acquiring Specially Adapted Housing

AGENCY: Loan Guaranty Service, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Loan Guaranty Service, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 2, 2018.

ADDRESSES: Submit written comments on the collection of information through www.Regulations.gov, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to oir_submission@omb.eop.gov. Please refer to “OMB Control No. 2900–0031” in any correspondence.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor, Enterprise Records Service (005R1B), Department

of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–5870 or email cynthia.harvey-pryor@va.gov. Please refer to “OMB Control No. 2900–0031” in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 44 U.S.C. 3501–21.

Title: Veteran/Servicemember's Supplemental Application For Assistance In Acquiring Specially Adapted Housing.

OMB Control Number: 2900–0031.

Type of Review: Revision of a currently approved collection.

Abstract: Title 38, U.S.C., chapter 21, authorizes a VA program of grants for specially adapted housing for disabled veterans or servicemembers. Section 2101(a) of this chapter specifically outlines those determinations that must be made by VA before such grant is approved for a particular Veteran or servicemember. VA Form 26–4555c is used to collect information that is necessary for VA to meet the requirements of 38 U.S.C. 2101(a). (Also, see 38 CFR 36.4402(a), 36–4404(a), and 36.4405.)

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 82 FR 181, Page 44029, on September 20, 2017.

Affected Public: Individuals or Households.

Estimated Annual Burden: 350 Hours
Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 1400.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Department Clearance Officer, Office of Quality, Privacy and Risk (OQPR), Department of Veterans Affairs.

[FR Doc. 2017–25810 Filed 11–29–17; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0110]

Agency Information Collection Activity: Application for Assumption Approval and/or Release From Personal Liability to the Government on a Home Loan

AGENCY: Loan Guaranty Service, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Loan Guaranty Service, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 29, 2018.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at www.Regulations.gov or to Cynthia Harvey-Pryor, *Office of Quality, Privacy and Risk*, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to cynthia.harvey-pryor@va.gov. Please refer to “OMB Control No. 2900–0110” in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor at (202) 461–5870.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA'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 respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: 38 U.S.C. 3713(a) and 3714 and 3702(b)(2).

Title: VA Form 26–6381 Application for Assumption Approval and/or Release from Personal Liability to the Government on a Home Loan.

OMB Control Number: 2900–0110.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 26–6381 is completed by Veterans who are selling their homes by assumption rather than requiring purchasers to obtain their own financing to pay off the loan. The data furnished on the form is essential to determinations for assumption approval, release of liability, and substitution of entitlement in accordance with 38 U.S.C. 3713(a) and 3714 and 3702(b)(2).

Affected Public: Individuals and households.

Estimated Annual Burden: 42 hours.

Estimated Average Burden per

Respondent: 10 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 250 per year.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Department Clearance Officer, Office of Quality, Privacy and Risk, Department of Veterans Affairs.

[FR Doc. 2017–25811 Filed 11–29–17; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0115]

Agency Information Collection Activity under OMB Review: Supporting Statement Regarding Marriage

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 2, 2018.

ADDRESSES: Submit written comments on the collection of information through www.Regulations.gov, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to oir_submission@omb.eop.gov. Please refer to “OMB Control No. 2900–0115” in any correspondence.

omb.eop.gov. Please refer to “OMB Control No. 2900–0115” in any correspondence.

FOR FURTHER INFORMATION CONTACT:

Cynthia Harvey-Pryor, Office of Quality, Privacy and Risk, Department of Veterans Affairs, 811 Vermont Avenue, Floor 5, Area 368, Washington, DC 20420, (202) 461–5870 or email cynthia.harvey-pryor@va.gov. Please refer to “OMB Control No. 2900–0115” in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 38 U.S.C. 103.

Title: Supporting Statement Regarding Marriage (VA Form 21P–4171).

OMB Control Number: 2900–0115.

Type of Review: Reinstatement without change of a previously approved collection.

Abstract: 38 U.S.C. 103 requires a marital relationship to be established before benefits may be paid to, or for, a spouse of a Veteran. VA codified this requirement at 38 CFR 3.1(j), which states “a marriage valid under the law of the place where the parties resided at the time of marriage, or the law of the place where the parties resided when the right to benefits accrued.”

The information requested under this collection is necessary to establish the common-law marriage of a Veteran and the dependency of the Veteran’s common-law spouse for the purpose of paying monetary benefits.

VBA utilizes VA Form 21P–4171 to collect information from third-parties regarding claimed common-law marriage between Veterans and spouses/surviving spouses. VBA uses the information collected to determine whether or not the claimed common-law marriage is valid under the law of the place where the parties resided at the time of marriage, or the law of the place where the parties resided when the right to benefits accrued, to comply with 38 CFR 3.1(j) and pay monetary benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 82 FR 44032 on September 20, 2017.

Affected Public: Individuals or Households.

Estimated Annual Burden: 800 hours.

Estimated Average Burden per

Respondent: 20 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 2,400.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Department Clearance Officer, Office of Quality, Privacy and Risk, Department of Veterans Affairs.

[FR Doc. 2017–25808 Filed 11–29–17; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0068]

Agency Information Collection Activity: Application for Service-Disabled Veterans Insurance

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed reinstatement of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed from veterans to apply for Service Disabled Veterans Insurance, to designate a beneficiary and to select an optional settlement.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 29, 2018.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at www.Regulations.gov or to Nancy J. Kessinger, Veterans Benefits Administrations (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to nancy.kessinger@va.gov. Please refer to “OMB Control No. 2900–0068” in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor at (202) 461–5870.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is

being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA'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 respondents, including through the use

of automated collection techniques or the use of other forms of information technology.

Authority: Public Law 104-13; 44 U.S.C. 3501-3521.

Title: Application for Service-Disabled Veterans Insurance VA Form 29-4364 and VA Form 29-0151.

OMB Control Number: 2900-0068.

Type of Review: Reinstatement of a previously approved collection.

Abstract: These forms are used by veterans to apply for Service Disabled Veterans Insurance, to designate a beneficiary and to select an optional settlement. The information is required by law, 38 U.S.C., Section 1922.

Affected Public: Individuals and households.

Estimated Annual Burden: 8,333 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents:

By direction of the Secretary.

Cynthia Harvey-Pryor,

Department Clearance Officer, Office of Quality, Privacy and Risk, Department of Veterans Affairs.

[FR Doc. 2017-25807 Filed 11-29-17; 8:45 am]

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